



May 4, 2022

Ms. Jessica E. Yates
Attorney Regulation Counsel
Ralph L. Carr Judicial Center
Colorado Supreme Court
1300 Broadway, Suite 500
Denver, CO 80203

**Re: Request for Investigation of Jenna L. Ellis (also known as Jenna Lynn Rives),¹
Colorado Registration Number 44026**

Dear Ms. Yates:

The States United Democracy Center is a nonpartisan organization advancing free, fair, and secure elections. We focus on connecting state and local officials, public-safety leaders, and pro-democracy partners across America with the tools and expertise they need to safeguard our democracy. Our work centers on making sure every election is safe, every vote is counted, and every voice is heard. Critical to our mission is helping to ensure that democracy violators are held accountable, including those in the legal profession who betray their professional responsibilities to uphold the rule of law.

INTRODUCTION AND SUMMARY

We respectfully request that the Office of Attorney Regulation Counsel (“OARC”) open an investigation into whether Ms. Jenna L. Ellis, a licensed Colorado lawyer, violated Colorado Rules of Professional Conduct (“Colo. RPC”) 1.1, 1.2, 2.1, 4.1, 5.1, and/or 8.4(a), (c), and (h) through her actions in late 2020 and early January 2021 to assist her clients, then-President Donald J. Trump and Mr. Trump’s campaign, in baseless attempts to overturn the results of the 2020 presidential election.

¹ We refer to Ms. Ellis using the name she used during the conduct at issue in the complaint, but we note that she is licensed in Colorado under the name Jenna Lynn Rives. The OARC has jurisdiction over this matter. *See* C.R.C.P. 242.1(a)(1) (granting disciplinary jurisdiction over a “lawyer admitted . . . to practice law in Colorado, regardless of where the lawyer’s conduct occurs or where the lawyer resides”). We are not aware of Ms. Ellis having a license to practice law in any other jurisdiction.

This memorandum concerns Ms. Ellis’s conduct during the period in the run-up to Election Day 2020 and continuing through Ms. Ellis’s willful participation in Mr. Trump’s unfounded efforts to overturn then-President-elect Joe Biden’s electoral victory by upending or postponing the final counting of the electoral votes at the Joint Session of Congress on January 6, 2021. As described below, Ms. Ellis was retained as a “senior legal adviser” to Mr. Trump and his campaign. After the 2020 election, Ms. Ellis made numerous public misrepresentations alleging fraud in the election—even as federal and state election officials repeatedly found that no fraud had occurred that could have altered the outcome and even as Mr. Trump and his allies brought and lost over 60 lawsuits claiming election fraud or illegality. As the fall of 2020 progressed, Ms. Ellis traveled from state to state with Rudolph Giuliani, another attorney for Mr. Trump, spreading misinformation regarding alleged fraud and urging state legislators to intervene in the election and “reclaim your authority,” up to and including certifying alternate slates of electors for Mr. Trump.

Ms. Ellis then knowingly and repeatedly assisted Mr. Trump’s various efforts to prevent the outcome of the 2020 election from being recognized by the Electoral College and Congress. In particular, she drafted two key memoranda that purported to provide a legal rationale and constitutional basis for then-Vice President Pence to upend the electoral count for Mr. Biden at the January 6, 2021, Joint Session of Congress. Ms. Ellis’ memoranda relied on the demonstrably false premise that “disputes” existed among slates of presidential electors in six swing states that had voted for Mr. Biden, and the equally false conclusion that, given these false purported disputes, Mr. Pence should not open and count electoral votes from those states and should instead suspend and postpone the electoral count. These memoranda were false, misleading, and dangerous attempts to support Mr. Trump’s goal of overturning the results of the election. Mr. Trump’s goal was to stop the electoral count for Mr. Biden and to assure Mr. Trump’s victory either by casting aside Biden electors in the six swing states in favor of Trump electors, or by throwing the election to the House of Representatives (where Mr. Trump hoped to prevail in a party-line vote of state delegations). Based on publicly available evidence, the OARC should investigate whether Ms. Ellis violated her obligations as an attorney licensed in Colorado through the following courses of conduct, explained in further detail below.

First, the OARC should investigate whether Ms. Ellis violated her professional obligations by knowingly providing objectively incorrect, false, and misleading legal advice that was designed to further Mr. Trump’s illegal schemes aimed at thwarting the count of electoral votes at the January 6 Joint Session.

Following Election Day 2020, Mr. Trump adopted various strategies to try to prevent the outcome of a lawful election from being recognized by the Electoral College and Congress. Mr. Trump ultimately landed on a strategy to pressure Mr. Pence to violate his own legal obligations under the Electoral Count Act of 1887, the United States Constitution, and a Concurrent Resolution of the Senate and House of Representatives by refusing to count the lawful electoral votes from six states. As noted above, this refusal would assertedly be based on alleged “disputes” among slates of electors in those states, with the goal being to assure Mr. Trump’s victory either by casting aside Biden electors or by throwing the election to the House of Representatives.

Ms. Ellis assisted Mr. Trump by drafting two memoranda that purported to provide a legal rationale for this extraordinary attempt to overturn a lawful presidential election, but those

memoranda were in fact factually and legally baseless. She supplemented those memoranda with public statements reaffirming her baseless theories. One of Ms. Ellis's memoranda was dated December 31, addressed to Mr. Trump, and delivered to Mr. Trump's Chief of Staff, who in turn sent it to Mr. Pence's senior staff; and the other was dated January 5 and addressed to Jay Sekulow, who was one of Mr. Trump's personal attorneys.

These memoranda rely on a legally frivolous and factually false premise. Ms. Ellis asserted that there were "two slates of electors" in each of those states, one for Mr. Biden and one for Mr. Trump. This was false because a "slate of electors" must meet state and federal legal requirements and there was only a single lawfully certified slate of electors in each state. Building from this false premise—which was objectively legally frivolous and factually false—Ms. Ellis asserted that Mr. Pence's constitutional duty was not to open the envelopes containing the electoral votes cast for Mr. Biden from those states, but instead to "direct a question" to those states to "confirm which of the two slates of electors have in fact been chosen in the manner" provided for by the legislature. This, too, was false, since clear and unbroken federal law and tradition confirmed that Mr. Pence's ministerial role was limited to opening the envelopes duly submitted by the states; any disputes among otherwise certified slates of electors would be resolved by the House and Senate. Finally, Ms. Ellis asserted in the memoranda that such a course of action was "meritorious" and would not "establish[] new precedent," even though no precedent supported her advice and even though an overwhelming wall of authority and tradition foreclosed it (authorities that Ms. Ellis near-totally ignored in her memoranda).

Ms. Ellis's memoranda were knowingly or recklessly false or misleading both as to fact and law. There is thus a strong basis to investigate whether Ms. Ellis violated relevant rules governing competence, judgment, candor, and truthfulness. *See, e.g.*, Colo. RPC 1.1, 2.1, 4.1(a), 8.4(c), 8.4(h). Moreover, Ms. Ellis's memoranda and her public statements were designed to assist Mr. Trump's efforts to prevent or delay the counting of the lawful electoral votes from six states—and a court recently found that Mr. Trump's efforts in this regard more likely than not violated federal criminal law. There is thus also good reason to investigate whether Ms. Ellis assisted in Mr. Trump's potentially criminal conduct in violation of Colo. RPC 1.2(d).

Second, the OARC should investigate whether Ms. Ellis violated her professional obligations by knowingly making public misrepresentations herself about fraud and manipulation in the election—and, separately, through her assistance to other attorneys for Mr. Trump (including Rudolph Giuliani) with respect to similar professional misconduct. Before Election Day, Mr. Trump asserted that Mr. Biden would be able to win only through fraud; after Election Day, Mr. Trump claimed that Mr. Biden's victory was the result of fraud. Over the following months, the American legal system undertook an extraordinary, comprehensive effort to investigate those and similar allegations and to adjudicate such claims. Federal and state election officials who investigated those allegations uniformly found them to be baseless. In addition, Mr. Trump and his allies brought and lost over 60 lawsuits claiming election fraud or illegality, in state and federal courts.

Nonetheless, Ms. Ellis made repeated public misrepresentations—through press conferences, Twitter, television, and otherwise—in which she falsely claimed that the election was fraudulent, rigged, and manipulated (particularly in the swing states of Arizona, Georgia,

Michigan, Nevada, Pennsylvania, and Wisconsin, all of which had voted for Mr. Biden). Many of Ms. Ellis’s statements were generalized public statements of widespread “fraud” that were wholly unsupported. At other times, she referred to specific false theories, such as claiming that election workers had illegally counted votes from “suitcases” of ballots or that voting results on Dominion Voting Systems’ machines had been manipulated. But Ms. Ellis’s falsehoods were not limited to the results of the 2020 election and alleged fraud. She also misrepresented both state law and the operation of the Electoral College process by falsely stating that Republican legislators in key states could lawfully refuse to certify Mr. Biden’s victory—and by falsely asserting that alternate slates of electors were lawfully certified under state law. Notably, Ms. Ellis took a tour of several swing states along with Mr. Giuliani, during which they both amplified false theories of voter fraud and urged state legislators to take action to prevent or reject the certification of the election results. Ms. Ellis told lawmakers they had “a variety of options in front of you” to overturn the election results and urged state legislators to “reclaim your authority.” These misrepresentations and falsehoods—as well as Ms. Ellis’s willful assistance to other attorneys in connection with their own misconduct—support an investigation into potential violations of Colo. RPC 4.1(a), 8.4(c), and 8.4(h). These misrepresentations and falsehoods also support an investigation into Ms. Ellis’s role in assisting and ratifying Mr. Giuliani’s and other attorneys’ similar conduct under Colo. RPC 8.4(a) and Colo. RPC 5.1(c).

In addition, it is worth noting that the First Amendment does not prevent OARC from investigating whether Ms. Ellis violated her professional responsibilities by engaging in knowingly false and misleading speech in connection with the 2020 election. Indeed, as a New York court explained in suspending Mr. Giuliani’s license to practice law in connection with much of the same conduct described above, attorneys may not knowingly misrepresent facts and make false statements in connection with representing clients.² Nor does the First Amendment protect speech that is part of an unlawful course of conduct. If the OARC finds that Ms. Ellis violated ethical prohibitions, then the First Amendment poses no barrier to imposing attorney discipline. Similarly, any subjective belief by Ms. Ellis in the justness of her cause, however sincerely held, does not justify Ms. Ellis’s conduct under settled law.

Ms. Ellis’s conduct caused substantial harm, impugning state and federal political and judicial institutions that had admirably ensured a free and fair election, and undertaken an extraordinary, comprehensive effort to investigate and adjudicate claims of fraud after the election. Yet Ms. Ellis threatened to cause even more significant harm: the lawless overturning of lawful presidential election results and indelible damage to our democracy. Had Ms. Ellis’s advice been followed, it could have permanently ended the peaceful transition of power in our country. Ms. Ellis’s conduct calls for a prompt and thorough investigation and, if the case outlined in this complaint is sustained, for substantial professional discipline.

FACTUAL BACKGROUND

In this section, we present relevant background in chronological order, relying on publicly available information and reporting about the events in question.

² *In re Giuliani*, 197 A.D.3d 1, 7 (N.Y. App. Div., 1st Dep’t 2021).

I. Ms. Ellis, as “Senior Legal Adviser” to Mr. Trump and His Campaign, Aided Mr. Trump’s Early Efforts to Falsely Discredit the 2020 Election as Fraudulent and “Rigged”

Donald Trump’s efforts to subvert and discredit the outcome of the 2020 election³ began long before Election Day.⁴ On May 26, 2020, Mr. Trump tweeted, “There is NO WAY (ZERO!) that Mail-In Ballots will be anything less than substantially fraudulent. . . . This will be a Rigged Election. No way!”⁵ On June 22, he tweeted, “MILLIONS OF MAIL-IN BALLOTS WILL BE PRINTED BY FOREIGN COUNTRIES, AND OTHERS. IT WILL BE THE SCANDAL OF OUR TIMES!”⁶ At a Wisconsin campaign rally on August 17, Mr. Trump said, “The only way we’re going to lose this election is if the election is rigged.”⁷ On August 27, he told the Republican National Convention that “the only way they can take this election away from us is if this is a rigged election.”⁸ On September 12, Mr. Trump told supporters in Nevada, “It’s a rigged election. It’s the only way we’re going to lose.”⁹ And on September 29, during a nationally televised presidential debate, Mr. Trump repeated, “[i]t’s a rigged election.”¹⁰

Jenna Ellis contributed to Mr. Trump’s efforts to subvert the results of the election well before Election Day. In November 2019, Ms. Ellis was retained as “senior legal adviser to the Trump 2020 campaign and to the president.”¹¹ According to Trump administration officials, during the runup to the November 2020 election, Ms. Ellis provided Mr. Trump with “false evidence of voter fraud” and encouraged him to engage in rhetoric disputing the integrity of mail-in ballots.¹²

Mr. Trump’s efforts to undermine the reliability of the election continued on and after November 3, 2020, Election Day. That night, as the vote count began to turn against him in several

³ See Kevin Liptak, *A List of the Times Trump Has Said He Won’t Accept the Election Results or Leave Office if He Loses*, CNN (Sept. 24, 2020, 9:59 AM ET), <https://www.cnn.com/2020/09/24/politics/trump-election-warnings-leaving-office/index.html>.

⁴ *United States National Archives, Electoral College Results – 2020*, <https://www.archives.gov/electoral-college/2020>.

⁵ Jonathan Karl, *Betrayal: The Final Act of the Trump Show* 37 (2021).

⁶ Bob Woodward & Robert Costa, *Peril* 131 (2021).

⁷ Terrance Smith, *Trump Has Longstanding History of Calling Elections ‘Rigged’ If He Doesn’t Like the Results*, ABC News (Nov. 11, 2020, 5:24 AM), <https://abcnews.go.com/Politics/trump-longstandinghistory-calling-elections-rigged-doesnt-results/story?id=74126926>; see Karl, *supra* note 5, at 113.

⁸ Woodward & Costa, *supra* note 6, at 131.

⁹ Karl, *supra* note 5, at 113.

¹⁰ *September 29, 2020 Presidential Debate Transcript*, Comm’n on Presidential Debates, <https://www.debates.org/voter-education/debate-transcripts/september-29-2020-debate-transcript>.

¹¹ Jonathan Swan, *Jenna Ellis Is the Latest Fox News Guest to Become a Trump Adviser*, Axios (Nov. 24, 2019), <https://www.axios.com/jenna-ellis-trump-adviser-87cebdba-a44f-4bbb-bdc3-3e044e76b746.html>; see also Jeremy W. Peters & Alan Feuer, *How s Trump’s Lawyer Jenna Ellis ‘Elite Strike Force’ Material?*, N.Y. Times (Dec. 3, 2020), <https://www.nytimes.com/2020/12/03/us/politics/jenna-ellis-trump.html>.

