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February 18, 2022

Via Hand Delivery

The Disciplinary Board of the
Supreme Court of New Mexico
2440 Louisiana Blvd NE, Ste. 280
Albuquerque, NM 87110

Attn: The Honorable Cynthia Fry (Ret.), Chair

Re: Complaint Against Attorneys Mark J. Caruso (NM #4459) and Michael Smith (Washington, DC #478674)

Dear Judge Fry:

I represent the New Mexico lawyers who filed a complaint with the Disciplinary Board against Mark J. Caruso and Michael Smith on Washington's Birthday, shortly after the January 6, 2021 attack on the United States Capitol.[1] The February 15 disciplinary complaint and my clients' subsequent letter further urging a formal investigation[2] stem from Mr. Caruso and Mr. Smith's attempt on behalf of the Trump campaign to obstruct New Mexico's certification of its electoral votes by suing the electors, the Secretary of State and the State Canvassing Board. The Disciplinary Board declined to formally investigate the complaint.[3] Today I am writing to urge you to reopen the disciplinary complaint, as supplemented by this letter, and docket the matter for a formal investigation and hearing. RULES GOVERNING DISCIPLINE, Rule 17-307(B) ("Upon request of any person affected by a dismissal, or sua sponte, the chair of the Disciplinary Board . . . may, at any time, order further investigation of a complaint that has been dismissed").

As Paul J. Kennedy represented Mr. Caruso and Mr. Smith prior to the Disciplinary Board's summary dismissal of the complaint, I am copying him on this.

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[1] Letter, Clinton W. Marrs et al. to The Disciplinary Board (Feb. 15, 2021) ("*Feb. 15 Complaint*").

[2] Letter, Clinton W. Marrs & Patrick J. Griebel to Christine E. Long (July 30, 2021) ("*July 30 Response*").

[3] Letter, Christine E. Long to Clinton W. Marrs (July 20, 2021); Letter, Hon. Cynthia A. Fry (Ret.) to Clinton W. Marrs & Patrick J. Griebel (Aug. 27, 2021).

A.

The Emergence of New Evidence Justifies Reopening the Complaint.

By your letter of August 27, 2021, you notified my clients that the Disciplinary Board would not docket the Complaint for formal investigation and hearing. In the intervening months since your honor's letter, details have emerged of what some have called the "fake electors plot," whereby Trump campaign officials and lawyers oversaw efforts in December 2020 to put forward illegitimate electors from seven states that Trump lost, including New Mexico. On December 14, 2020, the same day Mr. Caruso and Mr. Smith filed their lawsuit in Albuquerque, some Trump supporters attempted to enter the State Capitol in Santa Fe and present themselves as electors. December 14 was the day prescribed by federal and state law for the true electors to meet and cast their votes, with those electoral votes then to be delivered ultimately to Congress for counting on January 6. Capitol security did not let the purported electors enter the building due to COVID-19 restrictions, and the true electors accomplished their task unhindered. Three days later, on December 17, Trump supporters filed with the New Mexico Office of the Secretary of State (NMSOS) a bogus "CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM NEW MEXICO" [All Caps in Original]. Apparently signed by five people, the bogus certificate falsely claimed a Trump victory at a meeting of the electors at the state capitol on December 14. The Affidavit of Mandy Vigil, Director of Elections, lays out the facts of this episode and includes a file-stamped copy of the bogus certificates.[4]

Considering new evidence, we respectfully urge the Disciplinary Board to reopen the Complaint, as supplemented by this letter, and docket the matter for a formal investigation and hearing. We try to paint a clear picture here of the role lawyers appearing in a New Mexico federal court played in the attempt to delay and overturn the electoral count, based on publicly available sources. The facts surrounding the fake electors plot have emerged rapidly over the last few months, sometimes on a daily basis, and they clearly merit a formal investigation by the Disciplinary Board. Just a few weeks ago, the congressional committee investigating the January 6 attack on the United States Capitol issued subpoenas to 14 individuals who cast bogus electoral votes in states that Trump lost: Arizona, Georgia, Michigan, Nevada, Wisconsin, Pennsylvania and New Mexico. According to a written statement, Congress's Select Committee to Investigate the January 6th Attack on the United States Capitol ("*Select Committee*") issued subpoenas to Jewll Powdrell and Deborah W. Maestas of New Mexico, whose signatures appear on the bogus certificate submitted to the Secretary of State. The *Select Committee's* Chairman, Bennie G. Thompson (D-MS), explained:

> The Select Committee has obtained information that groups of individuals met on December 14th, 2020 in seven states carried by President Biden, then submitted

[4] A copy of the Certificate of Votes by which the true electors certified their votes and Certificate of Ascertainment by which the Governor certified the electors and the election results are **Exhibit 1** and **Exhibit 2**, respectively, hereto. The Affidavit of Mandy Vigil is attached as **Exhibit 3**.

> bogus slates of Electoral-College votes for former President Trump. The so-called alternate electors from those states then transmitted the purported Electoral-College certificates to Congress, which multiple people advising former President Trump or his campaign used to justify delaying or blocking the certification of the election during the Joint Session of Congress on January 6th, 2021.[5]

In addition to the congressional investigation of New Mexicans possibly involved in the plot, the New Mexico Attorney General has opened an investigation and made a referral to United State Department of Justice.[6]

Because a growing body of new evidence gives reasonable cause to believe Mr. Caruso and Mr. Smith violated the Rules of Professional Responsibility and procedural and perhaps criminal provisions of the Election Code, we urge the Disciplinary Board to reopen the Caruso and Smith matter. Unquestionably, the Disciplinary Board has the power and authority to do so and docket it for formal investigation and hearing. Rule 17-307 NMRA(B). A Disciplinary Board investigation would run parallel with the congressional investigation and any civil or criminal investigations by state or federal authorities, focusing on a question narrower than their mandate: possible lawyer misconduct in New Mexico. Although narrower in scope, a disciplinary investigation would serve no lesser purpose. The people deserve to know the truth about what role lawyers played in the plot to subvert the election in New Mexico. For this reason, a formal hearing is an extremely important outcome for this case—whether it leads to discipline or not—because the public has the right to know the results of the investigation.

1. A Comparison of the Trump Campaign's Legal Strategy in New Mexico with that of Bush-Cheney 2000 Demonstrates Mr. Caruso and Mr. Smith's Complaint was Part of the Plot to Delay and Overturn the Electoral Count.

By all outward appearances, the Caruso and Smith lawsuit looks like a part of the Trump campaign's plot to delay or block certification of the election. The best starting point for understanding this reality is the 2020 general election for president and vice president in New Mexico. Due to the quirky nature of the electoral college, although the names of Joe Biden and Kamala Harris and Donald Trump and Mike Pence appeared on the general election ballot, voters in the election really chose between slates of would-be electors, previously nominated by the Democratic and Republican Parties respectively. NMSA 1978, § 1-15-4 (1969). ("[P]residential elector nominees of the party whose nominees for president and vice president receive the highest number of votes at the general election shall be the elected presidential electors for this state . . .").

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[5] https://january6th.house.gov/news/press-releases/ select-committee-subpoenas-alternate-electors-seven-states, accessed Feb. 17, 2022. Copies of the Select Committee's January 28 subpoena to Mr. Powdrell and Ms. Maestas are attached as **Exhibit 4**.

[6] The Attorney General of New Mexico has referred the matter to the United Stated Department of Justice for investigation. https://abq.news/2022/01/nm-ag-refers-fake-election-certificates-to-federal-investigators/(Jan. 17, 2022), accessed Feb. 17, 2022.

Roughly sixty-eight percent of qualified voters cast ballots in the general election in New Mexico, or a total of 928,230 votes. The results, which the state canvassing board certified on November 24, 2020—three weeks before the Caruso and Smith filing—showed Joe Biden and Kamala Harris winning New Mexico by 99,720 votes, an 11% margin of victory. [**Exhibit 3**, ¶¶ 3, 4]. Historically, this margin is galactic. Al Gore squeaked by George W. Bush in the 2000 presidential election in New Mexico, by a paltry 366 votes out of 615,000 statewide. Even with this thinner-than-paper defeat, President Bush's campaign announced: "The Bush-Cheney Campaign 2000 respects the certified results in New Mexico and will not exercise its option to request a recount."[7]

Much can be learned comparing the actions of President Bush's and Vice President Cheney's team in 2000, with that of the Trump campaign in 2020 and the first week of 2021. First, the possibility of finding errors amounting to a few hundred votes in the case of Bush-Cheney, on a base of over six hundred thousand, at least lives in the realm of rational speculation. This notwithstanding the truth that reversing the outcome of any election remains difficult in the extreme. According to data compiled by FairVote, a nonpartisan election reform group, out of the 5,778 statewide general elections between 2000 and 2019 in the United States, there were 31 statewide recounts. Of those, three resulted in a reversal: races for the U.S. Senate in 2008 in Minnesota, auditor in 2006 in Vermont and governor in 2004 in Washington. The original margin separating the top two candidates in those three statewide reversals was less than 0.15%.[8] Flipping an 11% winning margin of over 99,000 votes is pure fantasy.

