

No. 26-336

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 *AMICUS CURIAE* OF APA WATCH
IN SUPPORT OF PETITIONER**

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Av NW
Suite 700
Washington, DC 20036
(202) 355-9452
ljoseph@larryjoseph.com

QUESTIONS PRESENTED

Pursuant to the Petition, this Court’s Rule 37.1, and *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (“we have on occasion rephrased the question presented by a petitioner ... or requested the parties to address an important question of law not raised in the petition”) (cleaned up), *amicus curiae* APA Watch respectfully submits that the questions presented are *or should be*:

1. Whether California’s disbarment of an attorney for legal advice, public commentary, and constitutional advocacy on matters of public concern is incompatible with the First Amendment.

2. Whether California’s treatment of constitutional advocacy as a conspiracy to defraud the United States under 18 U.S.C. §371 improperly expands that criminal statute in a way that impermissibly burdens speech and petitioning activity protected by the First Amendment.

3. Whether, under this Court’s decision in *In re Loney* or under the Supremacy Clause and federal law facially or as applied, subject-matter jurisdiction or authority to initiate discipline for allegedly false statements in a *federal* court filing lies exclusively with the *federal tribunal*.

TABLE OF CONTENTS

Questions Presented	i
Table of Contents	ii
Table of Authorities.....	iv
Interest of <i>Amicus Curiae</i>	1
Statement of the Case	1
Election litigation needed urgent attention.....	1
The ECA was unconstitutional.	4
Texas had standing in <i>Texas v. Pennsylvania</i>	5
Unlawful elections can lack <i>actual</i> fraud.	6
Summary of Argument.....	7
Argument.....	7
I. The First Amendment question is	
“certworthy.”	7
A. The First Amendment applies.	7
B. Several First-Amendment harms require	
this Court’s protection.....	8
1. California impairs <i>the public’s</i> First	
Amendment rights.	8
2. California impairs lawyers’ right to	
associate with their clients.....	9
3. California impairs lawyers’ in-court	
rights of speech and petition.	9
C. This Court’s intervention is urgent.	11
II. The question of fraud under 18 U.S.C. §371 is	
“certworthy.”	11
A. California cannot use §371 to relabel	
disfavored speech as “fraud.”	11
B. §371 potentially applies to some conduct	
in some federal proceedings.....	13
III. The <i>Loney</i> -preemption question is	
“certworthy.”	14

A. The Court should revise Eastman’s third question to include facial and as-applied preemption under federal law.....	14
1. Federal court rules can preempt State enforcement.	16
2. The First Amendment can preempt state enforcement.....	20
3. The federal interests in <i>Loney</i> can preempt state enforcement.....	22
B. The Court should weigh the benefits of a prophylactic ruling versus an adverse judgment against only California.	23
The Court should revisit standing in <i>Texas v. Pennsylvania</i>	24
Conclusion	25

TABLE OF AUTHORITIES

Cases

<i>Aguayo v. U.S. Bank</i> , 653 F.3d 912 (9th Cir. 2011).....	17
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983).....	6, 24
<i>Archer v. Griffith</i> , 390 S.W.2d 735, 740 (Tex. 1964)	6
<i>Ariz. Republican Party v. Richer</i> , 257 Ariz. 237 (2024)	21
<i>Arkansas Electric Cooperative Corp. v. Arkansas Pub. Serv. Comm’n</i> , 461 U.S. 375 (1983)	16
<i>Autobahn Imps., L.P. v. Jaguar Land Rover N. Am., L.L.C.</i> , 896 F.3d 340 (5th Cir. 2018).....	21
<i>Baker v. Carr</i> , 369 U.S. 186 (1962).....	8-9
<i>Baker v. Humphrey</i> , 101 U.S. 494 (1879).....	6
<i>BE&K Construction Co. v. NLRB</i> , 536 U.S. 516 (2002).....	10, 12
<i>Bhd. of R.R. Trainmen v. Virginia</i> , 377 U.S. 1 (1964).....	8, 10
<i>Bill Johnson’s Restaurants, Inc. v. NLRB</i> , 461 U.S. 731 (1983).....	22
<i>Bost v. Illinois State Bd. of Elections</i> , 607 U.S. 71 (2026).....	3, 19
<i>Brown v. Allen</i> , 344 U. S. 443 (1953).....	25
<i>Buckman Co. v. Plaintiffs’ Legal Comm.</i> , 531 U.S. 341 (2001).....	17

<i>Bush v. Gore</i> , 531 U.S. 1046 (2000)	1
<i>Bush v. Gore</i> , 531 U.S. 98 (2000)	2
<i>Carlisle v. United States</i> , 517 U.S. 416 (1996)	17
<i>Chambers v. NASCO, Inc.</i> , 501 U.S. 32 (1991)	17, 19
<i>Chiles v. Salazar</i> , 607 U.S. 627 (2026)	9
<i>Cooter & Gell v. Hartmarx Corp.</i> , 496 U.S. 384 (1990)	19
<i>De Canas v. Bica</i> , 424 U.S. 351 (1976)	20
<i>Democratic Nat’l Comm. v. Wisconsin State Legis.</i> , 592 U.S. 1039 (2020)	3
<i>Democratic Party of Georgia v. Raffensperger</i> , No. 1:19-cv-5028-WMR (N.D. Ga. Mar. 6, 2020)	3
<i>Dennis v. United States</i> , 384 U.S. 855 (1966)	12
<i>Dep’t of Homeland Sec. v. New York</i> , 589 U.S. 1173 (2020)	2
<i>Dickerson v. United States</i> , 530 U.S. 428 (2000)	23
<i>Dietz v. Bouldin</i> , 579 U.S. 40 (2016)	25
<i>Doyle v. Teasdale</i> , 263 Wis. 328 (1953)	6
<i>Duncan v. Poythress</i> , 657 F.2d 691 (5th Cir. 1981)	5