¹² Jon Swaine et al., *Conservative Nonprofit Group Challenging Election Results Around the Country Has Tie to Trump Legal Adviser Jenna Ellis*, Wash. Post (Dec. 7, 2020), https://www.washingtonpost.com/politics/thomas-more-jenna-ellis/2020/12/07/09057432-362d-11eb-b59c-adb7153d10c2_story.html.

key swing states, Mr. Trump tweeted, shortly after midnight, “We are up BIG, but they are trying to STEAL the Election. We will never let them do it. Votes cannot be cast after the Poles [*sic*] are closed!”¹³ Shortly thereafter, he tweeted, “I will be making a statement tonight. A big WIN!”¹⁴

That night, at around 2:30 a.m., Mr. Trump gave a brief speech in the East Room of the White House, claiming, “This is a fraud on the American public. . . . This is an embarrassment to our country. We were getting ready to win this election. Frankly, we did win this election. . . . So we’ll be going to the U.S. Supreme Court. . . . We want all voting to stop. We don’t want them to find any ballots at four o’clock in the morning and add them to the list.”¹⁵

Later that morning, Mr. Trump asserted on Twitter, “Last night I was leading, often solidly, in many key States, in almost all instances Democrat run & controlled. Then, one by one, they started to magically disappear as surprise ballot dumps were counted.”¹⁶

II. The Trump Campaign Began Pursuing Post-Election Legal Challenges and Its Fraud Narrative Unraveled

After Election Day, states with close election results completed the counting of ballots and conducted recounts as required by law, including in Georgia and Wisconsin.¹⁷ All recounts after Election Day confirmed Mr. Biden’s victory.¹⁸ No audit or recount identified any support for Trump’s claim that fraud had affected the outcome. Subsequently, the lawfully designated election officials and governors of both parties in key swing states (such as Arizona, Pennsylvania, and Michigan) affirmed the integrity of their states’ election returns.¹⁹

Nonetheless, in the weeks following the election, Mr. Trump, his campaign, and his allies launched and doggedly pursued dozens of lawsuits in both state and federal courts challenging the outcome of the election in multiple states (mainly Arizona, Georgia, Michigan, Nevada,

¹³ Donald Trump (@realDonaldTrump), Twitter (Nov. 4, 2020, 12:44 AM), <https://www.thetrumparchive.com>; Donald Trump (@realDonaldTrump), Twitter (Nov. 4, 2020, 12:49 AM), <https://www.thetrumparchive.com>; see Karl, *supra* note 5, at 126.

¹⁴ Karl, *supra* note 5, at 126.

¹⁵ Woodward & Costa, *supra* note 6, at 133; Karl, *supra* note 5, at 127; see Eugene Kiely et al., *Trump’s Falsehood-Filled Speech on the Election*, FactCheck.org (Nov. 4, 2020), <https://www.factcheck.org/2020/11/trumps-falsehood-filled-speech-on-the-election>.

¹⁶ Donald Trump (@realDonaldTrump), Twitter (Nov. 4, 2020, 10:04 AM), <https://www.thetrumparchive.com>.

¹⁷ See, e.g., Richard Fausset & Nick Corasaniti, *Georgia Recertifies Election Results Affirming Biden’s Victory*, N.Y. Times (Dec. 7, 2020), <https://www.nytimes.com/2020/12/07/us/politics/georgia-recertify-election-results.html>; Hailey Fuchs, *Recount in Two Wisconsin Counties Reinforces Biden’s Victory*, N.Y. Times (Nov. 29, 2020), <https://www.nytimes.com/2020/11/29/us/politics/recount-in-two-wisconsin-counties-reinforces-bidens-victory.html>.

¹⁸ Haley Schwab et al., *Vote Recounts and Election Contests in Battleground States*, Stanford-MIT Healthy Elections Project, (Mar. 10, 2021), [https://healthyelections.org/sites/default/files/2021-06/Recounts Contests Battleground States.pdf](https://healthyelections.org/sites/default/files/2021-06/Recounts%20Contests%20Battleground%20States.pdf).

¹⁹ See, e.g., Ann Gerhart, *Election Results Under Attack: Here Are the Facts*, Wash. Post (Mar. 11, 2021), <https://www.washingtonpost.com/elections/interactive/2020/election-integrity>.

Pennsylvania, and Wisconsin).²⁰ These lawsuits brought various baseless claims, including manipulation of voting machines, ballot box stuffing, barring of Republican observers from polling places, voting on behalf of dead persons, and violations of Article II, Section 1, clause 2 of the United States Constitution (often referred to as the Electors Clause).²¹

On November 12, 2020, the Election Infrastructure Government Coordinating Council and the Election Infrastructure Sector Coordinating Council²² jointly confirmed that the election had been secure: “There is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised. . . . While we know there are many unfounded claims and opportunities for misinformation about the process of our elections, we can assure you we have the utmost confidence in the security and integrity of our elections, and you should too.”²³

Notwithstanding this confirmation that the election had been free, fair, and secure—with no documented cases of fraud affecting the outcome—Ms. Ellis participated in Mr. Trump’s effort to pursue baseless claims of a fraudulent, stolen, or rigged election. In the days after the election, Ms. Ellis was part of a group of attorneys—including Mr. Giuliani and Sidney Powell (both of whom have since been sanctioned for attorney misconduct in this period)—who began appearing at the Trump campaign headquarters in Rosslyn, Virginia.²⁴ Then, on November 14, 2020, Mr. Trump formally announced via Twitter the formation of a legal team responsible for his campaign’s post-election legal challenges.²⁵ This team included Ms. Ellis, Mr. Giuliani, and other attorneys.²⁶ In his tweet, Mr. Trump announced, “I look forward to Mayor Giuliani spearheading the legal effort to defend OUR RIGHT to FREE and FAIR ELECTIONS! Rudy Giuliani, Joseph

²⁰ William Cummings, Joey Garrison & Jim Sergent, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA Today (Jan. 6, 2021, 10:50 AM), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001>.

²¹ Jacob Kovacs-Goodman, *Post-Election Litigation Analysis and Summaries*, Stanford-MIT Healthy Elections Project (Mar. 10, 2021), [https://healthyelections.org/sites/default/files/2021-06/Post-Election Litigation Analysis.pdf](https://healthyelections.org/sites/default/files/2021-06/Post-Election%20Litigation%20Analysis.pdf).

²² The Election Infrastructure Government Coordinating Council enables local, state, and federal governments to share information and collaborate on best practices to mitigate and counter threats to election infrastructure. Its members include officials from the Cybersecurity and Infrastructure Security Agency, the Election Assistance Commission, and the National Association of Secretaries of State, among others. *See, e.g.*, Election Infrastructure Subsector Government Coordinating Council Charter (Feb. 2021), <https://www.cisa.gov/sites/default/files/publications/gov-facilities-EIS-gcc-charter-2021-508.pdf>. The Election Infrastructure Sector Coordinating Council similarly enables critical infrastructure owners and operators, their trade associations, and industry representatives to interact on a wide range of sector-specific policies and activities. *See, e.g.*, Election Infrastructure Subsector Coordinating Council Charter (Feb. 2020), <https://www.cisa.gov/sites/default/files/publications/gov-facilities-EIS-scc-charter-2020-508.pdf>.

²³ Cybersecurity & Infrastructure Security Agency, *Joint Statement From Elections Infrastructure Government Coordinating Council & The Election Infrastructure Sector Coordinating Executive Committees* (Nov. 12, 2020), <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election>.

²⁴ Karl, *supra* note 5, at 133.

²⁵ Veronica Stracqualursi, *Trump Puts Giuliani in Charge of Post-Election Legal Fight After Series of Losses*, CNN (Nov. 16, 2020, 14:00 GMT), <https://edition.cnn.com/2020/11/14/politics/rudy-giuliani-trump-lawsuits-2020-election/index.html>.

²⁶ *Id.*

diGenova, Victoria Toensing, Sidney Powell, and Jenna Ellis, a truly great team, added to our other wonderful lawyers and representatives!”²⁷ Ms. Ellis would later describe this group as an “elite strike force team.”²⁸

On November 14, 2020, following Mr. Trump’s tweet, Ms. Ellis and Mr. Giuliani executed what campaign leadership saw as an attempted “coup.”²⁹ Ms. Ellis instructed campaign staffers that they must now answer to Ms. Ellis and Mr. Giuliani if they wanted to keep their jobs.³⁰

On November 17, 2020, Mr. Trump fired Christopher Krebs, the Director of the Cybersecurity and Infrastructure Security Agency in the United States Department of Homeland Security, who had earlier confirmed the security of the 2020 election and rebutted claims of hacking in the election.³¹ Mr. Krebs, a Trump appointee, later reaffirmed that the election had been “the most secure in U.S. history.”³²

III. Ms. Ellis Made Numerous Public Misrepresentations Regarding the 2020 Election, Including Alongside Mr. Giuliani and Other Attorneys for the Trump Campaign

Ms. Ellis made numerous media appearances discussing the election throughout the late fall of 2020, along with Mr. Giuliani and other Trump campaign attorneys, as well as various statements on Twitter.³³ For example, on November 13, 2020, Ms. Ellis made the following statements in a television interview with Bill Maher, each of which was objectively false:

- That Mr. Biden wanted to count “late ballots” and ballots from “dead” people and “from non-residents”,³⁴

²⁷ *Id.*

²⁸ Peters & Feuer, *supra* note 11.

²⁹ Karl, *supra* note 5, at 146.

³⁰ Philip Rucker et al., *20 Days of Fantasy and Failure: Inside Trump’s Quest to Overturn the Election*, Wash. Post (Nov. 28, 2020), https://www.washingtonpost.com/politics/trump-election-overturn/2020/11/28/34f45226-2f47-11eb-96c2-aac3f162215d_story.html; see Carol Leonnig & Philip Rucker, *I Alone Can Fix It: Donald J. Trump’s Catastrophic Final Year* 380–81 (2021).

³¹ Kevin Collier et al., *Trump Fires Head of Election Cybersecurity Who Debunked Conspiracy Theories*, NBC News (Nov. 17, 2020), <https://www.nbcnews.com/tech/security/trump-fires-head-u-s-election-cybersecurity-after-he-debunked-n1248063>; Woodward & Costa, *supra* note 6, at 159.

³² Christopher Krebs, Opinion, *Trump Fired Me for Saying This, But I’ll Say It Again: The Election Wasn’t Rigged*, Wash. Post (Dec. 1, 2020), https://www.washingtonpost.com/opinions/christopher-krebs-trump-election-wasnt-hacked/2020/12/01/88da94a0-340f-11eb-8d38-6aea1adb3839_story.html.

³³ E.g., Jenna Ellis (@JennaEllisEsq), Twitter (Nov. 16, 2020, 4:53 PM), <https://twitter.com/jennaellis/esq/status/1328456077705437190> (“Mainstream media is complicit in suppressing the TRUTH about election irregularities, illegality, and outright fraud and unlawful conduct.”).

³⁴ Ross A. Lincoln & Phil Owen, *Maher Fights with Trump Campaign Lawyer Jenna Ellis Over Her Nonstop Falsehoods: ‘Just Stop It’*, Wrap (Nov. 13, 2020, 9:57 PM), <https://www.thewrap.com/maher-fights-with-trump-campaign-lawyer-jenna-ellis-over-her-nonstop-falsehoods-just-stop-it>.

- That Republican poll observers had lacked “meaningful access” to the polls and had not been “able to observe the ballots being counted” “in Pennsylvania or Michigan”;³⁵
- That “682,000 ballots” “were counted without meaningful access from Republicans or team Trump”;³⁶
- That there were “over 11,000 credible reports that are coming in through our election hotline” of ballots that were “manipulated,” “counted twice,” “changed,” or had signatures “destroyed”;³⁷ and
- That “Hillary Clinton still has not conceded the 2016 election.”³⁸

On November 19, 2020, Ms. Ellis, along with Mr. Giuliani, Ms. Powell, and other attorneys for the Trump campaign, spoke at a press conference in the lobby of the Republican National Committee’s headquarters in Washington, D.C.³⁹ Mr. Giuliani introduced Ms. Ellis as part of the “legal team” “representing President Trump” and “the Trump campaign.”⁴⁰

During this press conference, Mr. Giuliani falsely alleged that there existed “a plan from a centralized place to execute these various acts of voter fraud” in “big cities controlled by Democrats.”⁴¹ Mr. Giuliani declared falsely that “[o]ur votes are counted in Germany and in Spain, by a company owned by affiliates of [former Venezuelan President Hugo] Chavez and [current Venezuelan President Nicolás] Maduro,” and that the “secretary of state of Michigan never bothered to find out that the votes in her state were being counted in Germany, by a Venezuelan company.”⁴²

Later in this same press conference, Ms. Powell falsely asserted that Dominion’s voting machines had been tampered with by Venezuelan Communist forces at the direction of Hugo Chavez (who had died seven years prior).⁴³ By the time of this press conference, the Trump

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Rucker, *20 Days*, *supra* note 30; Aaron Blake, *Trump’s Legal Team Lights a Fuse Beneath Its Remaining Credibility*, Wash. Post (Nov. 19, 2020), <https://www.washingtonpost.com/politics/2020/11/19/trumps-legal-team-lights-fuse-beneath-its-remaining-credibility/>; *see also* Leonnig & Rucker, *supra* note 30, at 390–91; Karl, *supra* note 5, at 147.

⁴⁰ *Rudy Giuliani Trump Campaign Press Conference Transcript November 19: Election Fraud Claims*, Rev (Nov. 19, 2020), <https://www.rev.com/blog/transcripts/rudy-giuliani-trump-campaign-press-conference-transcript-november-19-election-fraud-claims> [hereinafter “November 19 Conference Transcript”]; *see also* *Trump Campaign News Conference on Legal Challenges*, C-SPAN (Nov. 19, 2020), <https://www.c-span.org/video/?478246-1/trump-campaign-alleges-voter-fraud-states-plans-lawsuits> [hereinafter “November 19 Conference Video”].

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*; *see also* Blake, *supra* note 39; Rucker, *20 days*, *supra* note 30.

campaign had already prepared an internal memorandum debunking false conspiracy theories about Dominion, including that it had direct ties to Venezuela.⁴⁴

About halfway through the press conference, Ms. Ellis presented herself as the “senior legal adviser to the Trump campaign.”⁴⁵ She stated that the election had been infected by “corruption and the irredeemably challenged and overturned votes that are absolutely corrupt in all of these counties. It is irredeemably compromised.”⁴⁶ When asked to substantiate allegations that Joe Biden was part of a national conspiracy, Ellis commented, “Your question is fundamentally flawed when you’re asking, where’s the evidence.”⁴⁷ Rather, Ellis said, they were providing “an overview and a preview of what we’ve discovered.”⁴⁸

Several days later, Attorney General William Barr told Mr. Trump that, based on the Department of Justice’s investigation, Mr. Trump’s voting machine claims were “bullshit.”⁴⁹

On December 1, 2020, Attorney General Barr, whose Department of Justice had monitored the relevant state elections for fraud and illegality, said in a press interview that “to date, we have not seen fraud on a scale that could have effected a different outcome in the election.”⁵⁰ In a

⁴⁴ Alan Feuer, *Trump Campaign Knew Lawyers’ Voting Machine Claims Were Baseless, Memo Shows*, N.Y. Times (Nov. 6, 2021), <https://www.nytimes.com/2021/09/21/us/politics/trump-dominion-voting.html>; *see also, e.g.*, Daniel Funke & Samantha Putterman, *No Evidence Dominion Voting Systems Caused Widespread Tabulation Errors That Flipped Votes for Biden*, Politifact (Nov. 13, 2020), <https://www.politifact.com/factchecks/2020/nov/13/facebook-posts/no-evidence-dominion-voting-systems-caused-widespr/>; Daniel Funke & Samantha Putterman, *Trump’s tweet about 2.7 million deleted votes is baseless*, Politifact (Nov. 13, 2020), <https://www.politifact.com/factchecks/2020/nov/12/donald-trump/trumps-tweet-about-27-million-deleted-votes-basele>.

⁴⁵ November 19 Conference Transcript, *supra* note 40; November 19 Conference Video *supra* note 40.

⁴⁶ *Id.*

⁴⁷ *Id.*; *see also* Leonnig & Rucker, *supra* note 30, at 392.

⁴⁸ November 19 Conference Transcript, *supra* note 40; November 19 Conference Video *supra* note 40; *see also* Blake, *supra* note 39; Christina Prignano, *Four Takeaways from Rudy Giuliani’s Meandering Press Conference*, Boston Globe (Nov. 19, 2020, 7:56 PM), <https://www.bostonglobe.com/2020/11/19/nation/four-takeaways-rudy-giulianis-meandering-press-conference>.

⁴⁹ Woodward & Costa, *supra* note 6, at 166. The same day, after Michigan had certified Mr. Biden’s win in that state, Ms. Ellis made a statement on behalf of the campaign that sought to dismiss the certification of the vote as a “procedural step”: “Certification by state officials is simply a procedural step. We are going to continue combatting election fraud around the country as we fight to count all the legal votes.” Alana Wise, *Michigan Certifies Joe Biden’s Election Victory*, NPR (Nov. 23, 2020, 1:30 PM), <https://www.npr.org/sections/biden-transition-updates/2020/11/23/938015808/michigan-a-state-where-biden-leads-to-certify-election-results>. On November 28, 2020, Ms. Ellis tweeted, “Election official FRAUD must be and will be exposed in #Wisconsin! Count all LEGAL votes!” Jenna Ellis (@JennaEllisEsq), Twitter (Nov. 28, 2020, 10:54 PM), <https://twitter.com/jennaellis/status/1332895810313392130>.