The second thing that can be learned by comparing the Trump campaign and Bush-Cheney 2000 is this fact. Mr. Caruso and Mr. Smith did not even bother with requesting a recount or mounting a statutory election contest. The Bush-Cheney Campaign, by contrast, clearly understood that it would be unlawful to ignore New Mexico's judiciary and state canvassing board and to bypass the recount and challenge statutes, as Bush-Cheney paid appropriate and express deference to New Mexico's "recount" procedure and its "certified results" when deciding to let things stand in 2000. See New Mexico Election Code, Contests and Recounts, NMSA 1978, §§ 1-14-1 to -25 (1969 through 2018). The New Mexico legislature has vested exclusive authority to certify presidential electors to the state canvassing board. NMSA 1978, § 1-15-4 (1969) (providing "presidential elector nominees" of the winning party "each shall be granted a certificate of election by the state canvassing board"). Once the state canvassing board certified the true electors on November 24 and no recount was requested, the only proper way to challenge their authority would have been to file "a verified complaint of contest in the [state] district court." NMSA 1978, § 1-14-3; Rule 1-087 NMRA (special rule of civil procedure governing contests of election with provision for accelerated proceedings). The election contest statute also provides that the electors, as persons "holding the certificate of election shall take possession and discharge the duties of the office until the contest is decided." NMSA 1978, § 1-14-2. (1969). Appeal of

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[7]https://www.cnn.com/2000/ALLPOLITICS/stories/12/09/election.newmexico.reut/index.html (Dec. 9, 2000), accessed Feb. 17, 2022.

[8] FairVote, *Research Report: A Survey and Analysis of Statewide Election Recounts*, 2000-2019 (November 2020), p. 2 available at www.fairvote.org.

decision in an election contest goes directly to the Supreme Court of New Mexico. NMSA 1978, § 1-14-5 (1969).

2. In Bypassing the Recount and Challenge Statutes, Mr. Caruso and Mr. Smith Engaged in an Unlawful Collateral Attack on New Mexico's Election Laws and State Judiciary: The Legal Framework of New Mexico's Democracy.

At this point, it bears remembering that after the State Canvassing Board certified them, the electors were duly elected office holders of New Mexico. Ensuring the proper place for federal courts is crucial for the preservation of elected democratic government under our federal system. In America, presidents are not kings, nor is a secretary of state, and certainly federal judges are not. With the important exception of voting rights, elections are state and local affairs, run by state and county officers. Even under English common law in a monarchy, a person could not be dispossessed of public office except by the strict standards of pleading for a writ of quo warranto, which is an action at law that cannot be heard in equity. *See, e.g., State ex rel. Abercrombie v. District Court*, 1933-NMSC-057, ¶ 6, 37 N.M. 407 ("In America it has been generally considered that the common-law mode of testing title to office is by information in the nature of quo warranto under the Statute of Anne. The election contest is purely statutory.") Early in New Mexico's history, the legislature substituted the election contest statute for the old writ, which statute the New Mexico Supreme Court held to provide the exclusive remedy for "a contest between two persons for the same office". *Id.* (holding the election contest statute to be the exclusive remedy for challenging an election). In modern times, the election contest statute continues to be the exclusive remedy for challenging electoral contests between two persons for the same office. *See generally State ex rel. King v. Sloan*, 2011-NMSC-20, ¶ 10, 149 N.M. 620, 622 (per curiam) (contrasting the use of quo warranto to "remove someone from office who has forfeited the right to a local public office upon conviction for a felony offense").

This law is not a mere antiquarian interest. It bears directly on Mr. Caruso and Mr. Smith's purpose in seeking to enjoin New Mexico's duly certified electors at the same time a slate of bogus electors proffered a false Certificate of the Votes of 2020 Electors from New Mexico. The Trump campaign chose not to apply for recount under New Mexico statute. NMSA 1978, §§ 1-14-14 to -25 (1969 through 2015) (providing the statutory scheme for applying for recount or receiving an automatic recount of an election). That decision closed one of only two legitimate routes to challenge the election. Filing an action for contest of election in state court by verified complaint was the only door left open to Mr. Caruso and Mr. Smith. Ignore for the moment the mishmash of half-truths, mistakes and irrelevancies in the original and amended complaints they filed in federal court. We urge the Disciplinary Board to focus for the moment instead on two remarkable things: (1) the timing of Mr. Caruso and Mr. Smith's commencement of suit (December 14, 2020) and (2) the relief they requested (nullification by federal injunction of the electors' certification).

Was the timing of their suit happenstance or was it calibrated to interfere with the meeting of true electors that same day? *See* 3 U.S.C. § 8 (electors shall meet on the first Monday after the second Wednesday in December [December 14, 2020] in the respective states at a place the

legislature directs); NMSA 1978, § 1-15-18 (1969) (calling the meeting of electors on the day fixed by federal law and specifying that it take place at noon in the state capitol). After considering what has been recently revealed—that a group of Trump supporters claiming to be electors showed up at the State Capitol on December 14—only one surmise remains: *the reasonable suspicion that Mr. Caruso and Mr. Smith's lawsuit was orchestrated and that it was part of a larger strategy, repeated in six other states, to justify an extra-constitutional usurpation of the election.* Once again, the Bush-Cheney Campaign's conduct in New Mexico merits attention. It announced its decision not to contest New Mexico on December 9, before the statutory deadline for the meeting and certification of electors. In contrast, the Trump campaign and its allies attacked the true electors on the very day of the statutory deadline.

Moreover, while the timing of Mr. Caruso and Mr. Smith's lawsuit is inculpatory, the relief they requested might convict them. Mr. Caruso and Mr. Smith sought three kinds of relief: (1) an *ex parte* temporary restraining order "to delay disposition of certificates" of New Mexico's electoral votes, FEB. 15 COMPLAINT, **Exhibit A** thereto, Prayer for Relief ¶ A, (2) an injunction to "vacate (sic) the Defendant Electors' certifications" and "remand (sic) to the New Mexico legislature, *id.* Prayer for Relief ¶ A, and (3) an injunction against the Secretary of State discharging her statutory duties, including the conduct of a statewide canvass, *id.* Prayer for Relief ¶¶ B, C. On any state of facts, Mr. Caruso and Mr. Smith had no chance of obtaining this relief, even if the federal court could somehow decipher what a "remand" to a state legislature meant. From the moment they filed it on December 14, Mr. Caruso and Mr. Smith knew or should have known their lawsuit had zero chance. FEB. 15 COMPLAINT, pp. 5-15; JULY 30 RESPONSE, pp. 3-8. *But as the newly discovered evidence suggests, success on the merits was not their goal. It appears New Mexico was part of a larger strategic play in service of President Trump and his allies' goal of justifying the subversion of the election.*

3. Trump's Pursuit of the Same Strategy in Seven States Demonstrates Central Control of the Plot to Delay and Overturn Electoral Count.

The plot to delay and overturn the electoral count achieved dramatic nationwide scope with the slates of fake electors in Arizona, Georgia, Michigan, Nevada, Pennsylvania, Wisconsin and New Mexico, and the forms used by the fake electors in these states—which are identical or nearly so—prove that they came from a common source. It should be noted here the bogus certificate in New Mexico contained conditional language unlike some of the other states. Yet, that language—"WE THE UNDERSIGNED, on the understanding that it might later be determined that we are duly elected and qualified electors"—makes matters worse for Mr. Caruso and Mr. Smith. It shows the fake electors in New Mexico were seemingly aware of the lawsuit, and the phrase "might later be determined" is sufficiently vague so that it would apply with equal force to a court ruling or a January 6 determination by Vice President Pence. In any event, the commonality in the certicates echoes Mr. Caruso and Mr. Smith's use of cut-and-paste pleadings, including their use in New Mexico of an affidavit that President Trump's surrogates had used without success in their attempt to overthrow Michigan's election. See FEB. 15, 2021 COMPLAINT, pp. 14-15. This commonality cannot be waved away as mere coincidence. It smacks of coordination. It warrants further investigation.

As mentioned in the introduction, on January 28, 2022, Congress's Select Committee subpoenaed 14 individuals who purported to cast electoral votes for President Trump and Vice President Pence in Arizona, Georgia, Michigan, Nevada, Wisconsin, Pennsylvania and New Mexico. Even more recently, it has been reported that at the same time the strategy of suing to discredit the general election and promoting false Certificates of the Votes in the names of bogus electors, President Trump and his allies were contemplating the seizure of voting machines in key swing states. In recent weeks the Select Committee learned that President Trump or his surrogates had caused an executive order, dated December 16, 2020, to be drafted calling for the Secretary of Defense to seize voting equipment in the swing states.[9] As a pretext for this authoritarian proposal, the executive order cited President Trump's surrogates' allegations in *King v. Whitmer*, the Michigan case from which Mr. Caruso and Mr. Smith borrowed the previously debunked Ramsland affidavit. *See* FEB. 15 COMPLAINT, pp. 2, 9 & note 46, 13-15. The fact that both the New Mexico lawsuit and Trump's draft executive order rely upon the same fantastical conspiracy theory alleged in *King v. Whitmer* poses a big ethical problem for Mr. Caruso and Mr. Smith, as the federal court in Michigan had fully rejected it on December 7, 2020, before the duo filed their initial and amended complaints. What the *Whitmer* court ruled should have dissuaded Mr. Caruso and Mr. Smith from filing their copycat lawsuit:

> [T]he Court finds that [the Trump] Plaintiffs are far from likely to succeed in this matter. In fact, this lawsuit seems to be less about achieving the relief Plaintiffs seek—as much of that relief is beyond the power of this Court—and more about the impact of their allegations on People's faith in the democratic process and their trust in our government. Plaintiffs ask this Court to ignore the orderly statutory scheme established to challenge elections and to ignore the will of millions of voters. This, the Court cannot, and will not, do. The People have spoken.

