

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

**JOHN C. EASTMAN,
Plaintiff,**

vs.

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

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

**ORDER RE PRIVILEGE OF
DOCUMENTS DATED JANUARY 4-7,
2021**

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

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

11 The Court previously ordered the parties to begin with documents from January 4-7,
 12 2021. Dr. Eastman reviewed each document and claimed privilege over some, and the Select
 13 Committee objected to a number of his claims. At this point, the parties disagree on whether
 14 111 documents from those dates are privileged. The parties submitted briefing, and the Court
 15 held a hearing on the privilege claims on March 8, 2022. The Court then personally reviewed
 16 the 111 challenged documents, which were provided by Dr. Eastman.

17 **I. BACKGROUND**

18 **A. Facts²**

19 **1. Election fraud claims**

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

24 In the months after the election, President Trump and Dr. Eastman helped foster those

25 ¹ Complaint (“Compl.”) (Dkt. 1) ¶¶ 5–6.

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

28 ³ Compl. ¶ 1.

⁴ *Id.*

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

7 President Trump also made personal appeals to state officials. On January 2, he called
 8 Georgia Secretary of State Brad Raffensperger to discuss allegations of election fraud.⁷ During
 9 the call, President Trump repeatedly claimed it was impossible for him to have lost the popular
 10 vote in Georgia,⁸ and repeatedly mentioned his “current margin [of] only 11,779” votes.⁹ He
 11 explained to Secretary Raffensperger that he did not care about specific fraud numbers as long
 12 as he won, “[b]ecause what’s the difference between winning the election by two votes and
 13 winning it by half a million votes[?]”¹⁰ When Secretary Raffensperger pushed back against
 14 these requests, the President warned of public anger and threatened criminal consequences.¹¹
 15 The President interspersed the conversation with specific fraud claims—dead people voting,
 16 absentee ballot forgeries, trucks ferrying illegal ballots, and machines stuffed with “unvoted”

17
 18 ⁵ Declaration of John Eastman (“Eastman Decl.”) (Dkt. 132-1) ¶ 30.

19 ⁶ Select Committee’s Privilege Opposition (“Opp’n”) (Dkt. 164) at 7 (citing Michael Leahy, *President Trump*
 20 *Joins Call Urging State Legislators to Review Evidence and Consider Decertifying ‘Unlawful’ Election Results*,
 21 BREITBART (Jan. 3, 2021), [perma.cc/GZ8R-68EY](https://www.breitbart.com/politics/2021/01/03/trump-joins-call-urging-state-legislators-to-review-evidence-and-consider-decertifying-unlawful-election-results/), and Jacqueline Alemany et al., *Ahead of Jan. 6, Willard Hotel*
 22 *in Downtown DC was a Trump Team ‘Command Center’ for Effort to Deny Biden the Presidency*, WASH. POST
 23 (Oct. 23, 2021), [perma.cc/2PRC-NXKV](https://www.washingtonpost.com/politics/2021/10/23/trump-command-center-dc-jan-6/) (quoting Michigan State Senator Ed McBroom)).

24 ⁷ *Id.* at 8 (citing Amy Gardner & Paulina Firozi, *Here’s the full transcript and audio of the call between Trump*
 25 *and Raffensperger*, WASH. POST (Jan. 5, 2021), [perma.cc/5SMX-4FPX](https://www.washingtonpost.com/politics/2021/01/05/trump-raffensperger-call-transcript/) (“Trump-Raffensperger Call
 26 Transcript”).

27 ⁸ Trump-Raffensperger Call Transcript (“It’s just not possible to have lost Georgia. It’s not possible.” / “There’s
 28 no way I lost Georgia. There’s no way. We won by hundreds of thousands of votes.”).

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

¹⁰ *Id.*

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

1 ballots.¹² Mr. Raffensperger debunked the allegations “point by point” and explained that “the
2 data you have is wrong;” however, President Trump still told him, “I just want to find 11,780
3 votes.”¹³

4 The next day, President Trump attempted to elevate Jeffrey Clark to Acting Attorney
5 General, based on Mr. Clark’s statements that he would write a letter to contested states saying
6 that the election may have been stolen and urging them to decertify electors.¹⁴ The White
7 House Counsel described Mr. Clark’s proposed letter as a “murder-suicide pact” that would
8 “damage everyone who touches it” and commented “we should have nothing to do with that
9 letter.”¹⁵ President Trump eventually did not promote Mr. Clark after multiple high-ranking
10 members of the Department of Justice threatened mass resignations that would leave the
11 Department a “graveyard.”¹⁶

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

23 ¹² *Id.*

24 ¹³ *Id.*

25 ¹⁴ Opp’n Ex. B, Richard Donoghue Deposition Transcript (“Donoghue Tr.”) (Dkt. 160-5) 124.

26 ¹⁵ *Id.* at 126.

27 ¹⁶ *Id.* at 123–26; Opp’n Ex. C, Jeffrey Rosen Deposition Transcript (“Rosen Tr.”) (Dkt. 160-6) 105–06, 118.

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

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

¹⁹ Donoghue Tr. 59–60, 80.

1 Still, President Trump repeatedly urged that “the Department [of Justice] should publicly say
2 that the election is corrupt or suspect or not reliable.”²⁰

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

5 **2. Plan to disrupt electoral count**

6 In response to alleged fraud, Dr. Eastman researched and planned a strategy for
7 President Trump to win the election. Just after Christmas, Dr. Eastman wrote a now-public two-
8 page memo proposing that Vice President Pence refuse to count certified electoral votes from
9 states contested by the Trump campaign: Arizona, Georgia, Michigan, Nevada, New Mexico,
10 Pennsylvania, and Wisconsin.²² The memo outlines the two ways in which Dr. Eastman’s plan
11 ensures “President Trump is re-elected.”²³ If Vice President Pence refused to count electoral
12 votes from all seven contested states, President Trump would win 232 votes to 222.²⁴
13 Alternatively, if Congress claimed that a candidate could not win without reaching 270 votes,
14 Vice President Pence could send the election to the Republican-majority House of
15 Representatives, which would then elect President Trump.²⁵ The memo emphasizes that “[t]he
16 main thing here is that Pence should do this without asking for permission – either from a vote
17 of the joint session or from the Court.”²⁶

18 On January 3, 2021, Dr. Eastman drafted a six-page memo expanding on his plan and
19 analysis,²⁷ which he later disclosed to the media.²⁸ This memo “war gam[ed]” four potential
20 scenarios for January 6, only some of which would lead to President Trump winning re-
21 election.²⁹ Claiming that “[t]he stakes could not be higher,” Dr. Eastman concludes his memo

22 ²⁰ *Id.* at 59.

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

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

25 ²³ Eastman Short Memo at 2.

26 ²⁴ *Id.*

27 ²⁵ *Id.*

28 ²⁶ *Id.*

29 ²⁷ Opp’n at 9 (citing *Jan. 3 Memo on Jan. 6 Scenario*, CNN, perma.cc/B8XQ-4T3Z (“Eastman Long Memo”)).

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

²⁹ See generally Eastman Long Memo.

1 stating that his plan is “BOLD, Certainly. But this Election was Stolen by a strategic Democrat
2 plan to systematically flout existing election laws for partisan advantage; we’re no longer
3 playing by Queensbury Rules.”³⁰

4 On January 4, President Trump and Dr. Eastman invited Vice President Pence, the Vice
5 President’s counsel Greg Jacob, and the Vice President’s Chief of Staff Marc Short to the Oval
6 Office to discuss Dr. Eastman’s memo.³¹ Dr. Eastman presented only two courses of action for
7 the Vice President on January 6: to reject electors or delay the count.³² During that meeting,
8 Vice President Pence consistently held that he did not possess the authority to carry out Dr.
9 Eastman’s proposal.³³

10 The Vice President’s counsel and chief of staff were then directed to meet separately
11 with Dr. Eastman the next day to review materials in support of his plan. Dr. Eastman opened
12 the meeting on January 5 bluntly: “I’m here asking you to reject the electors.”³⁴ Vice
13 President’s counsel Greg Jacob and Dr. Eastman spent the majority of the meeting in a Socratic
14 debate on the merits of the memo’s legal arguments.³⁵ Over the course of their discussion, Dr.
15 Eastman’s focus pivoted from requesting Vice President Pence reject the electors to asking him
16 to delay the count, which he presented as more “palatable.”³⁶ Ultimately, Dr. Eastman
17 conceded that his argument was contrary to consistent historical practice,³⁷ would likely be
18 unanimously rejected by the Supreme Court,³⁸ and violated the Electoral Count Act on four
19 separate grounds.³⁹

20 Despite receiving pushback, President Trump and Dr. Eastman continued to urge Vice
21 President Pence to carry out the plan. At 1:00 am on January 6, President Trump tweeted, “If

22 ³⁰ *Id.* at 5.