⁵⁰ Michael Balsamo, *Disputing Trump, Barr Says No Widespread Election Fraud*, Assoc. Press (Dec. 1, 2020), <https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d>; *see Eastman*, 2022 WL 894256, at *2 (“In early December, Attorney General Barr publicly stated there was no evidence of fraud . . .”).

meeting with Mr. Trump later that day, Attorney General Barr advised Mr. Trump that the theory of voting machine fraud on which he was relying was “demonstrably crazy.”⁵¹

Nonetheless, Ms. Ellis knowingly and willfully assisted Mr. Trump’s continued efforts to falsely discredit the election. On December 2, 2020, Mr. Trump gave a White House speech about the election, stating that the nation’s election system was “under coordinated assault and siege” and that it was “statistically impossible” for him to have lost to Mr. Biden.⁵² According to an administration official, this speech was “a Jenna production.”⁵³

IV. The Trump Campaign Lost Its Post-Election Legal Challenges

As the fall of 2020 continued, Mr. Trump and his lawyers pursued numerous lawsuits to overturn the results of the election, despite a lack of evidence to support their claims.⁵⁴ By early December 2020, Mr. Trump and his allies had lost more than 50 post-election lawsuits.⁵⁵ In some of these lawsuits, claims of fraud were withdrawn.⁵⁶ In others, reputable lawyers refused to make them and withdrew.⁵⁷ In still others, Mr. Trump’s lawyers pressed forward with claims of fraud, but courts found the claims unsubstantiated.⁵⁸ Ultimately, Mr. Trump and his allies lost over 60 lawsuits claiming election fraud or illegality, in both state and federal courts around the country.⁵⁹ In the course of these lawsuits, Mr. Trump’s attorneys engaged in conduct that led to the imposition of judicial sanctions in multiple actions.

While Ms. Ellis did not sign her name to the papers in these lawsuits or appear in court to present argument, she publicly commented on these losses on several occasions and continued to

⁵¹ Woodward & Costa, *supra* note 6, at 170.

⁵² Philip Rucker, *Trump Escalates Baseless Attacks on Election with 46-Minute Video Rant*, Wash. Post (Dec. 2, 2020), https://www.washingtonpost.com/politics/trump-election-video/2020/12/02/f6c8d63c-34e8-11eb-a997-1f4c53d2a747_story.html.

⁵³ Swaine, *supra* note 12.

⁵⁴ Many of these lawsuits were filed by the Thomas More Society (to which Ms. Ellis served as special counsel), through its “Amistad Project.” Swaine, *supra* note 12; Jim Rutenberg et al., *77 Days: Trump’s Campaign to Subvert the Election*, N.Y. Times (June 15, 2021), <https://www.nytimes.com/2021/01/31/us/trump-election-lie.html>.

⁵⁵ Woodward & Costa, *supra* note 6, at 178.

⁵⁶ Pete Williams & Nicole Via y Rada, *Trump’s Election Fight Includes Over 50 Lawsuits. It’s Not Going Well*, NBC News (Dec. 10, 2020, 12:42 PM ET), <https://www.nbcnews.com/politics/2020-%20election/trump-s-election-fight-includes-over-30-lawsuits-it-s-n1248289>.

⁵⁷ Aaron Blake, *Timeline: Trump’s Revolving Door of Lawyers*, Wash. Post (Nov. 23, 2020), <https://www.washingtonpost.com/politics/2020/11/17/trump-keeps-losing-court-he-keeps-losing-his-lawyers-too/>.

⁵⁸ See, e.g., Louis Jacobson et al., *Donald Trump Has Lost Dozens of Election Lawsuits. Here’s Why*, Politifact (Dec. 10, 2020), <https://www.politifact.com/article/2020/dec/10/donald-trump-has-lost-dozens-election-lawsuits-her/>.

⁵⁹ Cummings, Garrison & Sergent, *supra* note 20; Amy Sherman & Miriam Valverde, *Joe Biden Is Right That More Than 60 Of Trump’s Election Lawsuits Lacked Merit*, Politifact (Jan. 8, 2021), <https://www.politifact.com/factchecks/2021/jan/08/joe-biden/joe-biden-right-more-60-trumps-election-lawsuits-1/>.

assert—falsely—that there had been massive fraud in the election.⁶⁰ Appearing on *The Beat with Ari Melber* on MSNBC on November 23, 2020, Ms. Ellis was asked about the Trump campaign’s losing record in the courts.⁶¹ By this time, many of Mr. Trump’s lawsuits had already been dismissed or withdrawn, and none of his lawsuits alleging fraud succeeded.⁶² Nonetheless, Ms. Ellis doubled down on her objectively false and wholly unsupported claim that “the election was stolen and President Trump won by a landslide.”⁶³

On November 27, 2020, after a federal appellate court affirmed dismissal of one such lawsuit (in an opinion written by a judge appointed by then-President Trump), Ms. Ellis tweeted a joint statement on behalf of her and Mr. Giuliani: “The activist judicial machinery in Pennsylvania continues to cover up the allegations of massive fraud. We are very thankful to have had the opportunity to present proof and the facts to the PA state legislature. On to SCOTUS!”⁶⁴

V. Ms. Ellis and Mr. Giuliani Urged State Legislators to Attempt to Overturn the Election Results

In late November, as the Trump campaign accumulated losses in the courts, Ms. Ellis and Mr. Giuliani escalated their efforts to undo the election. They went on a tour of swing states that had voted for Mr. Biden in an attempt both to undermine the legitimacy of the election by airing false claims of fraud and to convince Republican state legislators to overturn the election results in each of those states (including by certifying alternate slates of Trump electors).

Pennsylvania. Ms. Ellis’s first stop was Pennsylvania, which certified its election results on November 24, 2020, and which Mr. Biden won by more than 80,000 votes.⁶⁵ The day after that certification, on November 25, Ms. Ellis and Mr. Giuliani addressed a meeting of the Republican

⁶⁰ See, e.g., Jeremy Roebuck, *‘Not how the Constitution works’: Federal Judge Tosses Trump Suit Seeking to Disrupt Pa. Election Results*, Philadelphia Inquirer (Nov. 21, 2020), <https://www.inquirer.com/news/pennsylvania-election-lawsuit-trump-dismissed-matthew-brann-certification-vote-results-20201121.html> (“Today’s decision . . . helps us in our strategy to get expeditiously to the U.S. Supreme Court.”); Jon Swaine, *In Scathing Opinion, Federal Judge Dismisses Trump Campaign Lawsuit in Pennsylvania*, Wash. Post (Nov. 21, 2020), https://www.washingtonpost.com/politics/us-judge-dismisses-trump-campaign-lawsuit-in-pa/2020/11/21/cc097fbc-2c50-11eb-9b14-ad872157ebc9_story.html (“We are disappointed we did not at least get the opportunity to present our evidence at a hearing.”).

⁶¹ Ian Schwartz, *MSNBC’s Ari Melber vs. Trump Legal Team’s Jenna Ellis: “What Is The Point Of All Of This?”*, RealClearPolitics (Nov. 23, 2020), https://www.realclearpolitics.com/video/2020/11/23/msnbc_ari_melber_vs_trump_legal_teams_jenna_ellis_what_is_the_point_of_all_of_this.html.

⁶² Williams & Via y Rada, *supra* note 56.

⁶³ Schwartz, *supra* note 61.

⁶⁴ Jenna Ellis (@JennaEllisEsq), Twitter (Nov. 27, 2020, 12:46 PM), <https://twitter.com/jennaellis/status/1332380180065738754>; see Kara Scannell, *Federal Appeals Court Slams Trump Campaign Efforts to Turn Tide in Pennsylvania Ruling, Saying ‘Claims Have No Merit’*, CNN (Nov. 27, 2020, 7:13 PM ET), <https://www.cnn.com/2020/11/27/politics/trump-pennsylvania-lawsuit-appeal/index.html>.

⁶⁵ Press Release, Pennsylvania Pressroom, *Department of State Certifies Presidential Election Results* (Nov. 24, 2020), <https://www.media.pa.gov/pages/state-details.aspx?newsid=435>.

State Senate Majority Policy Committee designed to highlight alleged voter fraud.⁶⁶ The witnesses included self-described data experts and amateur statisticians, Republican ballot-counting observers, and voters who alleged they had seen suspicious activities while voting.⁶⁷

At the meeting, Ms. Ellis and Mr. Giuliani advised that the Pennsylvania legislature could decide to give Pennsylvania's 20 Electoral College votes to Mr. Trump by certifying their own slate of Trump electors.⁶⁸ Ms. Ellis told the legislators that they had "a variety of options in front of you" to overturn the election results and suggested that it would in fact be unconstitutional for them to certify the then-existing, legitimate results: "You can call for a special election. Still, you can direct the manner of your electors. You have a variety [of] constitutional options, but one option should not be to ignore it and to certify a corrupted, irredeemably compromised election."⁶⁹ She added, "Even though you have a manner in which your electors are generally selected in Pennsylvania, and that's worked for the past presidential election . . . this is an election that has been corrupted. And so you can't go through that method. The Legislature is the authorized entity in the Constitution that selects the manner. You can take that power back at any time."⁷⁰

Mr. Giuliani focused his address to the Pennsylvania legislators on an alleged discrepancy between the number of mail-in ballots counted (2,589,242) and the number of mail-in ballots distributed (1,823,148) before the election.⁷¹ At Trump campaign headquarters, shortly after the hearing was over, campaign spokesperson Tim Murtaugh attempted to locate backup for Mr. Giuliani's claim and discovered that it was untrue: there had been 1,823,148 ballots sent out for the *primary* election in June, not the *general* election in November (for which 3,087,524 mail-in ballots had been sent out).⁷² Mr. Murtaugh told Ms. Ellis, "You need to get him to stop saying this. He's made a mistake. It's not true."⁷³ Despite having been made aware of the falsity of Mr. Giuliani's claim, Ms. Ellis rejected Mr. Murtaugh's request: "It's too late . . . He's been saying it and he's going to keep saying it."⁷⁴

⁶⁶ Crystal Hill, *Giuliani Tells Pennsylvania Legislators They Can Override Popular Vote to Appoint Pro-Trump Electors*, Yahoo! News (Nov. 25, 2020), <https://news.yahoo.com/giuliani-tells-pennsylvania-legislators-they-can-override-popular-vote-to-appoint-pro-trump-electors-010121925.html>; see also Rucker, *20 days*, *supra* note 30; Karl, *supra* note 5, at 210.

⁶⁷ Hill, *supra* note 66.

⁶⁸ *Id.*

⁶⁹ Josh Wingrove et al., *Trump Calls Into Pennsylvania Event, Urges Overturning Election*, Bloomberg Quint (Nov. 27, 2020, 5:02 AM IST), <https://www.bloombergquint.com/politics/trump-plans-to-attend-republican-election-hearing-with-giuliani>.

⁷⁰ Hill, *supra* note 66.

⁷¹ *Id.*; see Karl, *supra* note 5, at 210.

⁷² Karl, *supra* note 5, at 211.

⁷³ *Id.*

⁷⁴ *Id.*

Arizona. Several days later, Ms. Ellis and Mr. Giuliani traveled to Arizona, which certified its results on November 30, 2020, and which Mr. Biden won by more than 10,000 votes.⁷⁵ The same day that Arizona certified its results in favor of Mr. Biden, Ms. Ellis and Mr. Giuliani held a meeting with Republican legislators in Phoenix, wherein Mr. Giuliani elicited stories of unsubstantiated allegations of fraud in the election.⁷⁶ As with Pennsylvania, Ms. Ellis urged the legislators to reject the election results: “We are asking you to step in to make sure that the corruption that occurred here does not stand.”⁷⁷ Ms. Ellis tweeted after the certification that “[t]he certification of Arizona’s FALSE results is unethical and knowingly participating in the corruption that has disenfranchised AZ voters ... BUT, this in no way impacts the state legislature's ability to take back the proper selection of delegates.”⁷⁸

Michigan. Several days later, Ms. Ellis and Mr. Giuliani traveled to Michigan, which had certified its election results on November 23, 2020, and which Mr. Biden had won by more than 154,000 votes.⁷⁹ On December 2, Ms. Ellis and Mr. Giuliani appeared at a four-hour Michigan House Oversight Committee hearing to urge Republican legislators to intervene in the November 2020 election results; notably, Mr. Giuliani repeated the false claim—which Mr. Murtaugh had already debunked, as Ms. Ellis knew—about more absentee ballots coming in than had been sent out in Pennsylvania.⁸⁰ The purported purpose of the hearing was to hear testimony about alleged fraud at the location where Detroit’s absentee ballots had been counted; many of those allegations had already been rejected by courts.⁸¹

⁷⁵ Andrew Oxford, *Arizona Secretary of State Certifies Election Results with Biden Winning State's 11 Electoral Votes*, Arizona Republic (Nov. 30, 2020, 4:06 PM MT), <https://www.azcentral.com/story/news/politics/elections/2020/11/30/arizona-secretary-state-certify-election-results-monday/6444577002>.

⁷⁶ Bob Ortega, *Arizona Certifies Biden's Victory*, CNN (Dec. 1, 2020, 1:08 AM), <https://www.cnn.com/2020/11/30/politics/joe-biden-arizona-certification/index.html>.

⁷⁷ Ryan Randazzo & Maria Polletta, *Arizona GOP Lawmakers Hold Meeting on Election Outcome with Trump Lawyer Rudy Giuliani*, Arizona Republic (Nov. 30, 2020, 7:02 PM MT), <https://www.azcentral.com/story/news/politics/elections/2020/11/30/republican-lawmakers-arizona-hold-meeting-rudy-giuliani/6468171002>. Ms. Ellis also said during the same meeting, “[W]e aren’t asking you to step in and overturn an election,” *id.*, a statement hard to square with her other statements concerning the Arizona results.

⁷⁸ Oma Seddiq, *Arizona Certifies Biden's Win as Trump's Legal Team Holds an Event in the State Over the President's Baseless Claims of Voter Fraud*, Bus. Insider (Nov. 30, 2020, 4:34 PM), <https://www.businessinsider.com/arizona-certifies-election-as-trump-team-holds-event-on-voter-fraud-2020-11>.

⁷⁹ Alana Wise, *Michigan Certifies Joe Biden's Election Victory*, NPR (Nov. 23, 2020, 1:30 PM), <https://www.npr.org/sections/biden-transition-updates/2020/11/23/938015808/michigan-a-state-where-biden-leads-to-certify-election-results>.

⁸⁰ See *Giuliani*, 197 A.D.3d at 9-10; *supra* notes 71-74 and accompanying text; Craig Mauger, *Giuliani Pushes Michigan Lawmakers to Intervene in Election*, Detroit News (Dec. 3, 2020, 8:49 AM), <https://www.detroitnews.com/story/news/politics/2020/12/02/giuliani-michigan-republicans-election-fraud-allegations/3788198001>.

⁸¹ *Id.* For example, a state court had already deemed allegations of fraud at the canvassing center to be “incorrect” and “not credible.” *Constantino v. City of Detroit*, No. 20-014780, at 13 (Mich. Cir. Ct. Nov. 13, 2020), available at https://www.michigan.gov/-/media/Project/Websites/sos/33lawens/Opinion_and_order_Nov_13_2020.pdf?rev=3bfa28f818ad49b5b45a0cd235a6126e.