King v. Whitmer, No. CV 20-13134, 2020 WL 7134198, at *13 (E.D. Mich. Dec. 7, 2020).

B.

Mr. Caruso and Mr. Smith's Participation in a Strategy of Discrediting the Election as Cover for the Repudiation of Electoral Votes in the Seven Key States, Including New Mexico.

Mr. Caruso appears to be a member of the Republican National Lawyers Association ("*RNLA*"). A "Member Profile" page hosted on the RNLA's website holds Mr. Caruso out as practicing personal injury litigation and "election law" and touts his experience as "Retained Counsel, Donald Trump for President 2020, NM counsel for campaign in election lawsuit against

[9] Politico publicly revealed the existence of the draft executive order on January 21, 2021. https://www.politico.com/news/2022/01/21/read-the-never-issued-trump-order-that-would-have-seized-voting-machines-527572 (Jan. 25, 2022), accessed Feb. 17, 2021. A copy of the draft order is attached as **Exhibit 5**.

NM Secretary of State".[10] His law firm's website (https://www.carusolaw.com), however, represents that "We only handle motor vehicle accidents".

1. Mr. Caruso and Mr. Smith's Abuse of Process in Support of Trump's Attempt to Seize Power by Overturning the Election.

The fact that Mr. Caruso does not appear to have any election law competencies, a point raised carefully in my clients' February 15 complaint, merits a second look from Disciplinary Board, given what is now known about the plot to delay and overturn the electoral count. Among other things, my clients' Complaint demonstrated reasonable cause to believe Mr. Caruso and Mr. Smith were not competent to evaluate the Trump campaign's litigation strategy. FEB. 15 COMPLAINT, pp. 7-8. We appreciate that as of August 27, 2021, your honor did not agree. Now that the plot has been revealed, what might look at first like forgivable ignorance takes on a more sinister character. Mr. Caruso and Mr. Smith find themselves on the horns of a very uncomfortable dilemma. Either the filing in federal court displays stunning incompetence: failing to reflect passing familiarity with important statutory law and case law interpreting it (*e.g.*, appointment of electors, recounts, election contests, title to public office etc.); lacking law-student facility with basic ideas such as the difference between legal and equitable remedies; missing obvious limits to federal jurisdiction; displaying ignorance of rudimentary notions from administrative law like exhaustion; blowing recount and contest deadlines; forgetting to make any effort to serve the opposing side when asking for ex parte relief; attaching an affidavit to a pleading from Michigan that makes no reference to New Mexico, overlooking an adverse ruling on that very same Michigan pleading and sitting on their case for weeks after the meeting of the State Canvassing Board. The list could go on. Or maybe Mr. Caruso and Mr. Smith never cared whether their suit had a greater than zero chance in court in the first place. Maybe they filed the suit for an altogether improper purpose: that of delaying the electoral count and purposefully evading New Mexico election procedures and the exclusive jurisdiction of the New Mexico courts.

In these circumstances, what my clients' Complaint asked bears asking again:

> "We ask the Disciplinary Board to investigate the purpose for which [Mr. Caruso and Mr. Smith] filed their complaint and motion for injunctive relief. We ask the Disciplinary Board to investigate the efforts they took, or did not take, to determine whether their legal contentions were warranted or whether they had any nonfrivolous arguments for changing the law. And we ask the Disciplinary Board to investigate the efforts they took, or did not take, to determine whether their factual allegations had evidentiary support."

FEB. 15 COMPLAINT, p. 4.

[10] https://www.rnla.org/markcaruso, accessed Feb. 17, 2022. A copy of the RNLA Member Profile is attached as **Exhibit 6**.

2. After Examination of the Leaked Memos by Trump Lawyers John Eastman and Jenna Ellis, Any Doubt Mr. Caruso and Mr. Smith's Lawsuit Was Part of the Plot to Delay and Overturn the Electoral Count Evaporates.

The evidence that has emerged since August 27, 2020 documents President Trump's strategy of attempting to cling to power by sowing misinformation (the Big Lie) and discrediting the election as pretexts for manipulating the Electoral College. This evidence, including the Eastman memoranda[11] and memoranda drafted by Trump lawyer Jenna Ellis,[12] reveals that President Trump's allies had developed plans by which Vice President Pence would discard seven states' electoral votes, including New Mexico's, and thereby tilt the Electoral College in President Trump's favor on January 6, 2021, when Congress met to tally the votes and declare the winner. Eastman and Ellis wrote their memoranda in the final days before January 6, after the groundwork had been laid earlier in November and December with, among other things, the propaganda campaign pushing slogans like "Stop the Steal" and featuring the wild Giuliani press appearances. The less visible groundwork had been built by laborers such as Mr. Caruso and Mr. Smith and the true believers who presented themselves as fake electors in seven states. The Eastman and Ellis memoranda are best seen, then, as an extended spitball session put into words, throwing ideas against the wall with hopes of finding one or two that would give Vice President Pence enough psychological balm to go along with an unconstitutional seizure of power. As more details of the plot emerge, chants of "Hang Mike Pence" on January 6 become more understandable in historical terms but so do the appearances of fake electors at the doors of the State Capitol in Santa Fe and the filing of a thirteenth hour lawsuit that same day in Albuquerque.

After Trump suffered defeat after defeat in courts around the country in November and early December 2021, consideration of the merits of any newly hatched lawsuit became wholly absent from the Trump team's legal thinking. The Trump circle wanted the fact of pending lawsuits, nothing more. As January 6 drew near, no one expressed a belief that any court would reverse an election in any state. Instead, they wanted the bogus certificates and "ongoing election disputes," in the words of Trump lawyer John Eastman. Then Vice President Pence as presiding officer of Joint Session of Congress on January 6 would, under various "war gaming" scenarios, delay the count, stop the count, count only some states, ask legislatures to weigh in and the list goes on.

Right before Christmas in December 2020, Lawyer John Eastman drafted a two-page memo for the Trump campaign arguing that the "dual slates of electors" that existed in several

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[11] There are two Eastman memoranda—the first is two-pages long and the other, six pages. Both are entitled "January 6 scenario". The two memoranda are attached hereto as **Exhibit 7** and **Exhibit 8**, respectively.

[12] The first Ellis memorandum, dated December 31, 2020, sought to exploit disputes over a state's "electoral delegates" as a pretext for Vice President Pence to disregard the state's electoral votes when Congress tallied the votes on January 6. The second Ellis memorandum, dated January 5, elaborated further on the argument. These memoranda are attached hereto as **Exhibit 9** and **Exhibit 10**, respectively.

states would allow Vice-President Pence to skip over counting the electoral votes of those states and then "gavel[] President Trump as re-elected." This first Eastman memo also suggests an alternative delay tactic giving "state legislatures time to weigh in. . . .". Although the memo does not name New Mexico explicitly, the *Wall Street Journal* reported around the same time that "State Republican parties and the Trump campaign helped organize the alternate Electoral College meetings in six states: Wisconsin, Arizona, Pennsylvania, Georgia, New Mexico and Nevada."[13] Expressing ideas that would resurface a few weeks later in the memo, Mr. Caruso and Mr. Smith's complaint sought explicit delay of electoral certifications and promoted the idea of "remand" to the legislature, giving it time to weigh in.

The other memos continue in the same vein, but with more detailed ideas. Apparently in reference to the six states including New Mexico listed a few days earlier by the *Wall Street Journal*, then White House lawyer Jenna Ellis sent a memo dated December 31, 2020, to President Trump, arguing "six states have electoral delegates in dispute" and "Vice President Pence should therefore not open any of the votes from these six states." The Eastman memoranda explicitly proposed utilizing the "dual slate of electors" in New Mexico, and it envisaged the exploitation of division arising from "ongoing election disputes" as a pretext for not counting a state's Certificate of the Vote. The six-page memorandum's "War Gaming Alternatives" for January 6 included a scenario where "VP Pence determines that because multiple electors were appointed from the 7 states but not counted because of ongoing election disputes, neither candidate has the necessary 270 electoral votes, throwing the election to the House. . . . **TRUMP WINS**." (bold emphasis and capitalization in original).[14] The question my clients' Complaint presents, as supplemented by this letter, is whether Mr. Caruso and Mr. Smith were unwitting pawns in this endgame strategy or whether they knowingly contributed to the effort by manufacturing an "ongoing dispute" in New Mexico pursuant to the plan. This, we submit, should be determined after formal investigation and hearing.

None of this evidence was available to my clients or your honor before August 27, 2021. The first Eastman memorandum to be revealed was disclosed on September 21, 2021 when Bob Woodward and Robert Costa published their book, *Peril*. The Ellis memoranda were first revealed on November 16, 2021, with the publication of Jonathan Karl's book, *Betrayal: The Final Act Of The Trump Show*. Mr. Caruso and Mr. Smith's original and amended complaints sought to delay New Mexico's electoral certification and promoted the idea of "remand" to the legislature, giving it time to weigh in. In New Mexico, with the Democrats firmly in the legislative majority, that claimed relief was an unapologetic—and in hindsight, a transparent—subterfuge for the delay Eastman and Ellis hoped for.