23 ³¹ Opp’n Ex. F, Greg Jacob Deposition Transcript (“Jacob Tr.”) (Dkt. 160-8) 82.

24 ³² *Id.* at 89.

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

³⁴ *Id.* at 92.

³⁵ *Id.* at 96.

³⁶ *Id.*

³⁷ *Id.* at 109.

³⁸ *Id.* at 110.

³⁹ *Id.* at 128.

1 Vice President @Mike_Pence comes through for us, we will win the Presidency . . . Mike can
 2 send it back!”⁴⁰ At 8:17 a.m., the President tweeted again, “States want to correct their votes . . .
 3 All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a
 4 time for extreme courage!”⁴¹

5 Following his tweets, President Trump placed two calls to Vice President Pence directly.
 6 After not being able to connect with the Vice President around 9:00 am, they spoke at
 7 approximately 11:20 am.⁴² Vice President Pence’s National Security Advisor, General Keith
 8 Kellogg, Jr., was present and described President Trump as berating the Vice President for “not
 9 [being] tough enough to make the call” to delay or reject electoral votes.⁴³

10 **3. Attack on the Capitol**

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

15 President Trump’s personal attorney, Rudy Giuliani, introduced Dr. Eastman before he
 16 spoke as the “professor” who would “explain . . . what happened last night, how they cheated,
 17 and how it was exactly the same as what they did on November 3.”⁴⁴ Dr. Eastman declared to
 18 the crowd:

19 And all we are demanding of Vice President Pence is this afternoon at 1:00 he let the legislators of the
 20 state look into this so we get to the bottom of it, and the American people know whether we have control
 21 of the direction of our government, or not. We no longer live in a self-governing republic if we can’t get
 22 the answer to this question. This is bigger than President Trump. It is a very essence of our republican
 form of government, and it has to be done. And anybody that is not willing to stand up to do it, does not
 deserve to be in the office. It is that simple.⁴⁵

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

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

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

27 ⁴³ Opp’n Ex. G, Keith Kellogg, Jr. Deposition Transcript (“Kellogg Tr.”) (Dkt. 160-9) 87, 90–92.

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

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

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

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

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

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

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

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

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

23 Shortly after the speech, a large crowd of President Trump’s supporters—including some armed with
24 weapons and wearing full tactical gear—marched to the Capitol and violently broke into the building to
25 try and prevent Congress’s certification of the election results. The mob quickly overwhelmed law
26 enforcement and scaled walls, smashed through barricades, and shattered windows to gain access to the
27 interior of the Capitol. Police officers were attacked with chemical agents, beaten with flag poles and
28 frozen water bottles, and crushed between doors and throngs of rioters.⁴⁹

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

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

⁴⁸ Trump Speech Transcript.

⁴⁹ *Trump v. Thompson*, 20 F.4th 10, 15–16 (D.C. Cir. 2021), *cert. denied*, No. 21-932, 2022 WL 516395 (U.S. Feb. 22, 2022) (citing STAFF REP. OF S. COMM. ON HOMELAND SECURITY & GOVERNMENTAL AFFS. & S. COMM. ON RULES & ADMIN., 117TH CONG., EXAMINING THE U.S. CAPITOL ATTACK: A REVIEW OF THE SECURITY, PLANNING, AND RESPONSE FAILURES ON JANUARY 6, at 23–29 (June 8, 2021) (“Capitol Attack Senate Report”), and *Hearing on the Law Enforcement Experience on January 6th Before the H. Select Comm. to Investigate the January 6th Attack on the U.S. Capitol*, 117th Cong., at 2 (July 27, 2021)).

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

8 During the riot, Vice President Pence, Members of Congress, and workers across the
9 Capitol were forced to flee for safety.⁵³ Seeking shelter during the attack, Vice President
10 Pence’s counsel Greg Jacob emailed Dr. Eastman that the rioters “believed with all their hearts
11 the theory they were sold about the powers that could legitimately be exercised at the Capitol
12 on this day.”⁵⁴ Mr. Jacob continued, “[a]nd thanks to your bullshit, we are now under siege.”⁵⁵

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

20 As the attack progressed, Dr. Eastman continued to urge Vice President Pence to
21 reconsider his decision not to delay the count. In an email to Vice President Pence’s counsel
22 Greg Jacob at 2:25 pm on January 6, Dr. Eastman wrote: “The ‘siege’ is because YOU and

23 ⁵⁰ Opp’n Ex. J, Benjamin Williamson Deposition Transcript (“Williamson Tr.”) (Dkt. 160-12) 62.

24 ⁵¹ *Id.* at 65.

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

26 ⁵³ *Thompson*, 20 F.4th at 15–16.

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

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

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

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

1 your boss did not do what was necessary to allow this to be aired in a public way so the
2 American people can see for themselves what happened.”⁵⁸ At 6:09 pm, Dr. Eastman
3 “remain[ed] of the view” that “adjourn[ing] to allow the state legislatures to continue their
4 work” was the “most prudent course.”⁵⁹ At 11:44 pm, Dr. Eastman sent one final email to
5 persuade Jacob to change his mind: “I implore you to consider one more relatively minor
6 violation and adjourn for 10 days”⁶⁰

7 After the riot had subsided, the Joint Session of Congress reconvened. “It was not until
8 3:42 a.m. on January 7 that Congress officially certified Joseph Biden as the winner of the 2020
9 presidential election.”⁶¹

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

13 **4. Investigation into the attack**

14 In response to the attack, the House of Representatives created the Select Committee to
15 “investigate and report upon the facts, circumstances, and causes relating to the January 6,
16 2021, domestic terrorist attack upon the United States Capitol Complex . . . and relating to the
17 interference with the peaceful transfer of power.”⁶⁴

18 On November 8, 2021, the Select Committee issued a subpoena to Dr. Eastman.⁶⁵ In the
19 accompanying cover letter, Chairman Thompson stated that Dr. Eastman was “instrumental in
20 advising President Trump that Vice President Pence could determine which electors were
21 recognized on January 6, a view that many of those who attacked the Capitol apparently also
22

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

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

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

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

28 ⁶² *Id.* at 15–16.

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

⁶⁴ *Id.* § 3(2).

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

1 shared.”⁶⁶

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

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

12 **B. Procedural History**

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

20 On January 31, 2022, given the urgency of the investigation and the lack of prejudice to
21 Dr. Eastman, the Court granted the Select Committee’s request and ordered Dr. Eastman to
22 begin his production with documents dated between January 4 and January 7, 2021 (Dkt. 63).
23 On February 14, 2022, the Court set a briefing and hearing schedule as to the January 4-7
24 documents (Dkt. 104).

25 On February 22, 2022, Dr. Eastman filed his brief supporting his privilege assertions
26

27 ⁶⁶ Subpoena Cover Letter at 3.

⁶⁷ Opp’n at 17.

28 ⁶⁸ See generally Opp’n Ex. A, John Eastman Deposition Transcript (“Eastman Tr.”) (Dkt. 160-4).

⁶⁹ *Id.*

1 (“Brief”) (Dkt. 144). The Select Committee filed its opposition (“Opp’n”) (Dkt. 164) on March
2 2, 2022. Dr. Eastman filed his Reply on March 7, 2022 (Dkt. 185). The Court heard oral
3 arguments on March 8, 2022.