At this hearing, Ms. Ellis repeatedly railed against alleged corruption and foreign influence in the 2020 election.⁸² Ms. Ellis stated that “this is not a political question, this is a legal one. When you have . . . substantial evidence of fraud and corruption in an election, it’s your obligation under the United States [C]onstitution to not allow the corruption to continue.”⁸³ The hearing included statements from an individual claiming that election workers had run ballots through tabulators multiple times and that ballots were counted more than once—claims that a court had already considered and found incorrect and not credible.⁸⁴

At the conclusion of the hearing, Ms. Ellis stated, “[N]o honest person can hear these citizens of your own state today . . . and can let this proceed.”⁸⁵ She said, “This was election officials who have violated the laws of your state that you, as the General Assembly, passed in order to preserve election integrity. . . . [Y]ou have more than enough just based on the election official, absolute fraud, absolutely ignoring the laws of this general assembly, the laws of your state to reclaim your authority. That is your duty. It’s your constitutional obligation. And that’s why we are in front of you.”⁸⁶ She added, “There have been a massive amount of irregularities. There have been ignorance and complete disregard for the law of the State of Michigan.”⁸⁷ Mr. Giuliani stated that he wanted Michigan lawmakers to intervene and “take back your power.”⁸⁸

Georgia. The next day, on December 3, 2020, Ms. Ellis and Mr. Giuliani appeared in Georgia, which had certified its election results on November 20 and which Mr. Biden had won by more than 12,000 votes.⁸⁹ There, Ms. Ellis and Mr. Giuliani attended a Georgia Senate hearing at the State Capitol in Atlanta.⁹⁰ During the hearing, a volunteer Trump campaign attorney, Jacki Pick, falsely alleged that two Fulton County election workers had engaged in maneuvers involving “suitcases” of ballots pulled out from under a table and illegally counted through the night.⁹¹ As

⁸² Mauger, *supra* note 80.

⁸³ *Trump Lawyers Rudy Giuliani & Jenna Ellis Testify Before Michigan House Oversight Committee: Full Transcript*, Rev (Dec. 3, 2020), <https://www.rev.com/blog/transcripts/trump-lawyers-rudy-giuliani-jenna-ellis-testify-before-michigan-house-oversight-committee-transcript> [hereinafter “Michigan Committee Transcript”].

⁸⁴ Teo Armus, *Trump Campaign’s Star Witness in Michigan Was Deemed ‘not credible.’ Then, Her Loud Testimony Went Viral*, Wash. Post. (Dec. 3, 2020), <https://www.washingtonpost.com/nation/2020/12/03/melissa-carone-michigan-trump-giuliani-election/>; Lauren Gibbons, *In Unusual Hearing, Rudy Giuliani Asks Michigan Lawmakers to ‘take back your power,’* MLive.com (Dec. 3, 2020, 6:21 PM ET), <https://www.mlive.com/public-interest/2020/12/in-unusual-hearing-rudy-giuliani-asks-michigan-lawmakers-to-take-back-your-power.html>.

⁸⁵ Michigan Committee Transcript, *supra* note 83.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Mauger, *supra* note 80.

⁸⁹ Kate Brumback, *Georgia Officials Certify Election Results Showing Biden Win*, Assoc. Press (Nov. 20, 2020), <https://apnews.com/article/georgia-certify-election-joe-biden-ea8f867d740f3d7d42d0a55c1aef9e69>.

⁹⁰ Jeremy Diamond et al., *Giuliani Hospitalized After Testing Positive for Coronavirus*, CNN (Dec. 7, 2020, 9:34 AM), <https://www.cnn.com/2020/12/06/politics/rudy-giuliani-coronavirus-positive/index.html>.

⁹¹ Jason Szep & Linda So, *Trump Campaign Demonized Two Georgia Election Workers – and Death Threats Followed*, Reuters (Dec. 1, 2021, 8 P.M. GMT), <https://www.reuters.com/investigates/special-report/usa-election-threats-georgia>.

Ms. Pick spoke, Ms. Ellis tweeted about the “SHOCKING... VIDEO EVIDENCE” being presented at the hearing, declaring a “FRAUD!!!”⁹² Yet as a New York court later explained with respect to the same video evidence (in the context of an opinion suspending Mr. Giuliani’s law license), no fraud occurred: “When viewed in full context and not as snippets, the videos do not show secreting and counting of illegal ballots,” and a subsequent investigation “concluded that there was no improper activity.”⁹³

The next day, on December 4, 2020, Ms. Ellis tweeted, “No honest person can look at the testimony from all of these witnesses across six states—how many laws were ignored and broken, and the video from Georgia—and conclude that we should just proceed as a nation with the false certified results.”⁹⁴

Colorado. Finally, on December 15, 2020, Ms. Ellis appeared before the Colorado legislature’s Legislative Audit Committee to testify at a hearing on Colorado’s election integrity called by the committee’s Republican chairperson.⁹⁵ Colorado had certified its election results on December 8, 2020; Mr. Biden won Colorado by more than 430,000 votes.⁹⁶ In Colorado, Ms. Ellis pressed the committee to investigate the state’s use of Dominion voting software.⁹⁷ In doing so, Ms. Ellis pointed to alleged problems with Dominion’s systems that had already been debunked.⁹⁸

VI. The Electoral College Process Moved Toward Completion as Ms. Ellis and Mr. Giuliani Promoted the Appointment of Alternate Slates of Electors

By early December, every relevant state and federal official or agency that had conducted audits, recounts, or investigations had found no evidence of significant or outcome-changing fraud in any state, and every litigated claim of fraud had failed in the courts.

⁹² *Id.*

⁹³ *Giuliani*, 197 A.D.3d at 18–19.

⁹⁴ Jenna Ellis (@JennaEllisEsq), Twitter (Dec. 4, 2020, 8:29 AM), <https://twitter.com/jennaellisesq/status/1334852344241135616>.

⁹⁵ Jesse Paul, *8-hour, Republican-led Hearing on Colorado’s Election Integrity Ends Without Evidence of Widespread Fraud*, Colo. Sun (Dec. 15, 2020, 7:02 MST), <https://coloradosun.com/2020/12/15/colorado-election-integrity-hearing-no-evidence>.

⁹⁶ Tom Massmann, *Colorado Certifies Final Election Results*, KRDO (Dec. 8, 2020, 12:16 PM), <https://krdo.com/news/top-stories/2020/12/08/colorado-certifies-final-election-results>.

⁹⁷ Paul, *supra* note 95.

⁹⁸ *Id.*; see also Daniel Funke & Samantha Putterman, *No Evidence Dominion Voting Systems Caused Widespread Tabulation Errors That Flipped Votes for Biden*, Politifact (Nov. 13, 2020), <https://www.politifact.com/factchecks/2020/nov/13/facebook-posts/no-evidence-dominion-voting-systems-caused-widespr>.

Meanwhile, the Electoral College process moved to completion.⁹⁹ By December 8, 2020, each state had certified its electors.¹⁰⁰ On December 14, the Electoral College met and voted 306-232 for Mr. Biden.¹⁰¹ On December 15, in a speech on the Senate floor, Senate Majority Leader Mitch McConnell congratulated “President-elect Joe Biden.”¹⁰²

Despite the absence of proof of fraud associated with the election, Mr. Trump continued to insist that the election had been stolen and to attempt to falsely discredit the results. Senior members of the Trump administration attempted to disabuse him of these views. For example, at a December 15, 2020 meeting, Deputy Attorney General Jeffrey Rosen, Principal Associate Deputy Attorney General Richard Donoghue, and other officials told Mr. Trump, with respect to accusations of fraud, that people were telling him “things that are not right” and “not accurate.”¹⁰³ On December 27, Mr. Donoghue told Mr. Trump “in very clear terms” that after “dozens of investigations, hundreds of interviews” looking at “Georgia, Pennsylvania, Michigan, and Nevada,” the Department of Justice had concluded that Mr. Trump’s “major allegations are not supported by the evidence developed.”¹⁰⁴

Undeterred and just like Mr. Trump, Ms. Ellis continued to espouse false claims that the election had been infected by widespread fraud and stolen from Mr. Trump. For example, on December 14, 2020, the same day that the Electoral College cast their votes for Mr. Biden, Ms. Ellis tweeted, referencing the meeting of the Michigan electors, “FALSE certification!”¹⁰⁵

Ms. Ellis also continued to call on state legislators, as she had during her swing-state tour with Mr. Giuliani, to appoint alternate slates of electors to vote for Mr. Trump. For example:

- On December 21, Ms. Ellis retweeted Mr. Trump’s tweet, “Conservatives Call on State Legislators to Appoint New Electors, in Accordance with the Constitution,” with the

⁹⁹ *The Electoral College: A 2020 Presidential Election Timeline*, Cong. Res. Serv. (Oct. 22, 2020), <https://crsreports.congress.gov/product/pdf/IF/IF11641> [hereinafter “*Presidential Election Timeline*”].

¹⁰⁰ Miles Parks, *Biden’s Victory Cemented as States Reach Key Electoral College Deadline*, NPR (Dec. 8, 2020, 1:45 PM ET), <https://www.npr.org/2020/12/08/942288226/bidens-victory-cemented-as-states-reach-deadline-for-certifying-vote-tallies>.

¹⁰¹ *Track Electoral College Votes, State by State*, CNN (Dec. 14, 2020, 11:16 AM ET), <https://www.cnn.com/2020/12/14/politics/2020-electoral-college-vote-tracker/index.html>.

¹⁰² Nicholas Fandos & Luke Broadwater, *McConnell Congratulates Biden and Lobbies Colleagues to Oppose a Final-Stage G.O.P. Effort to Overturn His Victory*, N.Y. Times (Dec. 15, 2020), <https://www.nytimes.com/2020/12/15/us/politics/mitch-mcconnell-congratulates-biden.html>.

¹⁰³ *Interview of Jeffrey Rosen*, U.S. Sen. Comm. on Judiciary, 28-30 (Aug. 7, 2021), <https://www.judiciary.senate.gov/imo/media/doc/Rosen%20Transcript.pdf>.

¹⁰⁴ Interview of Richard Peter Donoghue, *Eastman v. Thompson*, No. 8:22-cv-00099-DOC-DFM, ECF No. 164-6, at 59-60 (C.D. Cal. Mar. 3, 2022).

¹⁰⁵ Jenna Ellis (@JennaEllisEsq), Twitter (Dec. 14, 2020, 2:58 PM), <https://twitter.com/jennaellis/status/1338574122725613576>.

message, “This [is] the Constitution’s solution to #StopTheSteal. The state legislatures do not need a judicial order to exercise their authority under Article II, Sec 1.2.”¹⁰⁶

- The next day, on December 22, Ms. Ellis tweeted, “The judicial branch has failed the American people. The state legislatures do not need a court order. Will they step up and protect election integrity? They are who the Constitution specifically grants plenary authority to. They HAVE to act.”¹⁰⁷
- On December 29, Ms. Ellis stated on Newsmax TV that the state legislatures were “the last full stop that our Founders required of them [sic] to make sure that the manner in which electoral delegates are selected has to be according to that which each general assembly says. We know that in six states those laws were absolutely, flagrantly violated.”¹⁰⁸

At the same time, Mr. Giuliani and other Trump campaign allies were working “to put forward illegitimate electors from seven states that Trump lost” and to “coordinate[] the nuts-and-bolts of the process on a state-by-state level.”¹⁰⁹ Consequently, on December 14, 2020, certain groups of Trump supporters met in seven states and declared themselves presidential electors for Mr. Trump.¹¹⁰ However, as even the most cursory inspection would immediately disclose, those groups objectively did not meet the state or federal legal requirements to be certified as presidential electors, and their “votes” thus had no legal meaning or significance whatsoever.¹¹¹ Federal law is clear about the process to qualify as a state’s slate of electors: it is “the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State” to send a “certificate of such ascertainment of the electors appointed, setting forth the names of such electors,” to the Archivist of the United States.¹¹² The laws of each State, in turn, describe the substantive and procedural requirements by which a group of electors may lawfully be certified and vested with power to cast electoral votes on behalf of the State. Together, these federal and

¹⁰⁶ Jenna Ellis (@JennaEllisEsq), Twitter (Dec. 21, 2020, 10:19 PM), <https://web.archive.org/web/20201222090308/https://twitter.com/JennaEllisEsq/status/1341267005123354624>.

¹⁰⁷ Jenna Ellis (@JennaEllisEsq), Twitter (Dec. 22, 2020, 10:43 PM ET), <https://twitter.com/JennaEllisEsq/status/1341590196794507264>.

¹⁰⁸ Eric Mack, *Jenna Ellis to Newsmax TV: Trump Denied 'Due Process'*, Newsmax (Dec. 29, 2020, 8:46 PM), <https://www.newsmax.com/newsmax-tv/jenna-ellis-campaign-legal-adviser/2020/12/29/id/1003545>.

¹⁰⁹ Marshall Cohen et al., *Trump Campaign Officials, Led by Rudy Giuliani, Oversaw Fake Electors Plot in 7 States*, CNN (Jan. 20, 2022, 9:58 PM ET), <https://www.cnn.com/2022/01/20/politics/trump-campaign-officials-rudy-giuliani-fake-electors/index.html>.

¹¹⁰ See *American Oversight Obtains Seven Phony Certificates of Pro-Trump Electors*, American Oversight (Mar. 2, 2021), <https://www.americanoversight.org/american-oversight-obtains-seven-phony-certificates-of-pro-trump-electors>; see also Haisten Willis et al., *As Electoral College Formalizes Biden’s Win, Trump Backers Hold Their Own Vote*, Wash. Post (Dec. 14, 2020), https://www.washingtonpost.com/politics/trump-backers-electoral-college/2020/12/14/f0fcc59c-3e52-11eb-9453-fc36ba051781_story.html.

¹¹¹ Joshua Matz et al., *Guide to Counting Electoral College Votes and the January 6, 2021 Meeting of Congress*, States United Democracy Center 8–11 (Jan. 4, 2021), <https://statesuniteddemocracy.org/wp-content/uploads/2021/01/VPP-Guide-to-Counting-Electoral-Votes.pdf>.

¹¹² See 3 U.S.C. § 6.

state legal requirements prevent *ad hoc* groups of citizens from meeting wherever they want and using whatever procedures they see fit to declare themselves to be “electors” for purposes of the Electoral College. And here, there was no basis whatsoever—either factually or legally—for Ms. Ellis’s assertion that there was a “dispute” about who could cast electoral votes for the states in question or that these random groups of self-appointed people counted as “slates of electors” in any sense known to federal or state law.

This assertion was in every relevant sense factually false and objectively legally frivolous. Indeed, by mid-December, the White House Counsel’s Office had concluded that the plan to have alternate electors meet and cast votes for Mr. Trump in states that he had lost was “not legally sound.”¹¹³ Individuals from the White House Counsel’s Office reported this conclusion to the attendees at a meeting involving White House Chief of Staff Mark Meadows, Mr. Giuliani, and several unidentified “associates” of Mr. Giuliani.¹¹⁴

VII. Mr. Trump Decided to Attempt to Prevent the Counting of Electoral Votes at the Joint Session of Congress on January 6

In the following weeks, Mr. Trump considered various desperate strategies to stave off defeat. For example, at a White House meeting on December 19, Mr. Trump discussed appointing Ms. Powell as a special counsel to investigate the outcome of the election; an executive order to take control of voting machines was discussed at the same meeting.¹¹⁵ Moreover, in meetings with Mr. Meadows beginning in late November or early December, staff from Mr. Trump’s campaign including Ms. Ellis, Mr. Giuliani, and Ms. Powell raised the idea of Vice President Pence doing something “other than just counting electoral votes” on January 6.¹¹⁶ Eventually, Mr. Trump settled on the strategy of preventing or delaying the counting of electoral votes at the Joint Session of Congress on January 6, 2021.¹¹⁷ Mr. Trump decided that he would try to achieve that result through pressure on Vice President Pence.¹¹⁸

¹¹³ Continued Interview of Cassidy Hutchinson, *Meadows v. Pelosi*, Case No. 1:21-cv-3217, ECF No. 15-8, at 61-64 (D.D.C. Apr. 22, 2022) (House Select Committee’s interview of Cassidy Hutchinson, who was one of Mr. Meadows’s aides), available at <https://january6th.house.gov/sites/democrats.january6th.house.gov/files/20220422%20Motion%20for%20Summary%20Judgment.pdf>; see also Nicole Acevedo, *Meadows Was Warned Jan. 6 Could Turn Violent, Former White House Official Says*, NBC News (Apr. 23, 2022), <https://www.nbcnews.com/politics/politics-news/meadows-was-warned-jan-6-turn-violent-former-white-house-official-says-rcna25706>.