This evidence lends further support for reasonably believing that Mr. Caruso and Mr. Smith filed their frivolous action in bad faith and for an improper purpose, namely, to fabricate an "ongoing dispute" in concert with a scheme to promote a contested "dual slate of electors," all as

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[13] https://www.wsj.com/articles/republican-electors-cast-unofficial-ballots-setting-up-congressional-clash-11609164000 (Dec.28, 2020), accessed Feb. 17, 2022.

[14] **Exhibit 7**, p. 2 (mentioning New Mexico), p. 3 ("War Gaming the Alternatives").

cover for Vice President Pence to disregard New Mexico's electoral votes. In her January 5, 2020 memorandum to President Trump's lawyer Jay Sekulow, Ms. Ellis wrote that if Vice President Pence determined on January 6 that a state's final certification of its electoral vote "has not been completed as to ascertain electors, the Vice President should determine that no electors can be counted from the state."[15] As of that date, Mr. Caruso and Mr. Smith continued to challenge the legality of New Mexico's electors. The bogus electors never repudiated their fake slate. Only time would tell whether, the next day, Vice President Pence would go along with the plan and refuse to count the electoral votes from New Mexico and the other six states.

America's constitutional democracy dodged a bullet. The Eastman-Ellis strategy of manufacturing "ongoing election disputes" by means of baseless litigation and contested "dual slates of electors" collapsed on January 6, 2021 when Mr. Pence refused to go along with it. In the wake of Mr. Pence's refusal, there was no longer any need for manufacturing political cover by means of baseless litigation and "dual slates of electors". The political game was up. Nothing further was to be gained by Mr. Caruso and Mr. Smith's lawsuit. Consequently, within days they unilaterally dismissed the suit by filing a notice. FEB. 15 COMPLAINT, pp. 4-5.

If we are right, Mr. Caruso and Mr. Smith's goal was not victory on the merits of their claims in federal court. Instead, their goal, in lending the aid of their law licenses to the effort, was to contribute to the political conditions for Vice President Pence to throw the election in the Electoral College. It is one thing to have summarily dismissed the disciplinary complaint based on what was before the Disciplinary Board as of August 27, 2021. But it is now an entirely different matter, based on this newly discovered evidence. And in light of this evidence, we respectfully submit that the board should reopen the Complaint, as supplemented by this letter, and proceed with a formal investigation of the allegations and a formal evidentiary hearing.

3. The Great Public Importance of the Matters Presented.

The importance of the Complaint's allegations, as supplemented by this letter, can hardly be overstated. A defeated President and his allies attempted to derail the peaceful transfer of presidential power for the first time in 224 years.[16] Beyond the interests of New Mexico's judicial branch, there are other crucial interests to protect. In the first place, there are the electors who were duly certified under New Mexico law and faithfully discharged their statutory duties as electors. Does the Disciplinary Board have an interest in protecting them, and future electors, from being sued frivolously in service to a plot to derail democracy? Of course, the answer is "yes." Electors in New Mexico must keep faith with the electorate who put them into office by

[15] **Exhibit 9**, p. 1.

[16] The first transfer of power from an outgoing President to a new President-elect occurred when John Adams succeeded George Washington, after narrowly beating Thomas Jefferson in the election of 1796. Washington's yielding to Adam and Adam's acceptance of Jefferson's subsequent victory over him in 1800 established the American tradition of peaceful presidential transitions.

casting their electoral votes only for the winning presidential ticket. If an elector were to break faith with the voters by casting votes for other people, he or she would commit a felony. NMSA 1978, § 1-15-9. In a unanimous ruling, the United States Supreme Court recently upheld the constitutionality of a "faithless" elector statute similar to New Mexico's and reasoned: "Then too, the State instructs its electors that they have no ground for reversing the vote of . . . its citizens. That direction accords with the Constitution—as well as with the trust of a Nation that here, We the People rule." *Chiafalo v. Washington,* 140 S. Ct. 2316, 2328 (2020); *see also* N.M. Const. art. II, § 2 ("All political power is vested in and derived from the people"); N.M. Const. art. II, § 3 ("All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage"). How strange a result it would be that a faithless elector would face a felony, but a faithless lawyer would go unpunished.

Ironically, the five nonlawyers who put themselves forward as alternate Trump electors may be in the most need of protection against bad lawyering. The simultaneity of the filing and the attempt of the illegitimate electors to get into the State Capitol strongly suggests coordination and lawyer involvement. Typical people on the street would not know when and where to show up for a meeting of electors. They would be unable to draft a bogus electoral certificate that appears passably legitimate. They would not know how to send something to the right recipients under the Electoral Count Act, let alone cite the federal statute properly. *See* 3 U.SC § 11. It seems a virtual certainty lawyers led nonlawyers on the road to perdition in New Mexico and the other states, as evidenced most simply by the near identical format and wording of the bogus certificates in the states where the Trump campaign pushed slates of alternate electors. In New Mexico, that road apparently ends in congressional subpoenas and possible criminal liability. *See, e.g.,* NMSA 1978, § 1-20-9 (2009) (providing that a person who with the requisite intent submits a false certificate of nomination or election return is guilty of a fourth degree felony); NMSA 1978, § 1-20-9 (1969) (making conspiracy to violate the Election Code a fourth degree felony). That these nonlawyers have most likely been put into this unenviable position by one or more officers of some court cries out for a formal investigation and hearing. Perhaps an investigation and public hearing of the allegations and evidence will exonerate Mark Caruso and Michael Smith. Perhaps it will show them to have been used as unwitting dupes of other persons' desperate pursuit of power. But maybe it won't. Perhaps their involvement was wider.

We respectfully submit the new and still emerging evidence of the Trump campaign's plot to delay and overturn the electoral count—the so-called fake electors plot—requires the Disciplinary Board to reopen the Caruso and Smith matter. The investigation should be formal and should include a formal hearing, because the public has the right to know the truth. What my clients argued previously bears repetition now and with great urgency: the facts are "are far too serious to be dismissed based on *ex parte* communications with Mr. Caruso and Mr. Smith's defense counsel." JULY 30 RESPONSE, p. 3 (emphasis in original).

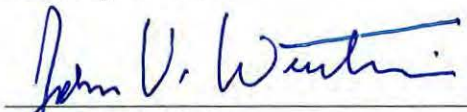
As my clients noted in their February 15 Complaint, "lawyers 'play a vital role in the preservation of society' and, when Mr. Caruso and Mr. Smith appeared in the federal action, they appeared as officers of the court and as public citizens 'having special responsibility for the quality of justice.'" Mr. Caruso and Mr. Smith might be exonerated for their conduct in the federal action

after a full and careful investigation and formal hearing, but the public, which indisputably has a compelling interest in their licensure to practice law in New Mexico, is entitled to know that their conduct satisfied—or violated—the Rules of Professional Conduct or other laws, and *why* their unprecedented conduct satisfied—or violated—the rules.

We urge you to reopen the Complaint and docket the matter for a formal investigation and a public hearing of the allegations and evidence.

Respectfully submitted,

JOHN V. WERTHEIM
Attorney at Law



John V. Wertheim

Attorney for the following Complainants:
Martin J. Chavez, Esq.
Clinton W. Marrs, Esq.
Patrick Griebel, Esq.
Ben Davis, Esq.

cc: Honorable Paul J. Kennedy (Ret.)., w/enclosures
Clinton W. Marrs, Esq. w/enclosures
Patrick Griebel, Esq. w/enclosures
Via Hand Delivery
Other clients via email

STATE OF NEW MEXICO

PRESIDENTIAL ELECTORS
CERTIFICATE OF VOTE

WE, the undersigned, being the duly elected and qualified presidential electors for the State of New Mexico, empowered to perform the duties of the presidential electors required by the Constitution and laws of the United States and the laws of the State of New Mexico, do hereby certify that on the 14th day of December, 2020 in Santa Fe, New Mexico, voted by ballot for the President and Vice President of the United States of America with the following result:

JOSEPH R BIDEN	FIVE (5) VOTES

KAMALA D HARRIS	FIVE (5) VOTES

IN WITNESS WHEREOF, we have signed and caused to be affixed the Great Seal of the State of New Mexico, on December 14, 2020, at Santa Fe, New Mexico.

Vincent Alvarado

Brianna Gallegos

Stephanie Thomas

Aleta Suazo

Ben Salazar

ATTEST:

Maggie Toulouse Oliver
New Mexico Secretary of State

EXHIBIT 1

STATE OF NEW MEXICO
OFFICE OF THE GOVERNOR

CERTIFICATE OF ASCERTAINMENT

I, **Michelle Lujan Grisham,** Governor of the State of New Mexico, hereby certify that the following are the official total votes received by the presidential electors whose names of party nominees for President and Vice-President of the United States, respectively, appeared on the General Election ballot of November 3, 2020, which names and votes were certified by the **New Mexico State Canvassing Board** on November 24, 2020:

ELECTORS	PARTY	CANDIDATES	VOTES
Vincent Alvarado Brianna Gallegos Stephanie Thomas Aleta Suazo Ben Salazar	Democratic	Joseph R. Biden Kamala D. Harris	501,614
Rosalind Tripp Debbie Maestas Lupe Garcia Harvey Yates Jewll Powdrell	Republican	Donald J. Trump Mike Pence	401,894
Thomas Mahon Laura Burrows Elizabeth Hanes Helen Milenski Mayna Myers	Libertarian	Jo Jorgensen Jeremy "Spike" Cohen	12,585
Chanel Espinosa Stephen Verchinski Rick Brown Ryan Buckman Em Ward	Green	Howie Hawkins Angela Nicole Walker	4,426
Israela Garcia Gail Nelson Christopher Pena John Fakes Cynthia Louis Jones	Constitution	Sheila "Samm" Tittle David Carl Sandige	1,806
Rebecca Hampton Kathryn Barr Ben T. Imbus Ramona R. Malczynski Jose M. Enriquez	Party for Socialism and Liberation	Gloria La Riva Sunil Freeman	1,640

GIVEN UNDER MY HAND and the Great Seal of the State of New Mexico in the City of Santa Fe, at the State Capitol, on the 24th day of November, 2020.