4 **II. LEGAL STANDARD**

5 Federal common law governs the attorney-client privilege when courts adjudicate issues
6 of federal law.⁷⁰ “As with all evidentiary privileges, the burden of proving that the attorney-
7 client privilege applies rests not with the party contesting the privilege, but with the party
8 asserting it.”⁷¹ The “party asserting the attorney-client privilege has the burden of establishing
9 the relationship *and* the privileged nature of the communication.”⁷² The party must assert the
10 privilege “as to each record sought to allow the court to rule with specificity.”⁷³ It is “extremely
11 disfavored” when a “subpoena [i]s met by blanket assertions of privilege.”⁷⁴ “Because it
12 impedes full and free discovery of the truth, the attorney-client privilege is strictly construed.”⁷⁵
13 The same burden applies to the party asserting work product protection.⁷⁶

14 **III. DISCUSSION**

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

19 **A. Attorney-Client Privilege**

20 The attorney-client privilege protects confidential communications between attorneys
21 and clients for the purpose of legal advice.⁷⁷ The privilege “is intended ‘to encourage clients to
22 make full disclosure to their attorneys,’” recognizing that sound advice depends on
23 transparency.⁷⁸

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

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

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

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

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

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

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

⁷⁷ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

⁷⁸ *Hernandez*, 604 F.3d at 1100 (quoting *Upjohn*, 449 U.S. at 389).

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

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.⁷⁹

“The party asserting the privilege bears the burden of proving each essential element.”⁸⁰

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

1. Existence of attorney-client relationship

The Select Committee argues that Dr. Eastman has not met his burden of proving that an attorney-client relationship existed between him and President Trump.⁸² An attorney-client relationship is formed when an attorney advises a client who has consulted him seeking legal assistance.⁸³ Attorney-client relationships may be express or implied.⁸⁴ Among other factors, courts consider “the intent and conduct of the parties”⁸⁵ and “whether the client believed an attorney-client relationship existed.”⁸⁶

In response to the Court’s request for evidence of an attorney-client relationship, Dr. Eastman provided only an unsigned, undated retainer agreement between him, President Trump as candidate, and President Trump’s campaign committee.⁸⁷ However, strong evidence establishes that Dr. Eastman had an attorney-client relationship with President Trump and his campaign between January 4 and 6, 2021. Dr. Eastman appeared on behalf of President Trump

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

⁸⁰ *Id.*

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

⁸² Opp’n at 20–21.

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

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

⁸⁵ *Waggoner*, 991 F.2d at 1505.

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

⁸⁷ Eastman Decl., Ex. A (“Retainer Agreement”) (Dkt. 132-2).

1 in a Georgia lawsuit on January 5, 2021.⁸⁸ In the days leading up to January 6, Dr. Eastman
2 also attended closed-door meetings with and on behalf of President Trump to present his legal
3 theories on the Electoral Count Act. The Vice President’s counsel, who attended those
4 meetings, “assumed it to be true for the purposes of [his] interactions with him” that Dr.
5 Eastman was representing President Trump.⁸⁹ President Trump’s speech explicitly
6 acknowledged Dr. Eastman’s legal role in developing the plan to delay or stop the count: “John
7 is one of the most brilliant lawyers in the country, and he looked at this and he said, ‘What an
8 absolute disgrace that this can be happening to our Constitution.’”⁹⁰ And on May 5, 2021, Dr.
9 Eastman stated on a talk show that President Trump was his client in the aftermath of the
10 election.⁹¹ The evidence clearly supports an attorney-client relationship between President
11 Trump, his campaign, and Dr. Eastman during January 4-7, 2021.

12 **2. Chapman University email use**

13 Communications between an attorney and a client are only privileged if they are
14 intended to be kept confidential and are not disclosed.⁹² Dr. Eastman used his Chapman
15 University email to communicate with legal clients that he represented outside of his university
16 activities. The Select Committee argues that Dr. Eastman’s use of his Chapman email prevents
17 all of his communications from being privileged given the university’s monitoring policies.⁹³
18 Although the Select Committee argued at the hearing that use of Chapman email destroys
19 privilege for all 111 documents, their confidentiality argument is only relevant to attorney-
20 client privilege and therefore applies only to nine documents.⁹⁴ The Court examines how using
21 Chapman email affects the other documents when it reaches work product protection below.⁹⁵

22 ⁸⁸ Reply at 8 (citing Application for Admission of Jonathan Eastman Pro Hac Vice, *Trump v. Kemp*, No. 1:20-cv-
23 05310 (N.D. Ga. Dec. 31, 2020), ECF No. 17).

24 ⁸⁹ Jacob Tr. 106–07.

25 ⁹⁰ Trump Speech Transcript.

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

28 ⁹² *Graf*, 610 F.3d at 1156.

⁹³ Opp’n at 24.

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

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

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

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

8 **a. Client expectations of confidentiality**

9 The Select Committee's argument rests on Dr. Eastman lacking a reasonable expectation
10 of confidentiality in his emails. Dr. Eastman argues that he and his clients reasonably expected
11 privacy, particularly since representing clients was part of his duties as a professor.⁹⁶

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

17 Here, Dr. Eastman represented clients while employed as a law professor at Chapman
18 University, and he used his official university email to communicate with those clients. When
19 President Trump and members of his campaign referenced Dr. Eastman in public, they
20 frequently highlighted his position as a law professor.⁹⁹ Since Dr. Eastman's work for President
21 Trump was tied to his position as a "preeminent constitutional scholar[]," it would be logical
22

23 ⁹⁶ Brief at 26, 29.

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

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

⁹⁹ *E.g.*, Giuliani Speech ("I have Professor Eastman here with me to say a few words about that. He's one of the
preeminent constitutional scholars in the United States."); Trump Speech Transcript ("John is one of the most
brilliant lawyers in the country . . . this is from the number one, or certainly one of the top, Constitutional lawyers
in our country . . .").

1 for his clients to communicate with him through his university email.¹⁰⁰ Moreover, it is clear
2 from reviewing the emails that Dr. Eastman's correspondents believed they were using an
3 appropriate email address to discuss confidential legal matters.¹⁰¹ In these circumstances,
4 clients and their agents who communicated with Dr. Eastman on his Chapman University email
5 address had a reasonable expectation of privacy in their communications.

6 **b. Potentially unauthorized use of Chapman email**

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

10 Although there are no Ninth Circuit cases addressing this kind of attorney waiver, courts
11 in other jurisdictions have analyzed a *client's* use of monitored employer email. The Court will
12 follow those other district courts in considering four factors:

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

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

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

24 The policy does not clearly apply to Dr. Eastman's work for President Trump, as it was
25 uncompensated¹⁰⁶ and Dr. Eastman contends that it was "in connection with scholarly
26

27 ¹⁰⁰ Giuliani Speech.

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

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

¹⁰³ Opp'n at 27–28.

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

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

¹⁰⁶ Retainer Agreement at 2.

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

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

IRS rules prohibit faculty from using university resources to support political candidates,¹¹¹ which Chapman’s President publicly reiterated in the context of Dr. Eastman’s work on December 10, 2020.¹¹² But as Dr. Eastman notes, the IRS prohibits “[c]ontributions to political campaign funds or public statements . . . in favor of or in opposition to any candidate for public office,” but does not mention post-election litigation for campaigns.¹¹³ Chapman’s endorsement of Dr. Eastman’s 2000 post-election litigation and the lack of IRS enforcement against other law professors representing candidates in post-election litigation¹¹⁴ suggest that

¹⁰⁷ Eastman Decl. ¶ 5.

¹⁰⁸ *Id.*

¹⁰⁹ Eastman Decl. ¶ 17.

¹¹⁰ *Id.*

¹¹¹ DuMontelle Decl. ¶ 3.