¹¹⁴ Continued Interview of Cassidy Hutchinson, *supra* note 113, at 61-64.

¹¹⁵ Maggie Haberman & Zolan Kanno-Youngs, *Trump Weighed Naming Election Conspiracy Theorist as Special Counsel*, N.Y. Times (Jan. 18, 2021), <https://www.nytimes.com/2020/12/19/us/politics/trump-sidney-powell-voter-fraud.html>.

¹¹⁶ Interview of Cassidy Hutchinson, *Meadows v. Pelosi*, Case No. 1:21-cv-3217, ECF No. 15-17, at 72-73 (D.D.C. Apr. 22, 2022), available at <https://january6th.house.gov/sites/democrats.january6th.house.gov/files/20220422%20Motion%20for%20Summary%20Judgment.pdf>.

¹¹⁷ Woodward & Costa, *supra* note 6, at 228–30.

¹¹⁸ *Id.* at 225–26.

In his capacity as presiding officer of the Senate, Mr. Pence was scheduled to preside over the certification of Mr. Biden’s victory at the January 6 Joint Session.¹¹⁹ Under Article II and the Twelfth Amendment of the United States Constitution, the Electoral Count Act, and a Concurrent Resolution of the Senate and House of Representatives (as well as longstanding practice) the Vice President’s role in that process was purely ministerial.¹²⁰ By law, Mr. Pence’s role was limited largely to opening the certificates of votes sent by the states’ lawfully certified presidential electors (and to announcing the final outcome).¹²¹ Mr. Pence was assigned no role or responsibility in adjudicating any asserted disputes about which electoral votes to count, or in deciding whether a dispute even existed or which lawfully certified votes to open. By law, any such disputes were to be resolved by the House and Senate, not by the Vice President (a rule that makes very good sense given the obvious potential for corruption or abuse if the sitting Vice President could dictate the course of a proceeding designed to select the next President). The same legal authorities (including the Electoral Count Act) further provided that once convened, the Joint Session to count the ballots could not be dissolved until the count was completed, except pursuant to very specific requirements (none of which involved decision-making by the Vice President in his capacity as Presiding Officer).¹²²

It was clear to Mr. Trump (and Ms. Ellis) that the Joint Session—absent some extraordinary and unprecedented intervention—would confirm Mr. Biden’s election. Unwilling to accept defeat, Mr. Trump (aided and abetted by Ms. Ellis) attempted to pressure Mr. Pence to violate this settled law by declining to count the electors from multiple states, which would likely throw the election to the House of Representatives, where each state delegation would have one vote, and where Republicans controlled 26 state delegations that could ensure a Trump-Pence majority.¹²³

Mr. Trump had enormous leverage over Mr. Pence. As Mr. Trump repeatedly said and implied, if Vice President Pence did not accede to Mr. Trump’s demand that he violate the law, Mr. Trump would denounce him, aiming to eliminate his prospects to be a viable future presidential candidate.¹²⁴ Mr. Pence’s own staff reportedly believed that Mr. Trump had Mr. Pence “in a corner” since he could not sever his relationship with Mr. Trump without forgoing his presidential ambitions.¹²⁵ Thus, starting in late December and continuing up to and during the January 6 Joint Session, Mr. Trump maintained a relentless campaign of public and private pressure on Mr. Pence to violate his constitutional obligations.¹²⁶

¹¹⁹ *Presidential Election Timeline*, *supra* note 99, at 2.

¹²⁰ Matz, *supra* note 111, at 12–18.

¹²¹ *Id.*

¹²² See 3 U.S.C. § 16.

¹²³ Woodward & Costa, *supra* note 6, at 209–12, 225–26.

¹²⁴ *Id.* at 228–30, 238–40.

¹²⁵ *Id.* at 205.

¹²⁶ See *id.* at 238–240; see also Michael S. Schmidt, *Trump Says Pence Can Overturn His Loss in Congress. That’s Not How It Works*, N.Y. Times (Apr. 30, 2021), <https://www.nytimes.com/2021/01/05/us/politics/pence-trump-election.html>.

VIII. Ms. Ellis Drafted Two Memoranda to Help Aid Mr. Trump’s Effort to Stop the Electoral Count for Mr. Biden

In late December 2020, Ms. Ellis played a critical role in Mr. Trump’s pressure campaign on Mr. Pence by authoring key memoranda, one to Mr. Trump and one to Mr. Trump’s personal attorney Jay Sekulow.¹²⁷ In these memoranda, Ms. Ellis advanced factually and legally incorrect and misleading legal justifications for Mr. Pence to set aside Electoral College votes for Mr. Biden from six swing states—Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin. Each of these proposed justifications, moreover, rested expressly on the factually and legally frivolous premise that there were legally cognizable or relevant “disputes” between two “slates of electors” in each of those states.¹²⁸

Ms. Ellis’s role ran parallel to a similar campaign by John Eastman, a former law school dean at Chapman University and a self-described “activist law professor” who worked with Mr. Trump and his campaign on legal and political strategy after the 2020 election.¹²⁹ Mr. Eastman likewise wrote two memoranda outlining ways in which Mr. Pence could allegedly ensure Mr. Trump’s reelection, including by refusing to count certified electoral votes from several states that had voted for Mr. Biden but that were contested by the Trump campaign (Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin).¹³⁰ On January 2, 2021, Mr. Trump and Mr. Eastman hosted a briefing urging several hundred state legislators from states won by Mr. Biden to “decertify” their Biden electors.¹³¹ On January 4, 2021, Mr. Trump and Mr. Eastman discussed Mr. Eastman’s memoranda with Mr. Pence and members of Mr. Pence’s staff.¹³² And on January 5, 2021, in a separate meeting with Mr. Pence, Mr. Eastman explicitly stated to Mr. Pence, “I’m here asking you to reject the [Biden] electors,” before later pivoting to requesting that Mr. Pence delay the count rather than outright reject the electors.¹³³

¹²⁷ Betsy Woodruff Swan & Kyle Cheney, *Trump Campaign Lawyer Authored 2 Memos Claiming Pence Could Halt Biden’s Victory*, Politico (Dec. 10, 2021, 1:00 PM), <https://www.politico.com/news/2021/12/10/trump-lawyer-pence-biden-524088>.

¹²⁸ See Jenna Ellis Dec. 31, 2020 and Jan. 5, 2021 Memos, <https://www.politico.com/f/?id=0000017d-a4d0-dac5-abff-a5ddcf600000>.

¹²⁹ *Eastman v. Thompson*, No. 8:22-cv-00099, --- F. Supp. 3d. ----, 2022 WL 894256, at *1 (C.D. Cal. Mar. 28, 2022).

¹³⁰ *Id.* at *6.

¹³¹ *Id.* at *4.

¹³² *Id.* at *7.

¹³³ *Id.*

A. Ms. Ellis Drafted a Memo Dated December 31, 2020, Asserting False Factual Claims and Providing Objectively Unsupportable Legal Advice, Which Mr. Trump Used to Pressure Mr. Pence to Reject or Delay the Election Results

Ms. Ellis’s first memorandum (the “December 31 Memo”) was addressed to Mr. Trump and dated December 31, 2020.¹³⁴ It began: “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.”¹³⁵ It then asserted: “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.”¹³⁶

Thus, the December 31 Memo began from the false and misleading premise that these states had legitimate “disputes” and two competing “slates of electors”—one for Mr. Biden and one for Mr. Trump. In fact, each of the states had only certified legitimate electoral votes for Mr. Biden.¹³⁷ No other supposed “slate of electors” had complied with the most elementary federal and state legal requirements to qualify as a “slate of electors.” They were simply self-selected groups of people who wanted Trump to win and met in person to cast “votes” for Trump; they did not qualify as a “slate of electors” any more than a random citizen who puts on a black robe and purchases a gavel qualifies as a “federal judge.” Of course, a self-appointed fake judge cannot create a “dispute” of judicial authority by purporting to issue a decision in conflict with a ruling issued by an *actual* federal judge, and a self-appointed fake “slate of electors” cannot create a “dispute” by meeting and declaring that it gets to participate in the Electoral College in a manner that conflicts with the votes cast by the state’s *actual* slate of electors. So Ms. Ellis’s legal advice in the December 31 Memo arose from a factually and legally false and misleading premise.

Having asserted false “disputes” between multiple “slates of electors,” the December 31 Memo then builds to its central (and equally objectively false) argument. Ms. Ellis asserted that when each of the six swing states came up for a count on January 6, Mr. Pence could simply refuse to open the envelopes from those states based on a purported “dispute,” and could instead instruct the states to clarify whether they intended to send electoral votes for Mr. Biden (as they all, in fact, had) or for Mr. Trump.¹³⁸ More specifically, according to Ms. Ellis, “[o]n 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.”¹³⁹ She added that Mr. Pence “should require a response

¹³⁴ Memorandum from Jenna Ellis to Donald J. Trump (Dec. 31, 2020), <https://www.politico.com/f/?id=0000017d-a4d0-dac5-abff-a5ddcf600000> [hereinafter “December 31 Memo”].

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Karl, *supra* note 5, at 259.

¹³⁸ Karl, *supra* note 5, at 259; *see* Swan & Cheney, *supra* note 127.

¹³⁹ December 31 Memo, *supra* note 134.

from each state legislature no later than 7:00pm EST on January 15, 2021.”¹⁴⁰ Here, too, Ms. Ellis’s legal advice was false, misleading, and wholly without legal support: there is no legal authority that authorizes the Vice President (who has a minor and ministerial role in this process) to “require a response” from states (let alone specifically from state legislatures), and there is a wall of authority and tradition foreclosing such conduct by requiring that the House and Senate (rather than the Vice President) resolve any disputes.¹⁴¹ This legal advice from Ms. Ellis simply ignored or misrepresented virtually every relevant authority, and asserted the propriety (indeed, the necessity) of a course of action that would be squarely inconsistent with law and historical practice.

Finally, Ms. Ellis explained how the process would end in likely victory for Mr. Trump.¹⁴² She wrote, again without citing any evidence or precedent (or addressing the extensive legal provisions empowering the House and Senate to resolve disputes within the framework of the Electoral College), that “[i]f any state legislature fails to provide a timely response, no electoral votes can be opened and counted from that state.”¹⁴³ And if the legislatures did not respond, she added, then this would throw the election to Congress outside the Electoral College process: “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.”¹⁴⁴ Because Republicans had a majority in 26 of the 50 state delegations, a vote of congressional delegations would likely result in a victory for Mr. Trump.¹⁴⁵

At every opportunity, Ms. Ellis presented this course of action as not just permissible but instead as Mr. Pence’s constitutional duty: “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.”¹⁴⁶

For reasons including those highlighted above, the December 31 Memo ran squarely contrary to established legal authority and historical tradition. Ms. Ellis’s advice that the Vice President could unilaterally disregard provisions of the Electoral Count Act and reject properly certified electoral votes—thereby disenfranchising tens of millions of voters by disregarding the results of the actual election—had no basis in the law. There is no support in the text of the Constitution for that result; it runs contrary to an unbroken chain of past practice and legislation since the enactment of the 12th Amendment; and it has been flatly rejected by constitutional

¹⁴⁰ *Id.*

¹⁴¹ Matz, *supra* note 111, at 12–18.

¹⁴² December 31 Memo, *supra* note 134; see Karl, *supra* note 5, at 259.

¹⁴³ December 31 Memo, *supra* note 134.

¹⁴⁴ *Id.*

¹⁴⁵ Karl, *supra* note 5, at 260.

¹⁴⁶ December 31 Memo, *supra* note 134.

scholars.¹⁴⁷ As U.S. District Judge David O. Carter put it with respect to Mr. Eastman’s similar proposal, “The illegality of the plan was obvious.”¹⁴⁸ Indeed, even Mr. Eastman reportedly separately conceded to Mr. Pence’s counsel in a meeting on January 5, 2021 that such an effort would be “contrary to consistent historical practice, would likely be unanimously rejected by the Supreme Court, and violated the Electoral Count Act on four separate grounds.”¹⁴⁹

Furthermore, a delay or postponement of the Joint Session or in the electoral count in the manner apparently contemplated by Ms. Ellis (a mere two weeks before Inauguration) would be squarely contrary to law. The Constitution, the Electoral Count Act, the standing rules of both chambers of Congress, and the Concurrent Resolution regulate adjourning, recessing, or dissolving Congress, including when it is in Joint Session.¹⁵⁰ Any effort by Mr. Pence to adjourn the Joint Session would have violated the statute and the Concurrent Resolution; there is no historical or legal authority that would have non-frivolously authorized such a directive.

In addition, Ms. Ellis’s legal advice was predicated not only on unsupportable legal assertions but on false factual allegations concerning pending “disputes” in the six states and multiple slates of electors.¹⁵¹ The reality was that each state had sent votes from only *one* slate; those ballots complied with the requirements of the Constitution and the Electoral Count Act; all timely legal challenges to those ballots had failed; and there were no lawfully cognizable competing slates of certified electors.

On December 31, 2021, Mr. Meadows emailed Ms. Ellis’s December 31 Memo to Mr. Pence’s senior staff, with the subject line “Constitutional Analysis of the Vice President’s Authority for January 6, 2021, Vote Count.”¹⁵² On January 4, 2021, Ms. Ellis publicly walked through her proposal on “The Water Cooler with David Brody” on *Just the News*:

What Mike Pence could do, and what he should do, in fact, is to direct a question back to the state legislatures when there are two competing slates of delegates from these six states, he can ask that question to the states and say, “well, state legislators, you know, I have an oath to the Constitution to uphold the Constitution as written

¹⁴⁷ See, e.g., Matz, *supra* note 111; Matthew A. Seligman, *The Vice President’s Non-Existent Power to Reject Electoral Votes* (Jan. 6, 2022) (unpublished article), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3939020; Laurence H. Tribe, et al, *How to Prevent the Legal Strategy that Nearly Undid the Last Election from Ending Democracy*, Boston Globe (Sept. 27, 2021, 12:31 PM), <https://www.bostonglobe.com/2021/09/27/opinion/how-prevent-legal-strategy-that-nearly-undid-last-election-ending-democracy> (addressing John Eastman’s memo providing advice similar to that of Ellis).

¹⁴⁸ See *Eastman*, 2022 WL 894256, at *22.

¹⁴⁹ *Id.* at *24.

¹⁵⁰ See, e.g., 3 U.S.C. § 16.

¹⁵¹ Scholars had explained prior to January 6, 2021, why assertions such as those by Ms. Ellis and Mr. Eastman about the Vice President’s role on January 6 were without merit. See, e.g., Matz, *supra* note 111.

¹⁵² Karl, *supra* note 5, at 259; see also Libby Cathey, *Memo from Trump Attorney Outlined How Pence Could Overturn Election, Says New Book*, ABC News (Nov. 14, 2021, 7:24 AM), <https://abcnews.go.com/Politics/memo-trump-attorney-outlined-pence-overturn-election-book/story?id=81134003>; Swan & Cheney, *supra* note 127.

in Article II Section 1.2 which says the state legislatures direct the manner in which electoral delegates are selected. So you tell me which of these two slates was selected in the manner that your state general assembly has designated.”¹⁵³

Ms. Ellis continued, “That’s actually returning the authority to the constitutionally vested entity and just simply directing that question I think would then require a response from these very timid, to put it lightly, state legislators that haven’t been willing to act, and it would in fact then give a very clean outcome to this election.”¹⁵⁴ Ms. Ellis then followed her televised appearance with several tweets promoting her appearance and again reiterating her theory.¹⁵⁵

B. Ms. Ellis Drafted a Memo Dated January 5, 2021, That Again Asserted False Factual Claims and Provided Objectively Unsupportable Legal Advice

The day before the January 6 Joint Session, Ms. Ellis circulated a second memo that was addressed to Mr. Sekulow (the “January 5 Memo”).¹⁵⁶ At the time, Mr. Sekulow was one of Mr. Trump’s longest-serving personal lawyers, and he had represented Mr. Trump during his first impeachment trial.¹⁵⁷

Like Ms. Ellis’s December 31 Memo, the January 5 Memo purported to provide a constitutional basis for Mr. Pence to set aside electoral votes from swing states that had voted for Mr. Biden based on the false assertion that there were “disputes” between dual slates of electors in those states.¹⁵⁸ Ms. Ellis argued that Mr. Pence should declare that the disputed states had failed to meet the legal standard for certifying their legal electors. In her view (which rested on numerous false and misleading factual and legal propositions), this would require the legislatures in those states “to act.”¹⁵⁹ That presumably meant certifying Trump slates of electors, and it might also throw the election to Congress outside the Electoral College process, where Republicans held an edge in congressional delegations.¹⁶⁰

¹⁵³ John Solomon, *Trump Lawyer Suggests Pence Could Defer Certifying Election, Send Requests to State Legislatures*, Just the News (Jan. 4, 2021, 7:15 PM), <https://justthenews.com/politics-policy/elections/trump-lawyer-suggests-pence-could-defer-certifying-election-send-requests>.