Michelle Lujan Grisham
MICHELLE LUJAN GRISHAM, GOVERNOR

ATTEST:

Maggie Toulouse Oliver
MAGGIE TOULOUSE OLIVER, SECRETARY OF STATE

EXHIBIT 2

AFFIDAVIT OF MANDY VIGIL

I, **MANDY VIGIL** , being first duly sworn, hereby states the following:

1. I have personal knowledge of the matters set forth below, am over the age of eighteen, and am otherwise competent to make this affidavit.

2. I have worked for the New Mexico Office of the Secretary of State (NMSOS) since May 2011 and am the State Elections Director for the NMSOS.

3. In New Mexico, roughly sixty-eight percent of registered voters cast ballots in the 2020 General Election. That amounts to 928,230 New Mexicans who voted either in person or by absentee ballot. These votes were counted and certified by 33 county canvassing boards and the State Canvassing Board. The election results were also independently audited and verified.

4. The certified election results for the race for president and vice present showed Joseph Biden and Kamala Harris winning by 99,720 votes, equaling an 11% margin of victory.

5. On November 24, NMSOS sent the winning slate of Presidential Electors, Certificates of Ascertainment, to the Archivist of the United States, confirming New Mexico's votes for the successful candidates. 3 U.S.C. Sec. 6.

6. Pursuant to NMSA 1978, Section 1-15-4(C), presidential elector nominees of the party whose nominees for president and vice president receive the highest number of votes at the general election shall be the elected presidential electors for this state, and each shall be granted a certificate of election by the state canvassing board.

7. Because Joseph Biden and Kamala Harris won the general election in New Mexico, the Democratic Presidential Electors were the properly elected presidential electors in the state.

8. On Monday December 14, 2020, the Meeting of the Presidential Electors was held in Room 307 in the State Capital building in Santa Fe New Mexico, and the proper Democratic

Presidential Electors voted, certified, and transmitted their certificates to all relevant parties, including to the Archivist of the United States pursuant to 3 U.S.C. § 11 and NMSA 1978, Section 1-15-8.

9. On Monday December 14, 2020, the Republican Presidential Electors arrived at the New Mexico Capitol Building to conduct their vote but were not let in by Building Services staff due to COVID-19 restrictions.

10. The Republican Presidential Electors submitted their certified votes for Donald J. Trump and Michael Pence via electronic mail to our office on or about December 17, 2020.

11. On the same day as the Meeting of the Presidential Electors, December 14, 2020, Mark Caruso, on behalf of the Donald J. Trump Campaign, filed its lawsuit to seek to overturn the 2020 election results. *See Donald J. Trump For President, Inc. v. Maggie Toulouse Oliver, the Electors of New Mexico and the State Canvassing Board of New Mexico*. 1:20-cv-01289.

FURTHER AFFIANT SAYETH NAUGHT.

Mandy Vigil
New Mexico Elections Director

STATE OF NEW MEXICO)
)
COUNTY OF SANTA FE)

Subscribed and sworn to before me by **Mandy Vigil** on this 9th day of December, 2021.

Charles Gregory Romero
Notary Public

OFFICIAL SEAL
Charles Gregory Romero
NOTARY PUBLIC
STATE OF NEW MEXICO
My Commission Expires: JAN 31, 2022

My commission expires: January 31, 2022

RECEIVED

2020 DEC 17 AM 11:15

SECRETARY OF STATE

MEMORANDUM

TO: President of the Senate (By Registered Mail)
United States Senate
Washington, D.C. 20510

Archivist of the United States (By Registered Mail)
700 Pennsylvania Avenue, NW
Washington, DC 20408

Secretary of State (By Certified Mail)
State of New Mexico
325 Don Gaspar, Suite 300
Santa Fe, NM 87501

Chief Judge, U.S. District Court (By Certified Mail)
District of New Mexico
Santiago E. Campos U.S. Courthouse
106 S. Federal Place
Santa Fe, NM 87501

FROM: JEWLL POWDRELL, Chairperson,

Electoral College of New Mexico

DATE: December 14, 2020

RE: New Mexico's Electoral Votes for President and Vice President

Pursuant to 3 U.S.C. § 11, enclosed please find duplicate originals of New Mexico's electoral votes for President and Vice President, as follows: two (2) duplicate originals for the President of the Senate and the Archivist, and one (1) duplicate original for the Secretary of State and Chief Judge.

Jewll Powdrell

JEWLL POWDRELL

Enclosures as noted.

CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM NEW MEXICO

****

WE, THE UNDERSIGNED, on the understanding that it might later be determined that we are the duly elected and qualified Electors for President and Vice President of the United States of America from the State of New Mexico, do hereby certify the following:

(A) That we convened and organized at the State Capitol, in Santa Fe, New Mexico at 12:00 noon on the 14th day of December, 2020, to perform the duties enjoined upon us;

(B) That being so assembled and duly organized, we proceeded to vote by ballot, and balloted first for President and then for Vice President, by distinct ballots; and

(C) That the following are two distinct lists, one, of all the votes for President; and the other, of all the votes for Vice President, so cast as aforesaid:

FOR PRESIDENT

Names of the Persons Voted For	Number of Votes
DONALD J. TRUMP of the State of Florida	5

FOR VICE PRESIDENT

Names of the Persons Voted For	Number of Votes
MICHAEL R. PENCE of the State of Indiana	5

IN WITNESS WHEREOF, we, the undersigned, have hereunto, at the Capitol, in Santa Fe, in the State of New Mexico, on this 14th day of December, 2020, subscribed our respective names.

JEWLL POWDRELL, Chairperson

DEBORAH W. MAESTAS, Secretary

LUPE GARCIA

ROSIE TRIPP

ANISSA FORD-TINNIN

CERTIFICATE OF FILLING VACANCY OF THE 2020 ELECTORS FROM NEW MEXICO

****

Upon the call of the roll, a vacancy became known due to the absence of Elector

HARVEY YATES

Thereupon, by nomination duly made and seconded,

ANISSA FORD-TINNIN

Was elected by the Electors present, as an Elector of President and Vice President of the United States of America for the State of New Mexico to fill the vacancy in the manner provided by law. This Elector participated in the proceedings as set forth in the record of the Electoral College.

IN WITNESS WHEREOF, the undersigned Chairperson and Secretary of the Electoral College of New Mexico hereunto Subscribe their names this 14th day of December, 2020.

JEWLL ROWDRELL, Chairperson

DEBORAH W. MAESTAS, Secretary

CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM NEW MEXICO

****

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DEBORAH W. MAESTAS, Secretary

LUPE GARCIA

ROSIE TRIPP

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DEBORAH W. MAESTAS, Secretary

BENNIE G. THOMPSON, MISSISSIPPI
CHAIRMAN

ZOE LOFGREN, CALIFORNIA
ADAM B. SCHIFF, CALIFORNIA
PETE AGUILAR, CALIFORNIA
STEPHANIE N. MURPHY, FLORIDA
JAMIE RASKIN, MARYLAND
ELAINE G. LURIA, VIRGINIA
LIZ CHENEY, WYOMING
ADAM KINZINGER, ILLINOIS

U.S. House of Representatives
Washington, DC 20515

january6th.house.gov
(202) 225-7800

One Hundred Seventeenth Congress

Select Committee to Investigate the January 6th Attack on the United States Capitol

January 28, 2022

Mr. Jewll Powdrell
[redacted]

Dear Mr. Powdrell:

Pursuant to the authorities set forth in House Resolution 503 and the rules of the House of Representatives, the Select Committee to Investigate the January 6th Attack on the United States Capitol ("Select Committee") hereby transmits a subpoena that compels you to produce the documents set forth in the accompanying schedule by February 11, 2022, at 10 a.m., and to appear for a deposition on February 23, 2022, at 10 a.m.

The Select Committee is investigating the facts, circumstances, and causes of the January 6th attack and issues relating to the peaceful transfer of power, in order to identify and evaluate lessons learned and to recommend to the House and its relevant committees corrective laws, policies, procedures, rules, or regulations. The inquiry includes examination of how various individuals and entities coordinated their activities leading up to the events of January 6, 2021.

The Select Committee seeks information from you on a narrow range of issues. We have sincere respect for your privacy, and we are not seeking information about your political views or your efforts in the 2020 presidential campaign more generally. Rather, we are seeking information about your role and participation in the purported slate of electors casting votes for Donald Trump and, to the extent relevant, your role in the events of January 6, 2021.