¹¹² Opp’n at 26 (citing Dawn Bonker, *President Struppa’s Message on Supreme Court Case*, CHAPMAN UNIV. (Dec. 10, 2020), <https://perma.cc/3CTG-4DBN>).

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

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

1 Dr. Eastman's work on behalf of President Trump was not in violation of IRS rules.

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

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

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

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

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

16 Use of this computer system constitutes your consent that your activities on, or information you store in,
17 any part of the system is subject to monitoring and recording by Chapman University or its agents,
18 consistent with the Computer and Network Acceptable Use Policy without further notice. You are
responsible for being familiar with the University policies related to the use of this computer system.¹¹⁸

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

23 The above factors are not conclusive here and reveal substantial ambiguity in the

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

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

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

27 ¹¹⁸ DuMontelle Decl. ¶ 6.

28 ¹¹⁹ Brief at 27 n.5.

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

boundaries of Dr. Eastman's legal work at Chapman.

c. Public policy considerations

The Court notes the public policy implications of a finding that Dr. Eastman waived all attorney-client privilege through his use of Chapman email. Chapman states in its summary of its computer use policy that "[u]sers should not expect privacy in the contents of University-owned computers or e-mail messages."¹²¹ But at the hearing, Chapman confirmed that its clinical professors continue to use university email for client communications, and that Chapman has taken no steps to clarify its policies after raising concerns in this case. Although Chapman appears to be in the minority of American colleges and universities with a policy this unprotective of privacy,¹²² the Court is concerned about the broader ramifications for professors and their clients. Law professors across the country use their university email accounts to communicate with clients, and reasonably expect privacy for those emails as part of their jobs. More importantly, clients of law school clinics should not be expected to research that particular university's email policies before feeling secure in emailing their attorneys.

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

3. Communications between attorney and client

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

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

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

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

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

1 Dr. Eastman claims attorney-client privilege over only nine documents: five emails¹²⁵
2 and four attachments.¹²⁶ None of these documents includes Dr. Eastman's client, President
3 Trump, as a sender or recipient of the email. Instead, all emails are sent from a third party to
4 Dr. Eastman, and two of the emails blind copy (bcc) a close advisor to President Trump.¹²⁷

5 Despite having filed nearly a hundred pages of briefing, Dr. Eastman does not mention
6 this third-party email sender anywhere in his briefs; the person is named only in his privilege
7 log entries. Dr. Eastman's description in the privilege log is conclusory, describing the sender
8 merely as his "co-counsel."¹²⁸ Dr. Eastman failed to provide retainer agreements or a sworn
9 declaration that would prove this third party was an attorney or agent for President Trump. The
10 Court also cannot infer the third party's affiliation with President Trump from his email, which
11 is a generic, non-@donaldtrump.com email address. Dr. Eastman has not met his burden to
12 show that these communications were with an agent of President Trump or the Trump
13 campaign, and as such, these documents do not warrant the protection of the attorney-client
14 privilege. However, Dr. Eastman also claims work product protection over these nine
15 documents, so the Court analyzes them in the next section.

16 **B. Work Product**

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

21 To begin, the Court excludes ten of the 111 documents because they are entirely non-
22 substantive.¹³⁰ Seven of these documents are only images of logos attached to email signatures,
23 including Facebook, LinkedIn, and Twitter.¹³¹ One document is a blank page¹³² and two are

24 ¹²⁵ 4708; 4722; 4744 (duplicate); 4766 (duplicate); 4788.

25 ¹²⁶ 4713; 4723; 4745 (duplicate); 4767 (duplicate).

26 ¹²⁷ 4766; 4788.

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

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

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

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

¹³² 5160.

1 blank emails.¹³³ These ten documents do not contain any information protected by the work
2 product doctrine and the Court ORDERS that they must be disclosed.¹³⁴

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

6 **1. Whether the remaining documents qualify for protection**

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

12 **a. Anticipation of litigation**

13 In this section, the Court analyzes eighty-seven of the remaining 101 documents, all of
14 which present a question about whether they were prepared in anticipation of litigation. The
15 other fourteen documents¹³⁶ were obviously prepared for litigation, so the Court leaves those
16 for later discussion.¹³⁷

17 Documents qualify for work product protection if they were “prepared in anticipation of
18 litigation or for trial.”¹³⁸ However, some litigation documents are also prepared for a second,
19 non-litigation purpose. Courts protect such “dual purpose” documents when they pass the
20 “because of” test: whether “it can fairly be said that the ‘document was created *because of*
21 anticipated litigation, and would not have been created in substantially similar form *but for* the
22 prospect of that litigation.”¹³⁹ It does not matter “whether litigation was a primary or

23 ¹³³ 4827; 5154.

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

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

27 ¹³⁶ 4553; 4708; 4713; 4793; 4794; 4828; 5096; 5097; 5101; 5113; 5412; 5424; 5719; 5720; 5722.

28 ¹³⁷ See *supra* Section III.B.1.b, *Preparation by or for the client’s representative*.

¹³⁸ Fed. R. Civ. P. 26(b)(3).

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

secondary motive behind the creation of a document;”¹⁴⁰ instead, courts consider the totality of the circumstances surrounding the document’s creation.¹⁴¹

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

i. Electoral Count Act plan

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

The plan proposed by Dr. Eastman’s memo involve actions by the Vice President without recourse to the courts. The memo states explicitly: “[t]he main thing here is that Pence should do this without asking for permission—either from a vote of the joint session *or from the Court.*”¹⁴³ Dr. Eastman only acknowledged the potential for litigation dismissively, mocking the idea of opponents challenging him in court.¹⁴⁴ Litigation was never Dr. Eastman’s motivation for planning the events of January 6, perhaps because, as he conceded, his legal theories would be rejected “9-0” by the Supreme Court.¹⁴⁵ The Court’s review of the twenty-two documents shows they are consistent with the memo’s plan to proceed without judicial involvement.

Sixteen of the twenty-two documents discuss, forward, or request academic articles

¹⁴⁰ *Id.* at 908.

¹⁴¹ *Id.*

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

¹⁴³ Eastman Long Memo at 5 (emphasis added).

¹⁴⁴ *Id.* at 5–6 (“Let the other side challenge his actions in court, where Tribe (who in 2001 conceded the President of the Senate might be in charge of counting the votes) and others who would press a lawsuit would have their past position -- that these are non-justiciable political questions – thrown back at them, to get the lawsuit dismissed.”). *Cf. Riverkeeper v. U.S. Army Corps of Engineers*, 38 F. Supp. 3d 1207, 1222 (D. Or. 2014) (holding that mere “awareness that litigation may have been a likely prospect” is insufficient for work product protection).

¹⁴⁵ Jacob Tr. 110.

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

8 In addition, five of the twenty-two documents discuss actions to advance the Electoral
9 Count Act plan.¹⁴⁷ In one of those, Dr. Eastman explains arguments for his plan that he had
10 previously sent to Vice President Pence's counsel, and does not reference litigation.¹⁴⁸ In
11 another email thread, Dr. Eastman's colleagues discuss whether to publish a piece supporting
12 his plan, and they touch on state lawsuits only to criticize how they are being handled by the
13 Trump campaign.¹⁴⁹ In a different email thread, Dr. Eastman and a colleague consider how to
14 use a state court ruling to justify Vice President Pence enacting the plan.¹⁵⁰ In another email, a
15 colleague focuses on the "plan of action" after the January 6 attacks, not mentioning future
16 litigation.¹⁵¹ Even if the authors of these five documents anticipated litigation, its prospect
17 certainly did not "animate every document [they] prepared."¹⁵² The true animating force behind
18 these emails was advancing a political strategy: to persuade Vice President Pence to take
19 unilateral action on January 6. Moreover, nothing about the form of these documents is tailored
20 to the prospect of litigation. Because these five documents were not created in anticipation of
21 litigation, Dr. Eastman must disclose them to the Select Committee.

22 One of the twenty-two documents relating to the Electoral Count Act plan presents a
23 much closer question on anticipation of litigation. In this email, a colleague forwards to Dr.