¹⁵⁴ *Id.*

¹⁵⁵ Jenna Ellis (@JennaEllisEsq), Twitter (Jan. 4, 2021) (retweeting Just the News tweet), <https://web.archive.org/web/20210105233724/https://twitter.com/JennaEllisEsq>; Jenna Ellis (@JennaEllisEsq), Twitter (Jan. 4, 2021), <https://web.archive.org/web/20210105233724/https://twitter.com/JennaEllisEsq> (retweeting Tom Fitton tweet); Jenna Ellis (@JennaEllisEsq), Twitter (Jan. 4, 2021), <https://web.archive.org/web/20210105233724/https://twitter.com/JennaEllisEsq> (retweeting Steve Cortes tweet).

¹⁵⁶ Swan & Cheney, *supra* note 127.

¹⁵⁷ Elizabeth Williamson, *In Jay Sekulow, Trump Taps Longtime Loyalist for Impeachment Defense*, N.Y. Times (Jan. 17, 2020), <https://www.nytimes.com/2020/01/17/us/politics/jay-sekulow-trump-impeachment.html>.

¹⁵⁸ Swan & Cheney, *supra* note 127.

¹⁵⁹ *Id.*

¹⁶⁰ See Karl, *supra* note 5, at 260.

More specifically, the January 5 Memo began by stating that 3 U.S.C. § 5 requires a “final determination” of electors “in accordance with state law.”¹⁶¹ Thus, according to Ms. Ellis’s memo, “[w]here a controversy has been initiated in accordance with State law, that process for a final determination must be completed” under state law “before a legitimate set of electors can be ‘ascertained’ by the chief executive officers of the state.”¹⁶² Much like the December 31 Memo, Ms. Ellis pointed to unspecified and illusory “judicial and legislative disputes” over certification in “at least six states,” though she did not identify any legal basis for treating as legitimate any asserted alternative electors.¹⁶³

The January 5 Memo also argued that a key provision of the Electoral Count Act was likely unconstitutional. Specifically, Ms. Ellis claimed that 3 U.S.C. § 15 (which provides for Congress to adjudicate disputes over disagreements regarding legitimacy of electors) violates the Electors Clause of the Constitution, which requires that electors be selected in a “manner” directed by state legislatures.¹⁶⁴ This is because, according to Ms. Ellis, 3 U.S.C. § 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.”¹⁶⁵ (This overlooks the factual point that state executives certify electors pursuant to state statutory schemes enacted by state legislatures; it also overlooks the point that certification by executives is perfectly consistent with underlying legislative authority.)

The January 5 Memo then claimed: “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 process 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.”¹⁶⁶

Finally, the January 5 Memo repeated the core argument that Mr. Pence should not count votes from the six states where disputes among dual slates of electors allegedly existed: “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. . . . 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

¹⁶¹ Memorandum from Jenna Ellis to Jay Sekulow 1 (Jan. 5, 2021), <https://www.politico.com/f/?id=0000017d-a4d0-dac5-abff-a5ddcf600000> [hereinafter “January 5 Memo”].

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (emphasis in original).

¹⁶⁶ *Id.* (emphases in original).

accordance with provisions of state law in order to legitimately assert that § 5 has not been completed.”¹⁶⁷ Ms. Ellis argued that as a result of the conflict between these constitutional provisions, “there is a colorable argument that § 15 violates the supremacy clause of the Constitution regarding plenary state legislative authority under Article II, § 1.2.”¹⁶⁸

Thus, the January 5 Memo argued that Mr. Pence “probably” had “the authority to simply adjourn the body until a determination that the process to have been completed [*sic*].”¹⁶⁹ Ms. Ellis wrote, “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.”¹⁷⁰ For reasons previously discussed, Ms. Ellis’s advice was contrary to the text of the Constitution, centuries of past practice and legislation, and the views of constitutional scholars.

IX. After Circulating Her Memoranda, Ms. Ellis Publicly Urged Mr. Pence to Block the Electoral Count

On January 6, 2021, Ms. Ellis appeared on the “Charlie Kirk Show” podcast to reaffirm the central theory of her memoranda—that, because of the alleged disputes between slates of electors in the six swing states (when in fact no lawful alternate slates existed), Mr. Pence could simply decide not to count the votes from those states at the January 6 Joint Session. She said:

Six states currently have electoral delegates that are in dispute, and we know based on the clear and convincing evidence that there is a sufficient legal basis to question whether the state law and the Constitution was followed in the administration of those elections. ... [Pence] should not open any of the electoral votes in the six contested states ... and [he should instead] ask [state legislatures] to confirm which of the two slates of electors have in fact been chosen in the manner that they have provided for.¹⁷¹

Ms. Ellis promoted her discussion of this alleged “constitutional option” via Twitter as well.¹⁷² On January 5, 2021, for example, she tweeted, “HUGE: More than 100 state legislators ask @VP @Mike_Pence to delay certification of electoral votes. Under 3 USC 5, federal law requires a final determination in accordance with state law to ascertain legitimate slate of

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Charlie Kirk, *Jenna Ellis Lays Out Pence's Legal Path*, YouTube, at 0:48 (Jan. 6, 2021), <https://www.youtube.com/watch?v=IHMSnRFX3DI>.

¹⁷² Jenna Ellis (@JennaEllisEsq), Twitter (Jan. 5, 2021), <https://web.archive.org/web/20210107050313/https://twitter.com/JennaEllisEsq/status/1346630023562711041>.

electors.”¹⁷³ She then tweeted, “This is NOT about what ‘we want.’ This is about what the Constitution and rule of law requires.”¹⁷⁴

X. Mr. Trump Urged Mr. Pence to Set Aside the Swing-State Ballots

On January 4, 2021, Mr. Trump met with Mr. Pence, along with Mr. Eastman and some of Mr. Pence’s staff.¹⁷⁵ Mr. Eastman proposed that Mr. Pence either reject electors or delay the count on January 6. Mr. Pence consistently asserted that he did not have the authority to do that.¹⁷⁶

On January 5, Mr. Trump again met with Mr. Pence. Mr. Trump, in line with the advice from Ms. Ellis and Mr. Eastman, insisted that Mr. Pence had the power to decline to count Biden’s electors.¹⁷⁷ Mr. Trump told Mr. Pence that if he failed to do so, “Your career is over.”¹⁷⁸ Later that evening, he tweeted: “If Vice President @Mike_Pence comes through for us, we will win the Presidency. Many States want to decertify the mistake they made in certifying incorrect & even fraudulent numbers in a process NOT approved by their State Legislatures (which it must be). Mike can send it back!”¹⁷⁹

On the morning of January 6, 2021, Mr. Trump tweeted, again seemingly relying on the same legal advice: “All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!”¹⁸⁰ Later, Mr. Trump called Mr. Pence, again pushing him to prevent certification: “You can either go down in history as a patriot . . . or you can go down in history as a pussy.”¹⁸¹ Mr. Pence, advised by his staff, former Vice President Dan Quayle,¹⁸² and leading conservative lawyers (including former Fourth Circuit Judge J. Michael Luttig and Professor John Yoo) that he had no discretion to stop or delay the count and that doing so would be illegal, issued a letter disclaiming “unilateral authority to determine which electoral votes should be counted and which should not” and indicating his intention to abide by the Electoral Count Act.¹⁸³

¹⁷³ Jenna Ellis (@JennaEllisEsq), Twitter (Jan. 5, 2021), <https://web.archive.org/web/20210107050313/https://twitter.com/JennaEllisEsq/status/1346605994550255616>.

¹⁷⁴ Jenna Ellis (@JennaEllisEsq), Twitter (Jan. 5, 2021), <https://web.archive.org/web/20210107050313/https://twitter.com/JennaEllisEsq/status/1346619486946746369>.

¹⁷⁵ *Eastman*, 2022 WL 894256, at *3.

¹⁷⁶ *Id.*

¹⁷⁷ Woodward & Costa, *supra* note 6, at 228–30.

¹⁷⁸ *Id.*

¹⁷⁹ Donald Trump (@realDonaldTrump), Twitter (Jan. 6, 2020, 1:00 AM), <https://www.thetrumparchive.com>.

¹⁸⁰ Donald Trump (@realDonaldTrump), Twitter (Jan. 6, 2020, 8:17 AM), <https://www.thetrumparchive.com>.

¹⁸¹ Peter Baker, Maggie Haberman & Annie Karni, *Pence Reached His Limit With Trump. It Wasn’t Pretty.*, N.Y. Times (Jan. 13, 2021), <https://www.nytimes.com/2021/01/12/us/politics/mike-pence-trump.html>.

¹⁸² Woodward & Costa, *supra* note 6, at 198–200.

¹⁸³ *Read Pence’s Full Letter Saying He Can’t Claim ‘Unilateral Authority’ to Reject Electoral Votes*, Associated Press (Jan. 6, 2021, 1:43 PM ET), <https://www.pbs.org/newshour/politics/read-pences-full-letter-saying-he-cant-claim-unilateral-authority-to-reject-electoral-votes>; see Woodward & Costa, *supra* note 6, at 237–40.

Later that morning, at the “Stop the Steal” rally on the National Mall, before a crowd of thousands of Trump supporters, a parade of speakers including Mr. Giuliani repeated false claims of election fraud and urged the crowd to fight and to resist the certification process.¹⁸⁴ Mr. Trump then addressed the rally, repeating claims that “we won this election and we won it by a landslide” and telling the crowd that “if you don’t fight like hell, you’re not going to have a country anymore.”¹⁸⁵ Mr. Trump said, again parroting Ms. Ellis and Mr. Eastman’s legal advice, “All Vice President Pence has to do is send it back to the states to recertify and we become president and you are the happiest people.”¹⁸⁶ An hour later, in an effort to interfere with or stop the certification process, the crowd breached and vandalized the Capitol.¹⁸⁷ As the mob was entering the Capitol, driving Mr. Pence into hiding, Mr. Trump tweeted that Mr. Pence lacked “the courage to do what should have been done to protect our Country and our Constitution.”¹⁸⁸

On January 6, 2021, after Mr. Pence had failed to follow through on Ms. Ellis’s scheme, she tweeted: “I am deeply disappointed in @Mike_Pence. The Constitution constrains, yes, and that’s why we worked hard to provide him with a constitutional option to protect election integrity. BUT, he should not have been in that position—state leadership was cowardly first; SCOTUS was also.”¹⁸⁹ She also tweeted, “The weak GOP leadership failed to enforce the Constitution in six states. We can make every appeal, but those with power failed to act righteously.”¹⁹⁰

XI. Ms. Ellis Left the Republican Party and Ultimately Tried to Backtrack from Her Theories

Six months later, on July 13, 2021, Ms. Ellis left the Republican Party, following a report that Republican National Committee (“RNC”) chief counsel Justin Riemer had been trying to discourage her baseless claims that the 2020 election had been stolen, and that he had stated in an email, “What Rudy and Jenna are doing is a joke and they are getting laughed out of court.”¹⁹¹ In light of that email, Ms. Ellis announced that she would quit the GOP and not return unless RNC Chairwoman Ronna McDaniel and other members resigned.¹⁹²

¹⁸⁴ Matthew Choi, *Trump is on Trial for Inciting an Insurrection. What About the 12 People Who Spoke Before Him?*, Politico (Feb. 10, 2021, 4:30 AM ET), <https://www.politico.com/news/2021/02/10/trump-impeachment-stop-the-steal-speakers-467554>.

¹⁸⁵ Brian Naylor, *Read Trump's Jan. 6 Speech, a Key Part of Impeachment Trial*, NPR (Feb. 10, 2021, 2:43 PM), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial>.

¹⁸⁶ *Id.*

¹⁸⁷ *Inside the Capitol Riot: An Exclusive Video Investigation*, N.Y. Times (Jan. 6, 2022), <https://www.nytimes.com/2021/06/30/us/jan-6-capitol-attack-takeaways.html>.

¹⁸⁸ Donald Trump (@realDonaldTrump), Twitter (Jan. 6, 2020, 2:24 PM), <https://www.thetrumparchive.com>.

¹⁸⁹ Jenna Ellis (@JennaEllisEsq), Twitter (Jan. 6, 2021, 4:34 PM), <https://twitter.com/jennaellis/status/1346933207095132162>.

¹⁹⁰ Jenna Ellis (@JennaEllisEsq), Twitter (Jan. 6, 2021, 7:26 PM), <https://web.archive.org/web/20210107050313/https://twitter.com/JennaEllisEsq/status/1347021684579074056>.

¹⁹¹ Brendan Cole, *Jenna Ellis Calls Republicans ‘DNC-lite’ After Quitting GOP*, Newsweek (July 13, 2021, 9:35 AM ET), <https://www.newsweek.com/republican-party-jenna-ellis-gop-dnc-1609204>.

¹⁹² *Id.*

Five months after that, in December 2021—in a statement to *Politico*, which was publishing both of her memoranda in full for the first time—Ms. Ellis attempted to backtrack from her memoranda’s central legal theories.¹⁹³ In claims inconsistent with the language of the memos themselves, she said that her December 31 and January 5 Memos had been “exploring legal theories” rather than wholesale endorsements of the legal strategies she was outlining.¹⁹⁴ Ignoring the plethora of public statements, interviews, and tweets she had made to the contrary she added, “At no time did I advocate for overturning the election or that Mike Pence had the authority to do so . . . As part of my role as a campaign lawyer and counsel for President Trump, I explored legal options that might be available within the context of the U.S. Constitution and statutory law.”¹⁹⁵

XII. State Bars Have Opened Investigations and Courts Have Issued Decisions Documenting Misconduct by Attorneys Related to the Trump Campaign

Since January 6, 2021, various state bars have subsequently opened investigations into misconduct by attorneys associated with the Trump campaign, and in some instances courts have already imposed sanctions or interim discipline. Here, we identify several especially notable examples.

Rudy Giuliani: On June 24, 2021, a New York court suspended Mr. Giuliani’s New York law license for conduct that was very similar and at points essentially identical to Ms. Ellis’s misconduct as described above. The New York court concluded that there was “uncontroverted evidence that [Mr. Giuliani] communicated demonstrably false and misleading statements to courts, lawmakers and the public at large in his capacity as lawyer for former President Donald J. Trump and the Trump campaign in connection with Trump’s failed effort at reelection in 2020.”¹⁹⁶ The New York court identified, among other false statements concerning the election, Mr. Giuliani’s claim that in Pennsylvania more absentee ballots had come in during the election than had been sent out before the election; that dead people had voted in the election; that Dominion’s voting machines had manipulated the vote tallies; and that video evidence depicted Georgia election officials engaged in illegal counting of mail-in ballots surreptitiously retrieved from suitcases—many of which were claims similar to, if not identical to, false statements made by Ms. Ellis.¹⁹⁷ In addition, the New York court found that Mr. Giuliani’s misconduct presented an “immediate threat to the public, justifying [his] interim suspension.” The court explained that there was “evidence of continuing misconduct, the underlying offense is incredibly serious, and the

¹⁹³ Swan & Cheney, *supra* note 127.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Giuliani*, 197 A.D.3d at 4.