<i>Eaton v. Morse</i> , 212 Mont. 233 (1984)	6
<i>Edwards v. Arizona</i> , 451 U.S. 477 (1981)	23
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	21
<i>English v. General Electric Co.</i> , 496 U.S. 72 (1990)	15
<i>Ex parte Burr</i> , 22 U.S. (9 Wheat. 5) 529 (1824)	17
<i>Flast v. Cohen</i> , 392 U.S. 83 (1968)	10-11
<i>Freedman v. Maryland</i> , 380 U.S. 51 (1965)	23
<i>Genetski v Benson</i> , 2021 Mich. Ct.Cl. LEXIS 3 (Mar. 9, 2021)	3
<i>Gibson v. Florida Legis. Investigation Comm.</i> , 372 U.S. 539 (1963)	21-22
<i>Griffin v. Burns</i> , 570 F.2d 1065 (1st Cir. 1978)	5
<i>Hamilton v. Morial</i> , 644 F.2d 351 (5th Cir. 1981)	20
<i>Hubbard v. United States</i> , 514 U.S. 695 (1995)	13
<i>In re Loney</i> , 134 U.S. 372 (1890)	7, 14-16, 22
<i>In re Primus</i> , 436 U.S. 412 (1978)	8-9
<i>In re Snyder</i> , 472 U.S. 634 (1985)	18-19

<i>INS v. Chadha</i> , 462 U.S. 919 (1983).....	4
<i>International Longshoremen’s Ass’n v. Davis</i> , 476 U.S. 380 (1986).....	15
<i>Keller v. State Bar of California</i> , 496 U.S. 1 (1990).....	7-8
<i>Koehring Co. v. Hyde Construction Co.</i> , 382 U.S. 362 (1966).....	20
<i>Kurns v. R.R. Friction Prods. Corp.</i> , 565 U.S. 625 (2012).....	15
<i>Marshall v. Gates</i> , 44 F.3d 722 (9th Cir. 1994).....	16-17
<i>Maryland v. Shatzer</i> , 559 U.S. 98 (2010).....	23
<i>Mayo v. Dean Witter Reynolds, Inc.</i> , 258 F.Supp.2d 1097 (N.D. Cal. 2003).....	15
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819).....	22
<i>McDonnell v. United States</i> , 579 U.S. 550 (2016).....	12
<i>Mi Familia Vota v. Hobbs</i> , 977 F.3d 948 (9th Cir. 2020).....	3
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966).....	23
<i>Moore v. Harper</i> , 600 U.S. 1 (2023).....	2-3
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974).....	14
<i>Mullaney v. Anderson</i> , 342 U.S. 415 (1952).....	20

<i>Murthy v. Vilsack</i> , 609 F.3d 460 (D.C. Cir. 2010)	20
<i>N.Y. Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	23
<i>NAACP v. Button</i> , 371 U.S. 415 (1963)	8-10
<i>Priorities USA v. Wis. Elections Comm'n</i> , 412 Wis. 2d 594 (2024)	3
<i>Puerto Rico v. Franklin Cal. Tax-Free Tr.</i> , 579 U.S. 115 (2016)	17
<i>RadLAX Gateway Hotel, LLC v. Amalgamated Bank</i> , 566 U.S. 639 (2012)	14
<i>Raines v. Byrd</i> , 521 U.S. 811 (1997)	5
<i>Renne v. Geary</i> , 501 U.S. 312 (1991)	6
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	21
<i>Rosario v. Rockefeller</i> , 410 U.S. 752 (1973)	3
<i>Ruhrgas Ag v. Marathon Oil Co.</i> , 526 U.S. 574 (1999)	24
<i>Schlesinger v. Reservists Comm. to Stop the War</i> , 418 U.S. 208, 223 n.13 (1974)	5, 24
<i>Sperry v. Florida ex rel. Florida Bar</i> , 373 U.S. 379, 383–85 (1963)	15, 17
<i>Steel Co. v. Citizens for a Better Env't</i> , 523 U.S. 83, 109-10 (1998)	12
<i>Teigen v. Wis. Elections Comm'n</i> , 403 Wis. 2d 607, 646-55 (2022)	3

<i>Texas v. Pennsylvania</i> , 592 U.S. 1144 (2020)	5, 11, 20, 24-25
<i>Texas v. United States</i> , 523 U.S. 296, 300 (1998)	5, 24
<i>Theard v. United States</i> , 354 U.S. 278, 281 (1957)	17
<i>Tom Reed Gold Mines Co. v. United E. Mining Co.</i> , 39 Ariz. 533, 539-40 (1932)	6
<i>Tribull v. Tribull</i> , 208 Md. 490, 504-05 (1956)	6
<i>Trump v. Anderson</i> , 601 U.S. 100, 116 (2024)	6
<i>Trump v. United States</i> , 603 U.S. 593 (2024)	13
<i>Turner Broad. Sys., Inc. v. F.C.C.</i> , 512 U.S. 622 (1994)	21
<i>United States v. Bramblett</i> , 348 U.S. 503 (1955)	13
<i>United States v. Diaz-Villafane</i> , 874 F.2d 43 (1st Cir. 1989)	17
<i>United States v. Hvass</i> , 355 U.S. 570 (1958)	16
<i>United States v. Locke</i> , 529 U.S. 89 (2000)	17
<i>United States v. Ohio Power Co.</i> , 353 U.S. 98 (1957)	24
<i>Wadler v. Bio-Rad Laboratories, Inc.</i> , 212 F.Supp. 3d 829 (N.D. Cal. 2016)	15
<i>Webster v. Comm’n for Lawyer Discipline</i> , 704 S.W.3d 478 (Tex. 2024)	21