24 ¹⁴⁶ 4707; 4720; 4722; 4723; 4744 (duplicate); 4745 (duplicate); 4766 (duplicate); 4767 (duplicate); 4788; 4789;
25 4790; 4791; 4792; 4833; 4834; 4835.

26 ¹⁴⁷ 5114; 5283; 5329; 5484; 5488.

27 ¹⁴⁸ 5484.

28 ¹⁴⁹ 5283; 5329.

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

¹⁵¹ 5488.

¹⁵² *Torf*, 357 F.3d at 908.

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

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

12 **ii. State election-related documents**

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

15 First, eight of the nineteen documents forward or discuss communications from state
16 legislators about alleged fraud in the 2020 election.¹⁵⁵ Two of those are resolutions by state
17 legislatures regarding election fraud;¹⁵⁶ one is a letter from the Republican members of the
18 Arizona Legislature to Vice President Pence;¹⁵⁷ and two are letters from a Georgia state senator
19 to President Trump.¹⁵⁸ These documents do not reference litigation and are explicitly intended
20 to express the opinions of the legislature or seek assistance from federal officials. Similarly, the
21 four emails discussing these documents offer no litigation analysis. As such, these eight
22 documents are not protected work product and must be disclosed to the Select Committee.

23 In addition, eleven of the nineteen documents relate to concerns about election fraud.¹⁵⁹

25 ¹⁵³ 4708.

26 ¹⁵⁴ 4990; 5011; 5012; 5014; 5018; 5130; 5131; 5134; 5135; 5161; 5251; 5252; 5261; 5268; 5433; 5490; 5491;
5492; 5498.

27 ¹⁵⁵ 4990; 5011; 5012; 5014; 5251; 5252; 5261; 5268.

28 ¹⁵⁶ 5012 (Wisconsin); 5252 (Arizona).

¹⁵⁷ 5261.

¹⁵⁸ 4990; 5268 (duplicate).

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

1 Eight of those contain or discuss technical analyses of alleged fraud, including five noting
2 voting machine weaknesses that could lead to fraudulent results.¹⁶⁰ Although Dr. Eastman's
3 privilege log describes some of these documents as "comm with counsel and expert re fact
4 evidence," he does not specify any particular litigation.¹⁶¹ Moreover, the technical analyses
5 make no mention of any potential action based on their findings, and the email discussions do
6 not engage with the findings of the reports or specify any litigation uses for them. Three of
7 those eleven documents discuss general concerns about election fraud, such as fears about
8 voting machines¹⁶² and publicizing potential new evidence.¹⁶³ In general, Dr. Eastman used
9 evidence of alleged election fraud for two purposes: to support state litigation and to persuade
10 legislators and Vice President Pence to act. Despite those possible dual purposes, these emails
11 do not suggest that Dr. Eastman used them for litigation, make no mention of litigation, and
12 would have had the same form without the prospect of litigation.

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

16 **iii. Documents for Congress**

17 This section discusses seventeen of the eighty-seven documents, each of which specify
18 that it was created for distribution to Congress.¹⁶⁴ Two of those state, "[p]lease pass this
19 onto . . . federal legislators;"¹⁶⁵ or note "[t]his . . . has been circulated to Members."¹⁶⁶ Eight
20 documents are an email chain between Dr. Eastman and colleagues creating a memo of Article
21 II violations "for [C]ongress."¹⁶⁷ And seven emails name specific senators as the intended
22 recipients of the attached documents.¹⁶⁸ These communications were prepared for members of
23

24 ¹⁶⁰ 5018; 5130; 5131; 5134 (duplicate); 5135 (duplicate); 5161 (duplicate); 5492; 5498.

25 ¹⁶¹ Privilege log, 5130; Privilege log, 5134.

26 ¹⁶² 5433.

27 ¹⁶³ 5490; 5491.

28 ¹⁶⁴ 4494; 4496; 4547; 4721; 4839; 4841; 4976; 4977; 4979; 4992; 5017; 5045; 5046; 5064; 5068; 5091; 5094.

¹⁶⁵ 4547.

¹⁶⁶ 4976; 4977; 4979; 4992.

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

¹⁶⁸ 4494; 4496; 4839; 4841.

1 Congress and do not reference litigation strategy or concerns. The Court finds that those
2 documents were not prepared in anticipation of litigation, but rather were created to persuade
3 federal legislators to take action.¹⁶⁹

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

6 iv. Connecting third parties

7 This section discusses twenty of the eighty-seven documents, all of which connect third
8 parties.¹⁷⁰ Seven of those documents provide or request contact information for President
9 Trump, Dr. Eastman, and third parties.¹⁷¹ Thirteen documents are communications with third
10 parties volunteering to help Dr. Eastman, sending resumes, or offering suggestions for
11 President Trump.¹⁷² None of these documents relate to or implicate litigation. Although Dr.
12 Eastman claims that some of the emails are regarding “fact development,”¹⁷³ they are
13 predominantly administrative. The emails do not discuss how these third parties could
14 contribute to any potential litigation; in fact, some are unsolicited introductions or requests¹⁷⁴
15 rather than coordinated discussions between experts or advisors.

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

18 v. News articles and press releases

19 This section considers nine of the eighty-seven documents, each of which relates to or
20 includes news or press releases.¹⁷⁵ Five of those forward news reports and press releases about
21

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

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

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

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

¹⁷³ Privilege log, 5680.

¹⁷⁴ 5668; 5874.

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

1 the events of January 6 with no or virtually no text in the bodies of the emails.¹⁷⁶ Two email
2 chains comment on news reports about violent rioters on January 6, but do not relate to
3 litigation.¹⁷⁷ One email congratulates Dr. Eastman for his speech on the Ellipse and links to a
4 Twitter video of the speech.¹⁷⁸ These public articles, press releases, and videos were not created
5 for litigation, and the minimal commentary contained in the emails was unrelated to litigation.

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

8 **b. Preparation by or for the client's representative**

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

13 The work product doctrine protects materials prepared “by or for another party or by or
14 for that other party’s representative (including the other party’s attorney, consultant, surety,
15 indemnitor, insurer, or agent).”¹⁸⁰ Accordingly, documents are protected if they were prepared
16 by or for President Trump or his campaign, or by or for Dr. Eastman or another representative
17 of President Trump.

18 The Court finds that thirteen of these fifteen documents qualify as protected.¹⁸¹ Eight of
19 those were sent by Dr. Eastman, sent directly to Dr. Eastman, or had Dr. Eastman copied on the
20 email.¹⁸² Five documents were created by or for agents of President Trump or his campaign,
21 including attorneys of record in state cases and President Trump’s personal attorney.¹⁸³ These
22 documents were later forwarded to Dr. Eastman. Because these thirteen documents were
23

24 ¹⁷⁶ 5023; 5024; 5061; 5510 (email body is “FYI”); 5578 (commending press release).

25 ¹⁷⁷ 5489; 5515; 5519.

26 ¹⁷⁸ 5338.

27 ¹⁷⁹ 4553; 4708; 4713; 4793; 4794; 4828; 5096; 5097; 5101; 5113; 5412; 5424; 5719; 5720; 5722. The Court notes
28 that document 5114 includes the entirety of document 5113, so all discussions of 5113 apply to the corresponding
sections of 5114. *See* note 150.

¹⁸⁰ Fed. R. Civ. P. 26(b)(3); *see United States v. Nobles*, 422 U.S. 225, 238 (1975).

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

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

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

1 created by or for agents of President Trump or his campaign, they are protected work product.

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

5 **2. Waiver of protection**

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

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

14 The Select Committee previously argued that Dr. Eastman’s use of Chapman email
15 constituted waiver because he knew that his documents could be accessed by Chapman
16 University, which it claims was a conduit to an adversary by virtue of its “policy to disclose
17 emails in response to subpoenas.”¹⁸⁸ However, courts consider whether the party reasonably
18 believed that the recipient would keep the disclosed documents confidential,¹⁸⁹ and as discussed
19 above Dr. Eastman had a reasonable expectation of confidentiality in his emails.¹⁹⁰ Holding
20 otherwise would result in the sweeping proposition that using any email provider that complies
21 with subpoenas waives work product protection.¹⁹¹

22 ¹⁸⁴ 5096; 5722.