Based on publicly available information and information provided to the Select Committee, we believe that you have documents and information that are relevant to the Select Committee's investigation. For example, according to documents sent to the National Archives, you were a purported Electoral College elector who met with other purported electors on or about December 14, 2020 to cast votes for former President Trump and former Vice President Pence despite the fact that your state had made a final determination that Joseph Biden, Jr. and Kamala Harris were the winners of the November 2020 presidential election and the appointment of their electors had been certified.[1] Your delegation of purported electors for former President Trump and former Vice

[1] Documents on file with the Select Committee. Under the Constitution, each state "shall appoint" electors for President and Vice President pursuant to state law (Article II, Section 2, clause 1). The executive of the state is required to send under seal to the Archivist of the United States "a certificate of such ascertainment of the electors

President Pence then sent an alleged "Certificate of the Votes" of the purported electors to Congress for consideration by former Vice President Pence, in his role as President of the Senate, during the Joint Session of Congress on January 6, 2021.[2] The existence of these purported alternate-elector votes was used as a justification to delay or block the certification of the election during the Joint Session of Congress on January 6, 2021.[3]

Accordingly, the Select Committee seeks documents and a deposition regarding these matters that are within the scope of the Select Committee's inquiry. A copy of the rules governing Select Committee depositions, and document production definitions and instructions are attached. Please contact staff for the Select Committee at 202-225-7800 to arrange for the production of documents.

Sincerely,

Bennie G. Thompson
Chairman

appointed, setting forth the names of such electors," and shall do so "as soon as practicable" in cases where there has been "a final determination provided for by law of a controversy or contest concerning the appointment" of the electors (3 U.S.C. § 6).

[2] *Id.*

[3] *See, e.g.,* Documents on file with the Select Committee; *READ: Trump lawyer's full memo on plan for Pence to overturn the election,* CNN (September 21, 2021), found at https://www.cnn.com/2021/09/21/politics/read-eastman-memo/index.html;

BENNIE G. THOMPSON, MISSISSIPPI
CHAIRMAN

ZOE LOFGREN, CALIFORNIA
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PETE AGUILAR, CALIFORNIA
STEPHANIE N. MURPHY, FLORIDA
JAMIE RASKIN, MARYLAND
ELAINE G. LURIA, VIRGINIA
LIZ CHENEY, WYOMING
ADAM KINZINGER, ILLINOIS

U.S. House of Representatives
Washington, DC 20515

january6th.house.gov
(202) 225-7800

One Hundred Seventeenth Congress

Select Committee to Investigate the January 6th Attack on the United States Capitol

January 28, 2022

Ms. Deborah W. Maestas
[redacted]

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The Select Committee is investigating the facts, circumstances, and causes of the January 6th attack and issues relating to the peaceful transfer of power, in order to identify and evaluate lessons learned and to recommend to the House and its relevant committees corrective laws, policies, procedures, rules, or regulations. The inquiry includes examination of how various individuals and entities coordinated their activities leading up to the events of January 6, 2021.

The Select Committee seeks information from you on a narrow range of issues. We have sincere respect for your privacy, and we are not seeking information about your political views or your efforts in the 2020 presidential campaign more generally. Rather, we are seeking information about your role and participation in the purported slate of electors casting votes for Donald Trump and, to the extent relevant, your role in the events of January 6, 2021.

Based on publicly available information and information provided to the Select Committee, we believe that you have documents and information that are relevant to the Select Committee's investigation. For example, according to documents sent to the National Archives, you were a purported Electoral College elector who met with other purported electors on or about December 14, 2020 to cast votes for former President Trump and former Vice President Pence despite the fact that your state had made a final determination that Joseph Biden, Jr. and Kamala Harris were the winners of the November 2020 presidential election and the appointment of their electors had been certified.[1] Your delegation of purported electors for former President Trump and former Vice

[1] Documents on file with the Select Committee. Under the Constitution, each state "shall appoint" electors for President and Vice President pursuant to state law (Article II, Section 2, clause 1). The executive of the state is required to send under seal to the Archivist of the United States "a certificate of such ascertainment of the electors appointed, setting forth the names of such electors," and shall do so "as soon as practicable" in cases where there has been "a final determination provided for by law of a controversy or contest concerning the appointment" of the electors (3 U.S.C. § 6).

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Sincerely,

Bennie G. Thompson
Chairman

[2] *Id.*
[3] *See, e.g.,* Documents on file with the Select Committee; *READ: Trump lawyer's full memo on plan for Pence to overturn the election,* CNN (September 21, 2021), found at https://www.cnn.com/2021/09/21/politics/read-eastman-memo/index.html;

December 16, 2020

PRESIDENTIAL FINDINGS
TO PRESERVE COLLECT AND ANALYZE NATIONAL SECURITY INFORMATION
REGARDING THE 2020 GENERAL ELECTION

By the authority vested in me as President of the United States pursuant to the Constitution and laws of the United States of America, including Article 2 section 1 of the U.S. Constitution, Executive Orders 12333, 13848, National Security Presidential Memoranda 13 and 21, the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA) and all applicable Executive Orders derived therefrom, the National Emergencies Act (50 U.S.C.1601 et seq.) (NEA), and section 301 of title 3, United States Code:

I, Donald J. Trump, President of the United States, find that the forensic report of the Antrim County, Michigan voting machines, released December 13, 2020, and other evidence submitted to me in support of this order, provide probable cause sufficient to require action under the authorities cited above because of evidence of international and foreign interference in the November 3, 2020, election. Dominion Voting Systems and related companies are owned or heavily controlled and influenced by foreign agents, countries, and interests. The forensic report prepared by experts found that "the Dominion Voting System is intentionally and purposefully designed with inherent errors to create systemic fraud and influence election results. The system intentionally generates an enormously high number of ballot errors. The intentional errors lead to bulk adjudication of ballots with no oversight, no transparency, and no audit trail. This leads to voter or election fraud." The report found the election management system to be wrought with unacceptable and unlawful vulnerabilities––including access to the internet––probable cause to find evidence of fraud, and numerous malicious actions.

There is also probable cause to find that Dominion Voting Systems, Smartmatic, Electronic Systems & Software, and Hart Inter Civic, Clarity Election Night Reporting, Edison Research, Sequoia, Scytl, and similar or related entities, agents or assigns, have the same flaws and were subject to foreign interference in the 2020 election in the United States. There is probable cause to find these systems bear the same crucial code "features" and defects that allowed the same outside and foreign interference in our election, in which there is probable cause to find votes were in fact altered and manipulated contrary to the will of the voters.

Dominion Voting Systems is based in Toronto, Canada, and assigns its intellectual property including patents on its firmware and software to Hong Kong and Shanghai Bank Corporation (HSBC), a bank with its foundation in China and its current headquarters in London, United Kingdom. The Dominion Voting system is owned and controlled by foreign entities. Multiple expert witnesses and cyber experts identified acts of foreign interference in the election prior to November 3, 2020 and continued in the following weeks. In fact, there is probable cause to find a massive cyber-attack by foreign interests on our crucial national infrastructure surrounding our election––not the least of which was the hacking of the voter registration system by Iran. (E.O. 13800 of May 11. 2017)

Just **days prior to the election** of November 3, 2020, federal Judge Totenberg found, after three

days of testimony including by Dominion executive Eric Coomers:

> There are "true risks posed by the new BMD [Ballot Marking Device of Georgia's Dominion Voting Systems] voting system as well as its manner implementation. These risks are neither hypothetical nor remote under the current circumstances. The insularity of the Defendants' and Dominion's stance here in evaluation and management of the security and vulnerability of the BMD system does not benefit the public or citizens' confident exercise of the franchise. The stealth vote alteration or operational interference risks posed by malware that can be effectively invisible to detection, whether intentionally seeded or not, are high once implanted, if equipment and software systems are not properly protected, implemented, and audited. The modality of the BMD systems' capacity to deprive voters of their cast votes without burden, long wait times, and insecurity regarding how their votes are actually cast and recorded in the unverified QR code makes the potential constitutional deprivation less transparently visible as well, at least until any portions of the system implode because of system breach, breakdown, or crashes. Any operational shortcuts now in setting up or running election equipment or software creates other risks that can adversely impact the voting process.
>
> "The Plaintiffs' national cybersecurity experts convincingly present evidence that this is not a question of "right this actually ever happen?" - but "when it will happen," especially if further protective measures are not taken. Given the masking nature of malware and the current systems described here, if the State and Dominion simply stand by and say, "we have never seen it," the future does not bode well.
>
> "Still, this is year one for Georgia in implementation of this new BMD system as the first state in the nation to embrace statewide implementation of this QR barcode-based BMD system for its entire population. Electoral dysfunction - cyber or otherwise - should not be desired as a mode of proof. It may well land unfortunately on the State's doorstep. The Court certainly hopes not."[1]

And, yet it did. Every defect and hazard of which Judge Totenberg warned happened in Georgia. Witnesses in Georgia have provided evidence of crashes, the replacement of a server, impermissible updates to the system, connections to the internet, and both Coffee and Ware counties have identified a significant percentage of votes being wrongly allocated contrary to the will of the voter. Coffee County Georgia has refused to certify its result.

Accordingly, I hereby order:

(1) Effective immediately, the Secretary of Defense shall seize, collect, retain and analyze all machines, equipment, electronically stored information, and material records required for retention under United States Code Title 42, Sections 1974-1974(e), including but not limited to those identified in footnote 1. The Secretary of Defense has discretion to determine the interdiction of national critical infrastructure supporting federal elections. Designated locations will be identified in the operation order.

(2) Within 7 days of commencement of operations, the initial assessment must be provided to the Office of the Director of National Intelligence. The final assessment must be provided to

[1] Case 1:17-cv-02989-AT Document 964 Filed 10/11/20 Page 146 of 147

the Office of the Director of National Intelligence no later than 60 days from commencement of operations.