<i>Wood v. Raffensperger</i> , 981 F.3d 1307 (11th Cir. 2020).....	19
<i>Yee v. City of Escondido</i> , 503 U.S. 519 (1992).....	15
Statutes	
U.S. CONST. art. I, §4, cl. 1	2-3, 7, 10-11, 13, 25
U.S. CONST. art. I, §4, cl. 2	2-3, 7, 10-11, 13, 25
U.S. CONST. art. II, §1, cl. 2.....	2-3, 7, 10-11, 13, 25
U.S. CONST. art. III.....	3, 5-6, 9-10, 24
U.S. CONST. amend. I	1, 7-11, 13-16, 16, 20-23-
U.S. CONST. amend. XII	5, 24
Administrative Procedure Act	
5 U.S.C. §§551-706.....	1
18 U.S.C. §371	11-14
18 U.S.C. §1001	13
18 U.S.C. §1001(b).....	13-14
18 U.S.C. §1515(a)(1)(A)-(C)	14
18 U.S.C. §1515(c)	13-14
28 U.S.C. §1651	20
All Writs Act,	
28 U.S.C. §1651(a)	20
Rules Enabling Act,	
28 U.S.C. §§2071-2077.....	16
28 U.S.C. §2071(a).....	17
28 U.S.C. §2072	16
28 U.S.C. §2072(a).....	16
28 U.S.C. §2072(b).....	16
28 U.S.C. §2106	20
Act of March 2, 1793, ch. 22, §7, 1 Stat. 333	17-18

Ch. 67, 12 Stat. 696 (1863).....	13
Electoral Count Act of 1887	
Ch. 90, 24 Stat. 373.....	4
False Statements Accountability Act of 1996,	
PUB. L. NO. 104-292, §2, 110 Stat. 3459.....	13
Electoral Count Reform Act of 2022,	
PUB. L. NO. 117-328, 136 Stat. 4459 (2022)	4
25 PA. STAT. §3154(b)	3
Rules, Regulations and Orders	
S.Ct. Rule 8.2.....	19
S.Ct. Rule 37.6.....	1
FED. R. CIV. P. 21	20
FED. R. CRIM. P. 45	17
N.D. Ga. LR 83.1(C)	18
N.D. Ga. LR 83.1(F)(3)	18
GA. R. PROF’L CONDUCT 3.1.....	18
GA. R. PROF’L CONDUCT 3.3(a)(1).....	19
GA. R. PROF’L CONDUCT 3.3(b)	19
Other Authorities	
Joseph R. Biden, Jr., <i>Remarks on Voting Rights in</i> <i>Atlanta, Georgia</i> , 3 (Jan. 11, 2022)	2
Ethics Complaint Against John Eastman (July 28, 2022)	24
2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787 (1911)	4
Vasan Kesavan, <i>Is the Electoral Count Act</i> <i>Unconstitutional?</i> , 80 N.C.L. REV. 1653 (2002) ...	4
J. Story, 2 EQUITY JURISPRUDENCE §258 (Boston, Hilliard, Gray, & Co. 1833)	6-7

J. Story, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1464 (Boston, Hilliard, Gray, & Co. 1833).....	4
---	---

INTEREST OF AMICUS CURIAE

Amicus curiae APA Watch¹ is a nonprofit association advocating for judicial review of governmental action and inaction. That advocacy includes review not only via judicial review provisions such as the Administrative Procedure Act (“APA”) and its state and common law analogs but also via tort law and—as relevant here—infringement of First Amendment liberties, Due Process, and other federal statutory and constitutional protections. For these reasons, APA Watch has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Amicus adopts the facts as stated by petitioner, Pet. 7-11, but supplies additional context relevant to the 2020 election at issue—at least as background—in this matter.

Election litigation needed urgent attention.

Since the hanging chads of Florida’s 2000 election, *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring), litigation has overwhelmed our national elections. For partisan advantage, suits have selectively sought to undo legislative protections. In addition, and especially in the 2020 pandemic, administrative actions by governors and state election officials have similarly—and selectively—tweaked the elections laws adopted by state legislatures.

¹ Pursuant to Rule 37.6, *amicus* counsel authored this brief in whole, no party’s counsel authored this brief in whole or in part, and no person or entity—other than *amicus* and its counsel—contributed monetarily to preparing or submitting the brief.

Unsurprisingly, partisan polarization affects not only government policies but also the elections that choose policymakers. Democrat leaners can view Republican-leaning efforts at election integrity as “Jim Crow 2.0” voter suppression. *See* Joseph R. Biden, Jr., *Remarks on Voting Rights in Atlanta, Georgia*, 3 (Jan. 11, 2022). Some Republican leaners believe that Democrat-led election litigation is the equivalent of beating witnesses until they testify to whatever their assailant wants said.

In the related context of nationwide injunctions, Justice Gorsuch deemed the conduct “not normal” in our constitutional history. *Dep’t of Homeland Sec. v. New York*, 589 U.S. 1173, 1175 (2020) (Gorsuch, J., concurring in the grant of stay). For elections, these actions are even more abnormal: “The Times, Places and Manner of holding Elections for Senators and Representatives, *shall be prescribed in each State by the Legislature thereof*[.]” U.S. CONST. art. I, §4, cl. 1 (emphasis added), subject to the power of “Congress at any time by Law [to] make or alter such Regulations.” *Id.* art. I, §4, cl. 2; *id.* art. II, §1, cl. 2 (“[e]ach State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors”) (emphasis added).

In 2020, we had only a three-justice concurrence to guide us. *Bush v. Gore*, 531 U.S. 98, 113 (2000) (“significant departure from the legislative scheme for appointing Presidential electors presents a *federal constitutional question*”) (Rehnquist, C.J., concurring) (emphasis added). Now, we have more. *Moore v. Harper*, 600 U.S. 1, 37 (2023) (“federal courts must not abandon their own duty to exercise judicial review”).

But *Moore* says nothing about the latitude of *federal* courts, *Democratic Nat’l Comm. v. Wisconsin State Legis.*, 592 U.S. 1039 (2020) (“[d]ifferent bodies of law and different precedents govern these two situations”) (Roberts, C.J., concurring in denial of application to vacate stay), much less to state administrators or governors to deviate from state election law. Those answers must await further cases or controversies arising under the federal review that *Moore* recognized.²

Although this Court undoubtedly will continue to need to resolve the Electors and Elections Clauses’ application, *Moore* is not the only major development in resolving the uncertainty that existed in 2020. In *Bost v. Illinois State Bd. of Elections*, 607 U.S. 71, 77-82 (2026), this Court clarified that candidates for federal office have Article III standing for an election-integrity interest in challenging vote-counting rules,