23 ¹⁸⁵ 4553; 4708; 4713; 4793; 4794; 4828; 5097; 5101; 5113; 5412; 5424; 5719; 5720.

24 ¹⁸⁶ *Sanmina*, 968 F.3d at 1121; *Nobles*, 422 U.S. at 239.

25 ¹⁸⁷ *Sanmina*, 968 F.3d at 1121.

26 ¹⁸⁸ TRO Opp’n at 22–23.

27 ¹⁸⁹ *Sanmina*, 968 F.3d at 1121.

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

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

1 However, the Court finds work product protection was waived for two documents that
2 are now public: a court filing¹⁹² and a memo disclosed to the news media.¹⁹³ Making work
3 product public is the epitome of sharing with an adversary, thus waiving protection.¹⁹⁴ Because
4 these two documents are public, Dr. Eastman may not assert the privilege, and the Court
5 ORDERS them to be disclosed.

6 **3. Crime-fraud exception**

7 Based on the Court’s previous analysis, there are eleven remaining protected
8 documents.¹⁹⁵ The Court now considers whether any of those documents should be disclosed
9 based on the crime-fraud exception, as the Select Committee argues.¹⁹⁶

10 The crime-fraud exception applies when (1) a “client consults an attorney for advice that
11 will serve [them] in the commission of a fraud or crime,”¹⁹⁷ and (2) the communications are
12 “sufficiently related to” and were made “in furtherance of” the crime.¹⁹⁸ It is irrelevant whether
13 the attorney was aware of the illegal purpose¹⁹⁹ or whether the scheme was ultimately
14 successful.²⁰⁰ The exception extinguishes both the attorney-client privilege and the work
15 product doctrine.²⁰¹ The party seeking disclosure must prove the crime-fraud exception applies
16 by a preponderance of the evidence,²⁰² meaning “the relevant facts must be shown to be more
17
18

19 ¹⁹² 5720.

20 ¹⁹³ 4713 (November 18, 2020 memo from Kenneth Chesebro); *Read the Nov. 18 Memo on Alternate Trump Electors*, N.Y. TIMES (Feb. 2, 2022), www.nytimes.com/interactive/2022/02/02/us/trump-electors-memo-november.html.

21 ¹⁹⁴ *Bittaker v. Woodford*, 331 F.3d 715, 719–20 (9th Cir. 2004).

22 ¹⁹⁵ 4553; 4708; 4793; 4794; 4828 (duplicate); 5097; 5101; 5113; 5412; 5424; 5719.

23 ¹⁹⁶ Opp’n at 37.

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

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

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

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

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

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

1 likely true than not.”²⁰³

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

5 **a. Potential crimes or fraud**

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

8 (1) President Trump attempted to obstruct “Congress’s proceeding to count the
9 electoral votes on January 6,” in violation of 18 U.S.C. § 1512(c)(2);²⁰⁴

10 (2) “President Trump, Plaintiff [Dr. Eastman], and several others entered into an
11 agreement to defraud the United States by interfering with the election
12 certification process,” in violation of 18 U.S.C. § 371;²⁰⁵ and

13 (3) “President [Trump] and members of his Campaign engaged in common law fraud
14 in connection with their efforts to overturn the 2020 election results.”²⁰⁶

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

17 **i. Obstruction of an official proceeding**

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

22 Attempts to obstruct

23 Section 1512(c)(2) requires that the obstructive conduct have a “nexus . . . to a specific
24 official proceeding” that was “either pending or was reasonably foreseeable to [the person]

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26
27 ²⁰³ *United States v. Lawrence*, 189 F.3d 838, 844 (9th Cir.1999).

²⁰⁴ *Opp’n* at 38.

²⁰⁵ *Id.* at 43.

²⁰⁶ *Id.* at 46.

²⁰⁷ *Id.* at 38.

1 when he engaged in the conduct.”²⁰⁸ President Trump attempted to obstruct an official
2 proceeding by launching a pressure campaign to convince Vice President Pence to disrupt the
3 Joint Session on January 6.

4 President Trump facilitated two meetings in the days before January 6 that were
5 explicitly tied to persuading Vice President Pence to disrupt the Joint Session of Congress. On
6 January 4, President Trump and Dr. Eastman hosted a meeting in the Oval Office with Vice
7 President Pence, the Vice President’s counsel Greg Jacob, and the Vice President’s Chief of
8 Staff Marc Short.²⁰⁹ At that meeting, Dr. Eastman presented his plan to Vice President Pence,
9 focusing on either rejecting electors or delaying the count.²¹⁰ When Vice President Pence was
10 unpersuaded, President Trump sent Dr. Eastman to review the plan in depth with the Vice
11 President’s counsel on January 5.²¹¹ Vice President Pence’s counsel interpreted Dr. Eastman’s
12 presentation as being on behalf of the President.²¹²

13 On the morning of January 6, President Trump made several last-minute “revised
14 appeal[s] to the Vice President” to pressure him into carrying out the plan.²¹³ At 1:00 am,
15 President Trump tweeted: “If Vice President @Mike_Pence comes through for us, we will win
16 the Presidency . . . Mike can send it back!”²¹⁴ At 8:17 am, President Trump tweeted: “All Mike
17 Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for
18 extreme courage!”²¹⁵ Shortly after, President Trump rang Vice President Pence and once again
19 urged him “to make the call” and enact the plan.²¹⁶ Just before the Joint Session of Congress

20
21 ²⁰⁸ *United States v. Lonich*, 23 F.4th 881, 905 (9th Cir. 2022) (citing *United States v. Young*, 916 F.3d 368, 385 (4th Cir. 2019)).

22 ²⁰⁹ Jacob Tr. 82.

23 ²¹⁰ *Id.*

24 ²¹¹ *Id.* at 105–07.

25 ²¹² *Id.* at 107.

26 ²¹³ Short Tr. 26.

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

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

²¹⁶ POTUS Private Schedule (handwritten note on President’s schedule showing call with VPOTUS at 11:20 AM); Kellogg Tr. 87, 90–92 (describing President Trump criticizing the Vice President as “not tough enough to make the call” to delay or reject electoral votes). *See also* Short Tr. 16 (“Q [from Select Committee]: . . . I understand that you weren’t on the call, but I just want to read you something that was quoted in Bob Woodward’s book “Peril,” that he indicated in “Peril” that the President said: If you don’t do it, I picked the

1 began, President Trump gave a speech to a large crowd on the Ellipse in which he warned,
2 “[a]nd Mike Pence, I hope you’re going to stand up for the good of our Constitution and for the
3 good of our country. And if you’re not, I’m going to be very disappointed in you. I will tell you
4 right now.”²¹⁷ President Trump ended his speech by galvanizing the crowd to join him in
5 enacting the plan: “[L]et’s walk down Pennsylvania Avenue” to give Vice President Pence and
6 Congress “the kind of pride and boldness that they need to take back our country.”²¹⁸

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

9 Official proceeding

10 The Court next analyzes whether the Joint Session of Congress to count electoral votes
11 on January 6, 2021, constituted an “official proceeding” under the obstruction statute. The
12 United States Code defines “official proceeding” to include “a proceeding before the
13 Congress.”²¹⁹ The Twelfth Amendment outlines the steps to elect the President, culminating in
14 the President of the Senate opening state votes “in the presence of the Senate and House of
15 Representatives.”²²⁰ Dr. Eastman does not dispute that the Joint Session is an “official
16 proceeding.” While there is no binding authority interpreting “proceeding before the Congress,”
17 ten colleagues from the District of Columbia have concluded that the 2021 electoral count was
18 an “official proceeding” within the meaning of section 1512(c)(2),²²¹ and the Court joins those
19 well-reasoned opinions.