(3) The Director of National Intelligence shall deliver this assessment and appropriate supporting information to the President, the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the Attorney General, and the Secretary of Homeland Security.

(4) A direct liaison to be authorized to coordinate as required between the applicable U.S. Departments and Agencies.

(5) The Secretary of Defense may select by name or by unit federalization of appropriate National Guard support.

(6) The Assistant Secretary of Defense for Homeland Security will coordinate support requirements as needed from the Department of Homeland Security.

(7) The appointment of a Special Counsel to oversee this operation and institute all criminal and civil proceedings as appropriate based on the evidence collected and provided all resources necessary to carry out her duties consistent with federal laws and the Constitution.

DONALD J. TRUMP
PRESIDENT OF THE UNITED STATES

< Back (/online_directory_new_page)

Member Profile - Mark Caruso

 (/markcaruso)

Membership Level

Regular Member - 1 Year

Employer

Caruso Law Offices, PC

Email

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505-883-5000 (callto:505-883-5000)

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Law School

Pepperdine University Caruso School of Law

Practice Area 1

Personal Injury

Practice Area 2

Election Law

Practice Area 3

Litigation

BIO

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EXHIBIT 6

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PRIVILEGED AND CONFIDENTIAL

January 6 scenario

7 states have transmitted dual slates of electors to the President of the Senate.

The 12th Amendment merely provides that "the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." There is very solid legal authority, and historical precedent, for the view that the President of the Senate does the counting, including the resolution of disputed electoral votes (as Adams and Jefferson did while Vice President, regarding their own election as President), and all the Members of Congress can do is watch.

The Electoral Count Act, which is likely unconstitutional, provides:

> If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.

This is the piece that we believe is unconstitutional. It allows the two houses, "acting separately," to decide the question, whereas the 12th Amendment provides only for a joint session. And if there is disagreement, under the Act the slate certified by the "executive" of the state is to be counted, regardless of the evidence that exists regarding the election, and regardless of whether there was ever fair review of what happened in the election, by judges and/or state legislatures.

So here's the scenario we propose:

1. VP Pence, presiding over the joint session (or Senate Pro Tempore Grassley, if Pence recuses himself), begins to open and count the ballots, starting with Alabama (without conceding that the procedure, specified by the Electoral Count Act, of going through the States alphabetically is required).

2. When he gets to Arizona, he announces that he has multiple slates of electors, and so is going to defer decision on that until finishing the other States. This would be the first break with the procedure set out in the Act.

3. At the end, he announces that because of the ongoing disputes in the 7 States, there are no electors that can be deemed validly appointed in those States. That means the total number of "electors appointed" – the language of the 12th Amendment -- is 454. This reading of the 12th Amendment has also been advanced by Harvard Law Professor Laurence Tribe (here). A "majority of the electors appointed" would therefore be 228. There are at this point 232 votes for Trump, 222 votes for Biden. Pence then gavels President Trump as re-elected.

4. Howls, of course, from the Democrats, who now claim, contrary to Tribe's prior position, that 270 is required. So Pence says, fine. Pursuant to the 12th Amendment, no candidate has achieved the necessary majority. That sends the matter to the House, where the "the votes shall be taken by states, the representation from each state having one vote . . . ." Republicans currently control 26 of the state delegations, the bare majority needed to win that vote. President Trump is re-elected there as well.

5. One last piece. Assuming the Electoral Count Act process is followed and, upon getting the objections to the Arizona slates, the two houses break into their separate chambers, we should not allow the Electoral Count Act constraint on debate to control. That would mean that a prior legislature was determining the rules of the present one — a constitutional no-no (as Tribe has forcefully argued). So someone – Ted Cruz, Rand Paul, etc. – should demand normal rules (which includes the filibuster). That creates a stalemate that would give the state legislatures more time to weigh in to formally support the alternate slate of electors, if they had not already done so.

6. The 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. 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. The fact is that the Constitution assigns this power to the Vice President as the ultimate arbiter. We should take all of our actions with that in mind.

PRIVILEGED AND CONFIDENTIAL

January 6 scenario

Article II, § 1, cl. 2 of the U.S. Constitution assigns to the *legislatures* of the states the plenary power to determine the manner for choosing presidential electors. Modernly, that is done via statutes that establish the procedures pursuant to which an election must be conducted.

I. Illegal conduct by election officials.

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. When the laws at issue were specifically designed to reduce the risk of fraud in absentee voting, those violations are particularly troubling. A sampling of the more significant violations is as follows:

a. **Georgia** (as alleged in *Trump v. Kemp et al.* (N.D. Ga., filed Dec. 31)
   i. SOS altered signature verification requirements via an unauthorized settlement agreement.
   ii. Portable "polling places" targeted to heavily democrat ares
   iii. Refusal by the state judiciary to even assign a judge to hear the statutorily-authorized election challenge brought by the Trump campaign on Dec. 4.

b. **Pennsylvania** (as noted in *Trump v. Boockvar et al.* (S.Ct., filed Dec. 21)
   i. Following a collusive suit brought by the League of Women Voters against the Democrat Secretary of the Commonwealth seeking to require that absentee ballots not passing the signature verification process be given notice and an opportunity to cure, the Secretary unilaterally abolished the signature verification process altogether, issuing a directive that not only was it not required, it was not even permitted. She then filed an emergency writ action with the partisan-elected Supreme Court to ratify her elimination of that statutory requirement
   ii. The PA Supreme Court agreed with the Secretary, but went further, also eliminating the statutory right of candidates to challenge illegal ballots during the absentee ballot canvassing.
   iii. The PA Supreme Court next eviscerated the statutory requirement that candidates be allowed to have election observers, holding that 1 individual "in the room"—even if at the entrance of the football field-sized Philadelphia Convention Center—was sufficient.
   iv. The PA Supreme Court then eviscerated the remaining validation requirements in state law, holding that the statutory requirement that a voter "fill in, sign, and date" the absentee ballot certificate was

unenforceable because "fill in" was ambiguous, and because the date requirement served no purpose, in its view.

c. **Wisconsin** (as noted in two cert petitions, *Trump v. Biden*, filed on Dec. 29, and *Trump v. Wisc. Elections Comm'n*, filed on Dec. 30)
   i. The use of unmanned drop boxes, not authorized in Wisconsin law
   ii. The use of so-called "human drop boxes", also not authorized in Wisconsin law, and utilized in "Democracy in the Park" efforts coordinated by Dane County (Madison) election officials and the Biden campaign.
   iii. Allowed election officials to add missing information to absentee voter or witness declarations, contrary to law, which says such ballots must not be counted.
   iv. Dane and Milwaukee County clerks recommended that voters fraudulently claim to be "indefinitely confined" in order to avoid voter id requirements.

d. Michigan
   i. Mailed out absentee ballots to every registered voter, contrary to statutory requirement that voter apply for absentee ballots
   ii. Established remote drop boxes only in heavily Democrat precincts, without the statutorily mandated video surveillance.
   iii. Absentee ballots delivered at 3 am were counted without affording candidates the opportunity to observe, contrary to state law

e. Arizona
   i. Federal court reduced Arizona's 29-day-before-election registration requirement

f. Nevada
   i. Machine inspection of signatures, rather than the uman inspection of signatures mandated by state law, was allowed.

Because of these illegal actions by state and local election officials (and, in some cases, judicial officials, the Trump electors in the above 6 states (plus in New Mexico) met on December 14, cast their electoral votes, and transmitted those votes to the President of the Senate (Vice President Pence). There are thus dual slates of electors from 7 states.

II. The Constitutional and Statutory Process for Opening and Counting of Electoral Votes.

a. **The 12th Amendment** provides that "the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."

i. There is very solid legal authority, and historical precedent, for the view that the President of the Senate does the counting, including the resolution of disputed electoral votes (as Adams and Jefferson did while Vice President, regarding their own election as President), and all the Members of Congress can do is watch.

b. The Electoral Count Act of 1887, which is likely unconstitutional, provides:

If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title [the so-called "safe harbor" provision] to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.

i. This is the piece that we believe is unconstitutional. It allows the two houses, "acting separately," to decide the question, whereas the 12th Amendment provides only for a joint session. And if there is disagreement, under the Act the slate certified by the "executive" of the state is to be counted, regardless of the evidence that exists regarding the election, and regardless of whether there was ever fair review of what happened in the election, by judges and/or state legislatures. That also places the executive of the state above the legislature, contrary to Article II.