² Several federal decrees undermine California’s claim (Pet. Ap.. 30a, 87a) that alleged illegality was immaterial to the 2020 election. Compare *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973) (registration deadlines enforceable) with *Mi Familia Vota v. Hobbs*, 977 F.3d 948, 954-55 (9th Cir. 2020); see *Democratic Party of Georgia v. Raffensperger*, No. 1:19-cv-5028-WMR (N.D. Ga. Mar. 6, 2020) (settlement not authorized by Legislature). Various administrative policies raised Electors and Elections Clause issues. Compare *Teigen v. Wis. Elections Comm’n*, 403 Wis. 2d 607, 646-55 (2022) (finding unmanned drop-boxes illegal by 4-3 vote) with *Priorities USA v. Wis. Elections Comm’n*, 412 Wis. 2d 594, 598-99, (2024) (reversing *Teigen* by a 4-3 vote after a judicial election); see also *Genetski v Benson*, 2021 Mich. Ct.Cl. LEXIS 3, *19 (Mar. 9, 2021) (invaliding administrative signature-verification policy on state-law grounds); see also 25 PA. STAT. §3154(b).

regardless of whether those rules harm their electoral prospects or increase their campaigns costs.

The ECA was unconstitutional.

Neither the original Constitution nor the Twelfth Amendment included a dispute-resolution provision. J. Story, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1464 (Boston, Hilliard, Gray, & Co. 1833). The Vice-President’s role of counting the electoral votes is borne out by a unanimous resolution attached to the final Constitution that described the procedures for electing the first President, when there would not already be a sitting Vice-President: “the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening *and counting the Votes* for President.” 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 666 (1911) (emphasis added).

Congress enacted the Electoral Count Act of 1887 (“ECA”),³ after the contested election of 1876, but the ECA was likely unconstitutional because the ECA’s dispute-resolution process relied on concurrent resolutions without presentment. *See* Vasana Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C.L. REV. 1653, 1787-79 (2002); *see* Pet. 27 n.4 (collecting authorities). Despite ECA’s longevity, Congress’s belief in bicameral resolutions went unchecked until 1983. *INS v. Chadha*, 462 U.S. 919, 946 (1983), but there simply had not been a sufficiently contested election since *Chadha* to assess the ECA’s constitutionality under *Chadha*.

³ The Electoral Count Reform Act of 2022, PUB. L. NO. 117-328, 136 Stat. 4459 (2022), amended ECA.

Texas had standing in *Texas v. Pennsylvania*.

This Court dismissed No. 22O155 for lack of standing because “Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections.” *Texas v. Pennsylvania*, 592 U.S. 1144 (2020). While that curt analysis explains why a state likely could not sue the four defendant swing states *prior to the election*, *Texas v. United States*, 523 U.S. 296, 300 (1998) (“claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all”) (cleaned up), a state should have standing under the Twelfth Amendment to challenge unlawful voting in enough states to throw the election into the House and Senate. *See* U.S. CONST. amend. XII.

A prevailing plaintiff state gets to vote in House and Senate elections under the Twelfth Amendment. Given “that a personal stake in a fraction of a vote [is] sufficient to support standing” as “a concrete injury to fundamental voting rights,” *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 223 n.13 (1974), a plaintiff state’s personal stake in two whole votes—one in the House for President, one in the Senate for Vice-President—is a concrete injury under Article III.⁴

⁴ *See Raines v. Byrd*, 521 U.S. 811, 823 & n.6 (1997) (vote-nullification claim is an exception to lack of “legislative standing”); *Duncan v. Poythress*, 657 F.2d 691, 703 (5th Cir. 1981) (“denial of a legally-required election obviously erodes the democratic process”) (cleaned up); *cf. Griffin v. Burns*, 570 F.2d 1065, 1078-80 (1st Cir. 1978) (remedial authority includes ordering new election to redress injury from unlawful election).

In presidential elections, “the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States.” *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983); *accord Trump v. Anderson*, 601 U.S. 100, 116 (2024). The Constitution is a compact among the states, so states that uphold it are entitled to expect other states to do the same.

Texas had a clear basis for Article III standing. If Texas failed adequately to assert that basis, that’s one thing. *Renne v. Geary*, 501 U.S. 312, 316 (1991) (“[courts] presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record”) (cleaned up). But this Court’s curt analysis should not bar future litigants from choosing between forgoing clear rights or facing barfare.

Unlawful elections can lack *actual* fraud.

At various points, California conflates illegal elections with fraudulent elections. Pet. App. 30a, 57a-58a, 70a, 90a-91a. Accordingly, the dispute is partly semantic. Indeed, “fraud” without modification can mean either actual or constructive fraud. *Baker v. Humphrey*, 101 U.S. 494, 502 (1879); *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964); *Tom Reed Gold Mines Co. v. United E. Mining Co.*, 39 Ariz. 533, 539-40 (1932); *Doyle v. Teasdale*, 263 Wis. 328, 337 (1953); *Eaton v. Morse*, 212 Mont. 233, 241 (1984); *Tribull v. Tribull*, 208 Md. 490, 504-05 (1956). Constructive fraud includes “acts ..., although not originating in any actual evil design, or contrivance to perpetrate a positive fraud ..., are yet, by their tendency ... to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud.” J. Story, 2

EQUITY JURISPRUDENCE §258 (Boston, Hilliard, Gray, & Co. 1833). Elections and Electors Clause violations can be unconstitutional and illegal without “fraud” and can be constructively fraudulent without the type of misconduct (*e.g.*, ballot-stuffing, vote tampering) often intended by saying “fraud” without modification.

SUMMARY OF ARGUMENT

APA Watch supports granting a writ of *certiorari* on each of Eastman’s three questions presented.

First, California inflicts First-Amendment injury and chill on lawyers like Eastman and their clients (and the public generally) who need lawyers to enforce their constitutional right. *See* Section I, *infra*.

Second, this Court should not allow California to sidestep strict scrutiny under the First Amendment by labelling arguments as fraud. *See* Section II, *infra*.

Third, federal interests from *In re Loney*, 134 U.S. 372 (1890), as well as the applicable federal court rules and the First Amendment preempt California’s efforts to second guess federal litigation outside California’s jurisdiction. *See* Section III, *infra*.