20
21 wrong man 4 years ago. The President said: You’re going to wimp out. He reportedly said to the Vice President:
22 You can be a hero, or you can be a pussy.”).

23 ²¹⁷ Trump Speech Transcript.

24 ²¹⁸ *Id.*

25 ²¹⁹ 18 U.S.C. § 1515(a)(1)(B).

26 ²²⁰ U.S. CONST. amend. XII.

27 ²²¹ *United States v. Sandlin*, __ F. Supp. 3d __, No. 21-CR-00088-DLF, 2021 WL 5865006 (D.D.C. Dec. 10,
28 2021); *United States v. Caldwell*, __ F. Supp. 3d __, No. 21-CR-00028-APM, 2021 WL 6062718 (D.D.C. Dec.
20, 2021); *United States v. Mostofsky*, __ F. Supp. 3d __, No. 21-CR-00138-JEB, 2021 WL 6049891 (D.D.C.
Dec. 21, 2021); *United States v. Nordean*, __ F. Supp. 3d __, No. 21-CR-00175-TJK, 2021 WL 6134595 (D.D.C.
Dec. 28, 2021); *United States v. Montgomery*, No. 21-CR-00046-RDM, 2021 WL 6134591 (D.D.C. Dec. 28,
2021); *McHugh*, __ F. Supp. 3d __, 2022 WL 296304; *United States v. Grider*, No. 21-CR-00022-CKK, 2022 WL
392307 (D.D.C. Feb. 9, 2022); *United States v. Miller*, No. 21-CR-00119-CJN, 2022 WL 823070 (D.D.C. Mar. 7,
2022); *United States v. Andries*, No. 21-CR-00093-RC, 2022 WL 768684 (D.D.C. Mar. 14, 2022); *United
States v. Puma*, No. 21-CR-00454-PLF, 2022 WL 823079 (D.D.C. Mar. 19, 2022).

Corrupt intent

A person violates § 1512(c) when they obstruct an official proceeding with a corrupt mindset. The Ninth Circuit has not defined “corruptly” for purposes of this statute.²²² However, the court has made clear that the threshold for acting “corruptly” is lower than “consciousness of wrongdoing,”²²³ meaning a person does not need to know their actions are wrong to break the law. Because President Trump likely knew that the plan to disrupt the electoral count was wrongful, his mindset exceeds the threshold for acting “corruptly” under § 1512(c).

President Trump and Dr. Eastman justified the plan with allegations of election fraud—but President Trump likely knew the justification was baseless, and therefore that the entire plan was unlawful. Although Dr. Eastman argues that President Trump was advised several state elections were fraudulent,²²⁴ the Select Committee points to numerous executive branch officials who publicly stated²²⁵ and privately stressed to President Trump²²⁶ that there was no evidence of fraud. By early January, more than sixty courts dismissed cases alleging fraud due to lack of standing or lack of evidence,²²⁷ noting that they made “strained legal arguments

²²² *Lonich*, 23 F.4th at 906.

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

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

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

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

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

1 without merit and speculative accusations”²²⁸ and that “there is no evidence to support
2 accusations of voter fraud.”²²⁹ President Trump’s repeated pleas²³⁰ for Georgia Secretary of
3 State Raffensperger clearly demonstrate that his justification was not to investigate fraud, but to
4 win the election: “So what are we going to do here, folks? I only need 11,000 votes. Fellas, I
5 need 11,000 votes. Give me a break.”²³¹ Taken together, this evidence demonstrates that
6 President Trump likely knew the electoral count plan had no factual justification.

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

16 ²²⁸ *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 906 (M.D. Pa.), *aff’d sub nom. Donald*
17 *J. Trump for President, Inc. v. Sec’y of Pennsylvania*, 830 F. App’x 377 (3d Cir. 2020), *and appeal dismissed*, No.
18 20-3384, 2021 WL 807531 (3d Cir. Jan. 7, 2021) (“[T]his Court has been presented with strained legal arguments
without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence. In the
United States of America, this cannot justify the disenfranchisement of a single voter, let alone all the voters of its
sixth most populated state. Our people, laws, and institutions demand more.”).

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

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

24 ²³¹ *Id.*

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

26 ²³³ *Id.* The Queensberry Rules were accepted norms for boxing fights and commonly refers to general rules of fair
play. *Marquis of Queensberry Rules*, MERRIAM-WEBSTER, [perma.cc/UHF2-T3FY](https://www.merriam-webster.com/dictionary/queensberry%20rules). *Cf. R.A.V. v. City of St. Paul*,
27 *Minn.*, 505 U.S. 377, 392 (1992) (“St. Paul has no such authority to license one side of a debate to fight freestyle,
while requiring the other to follow Marquis of Queensberry rules.”); *Miranda v. Arizona*, 384 U.S. 436, 442
(1966) (quoting Police Commissioner arguing that “What the Court is doing is akin to requiring one boxer to fight
by Marquis of Queensbury rules while permitting the other to butt, gouge and bite”).

28 ²³⁴ Short Tr. 26–27.

²³⁵ Jacob Tr. 95.

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

8 The illegality of the plan was obvious. Our nation was founded on the peaceful transition
9 of power, epitomized by George Washington laying down his sword to make way for
10 democratic elections.²³⁹ Ignoring this history, President Trump vigorously campaigned for the
11 Vice President to single-handedly determine the results of the 2020 election. As Vice President
12 Pence stated, “no Vice President in American history has ever asserted such authority.”²⁴⁰
13 Every American—and certainly the President of the United States—knows that in a democracy,
14 leaders are elected, not installed. With a plan this “BOLD,”²⁴¹ President Trump knowingly tried
15 to subvert this fundamental principle.

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

18 **ii. Conspiracy to defraud the United States**

19 The Select Committee also alleges that President Trump, Dr. Eastman, and others
20 conspired to defraud the United States by disrupting the electoral count, in violation of 18
21 U.S.C. § 371.²⁴² That crime requires that (1) at least two people entered into an agreement to
22 obstruct a lawful function of the government (2) by deceitful or dishonest means, and (3) that a
23

24 ²³⁶ Reply at 20.

25 ²³⁷ *United States v. Int’l Mins. & Chem. Corp.*, 402 U.S. 558, 562 (1971).

26 ²³⁸ *See, e.g., Bush v. Gore*, 531 U.S. 98 (2000).

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

28 ²⁴⁰ Pence Letter at 2.

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

²⁴² Opp’n at 43.

1 member of the conspiracy engaged in at least one overt act in furtherance of the agreement.²⁴³

2 Agreement to obstruct a lawful government function

3 As the Court discussed at length above,²⁴⁴ the evidence demonstrates that President
4 Trump likely attempted to obstruct the Joint Session of Congress on January 6, 2021. While the
5 Court earlier analyzed those actions as attempts to obstruct an “official proceeding,” Congress
6 convening to count electoral votes is also a “lawful function of government” within the
7 meaning of 18 U.S.C. § 371, which Dr. Eastman does not dispute.

8 An “agreement” between co-conspirators need not be express and can be inferred from
9 the conspirators’ conduct.²⁴⁵ There is strong circumstantial evidence to show that there was
10 likely an agreement between President Trump and Dr. Eastman to enact the plan articulated in
11 Dr. Eastman’s memo. In the days leading up to January 6, Dr. Eastman and President Trump
12 had two meetings with high-ranking officials to advance the plan. On January 4, President
13 Trump and Dr. Eastman hosted a meeting in the Oval Office to persuade Vice President Pence
14 to carry out the plan. The next day, President Trump sent Dr. Eastman to continue discussions
15 with the Vice President’s staff, in which Vice President Pence’s counsel perceived Dr. Eastman
16 as the President’s representative.²⁴⁶ Leading small meetings in the heart of the White House
17 implies an agreement between the President and Dr. Eastman and a shared goal of advancing
18 the electoral count plan. The strength of this agreement was evident from President Trump’s
19 praise for Dr. Eastman and his plan in his January 6 speech on the Ellipse: “John is one of the
20 most brilliant lawyers in the country, and he looked at this and he said, ‘What an absolute
21 disgrace that this can be happening to our Constitution.’”²⁴⁷

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

24 Deceitful or dishonest means

25 Obstruction of a lawful government function violates § 371 when it is carried out “by

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

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

28 ²⁴⁵ *United States v. Paramount Pictures*, 334 U.S. 131, 142 (1948).