III. War Gaming the Alternatives.

a. VP Pence opens the ballots, counts those certified by the State executive, and does not receive any objections meeting the requirements of the Electoral Count Act. **BIDEN WINS 306-232.**

b. VP Pence opens the ballots, receives objections to the 7 states with multiple ballots. The two bodies adjourn to their separate chambers and decide which slate of electors to count.

   i. House votes to count the Biden slate; Senate votes to count the Biden slate as well (depending on Georgia election, only 1-3 Republicans voting with the Democrats would yield this result. **BIDEN WINS 306-232.**

   ii. House votes to count the Biden slate; Senate votes to count the Trump slate. Under the Electoral Count Act, because the two houses do not agree, the slate certified by the "executive" prevails. **BIDEN WINS 306-232.**

   iii. House votes to count the Biden slate; there is a filibuster in the Senate (contrary to the time limits of the Electoral Count Act). Stand-off until the filibuster ended by a cloture vote, which would only take 10-12 Republican Senators to accomplish. After the cloture vote, either i or ii above. **BIDEN WINS 306-232.**

c. VP Pence opens the ballots, determines on his own which is valid, asserting that the authority to make that determination under the 12th Amendment, and the Adams and Jefferson precedents, is his alone (anything in the Electoral Count Act to the contrary is therefore unconstitutional).

   i. If State Legislatures have certified the Trump electors, he counts those, as required by Article II (the provision of the Electoral Count Act giving the default victory to the "executive"-certified slate therefore being unconstitutional). Any combination of states totaling 38 elector votes, and **TRUMP WINS.**

   ii. If State Legislatures have not certified their own slates of electors, VP Pence determines, based on all the evidence and the letters from state legislators calling into question the executive certifications, decides to count neither slate of electors. (Note: this could be done with he gets to Arizona in the alphabetical roster, or he could defer Arizona and the other multi-slate states until the end, and then make the determination). At the end of the count, the tally would therefore be 232 for Trump, 222 for Biden. Because the 12th Amendment says

"majority of electors *appointed*," having determined that no electors from the 7 states were appointed (a position in accord with that taken by Harvard Law Professor Laurence Tribe (here)), **TRUMP WINS.**

iii. Alternatively, VP Pence determines that because multiple electors were appointed from the 7 states but not counted because of ongoing election disputes, neither candidate has the necessary 270 elector votes, throwing the election to the House. *IF the Republicans in the State Delegations stand firm*, the vote there is 26 states for Trump, 23 for Biden, and 1 split vote. **TRUMP WINS.**

d. VP Pence determines that the ongoing election challenges must conclude before ballots can be counted, and adjourns the joint session of Congress, determining that the time restrictions in the Electoral County Act are contrary to his authority under the 12th Amendment and therefore void. Taking the cue, state legislatures convene, order a comprehensive audit/investigation of the election returns in their states, and then determine whether the slate of electors initially certified is valid, or whether the alternative slate of electors should be certified by the legislature, exercise authority it has directly from Article II and also from 3 U.S.C. § 2, which provides:

"Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct."

i. If, after investigation, proven fraud and illegality is insufficient to alter the results of the election, the original slate of electors would remain valid. **BIDEN WINS.**

ii. If, on the other hand, the investigation proves to the satisfaction of the legislature that there was sufficient fraud and illegality to affect the results of the election, the Legislature certifies the Trump electors. Upon reconvening the Joint Session of Congress, those votes are counted and **TRUMP WINS.**

IV. **BOLD, Certainly. But this Election was Stolen by a strategic Democrat plan to systematically flout existing election laws for partisan advantage; we're no longer playing by Queensbury Rules, therefore.**

The main thing here is that VP Pence should exercise his 12th Amendment authority without asking for permission – either from a vote of the joint session or from the Court. 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. The fact is that the Constitution assigns this power to the Vice President as the ultimate arbiter. We should take all of our actions with that in mind.

I have outlined the likely results of each of the above scenarios, but I should also point out that we are facing a constitutional crisis much bigger than the winner of this particular election. If the illegality and fraud that demonstrably occurred here is allowed to stand—and the Supreme Court has signaled unmistakably that it will not do anything about it—then the sovereign people no longer control the direction of their government, and we will have ceased to be a self-governing people. The stakes could not be higher.

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

To: President Donald J. Trump

Prepared By: Jenna Ellis

Date: December 31, 2020

Memorandum Re: Constitutional Analysis of Vice President Authority for January 6, 2021 Electoral College Vote Count

Six states currently have electoral delegates in dispute and there is sufficient rational and legal basis to question whether the state law and Constitution was followed. There is clear basis in the Constitutional text that the Vice President's role is to open all electoral votes from the electors chosen in the "manner" prescribed by the state legislatures. The Vice President cannot fulfill that responsibility if he does not know which ones were so chosen.

On January 6, the Vice President should therefore not open any of the votes from these six states, and instead direct a question to the legislatures of each of those states and ask them to confirm which of the two slates of electors have in fact been chosen in the manner the legislature has provided for under Article II, Section 1.2 of the U.S. Constitution. The Vice President should open all other votes from states where electors have been certified and count accordingly.

The question would then require a response from the state legislatures, which would then need to meet in an emergency electoral session (which they may constitutionally call for on their own power, not withstanding any other provision of state law—state law may not impede the legislatures from fulfilling their Constitutional duty).

In his formal request, the Vice President should require a response from each state legislature no later than 7:00pm EST on January 15, 2021. If any state legislature fails to provide a timely response, no electoral votes can be opened and counted from that state. The Constitution provides that if no candidate for President receives a majority of electoral votes, the Congress shall vote by state delegation. This would provide two and one-half days for Congress to meet and vote by delegation prior to January 20 at noon for inauguration.

This is a meritorious request because the Vice President has taken an oath to uphold the Constitution. He is not exercising discretion nor establishing new precedent, simply asking for clarification from the constitutionally appointed authority. Further, it would cement precedent that the Constitution requires the state legislatures to act as the sole authority of the "manner" of selecting electoral delegates, and cannot delegate their plenary authority to the state executive branch in a manner that violates Article II and the separation of powers.

EXHIBIT 9

ATTORNEY-CLIENT PRIVILEGED

To: Jay Sekulow

Prepared by: Jenna Ellis

Date: January 5, 2020

Re: Vice President Authority in Counting Electors pursuant to U.S. Constitution and 3 U.S. Code §§ 5 and 15

3 U.S. Code § 5 requires a "final determination" in accordance with state law. Where a controversy has been initiated in accordance with State law, that process for a final determination must be completed before a legitimate set of electors can be "ascertained" by the chief executive officers of the state. (In at least six states, state executives rushed to certify while judicial and legislative disputes in accordance with state law had just begun—how can that be constitutional and entitled to deference EVEN IF federal law purports to allow it?)

3 U.S. Code § 15 purports to establish a constitutional process for adjudicating disputes when there is disagreement regarding the legitimacy of more than one set of electors. The problem with Section 15's process is that it violates Article II § 1.2, which requires that electors be selected in the "manner" directed by state legislatures. Section 15, by defaulting to electors certified by the state *executive*, violates the supremacy of the state legislature as the constitutional authority for determining the selection of valid legislators. *See, McPherson v. Blacker*, 146 U.S. 1 (1982); *Bush v. Gore*, 531 U.S. 98 (2000).

Where a determination or ascertainment process has not been completed in accordance with state law, no elector can be deemed as legitimate/valid/constitutionally determined because the constitution ***requires*** that electors be chosen as directed by the state legislature and the state law as enacted by the general assembly. Where state law provides a process to resolve challenges and controversies (including in the judiciary), these processes and procedures ***have to be completed***.

Congress ***may not*** arrogate to itself the authority to impose its preferred set of electors when state law has not been followed. This is what § 15 does. While it may be a sensible approach under less contentious circumstances (or perhaps the 1948 Congress did not contemplate a faithless executive), the magnitude of the problem, where at least six states are in significant dispute and a handful of electors counted one way or the other ***would*** be outcome determinative, § 15 cannot be regarded as constitutional to override Article II, § 1.2.

As a practical matter, there is no provision for communication between the Congress and state legislatures, other than the transmission of purported slates of electors. If the Vice President determines that § 5 has not been completed as to ascertain electors, the Vice President should determine that no electors can be counted from the state. This directly conflicts with the counting procedure laid out in § 15. If the Vice President takes this step there is no clear remedy, other than perhaps injunctive relief by some petitioner seeking a "writ of mandamus"

from the court to the Vice President to exercise his job. Section 15 states the Vice President shall open and hand the votes to the Tellers. Under his Oath of Office and a plain reading of the constitutional provisions, the Vice President has the authority (not just as a ministerial function) to not hand the votes to the teller where no electors have been "ascertained" under § 5. This would have to point back to the state law and where there are actual active disputes that are running in accordance with provisions of state law in order to legitimately assert that § 5 has not been completed.

If the Vice President exercises in this manner would § 15 be "ignored"? such that there would be no "debate" among the separate houses as to "objections"? Probably yes. As outlined above, there is a colorable argument that § 15 violates the supremacy clause of the Constitution regarding plenary state legislative authority under Article II, § 1.2.

What happens next? Does the Vice President have the authority to simply adjourn the body until a determination that the process to have been completed? Probably yes. Discretion of the President of the Senate and that he would be the Vice President is intentional. As John Hoestettler argues in *Ordained and Established*, the Vice President is a legislative officer – not an officer of the executive branch. The founders intended the Vice President to be the second most powerful elected member of the federal government as president of the senate. Tradition and practice after the 12th Amendment have blurred the constitutional distinction but as President of the Senate, the Vice President is a legislative officer—even if he chooses to ignore that role. Therefore the Vice President, as a presiding officer has great constitutional discretion to recognize speakers and to make fundamental determinations – probably not discretion in selecting which electors to count—but for 3 U.S. Code §§ 5 and 15, that would clearly be the case. As suggested, 3 USC § 15 may very well be unconstitutional.

Therefore, the Vice President should begin alphabetically in order of the states, and coming first to Arizona, not open the purported certification, but simply stop the count at that juncture, invoking authority of 3 U.S. Code § 5 and require the final determination of ascertainment of electors to be completed before continuing. The states would therefore have to act.