ARGUMENT

I. THE FIRST AMENDMENT QUESTION IS “CERTWORTHY.”

This Court should grant the writ of *certiorari* for Eastman’s question presented on First Amendment injuries. Several First-Amendment injuries exist.

A. The First Amendment applies.

Although the Court found the First Amendment to apply to the Bar, *Keller v. State Bar of California*, 496 U.S. 1, 10-14 (1990), two *amici* conflate state action with sovereign immunity under the arm-of-the-

state doctrine. *See* Sanai-Roshan *Amici* Br., at 5-12. Because the Bar initiated this proceeding, sovereign immunity is irrelevant.

B. Several First-Amendment harms require this Court's protection.

Assuming under *Keller* that the First Amendment applies, California impairs several First-Amendment rights, which warrants this Court's urgent review.

1. California impairs the public's First Amendment rights.

Most obviously, California's use of disciplinary authority here threatens much more than Eastman's license. California threatens the public's ability to obtain the counsel needed to petition courts or agencies for the redress of grievances. Moreover, although California appears to reject the distinction between voting that is unlawful under the Electors and Elections Clauses and voting that is tainted by actual fraud, Eastman's efforts sought to express that distinction. The First-Amendment injury here thus includes the chill on lawyers that impairs the affected public's right of petition and expression. *See NAACP v. Button*, 371 U.S. 415, 429-31 (1963); *In re Primus*, 436 U.S. 412, 426-27 (1978). If states can deter representation of unpopular clients by making good-faith advocacy of contested legal and factual positions a basis for professional extinction, the First Amendment's protections will be "vain and futile." *Bhd. of R.R. Trainmen v. Virginia*, 377 U.S. 1, 5 (1964). This Court must protect Eastman in order to protect the public. Doing so will also protect this Court through the "concrete adverseness which sharpens the presentation of issues upon which the court so

largely depends for illumination of difficult constitutional questions.” *Baker v. Carr*, 369 U.S. 186, 204 (1962) (referring to parties’ Article III adverseness).

2. California impairs lawyers’ right to associate with their clients.

The associational freedom at stake belongs not only to clients seeking redress, but also to the lawyers who join them in lawful efforts to advance political and constitutional claims. This Court’s decisions recognize that legal assistance undertaken to further political and ideological objectives can constitute protected expression and association, rather than merely a commercial transaction subject to ordinary professional regulation. *See Button*, 371 U.S. at 428-31; *Primus*, 436 U.S. 424-26, 431-32. States cannot evade First Amendment scrutiny simply by labeling protected joint activity professional misconduct. Abandoning good-faith advocacy of unpopular clients and their contested constitutional positions should not be the cost of the continued right to practice law.

3. California impairs lawyers’ in-court rights of speech and petition.

Similarly, lawyers do not waive First Amendment protection when they enter the courtroom to advocate lawful constitutional claims on their clients’ behalf. California cannot avoid First Amendment scrutiny of lawyers’ in-court advocacy simply by classifying their speech as professional conduct. *Chiles v. Salazar*, 607 U.S. 627, 647 (2026). Litigation can constitute both political expression and petitioning, and the protection afforded that activity necessarily encompasses the legal advocacy through which claims

are presented for adjudication. *See Button*, 371 U.S. at 428-31. Moreover, neither lawyers' motivations nor their failing to prevail convert reasonable advocacy into unprotected misconduct. *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 531-33 (2002). Those First-Amendment protections do not prevent courts of competent jurisdiction from enforcing duties of candor, procedural rules, or valid sanctions against litigation abuse, *id.* at 536-37, but California is not a court of competent jurisdiction here. California also fails to distinguish such misconduct from protected advocacy where California simply disagrees with the core arguments under the Elections and Electors Clauses that Eastman attempted to advance. California cannot use its licensing authority as a substitute for constitutional scrutiny of third-party litigation in other forums.

Although a state “undoubtedly has broad powers to regulate the practice of law *within its borders*,” a state—in doing so—“cannot ignore the rights of individuals secured by the Constitution.” *Bhd. of R.R. Trainmen*, 377 U.S. at 6 (emphasis added). California here seeks to regulate Eastman’s conduct *outside* its borders and—more importantly—California does so inconsistently with the applicable federal law. *See* Sections III.A.1.a-III.A.1.c, *infra*. That inconsistent, extraterritorial application of state authority impairs First-Amendment rights.

Indeed, the Article III nexus with the Eastman charges heightens this Court’s obligation to act. Even to learned counsel, this Court’s Article III analysis can “reduce[] constitutional standing to a word game played by secret rules.” *Flast v. Cohen*, 392 U.S. 83,

129 (1968) (Harlan, J., dissenting). Eastman stands accused of distinguishing between a voter's standing and a candidates standing in *Trump v. Kemp* and in supporting a voter's standing to compel an election required by the voter's legal theory in *Texas v. Pennsylvania*. See Sections III.A.1.b, III.C, *infra*. In both cases, Eastman was right and either California or the court in question was wrong. That is not a basis for disbarment.

C. Resolution is urgently needed.

This case provides this Court an opportunity to stop state-bar overreach before the phenomenon can escalate. Indeed, this Court should consider summary disposition in Eastman's favor.

II. THE QUESTION OF FRAUD UNDER 18 U.S.C. §371 IS "CERTWORTHY."

This Court should grant the writ of *certiorari* for Eastman's question presented on the application and scope of 18 U.S.C. §371 as applied to lawyers' conduct in litigation.

A. California cannot use §371 to relabel disfavored speech as "fraud."

If a lawyer were convicted of conspiring to defraud the United States under 18 U.S.C. §371, no-one would quarrel with disciplinary consequences, but that is not what happened here. Instead, California merely uses §371's "fraud" clause in an attempt to cast speech with which California disagrees outside First-Amendment protections.

Advocating disputed constitutional issues is not, without more, an agreement to obstruct government by fraudulent means under §371. Challenging

government conduct does not become a conspiracy whenever courts uphold the challenged conduct, *BE&K*, 536 U.S. at 531-33, which is doubly true when the court holds that it lacks jurisdiction to hear the challenge: “However desirable prompt resolution of the merits ... question may be, it is not as important as observing the constitutional limits set upon courts in our system of separated powers.” *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109-10 (1998). Jurisdictional dismissals do not reach the parties’ merits positions: “For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.” *Id.* at 101-02. California appears to use §371 to treat merits issues not reached in federal courts as issues decided against Eastman on the merits.