²⁴⁶ Jacob Tr. 107.

²⁴⁷ Trump Speech Transcript.

1 deceit, craft or trickery, or at least by means that are dishonest.”²⁴⁸ While acting on a “good
2 faith misunderstanding” of the law is not dishonest, “merely disagreeing with the law does not
3 constitute a good faith misunderstanding . . . because all persons have a duty to obey the law
4 whether or not they agree with it.”²⁴⁹

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

8 The evidence also demonstrates that Dr. Eastman likely knew that the plan was
9 unlawful. Dr. Eastman heard from numerous mentors and like-minded colleagues that his plan
10 had no basis in history or precedent. Fourth Circuit Judge Luttig, for whom Dr. Eastman
11 clerked, publicly stated that the plan’s analysis was “incorrect at every turn.”²⁵¹ Vice President
12 Pence’s legal counsel spent hours refuting each part of the plan to Dr. Eastman, including
13 noting there had never been a departure from the Electoral Count Act²⁵² and that not “a single
14 one of [the] Framers would agree with [his] position.”²⁵³

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

22 ²⁴⁸ *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924).

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

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

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

26 ²⁵² Jacob Tr. 108.

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

28 ²⁵⁴ Jacob Tr. 109.

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

²⁵⁶ Opp’n Ex. N (Dkt. 160-16), Email from John Eastman to Greg Jacob (Jan. 6, 2021, 9:44 pm MST) at 2. See
also Jacob Tr. 128 (“So the memo lays out the four ways in which the proposal would violate provisions of the
Electoral Count Act, and he acknowledged as much in our conversations [on January 5]”).

1 unanimously reject his plan for the Vice President to reject electoral votes.²⁵⁷ Later that day,
2 Dr. Eastman admitted that his “more palatable” idea to have the Vice President delay, rather
3 than reject counting electors, rested on “the same basic legal theory” that he knew would not
4 survive judicial scrutiny.²⁵⁸

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

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

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

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

16 *Overt acts in furtherance of the conspiracy*

17 President Trump and Dr. Eastman participated in numerous overt acts in furtherance of
18 their shared plan. As detailed at length above, President Trump’s acts to strong-arm Vice
19 President Pence into following the plan included meeting with and calling the Vice President
20 and berating him in a speech to thousands outside the Capitol.²⁶² Dr. Eastman joined for one of
21 those meetings, spent hours attempting to convince the Vice President’s counsel to support the
22 plan, and gave his own speech at the Ellipse “demanding” the Vice President “stand up” and
23

24 ²⁵⁷ Jacob Tr. 110 (recounting conversation between Dr. Eastman and Vice President’s counsel).

25 ²⁵⁸ *Id.* at 117 (recounting call between Dr. Eastman and Vice President’s counsel).

26 ²⁵⁹ Reply at 20.

27 ²⁶⁰ Jacob Tr. 110 (recounting conversation between Dr. Eastman and Vice President’s counsel on January 5). *See*
also Opp’n Ex. N (Dkt. 160-16), Email from Greg Jacob to John Eastman (Jan. 6, 2021, 2:14 pm EST) at 3 (“I
have run down every legal trail placed before me to its conclusion, and I respectfully conclude that as a legal
framework, it is a results oriented position that you would never support if attempted by the opposition, and
essentially entirely made up.”).

28 ²⁶¹ Jacob Tr. 110.

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

1 enact his plan.²⁶³

2 Based on the evidence, the Court finds that it is more likely than not that President
3 Trump and Dr. Eastman dishonestly conspired to obstruct the Joint Session of Congress on
4 January 6, 2021.

5 **iii. Common law fraud**

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

9 **b. Actions in furtherance of crime or fraud**

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

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

19 “[T]he crime-fraud exception does not require a *completed* crime or fraud but only that
20 the client have consulted the attorney in an *effort* to complete one.”²⁶⁷ The exception applies
21 even if the attorney does not participate in the criminal activity, and “and even [if] the
22 communication turns out not to help (and perhaps even to hinder) the client’s completion of a
23 crime.”²⁶⁸ An attorney’s wrongdoing alone may pierce the privilege, regardless of the client’s

24
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26 ²⁶³ Opp’n at 12 (quoting Eastman Speech).

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

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

²⁶⁶ *Id.* at 1094–95.

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

²⁶⁸ *Id.* at 382.

1 awareness or innocence.²⁶⁹

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

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

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

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

25 ²⁷⁰ 4553; 4793; 4794; 4828 (duplicate); 5097; 5101; 5113; 5412; 5719.

26 ²⁷¹ 5424.

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

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

²⁷⁴ 4708.

1 Session of Congress on January 6, 2021. Because the memo likely furthered the crimes of
2 obstruction of an official proceeding and conspiracy to defraud the United States, it is subject to
3 the crime-fraud exception and the Court ORDERS it to be disclosed.

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

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

8 All ten documents are ‘opinion’ work product because they include attorneys’ thoughts
9 and legal theories. Unlike fact-based work product, which may be disclosed,²⁷⁷ opinion work
10 product “is virtually undiscoverable.”²⁷⁸ A court may compel disclosure of opinion work
11 product only in the rare situation “when mental impressions are *the pivotal issue* in the current
12 litigation and the need for the material is compelling.”²⁷⁹

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

20 The Select Committee claims that Dr. Eastman’s opinions “are directly at issue” because
21 he “was a central figure in the effort to encourage the former Vice President to reject the

22 ²⁷⁵ 4553; 4793; 4794; 4828 (duplicate); 5097; 5101; 5113; 5412; 5424; 5719.

23 ²⁷⁶ Opp’n at 35.

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

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

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

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

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

electors from several states.”²⁸²

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

The tenth email includes Dr. Eastman’s thoughts on the evening of January 6 about potential future actions given Vice President Pence’s refusal to reject or delay the electoral count.²⁸⁵ Cases that have found a “compelling need” involved situations where an attorney’s bad faith was central to a claim or defense, making the attorney’s opinions critical evidence.²⁸⁶ Although Dr. Eastman’s thoughts in this email pertain to the January 6 electoral count, these thoughts are not analogously “pivotal” to the Select Committee’s investigation.

The Court reiterates its earlier statement that the Select Committee’s investigation is “weighty and urgent.”²⁸⁷ But the Court does not want to enable well-intentioned committees to circumvent work product protection by using broad and urgent mandates, as has occurred in our not-so-distant past.²⁸⁸

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

²⁸² Opp’n at 36.

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

²⁸⁴ H.R. Res. 503 § 3.

²⁸⁵ 5424.

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

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

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

1 **IV. DISPOSITION**

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

7 More than a year after the attack on our Capitol, the public is still searching for
8 accountability. This case cannot provide it. The Court is tasked only with deciding a dispute
9 over a handful of emails. This is not a criminal prosecution; this is not even a civil liability suit.
10 At most, this case is a warning about the dangers of “legal theories” gone wrong, the powerful
11 abusing public platforms, and desperation to win at all costs. If Dr. Eastman and President
12 Trump’s plan had worked, it would have permanently ended the peaceful transition of power,
13 undermining American democracy and the Constitution. If the country does not commit to
14 investigating and pursuing accountability for those responsible, the Court fears January 6 will
15 repeat itself.

16 With this limited mandate, the Court finds the following ten documents privileged:
17 4553; 4793; 4794; 4828; 5097; 5101; 5113; 5412; 5424; 5719.²⁸⁹ The Court **ORDERS** Dr.
18 Eastman to disclose the other one hundred and one documents to the House Select Committee.

19
20 DATED: March 28, 2022

21 

22 DAVID O. CARTER
23 UNITED STATES DISTRICT JUDGE
24
25
26
27

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