¹⁹⁷ *See id.* at 9-19.

uncontroverted misconduct in itself will likely result in substantial permanent sanctions at the conclusion of these disciplinary proceedings.”¹⁹⁸

Sidney Powell: On March 1, 2022, the State Bar of Texas filed a disciplinary action against Ms. Powell accusing her of violating the Texas Disciplinary Rules of Professional Conduct in connection with several federal lawsuits contesting the 2020 election.¹⁹⁹ Ms. Powell and several of her co-counsel had previously been sanctioned in federal court for some of the same misconduct cited by the Texas Bar.²⁰⁰

John Eastman: On March 1, 2022, the State Bar of California announced that since September 2021 it had been investigating whether Mr. Eastman had engaged in conduct in violation of California law and ethics rules in relation to the 2020 election.²⁰¹

Ken Paxton: The State Bar of Texas has pursued a complaint against Texas Attorney General Ken Paxton, accusing him of professional misconduct relating to his lawsuit to overturn 2020 presidential election results in four battleground states.²⁰²

Erick Kaardal: A federal judge referred a Minnesota lawyer for potential discipline over a lawsuit filed in December seeking to overturn Mr. Biden’s wins in at least five battleground states.²⁰³

Most recently (and as especially relevant here), Judge David O. Carter of the U.S. District Court for the Central District of California issued a decision on March 28, 2022, finding that it was “more likely than not” that (1) Mr. Trump, with Mr. Eastman’s knowing assistance, had “corruptly attempted to obstruct the Joint Session of Congress on January 6, 2021,” and (2) Mr. Trump and Mr. Eastman had “dishonestly conspired to obstruct the Joint Session of Congress on

¹⁹⁸ *Id.* at 15; see also Nicole Hong, William K. Rashbaum & Ben Protess, *Court Suspends Giuliani’s License, Citing Trump Election Lies*, N.Y Times (June 24, 2021), <https://www.nytimes.com/2021/06/24/nyregion/giuliani-law-license-suspended-trump.html>.

¹⁹⁹ David Lee, *Texas Bar Files Disciplinary Action Against Former Trump Attorney*, Courthouse News Serv. (Mar. 8, 2022), <https://www.courthousenews.com/texas-bar-files-disciplinary-action-against-former-trump-attorney>.

²⁰⁰ *Id.*; see also *King v. Whitmer*, No. 20-13134, 2021 WL 3771875, at *39 (E.D. Mich. Aug. 25, 2021) (“[T]he Court concludes that Plaintiffs’ counsel filed this lawsuit in bad faith and for an improper purpose. Further, they presented pleadings that (i) were not ‘warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or establishing new law’ and (ii) contained factual contentions lacking evidentiary support or likely to have evidentiary support.”).

²⁰¹ News Release, State Bar of Calif., *State Bar Announces John Eastman Ethics Investigation* (Mar. 1, 2022), <https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-announces-john-eastman-ethics-investigation>.

²⁰² Timia Cobb, *State Bar Complaint Against Attorney General Ken Paxton to Proceed After Key Deadline Passes*, Tex. Trib. (Mar. 8, 2022, 9:00 PM), <https://www.texastribune.org/2022/03/08/state-bar-paxton-complaint/>.

²⁰³ Josh Gerstein, *Lawyer Who Brought Election Suit Referred for Possible Discipline*, Politico (Feb. 19, 2021, 8:01 PM), <https://www.politico.com/news/2021/02/19/lawyer-election-suit-discipline-470369>.

January 6, 2021,” in each case in violation of federal criminal law.²⁰⁴ Judge Carter issued his decision in a case arising from a lawsuit that Mr. Eastman had filed to block a legislative subpoena from the U.S. House of Representatives Select Committee to Investigate the January 6th Attack on the United States Capitol.²⁰⁵ Mr. Eastman had attempted to block the subpoena on the basis of attorney-client privilege and the attorney work-product doctrine. In his decision, Judge Carter found that the privileges did not apply as to various documents, including because the crime-fraud exception extinguished any arguable privilege as to a draft memorandum sent to Mr. Eastman.²⁰⁶

ANALYSIS

Ms. Ellis’s conduct merits investigation under multiple provisions of the Colorado Rules of Professional Conduct.²⁰⁷ We begin in Section I by enumerating the relevant authorities we will discuss. We then in Section II address their application to Ms. Ellis’s baseless efforts to overturn the election. Next, in Section III, we address the application of the rules to Ms. Ellis’s misleading and dishonest conduct. In Sections IV and V, we explain that neither Ms. Ellis’s First Amendment rights nor a purported subjective belief in various falsehoods can justify professional misconduct. Finally, in Section VI, we explain the harm that her conduct wrought.

I. Applicable Colorado Rules of Professional Conduct

A. Competence (Colo. RPC 1.1)

Colo. RPC 1.1 provides: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

²⁰⁴ *Eastman*, 2022 WL 894256, at *22, *24.

²⁰⁵ Katelyn Polantz, *Trump Lawyer Ordered to Respond to January 6 Committee Subpoena for His Chapman University Emails*, CNN (Jan. 25, 2022, 10:36 PM ET), <https://www.cnn.com/2022/01/24/politics/eastman-january-6-committee-subpoena-chapman-university/index.html>.

²⁰⁶ *Eastman*, 2022 WL 894256, at *14-19, *26.

²⁰⁷ There is no question that Ms. Ellis is subject to Colorado’s disciplinary process. Under C.R.C.P. 242.1(a)(1), the OARC has disciplinary jurisdiction over a “lawyer admitted . . . to practice law in Colorado, regardless of where the lawyer’s conduct occurs or where the lawyer resides.” *See also* Colo. RPC 8.5(a) (providing that a “lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs”). It is a closer question whether Ms. Ellis’s conduct should be evaluated under the Colorado Rules of Professional Conduct. The applicable rules are generally “the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction.” Colo. RPC 8.5(b). This language suggests that the Rules of Professional Conduct of certain other jurisdictions, including the District of Columbia and Pennsylvania, should apply. Our examination of the Colorado Rules of Professional Conduct indicates that they do not differ materially from those in other potentially relevant jurisdictions, such as the District of Columbia and Pennsylvania, in their treatment of the issues described here. Because of these considerations, and for simplicity of analysis, this memorandum assumes for purposes of analysis that Colorado law governs. This is consistent with the approach taken by prior complaints regarding the alleged misconduct of other attorneys involved in efforts to overturn the election, including Mr. Giuliani, Mr. Eastman, Ms. Powell, and Mr. Paxton. *See, e.g.*, States United Democracy Center, *Re: Request for Investigation of John C. Eastman* (Oct. 4, 2021), <https://statesuniteddemocracy.org/wp-content/uploads/2021/10/10.4.21-FINAL-Eastman-Cover-Letter-Memorandum.pdf>.

B. Advising or Assisting a Crime or Fraud (Colo. RPC 1.2(d))

Colo. RPC 1.2(d) provides:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Under Colo. RPC 1.0(f), “‘Knowingly,’ ‘known,’ or ‘knows’ denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” Actual knowledge includes “willful blindness,” which occurs when a lawyer “deliberately closed his eyes to facts he had a duty to see.” *People v. Rader*, 822 P.2d 950, 953 (Colo. 1992) (quoting *United States v. Benjamin*, 328 F.2d 854, 862 (2d Cir. 1964)); see Colo. Bar Ass’n Ethics Comm., Formal Op. 142, at 5-6 (2021) (knowledge under Colo. RPC 1.2(d) includes “willful blindness”). Put otherwise, willful blindness is shown when “the facts before the lawyer create a high probability” of illegality and the lawyer consciously and deliberately chooses not to inquire further. ABA Comm. on Ethics & Pro. Resp., Formal Op. 491, at 6 (2020).

C. Advisor and Independent Professional Judgment (Colo. RPC 2.1)

Colo. RPC 2.1 provides, in relevant part: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”

D. Truthfulness, Misrepresentation, and Deceit (Colo. RPC 4.1(a) and 8.4(c))

A lawyer may not make knowing, willfully blind, or reckless misstatements of fact or law. The prohibition is reflected in at least two relevant rules.

First, Colo. RPC 4.1(a) provides: “In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.” Colo. RPC 4.1(a). “A false statement can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.” *Id.* at cmt. [1]. In addition, “[o]missions or partially true but misleading statements can be the equivalent of affirmative false statements.” *Id.* As under Colo. RPC 1.2 above, knowledge means “actual knowledge,” which can be inferred from the circumstances and includes “willful blindness.”

Second, Colo. RPC 8.4(c) encompasses both knowing and reckless deception, whether or not it occurs in the context of an attorney-client relationship. Specifically, Colo. RPC 8.4(c) provides: “It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, and investigators, who participate in lawful investigative activities.” Such conduct is subject to discipline if the lawyer made express or implied representations either knowing that they were false or deceptive or with “reckless disregard for the

true state of affairs.” *Rader*, 822 P.2d at 952–53 (construing similar language in former Colorado rule); see *People v. Brown*, 461 P.3d 683, 697–98 & n.73 (Colo. O.P.D.J. 2019) (recklessness suffices for scienter under Colo. RPC 8.4(c)). Colo. RPC 8.4(c) “applies to all lawyers at all times,” whether or not a lawyer is representing a client or acting in a professional capacity. *In re Marriage of Redmond & Bezdek*, 131 P.3d 1167, 1171 (Colo. App. 2005); see Colo. Bar Ass’n Ethics Comm., Formal Op. 98 (2015).

E. Responsibilities of a Partner or Supervisory Lawyer (Colo. RPC 5.1(c))

Colo. RPC 5.1(c) provides: “A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”

This paragraph “expresses a general principle of personal responsibility for acts of another.” *Id.* at cmt. [4]. “Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm. . . . Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer’s involvement and the seriousness of the misconduct.” *Id.* at cmt. [5].

F. Assisting or Inducing Another Lawyer to Violate the Rules of Professional Conduct (Colo. RPC 8.4(a))

Colo. RPC 8.4(a) provides, in relevant part: “It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” The scienter standard for Colo. RPC 8.4(a) is the same as for Colo. RPC 1.2(d): actual knowledge, which may be shown through willful blindness.

G. Conduct That Adversely Reflects on a Lawyer’s Fitness to Practice Law (Colo. RPC 8.4(h))

Colo. RPC 8.4(h) provides: “It is professional misconduct for a lawyer to . . . engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer’s fitness to practice law.”

II. Ms. Ellis’s Efforts to Assist Mr. Trump in Preventing or Delaying the Electoral College Count

Ms. Ellis knowingly and willfully assisted Mr. Trump in his scheme to undermine and overturn the election. These efforts included two memoranda (and associated public statements) that contained numerous legally and factually false and misleading assertions. They also involved a course of conduct designed to assist Mr. Trump in his unsuccessful and potentially criminal effort to pressure Mr. Pence to violate the law while presiding over the Joint Session of Congress on

January 6, 2021. There is thus a strong case for the OARC to investigate whether Ms. Ellis’s memoranda and associated conduct violated, among other rules, Colo. RPC 4.1(a) and Colo. RPC 8.4(c), forbidding “false statement[s]” and “conduct involving dishonesty, fraud, deceit or misrepresentation”; Colo. RPC 1.1 and 2.1, requiring an attorney to “provide competent representation,” to “exercise independent professional judgment,” and to “render candid advice”; and Colo. RPC 1.2(d), forbidding knowing assistance in “criminal or fraudulent” conduct.

First, in the final months of 2020, Ms. Ellis contributed to Mr. Trump’s efforts before and after the election by providing him with (and assisting him in making) false allegations of voter fraud.²⁰⁸ For example, after Election Day, she helped produce Mr. Trump’s speech about the election, in which he falsely stated that it was “statistically impossible” for him to have lost to Mr. Biden.²⁰⁹ These acts initially support an investigation into potential violations of the rules above, such as Colo. RPC 1.2(d), through Ms. Ellis’s efforts to assist Mr. Trump and the Trump campaign in “fraudulent” acts.

Second, leading up to the Joint Session of Congress on January 6, 2021, Ms. Ellis supported Mr. Trump in his effort to pressure Mr. Pence to violate his legal obligations by providing, in the form of two memoranda, a purported legal basis requiring Mr. Pence to halt or delay the electoral vote count. Ms. Ellis’s memoranda rested on various false or misleading factual and legal assertions, including but not limited to the following:

- Ms. Ellis falsely claimed that there were “two slates of electors” in the six swing states. In fact, each of the six states had certified only one slate of electors for Mr. Biden, and the vote certificates were proper in form, had withstood all timely legal challenges, and were not opposed by any valid competing slate of electors.²¹⁰ Ms. Ellis’s assertion rested on clear, objective factual and legal errors; there is no non-frivolous basis for treating self-declared “electors” who engage in an *ultra vires* meeting as creating a “dispute” or as undermining the lawfully certified electors.
- Ms. Ellis asserted that there was outcome-determinative fraud or corruption in the six states sufficient to place the “electoral delegates in dispute” in those states, and that alleged “judicial and legislative disputes” were unfolding regarding certification in those six states. In fact, lawsuits disputing the election results in those states had consistently failed; every official audit and recount had confirmed Mr. Biden’s victory; and by December 31 (and certainly by January 5) there was no factual or legal basis for asserting that any supposed “disputes” defeated the lawful certification.²¹¹
- Ms. Ellis asserted that, in the case of alleged “disputes” in the states, Mr. Pence could simply refuse to open the properly certified votes from each of those states, halt the count, and “direct a question” back to the states’ legislatures.²¹² This was a legally

²⁰⁸ See, e.g., *supra* note 12 and accompanying text.

²⁰⁹ See *supra* notes 52-53 and accompanying text.

²¹⁰ See *supra* notes 123-70 and accompanying text.

²¹¹ See *id.*

²¹² See *supra* notes 139, 153 and accompanying text.

frivolous suggestion, unsupported by authority or precedent and instead foreclosed by *overwhelming* authority and precedent. In fact, Mr. Pence’s ministerial role was limited to opening the certificates of votes sent by the states and announcing the outcome.²¹³

- Ms. Ellis insisted that her proposed course of action, and the power she claimed for Mr. Pence, was not merely *allowed* by the Constitution but was constitutionally *mandated* and would not establish any “new precedent.”²¹⁴ In fact, Ms. Ellis’s theory had no legal basis: it was flatly contradicted by the Constitution, by the Electoral Count Act, and by a Concurrent Resolution of the House and Senate; it was contrary to every historical precedent; and it had been repeatedly and thoroughly rejected, including by legal scholars, prominent conservative attorneys, and Mr. Pence himself.²¹⁵

These false and misleading statements of law and fact profoundly implicate Colorado ethics rules.

To start, Ms. Ellis’s memoranda and public statements support an investigation of potential violations of Colo. RPC 4.1(a) and 8.4(c). Many of her representations were materially false, misleading, or deceptive, thus forming a basis to investigate potential “conduct involving dishonesty, fraud, deceit or misrepresentation” by Ms. Ellis. Colo. RPC 8.4(c). Furthermore, her representations were delivered to “third person[s]”: the December 31 Memo was delivered to Mr. Pence’s senior staff, and Ms. Ellis followed her memoranda with public media appearances and tweets reaffirming her theory.²¹⁶ There is thus a strong basis to investigate whether Ms. Ellis made “false statement[s] of material fact or law to a third person.” Colo. RPC 4.1(a). Judge Carter’s recent decision regarding Mr. Eastman’s similar conduct is instructive: As Judge Carter explained (in words that also apply to Ms. Ellis), Mr. Eastman “likely acted deceitfully and dishonestly each time he pushed an outcome-driven plan that he knew was unsupported by the law.”²¹⁷

In addition, Ms. Ellis’s memoranda support an OARC investigation of potential violations of Colo. RPC 1.1 and 2.1. Colo. RPC 1.1 calls on lawyers to “provide competent representation” to their clients, where “[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” And Colo. RPC 2.1 requires lawyers to “exercise independent professional judgment and render candid advice.” Ms. Ellis framed her memoranda as privileged and confidential legal advice to a client, labeling them as “ATTORNEY-CLIENT PRIVILEGED”²¹⁸—labels signifying that the memoranda met the standards of independent professional judgment and candor required of a competent lawyer acting as an advisor. However, Ms. Ellis did not give accurate or candid accounts of the legal and constitutional principles involved in her analysis. She falsely suggested that her proposal would not establish new “precedent” and was constitutionally mandated, while failing to cite, describe,

²¹³ See *supra* notes 120-22 and accompanying text.