California’s loosely ascribing its “dishonesty” label chills constitutional advocacy and invites arbitrary enforcement. In a similar case, this Court narrowed another federal criminal statute because, *inter alia*, an expansive interpretation threatened ordinary political interactions, inadequate notice, and arbitrary enforcement. *McDonnell v. United States*, 579 U.S. 550, 576 (2016). Indeed, even when §371 applies, the claimed conspiracy “must be scrutinized carefully as to each of the charged defendants because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable.” *Dennis v. United States*, 384 U.S. 855, 860 (1966). If “dishonest means” includes advancing a legal theory that a later tribunal regards as untenable, lawyers cannot reliably know when

advocacy becomes criminal fraud. The chilling effect extends beyond elections to constitutional challenges involving agency authority, executive power, civil rights, and statutory validity.

B. §371 potentially applies to some conduct in some federal proceedings.

Under §371’s fraud clause, “fraud” means “any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.” *Trump v. United States*, 603 U.S. 593, 640 (2024) (collecting authorities that) (cleaned up). Citing §371’s antebellum-era vintage and its early focus on monetary and property claims, Eastman suggests that California improperly extends §371 to “legal and constitutional advocacy.” Pet. 34-36. Although California’s attempt to apply §371 to sidestep the First Amendment and this Court’s rules is foreclosed for the other reasons here and in the Petition, *see* Section II.A, *supra*; Pet. 33-36, §371 nonetheless may apply in *some* federal proceedings before federal courts or agencies.

Specifically, the false-statements and obstruction statutes include exceptions for litigation conduct, 18 U.S.C. §§1001(b), 1515(c), that—by their terms—do not apply to fraud under §371.⁵ The false-statement exception extends to aspects of counsel’s conduct in a

⁵ Like §371, §1001 dates back to the Civil War era. Ch. 67, 12 Stat. 696, 696-97 (1863); *United States v. Bramblett*, 348 U.S. 503, 504 (1955), *abrogated in part*, *Hubbard v. United States*, 514 U.S. 695, 715 (1995) (“federal court is neither a ‘department’ nor an ‘agency’ within the meaning of § 1001”), *abrogated in part*, False Statements Accountability Act of 1996, PUB. L. NO. 104-292, §2, 110 Stat. 3459 (enacting §1001(b)).

“judicial proceeding,” *id.* §1001(b), whereas the obstruction exception extends to “lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding” before a federal court or agency (among other federal proceedings). *Id.* §1515(a)(1)(A)-(C), (c). The subsequent and more specific enactment of §1001(b) undermines reliance on *Dennis* to charge §371 to litigation conduct. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645-46 (2012) (general provisions should not swallow specific provisions); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (“specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment”). The more-specific, later-enacted provisions undermine California’s reliance on §371 for litigation conduct.

III. THE *LONEY*-PREEMPTION QUESTION IS “CERTWORTHY.”

This Court should grant the writ of *certiorari* for Eastman’s question presented under *Loney* regarding state enforcement of ethical issues raised by federal litigation. Here, however, the Court should revise the Question Presented to expand on Eastman’s focus on the States’ *subject-matter jurisdiction* to second guess conduct in federal litigation to include both facial and as-applied preemption by the applicable federal court rules and the First Amendment.

A. The Court should revise Eastman’s third question to include facial and as-applied preemption under federal law.

This Court can “rephrase[] the question presented by a petitioner ... request[] the parties to address an important question of law not raised in the petition.”

(cleaned up), *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). As indicated, the Court should exercise that authority here to ask whether applicable federal court rules—facially or as applied—can preempt state ethics enforcement over lawyers’ conduct in federal litigation. Challenging subject-matter jurisdiction is but one way to bring a facial preemption challenge, *see International Longshoremen’s Ass’n v. Davis*, 476 U.S. 380, 391-93 & n.9 (1986) (distinguishing between “pre-emption claims that go to the State’s actual adjudicatory or regulatory power as opposed to the State’s substantive laws”), but states could be preempted in several other ways.

First, federal law can expressly preempt state law. *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990); *Wadler v. Bio-Rad Laboratories, Inc.*, 212 F.Supp. 3d 829, 856-57 (N.D. Cal. 2016) (federal rule expressly allows conduct that California ethics rules prohibit).

Second, federal law can facially conflict-preempt state authority otherwise within a state’s power. When Florida sought to prohibit patent practice that federal law authorized, this Court held that states may not use their licensing requirements to place additional incompatible conditions on federally authorized activity. *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 383-85 (1963); *Mayo v. Dean Witter Reynolds, Inc.*, 258 F.Supp.2d 1097, 1109-10 (N.D. Cal. 2003),

Third, federal law can occupy a field and displace all state regulation from the field. *Loney*, 134 U.S. at 375; *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 630-31 (2012),

Fourth, even if the Court rejects facial preemption of California's enforcement authority, the Court could find as-applied preemption of particular enforcement actions if they seriously compromised important federal interests. *Arkansas Electric Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 388-89 (1983).

While one typically think of First-Amendment violations as "unconstitutional," the Court should also analyze California's conduct under principles of preemption. Given the urgency of the issues presented here and the preemption arguments' closeness to not only Eastman's third question but also to his first, APA Watch respectfully submits that the Court should revise the third question presented as set forth above. *See* Questions Presented, at i, *supra*. Subject-matter jurisdiction under *Loney* is only one facet of the issues that this Court should consider.

1. Federal court rules can preempt State enforcement.

The Rules Enabling Act, 28 U.S.C. §§2071-2077, defines federal courts' authority to adopt court rules. Under §2072, the Supreme Court may adopt rules of practice (*e.g.*, the Federal Rules of Civil Procedure), and "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. §2072(a)-(b). Federal and local rules qualify as *federal law*. *See* 28 U.S.C. §2072(b) ("[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect"); *United States v. Hvass*, 355 U.S. 570, 575 (1958); *Marshall v. Gates*, 44 F.3d 722, 724 (9th Cir. 1994) (local rules are "laws of the United States" if

consistent with federal rules); *United States v. Diaz-Villafane*, 874 F.2d 43, 46 (1st Cir. 1989) (“[o]nce local rules have been promulgated, lawyers and their clients have a right to place reasonable reliance on them”). Ethical requirements about misstatements and the need to correct material misstatements are “rules for the conduct of [federal courts’] business” for purposes of 28 U.S.C. §2071(a) and thus federal law.

Although this Court has recognized that state and federal courts generally “have autonomous control over the conduct of their officers,” *Theard v. United States*, 354 U.S. 278, 281 (1957), that general control cannot override contrary federal law. *See, e.g., Sperry*, 373 U.S. at 383-85. Whatever “inherent power” courts have, that power “does not include the power to develop rules that circumvent or conflict with the” duly enacted federal rules. *Carlisle v. United States*, 517 U.S. 416, 426 (1996), *abrogated on other grounds* by 2005 amendments to FED. R. CRIM. P. 45. Moreover, no presumption against preemption applies to express or field preemption, *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016) (express); *Aguayo v. U.S. Bank*, 653 F.3d 912, 921 (9th Cir. 2011) (field), or to conflict preemption “when the State regulates in an area where there has been a history of significant federal presence.” *United States v. Locke*, 529 U.S. 89, 108 (2000); *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 347-48 (2001) (preempting fraud-on-federal-agency claims). Federal presence in the field regulating practice before federal courts is ancient. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (citing *Ex parte Burr*, 22 U.S. (9 Wheat. 5) 529, 531 (1824)); Act of March 2, 1793, ch. 22, §7, 1 Stat. 333,

335 (authorizing federal courts *inter alia* “to regulate the practice of said courts”). The next subsections explain how California erred in applying California rules to Eastman’s conduct in federal court.

a. California improperly relied on California’s ethics rules.

California applied its ethics rules to Eastman’s conduct in federal litigation in federal courts that have not adopted California’s ethics rules. *See* Pet. App. 27a-28a. As this Court has made clear, “[t]he state code of professional responsibility does not by its own terms apply to sanctions in the federal courts.” *In re Snyder*, 472 U.S. 634, 645 & n.6 (1985). For its part, *Snyder* involved an attempt to apply North Dakota’s rules to conduct in Eighth Circuit by a North Dakota-licensed attorney in an appeal arising from federal court in North Dakota. California’s ties to an original action in this Court and to litigation in Georgia are even more attenuated.

b. Georgia’s ethics rules apply to *Trump v. Kemp*.

California seeks to disbar Eastman in part for misstatements in a complaint filed in the U.S. District Court for the Northern District of Georgia. Pet. App. 24a. With exceptions not relevant here, the Northern District of Georgia has adopted the Georgia Rules of Professional Conduct as a local rule. N.D. Ga. LR 83.1(C). In addition to not following the *mandatory* complaint process, *id.* LR 83.1(F)(3), California has disbarred Eastman, notwithstanding that “[t]he maximum penalty for a violation of [Georgia Rule 3.1] is a public reprimand,” GA. R. PROF’L CONDUCT 3.1, and that the duty to correct applies only to material

misstatements, GA. R. PROF'L CONDUCT 3.3(a)(1), and continue to the proceeding's conclusion. *Id.* 3.3(b). Lin Wood's lacking standing as a voter is immaterial to Donald Trump's having standing as a candidate. *See Bost*, 607 U.S. at 77-82; *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) ("if Wood were a political candidate harmed by the recount, he would satisfy this requirement because he could assert a personal, distinct injury"). Federal law expressly and impliedly preempts California's disciplining Eastman for the *Trump v. Kemp* complaint, both facially and as applied.

c. This Court's ethics rule applies to Texas Pennsylvania.

In federal appellate courts, the federal appellate rules' conduct-unbecoming standard applies as a rule of federal law. *Snyder*, 472 U.S. at 645 & n.6. That rule is guided "by case law, applicable court rules, and the lore of the profession, as embodied in codes of professional conduct." *Id.* at 645 (cleaned up). While not as clear as the Northern District of Georgia's rules, the Court's Rule 8.2 displaces the California rules substantively and procedurally. An amalgam of the "lore of the profession" can include general rules without including a specific jurisdictions' atypical rules.

d. California could file disciplinary complaints with federal courts if it wanted to pursue Eastman.

Significantly, discipline under courts' inherent authority does not end when a case ends, *Chambers*, 501 U.S. at 55-56 (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-96 (1990)), so California

could pursue sanctions in the relevant federal courts if the issue were sufficiently important to California. Importantly, to do so, California may wish to engage counsel familiar with the law of the court in which the sanctions were sought.

e. This Court should not remand litigation counts to California.

This Court could use its broad remedial authority in 28 U.S.C. §2106 and the All Writs Act, 28 U.S.C. §1651(a), to sever⁶ the federal-litigation counts, retaining the *Texas v. Pennsylvania* count within this Court's original jurisdiction and transferring or remanding the *Trump v. Kemp* count to the Northern District of Georgia. See *Koehring Co. v. Hyde Construction Co.*, 382 U.S. 362, 364-65 (1966) (affirming extra-circuit transfer); *Hamilton v. Morial*, 644 F.2d 351, 353-54 & n.2 (5th Cir. 1981) (citing *Koehring*, 28 U.S.C. §§1651, 2106); cf. *Mullaney v. Anderson*, 342 U.S. 415, 416-17 (1952) (applying FED. R. CIV. P. 21 by analogy).

2. The First Amendment can preempt state enforcement.

Although federal preemption typically occurs with federal statutes or regulations, the Constitution too can preempt state law: “federal regulation is wholly irrelevant if the Constitution of its own force requires pre-emption of such state regulation.” *De Canas v. Bica*, 424 U.S. 351, 355 (1976). Here, the First Amendment can preempt California's direct and indirect attack on the First Amendment. See Sections

⁶ See *Murthy v. Vilsack*, 609 F.3d 460, 462-64 (D.C. Cir. 2010).

I.B.1-I.B.3, *supra* (identifying the First Amendment injury from California’s actions).

Even a brief deprivation of First Amendment rights constitutes irreparable injury, *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976), and voting rights are “a fundamental political right, because preservative of all rights.” *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (cleaned up). “Any suggestion that a party or attorney faces enhanced risk of sanction merely because they couple political motives with a long-shot effort to vindicate a legal right in the election law context intolerably chills citizens and their attorneys precisely in an arena where we can least afford to silence them.” *Ariz. Republican Party v. Richer*, 257 Ariz. 237, 250, ¶44 (2024); *Webster v. Comm’n for Lawyer Discipline*, 704 S.W.3d 478, 499 (Tex. 2024) (“deployment of Rule 8.04(a)(3) at the pleadings stage is particularly problematic”).⁷

Whether facially or as applied, the First Amendment protects against “[g]overnment seek[ing] ... to suppress unpopular ideas or information,” *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994). Where the unpopular views have “engendered the intense resentment and opposition of the politically dominant ... community” in a jurisdiction, “the deterrent and ‘chilling’ effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more immediate and substantial.” *Gibson v. Florida Legis.*

⁷ Texas uses “binding judicial *dictum*” for “statement[s] made deliberately after careful consideration and for future guidance in the conduct of litigation.” *Autobahn Imps., L.P. v. Jaguar Land Rover N. Am., L.L.C.*, 896 F.3d 340, 346 (5th Cir. 2018).

Investigation Comm., 372 U.S. 539, 556-57 (1963). If the power to tax carries with it the power to destroy, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819), California's power of inquiry similarly carries with it the power to destroy. See *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740-41 (1983) (recognizing the coercive and chilling effects of litigation and the substantial defense expenses imposed even by unmeritorious suits). Even if not facially preempted, the First Amendment should preempt uninjured states' bar prosecution as applied.

3. The federal interests in *Loney* can preempt state enforcement.

Loney held that states could not prosecute state-licensed notaries for alleged perjury in a federal proceeding because "the power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had." 134 U.S. at 375. The rationale for field preemption against that criminal prosecution should also apply to California's enforcement:

It is essential to the impartial and efficient administration of justice in the tribunals of the nation, that witnesses should be able to testify freely before them, unrestrained by legislation of the State, or by fear of punishment in the state courts.

Id. (emphasis added). If the federal courts sanctioned Eastman, California could bring reciprocal sanctions. But *Loney* preempts California's selective attack on Eastman's in-court conduct outside California and its courts.

B. The Court should weigh the benefits of a prophylactic ruling versus an adverse judgment against only California.

Beyond entering final judgment between the parties, the Court should consider prophylactical procedural or substantive protections for similarly situated parties. *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966); *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965); *cf. N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) (First Amendment requires “breathing space” in substantive law).

Although case-by-case adjudication can often be preferable, the risk of states’ direct interference with First Amendments rights and indirect chilling of those rights may warrant prophylactic protections. Eastman’s prevailing will not cure the chill from California’s actions. *Cf. Dickerson v. United States*, 530 U.S. 428, 443-44 (2000) (weighing the risks of prophylactic *Miranda* warnings versus reverting to a totality-of-the-circumstances test). In deciding on adopting or extending a judicially crafted rule, this Court thus considers the protective purpose, benefits, costs, and administrability, *Maryland v. Shatzer*, 559 U.S. 98, 106-10 (2010) (declining to extend *Edwards* beyond *Miranda* custody). There, the Court concluded that its existing rulings had “opened [the] protective umbrella far enough.” *Id.* at 109 (cleaned up). This Court should consider how far the umbrella is open here and how far it should be open.

C. The Court should revisit standing in *Texas v. Pennsylvania*.

California’s disciplining Eastman for *Texas v. Pennsylvania* provides an opportunity to revisit that case. Similarly, a barfare organization filed a disciplinary complaint with this Court against Eastman including allegations about Article III standing,⁸ which the Court has not publicly decided. This Court could answer the 65 Project complaint in its decision in this case. Alternatively, the Court could exercise its discretion to revisit the underlying case. *United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957). Either way, states have standing to challenge other states’ unlawful elections, U.S. CONST. amend. XII; *Schlesinger*, 418 U.S. at 223 n.13; note 4, *supra* (collecting cases); *cf. Anderson*, 460 U.S. at 795, and that claim ripens after Election Day when an outcome-determinative number of electoral votes hangs in the balance. *Texas*, 523 U.S. at 300. This Court’s *Texas v. Pennsylvania* decision thus stands as an obstacle to states’ enforcing the Constitution.

In asking the Court to revisit whether states have standing to challenge the constitutionality of elections in an outcome-determinative group of other states, the Court need not fully reopen the case: “[T]here is no unyielding jurisdictional hierarchy” to threshold bases for dismissal, *Ruhrgas Ag v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999). The Court could decide that Texas had standing in 2020 but the case is moot in 2026 (unless the capable-of-repetition-yet-evading-

⁸ Ethics Complaint Against John Eastman, 12-13 (July 28, 2022) (<https://the65project.com/ethics-complaint-against-john-eastman/> (last visited Oct. 14, 2026)).

review exception applies). It would be ironic—but equitable—if relentless barfare prompted this Court to resolve the recurring Electors and Elections Clause issues. And those issues continue urgently to need answers.

Whenever higher authorities review matters, some reversals are inevitable: “We are not final because we are infallible, but we are infallible only because we are final.” *Brown v. Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring in judgment). In a related vein, however, finality does not mean *forever*: “like any order, [a court decision] can be issued by mistake” because “[a]ll judges make mistakes. (Even us.)” *Dietz v. Bouldin*, 579 U.S. 40, 53 (2016). This case provides the Court the opportunity to correct or clarify the basis for dismissing *Texas v. Pennsylvania*.

CONCLUSION

The Court should grant the petition for a writ of *certiorari*.

October 14, 2026

Respectfully submitted,

LAWRENCE J. JOSEPH
Counsel of Record
 1250 Connecticut Av NW
 Suite 700
 Washington, DC 20036
 (202) 899-2987
 ljoseph@larryjoseph.com
Counsel for Amicus Curiae