²¹⁴ See *supra* note 146 and accompanying text.

²¹⁵ See, e.g., *supra* notes 182-83 and accompanying text.

²¹⁶ See *supra* notes 152-55 and accompanying text.

²¹⁷ *Eastman*, 2022 WL 894256, at *24.

²¹⁸ See Jenna Ellis Dec. 31, 2020 and Jan. 5, 2021 Memos, *supra* note 128.

or distinguish virtually any of the facts and authority foreclosing her position.²¹⁹ There is a sound basis for the OARC to investigate whether Ms. Ellis violated Colo. RPC 1.1 and 2.1, including by failing to reasonably investigate the relevant facts and law and thereby failing to “provide competent representation,” “exercise independent professional judgment,” or “render candid advice.”

In a similar vein, Ms. Ellis’s memoranda and her subsequent statements reinforcing her proposal appear to provide a basis to investigate potential violations of Colo. RPC 1.2(d) for advising or assisting a crime or fraud by Mr. Trump, specifically in providing an alleged constitutional basis for Mr. Trump’s attempted obstruction of the electoral count.

The analysis under Colo. RPC 1.2(d) starts with an assessment of whether there is a basis for finding an underlying crime or fraud by Mr. Trump. In his recent opinion, Judge Carter concluded that it was “more likely than not” that (1) “President Trump corruptly attempted to obstruct the Joint Session of Congress on January 6, 2021,” and (2) Mr. Trump and Mr. Eastman had “dishonestly conspired to obstruct the Joint Session of Congress on January 6, 2021,” in violation of federal criminal law.²²⁰ On these grounds, Judge Carter found that the crime-fraud exception applied to one of the documents that Mr. Eastman sought to withhold as attorney-client privileged.²²¹

Not only is there is a basis for concluding that Mr. Trump likely committed a crime or fraud; there is also a basis for investigating whether Ms. Ellis knowingly counseled and assisted him in doing so through her memoranda and other acts as his counsel. Ms. Ellis attempted to lend Mr. Trump’s campaign of obstruction a veneer of constitutional legitimacy through her memoranda. Indeed, those memoranda were key instruments of Mr. Trump’s unlawful acts, just as her false and misleading public statements were key instruments of Mr. Trump’s fraudulent attack on the certification of the presidential election results. Ms. Ellis’s conduct therefore provides grounds for the OARC to investigate violations of Colo. RPC 1.2(d) forbidding knowing assistance in “criminal or fraudulent” conduct.

Finally, all the misconduct above also supports a claim for the OARC to investigate whether Ms. Ellis violated Colo. RPC 8.4(h), which provides that “[i]t is professional misconduct for a lawyer” to “engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer’s fitness to practice law.” The New York court similarly found that “all of these acts of misconduct, when considered separately or taken together, also establish that [Mr. Giuliani] violated [the New York equivalent of] RPC 8.4 (h) because his conduct adversely reflects on his fitness as a lawyer.”²²² That same logic holds true here.

²¹⁹ See *supra* note 141 and accompanying text.

²²⁰ *Eastman*, 2022 WL 894256, at *22, *24.

²²¹ *Id.* at *26.

²²² *Giuliani*, 197 A.D.3d at 21.

III. Ms. Ellis’s False Statements and Deceitful Conduct

A. Ms. Ellis’s False and Misleading Statements Regarding Alleged Fraud in the Election

Ms. Ellis made numerous and repeated false statements in her capacity as a senior legal adviser to Mr. Trump and the Trump campaign. These false statements make out a compelling case that the OARC should investigate whether Ms. Ellis violated applicable rules governing truthfulness, misrepresentation, and deceit, including Colo. RPC 4.1(a) and Colo. RPC 8.4(c), as well as rules governing competence, judgment, and candor, including Colo. RPC 1.1 and 2.1.

First, as described above, Ms. Ellis made numerous false and misleading statements attempting to discredit the election as fraudulent, rigged, and manipulated, particularly in Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin. Many of Ms. Ellis’s misrepresentations were generalized public allegations of “fraud and unlawful conduct,” “irregularities,” “Election official FRAUD,” “corruption,” an “irredeemably compromised” process, and the like.²²³ These statements lacked any evidence or basis in fact. Indeed, when directly asked for evidence at the November 19, 2020, press conference, Ms. Ellis repeatedly avoided giving any, stating that none was required because this was “a preview of what we’ve discovered.”²²⁴

Indeed, at the same time, every official audit, recount, and investigation had repeatedly confirmed that Mr. Biden had won the election in those six states and that there was no fraud affecting the outcome—and Ms. Ellis knew or was willfully blind to this fact.²²⁵ Federal officials agreed with those conclusions. For example, on November 12, the Election Infrastructure Government Coordinating Council and the Election Infrastructure Sector Coordinating Council had reported that there was “no evidence” of any defect with the “security and integrity of our elections.”²²⁶ Meanwhile, the Trump campaign was at the same time losing every post-election lawsuit that it had filed alleging such claims as voting-machine manipulation, ballot-box stuffing, and voting on behalf of dead people.²²⁷ Thus, there is a strong case that the numerous public statements of generalized widespread “fraud” made by Ms. Ellis were false or misleading in violation of Colo. RPC 4.1(a) and 8.4(c), as well as violated Colo. RPC 1.1 and 2.1.

Other statements by Ms. Ellis alleging more particular types of fraud or manipulation were equally “false” or “misleading” for purposes of Colo. RPC 4.1 and 8.4. For example:

- Ms. Ellis alleged that certain ballots were being counted or that the Biden campaign wanted to count such ballots, such as “late” ballots, ballots from “dead” voters, or ballots from “non-residents.”²²⁸ Ms. Ellis presented no evidence for such claims. Indeed, the New

²²³ See, e.g., *supra* notes 33, 46, 49, 78, 83, 86-87 and accompanying text.

²²⁴ See *supra* notes 47-48 and accompanying text.

²²⁵ See *supra* notes 17-19 and accompanying text.

²²⁶ See *supra* note 23 and accompanying text.

²²⁷ See *supra* notes 20, 54-64 and accompanying text.

²²⁸ See *supra* note 34 and accompanying text.

York court found that Mr. Giuliani had violated New York’s equivalent Rules 4.1 and 8.4(c) in making similarly false claims that thousands of “dead people” and hundreds of thousands of “illegal aliens” had voted in particular states in the 2020 election.²²⁹

- Ms. Ellis claimed that “SHOCKING” “VIDEO EVIDENCE” presented at the Georgia hearing showed two election workers illegally counting ballots from suitcases hidden under a table.²³⁰ Yet as the New York court later explained in finding that Mr. Giuliani had violated his professional responsibility in asserting fraud based on the same video: “We disagree that the video can be viewed as evidence of illegal conduct during the vote tabulation process or that it provided a reasonable basis for respondent’s conclusions.”²³¹
- During the December 15, 2020, hearing in Colorado, Ms. Ellis made baseless allegations regarding problems with Dominion’s voting systems that had already been debunked.²³²
- Ms. Ellis also publicly made some smaller, but clearly false claims, such as that “Hillary Clinton still has not conceded the 2016 election.”²³³

In addition to presenting a case for the OARC to investigate potential violations of Colo. RPC 4.1(a), 8.4(c), 1.1, and 2.1, this misconduct supports a claim for the OARC to investigate whether Ms. Ellis violated Colo. RPC 8.4(h).

B. Ms. Ellis’s Assistance with the Misconduct of Other Attorneys and Ratification of or Failure to Correct False Statements Made by Other Attorneys

There is also a sound basis for the OARC to investigate potential violations of various Rules of Professional Conduct on the grounds that Ms. Ellis assisted in or ratified the misconduct of other attorneys. In particular, Ms. Ellis failed to correct the cascade of falsehoods and misrepresentations by Mr. Giuliani and others concerning alleged fraud and manipulation regarding the 2020 election, and instead repeatedly, willfully, and actively facilitated or ratified those false statements. Such conduct merits an investigation into potential liability under various rules, including but not limited to Colo. RPC 1.1, 2.1, 4.1, 5.1, and 8.4.

First, there is a strong case for the OARC to investigate whether Ms. Ellis assisted other attorneys, including Mr. Giuliani and Ms. Powell, in their own violations of the Rules of Professional Conduct in violation of Colo. RPC 8.4(a), which provides that “[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” Ms. Ellis participated as a “second chair” to Mr. Giuliani in various press conferences and swing-state hearings and meetings; she knew, must have known, or was willfully blind to the fact that Mr. Giuliani’s statements were false; she nevertheless refused to correct the record as to his

²²⁹ *Giuliani*, 197 A.D.3d at 13–14, 17–20.

²³⁰ *See supra* note 92 and accompanying text.

²³¹ *Giuliani*, 197 A.D.3d at 19 (rejecting the argument that a reasonable observer of the video could conclude that there was an illegal counting of the mail-in ballots).

²³² *See supra* notes 97-98 and accompanying text.

²³³ *See supra* note 38 and accompanying text.

misrepresentations; she instead participated in and spoke at the events herself as a senior legal adviser to the Trump campaign; and she endorsed Mr. Giuliani’s theories by generally echoing his claims of fraud and corruption—all of which assisted Mr. Giuliani’s misconduct in violation of Colo. RPC 8.4(a).

To identify one particularly notable example, Mr. Giuliani repeatedly and falsely asserted, including at the November 25 Pennsylvania meeting and the December 2 Michigan meeting, that more mail-in absentee ballots had been delivered and counted during the 2020 election than had been distributed before the election.²³⁴ As the New York court found, Mr. Giuliani’s statement “was simply untrue” and “violate[d] Rules of Professional Conduct 4.1 and 8.4 (c).”²³⁵ While Mr. Giuliani claimed in his own proceeding that he “did not make this misstatement knowingly,” the New York court found there to be “simply no proof to support this explanation.”²³⁶ Even worse, Ms. Ellis affirmatively *knew* the claims to be false, at least by the Michigan meeting, having been informed by a Trump campaign spokesperson, Mr. Murtaugh, shortly after the Pennsylvania meeting.²³⁷ Yet she failed to correct the record or stop Mr. Giuliani, telling Mr. Murtaugh, “It’s too late. He’s been saying it and he’s going to keep saying it.”²³⁸ Ms. Ellis continued to participate in events alongside Mr. Giuliani and effectively endorse his claims.²³⁹

Ms. Ellis likewise failed to correct and may well have assisted Mr. Giuliani in misconduct associated with numerous other misrepresentations that the New York court concluded violated rules of professional conduct, including the following:

- Thousands of “dead people ‘voted’ in Philadelphia,” a false statement that Mr. Giuliani made during the November 25, 2020, meeting of the Pennsylvania Republican Senate Majority Policy Committee in Gettysburg, Pennsylvania, with Ms. Ellis, among other times;
- The vote tallies resulting from Dominion’s voting machines had been manipulated and were incorrect, a false statement that Mr. Giuliani made during his December 3 Georgia appearance with Ms. Ellis, among other times;
- Video evidence from security cameras depicted Georgia election officials engaging in illegally counting mail-in ballots, a false statement that Mr. Giuliani made during the December 3 Georgia Senate hearing with Ms. Ellis, among other times; and
- A “few hundred thousand” “illegal aliens” had voted in Arizona during the 2020 presidential election, a false statement that Mr. Giuliani made during his November 30 appearance before a group of Arizona legislators with Ms. Ellis, among other times.²⁴⁰

²³⁴ See *Giuliani*, 197 A.D.3d at 9–10; see also *supra* notes 71, 80 and accompanying text.

²³⁵ *Giuliani*, 197 A.D.3d at 9–10.

²³⁶ *Id.* at 10.

²³⁷ See *supra* notes 72–74 and accompanying text.

²³⁸ See *supra* note 74 and accompanying text.

²³⁹ See *supra* notes 75–98 and accompanying text.

²⁴⁰ *Giuliani*, 197 A.D.3d at 13–15, 18–19.

In addition to the misrepresentations on which the New York court relied, Mr. Giuliani also made various other false statements that Ms. Ellis likewise failed to correct despite being aware of or recklessly indifferent to their falsity, such as his statements regarding votes being “counted in Germany and in Spain” by a “Venezuelan company.”²⁴¹

Finally, there is a similar basis to investigate whether Ms. Ellis violated Colo. RPC 8.4(a) in failing to correct misrepresentations made by Ms. Powell, such as that voting machines used in the 2020 election had been tampered with by Communist forces in Venezuela at the direction of Hugo Chavez (notwithstanding that the Trump campaign had by that time already internally debunked false conspiracy theories alleging that Dominion was tied to Venezuela).²⁴²

Second, in addition to potential violations of Colo. RPC 8.4(a), there is reason to investigate potential violations of Colo. RPC 5.1(c). This rule provides that a lawyer is responsible for another lawyer’s violation of the Rules, if the lawyer, “with knowledge of the specific conduct, ratifies the conduct involved.” Colo. RPC 5.1(c)(1). The facts recited above provide grounds for investigating whether, on one or more occasions, Ms. Ellis, knowing that Mr. Giuliani or another of her colleagues had violated the Rules, effectively ratified that conduct.

Rule 5.1(c)(2) provides that a lawyer with managerial authority comparable to a partner is responsible for the misconduct of another lawyer in the same firm when the lawyer “knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.” For purposes of representing Mr. Trump, Ms. Ellis appears to have been part of the same *de facto* law firm—the “elite strike force team,” as she called it—as Mr. Giuliani, Ms. Powell, and other attorneys.²⁴³ Indeed, given her role as “senior legal adviser,” her direction to other campaign employees to report to her, and her self-proclaimed expertise and standing, there are substantial grounds to investigate whether Ms. Ellis in fact exercised authority within the “team” comparable to that of a law firm partner. If she did, Ms. Ellis would likely be responsible for Mr. Giuliani’s ethical violations because she knew of them at a time when their consequences could have been mitigated or avoided and declined to take any remedial action, even when explicitly prompted to do so.

Third, there is likewise reason to investigate whether Ms. Ellis violated her own obligations of competence, candor, and truthfulness under such rules as Colo. RPC 1.1, 2.1, 4.1, and 8.4(c) by failing to take reasonable steps to correct the falsehoods that Mr. Giuliani presented to third parties in her presence and with her knowledge.

C. Ms. Ellis’s Misrepresentations Regarding the Electoral College Process

Aside from misrepresentations concerning alleged manipulation and fraud in the 2020 election, Ms. Ellis also made repeated false public statements—during her tour of swing states with Mr. Giuliani, via Twitter, on television, and otherwise—concerning the role of the state

²⁴¹ See *supra* notes 41-42 and accompanying text.

²⁴² See *supra* notes 43-44 and accompanying text.

²⁴³ See *supra* notes 24-28 and accompanying text.

legislatures and the nature of the Electoral College process. These included, among others, stating or implying that state legislatures could unilaterally decide to certify alternate slates of electors.²⁴⁴ Such statements concerning the Electoral College process itself, like those above regarding alleged fraud in the 2020 election, provide a sound basis for the OARC to investigate potential violations of, among other rules, Colo. RPC 1.1, 1.2, 4.1(a), 8.4(c), and 8.4(h).

IV. The First Amendment Does Not Protect Ms. Ellis From Professional Discipline

Ms. Ellis may claim that the First Amendment prohibits OARC from investigating whether she engaged in professional misconduct in her speech and conduct in connection with the 2020 election. It does not. While Ms. Ellis’s acts included speech on political subjects, that does not insulate her from discipline under the Rules of Professional Conduct. Indeed, the New York court rejected exactly this argument with respect to Mr. Giuliani, explaining that “[t]his disciplinary proceeding concerns the professional restrictions imposed on respondent as an attorney to not knowingly misrepresent facts and make false statements in connection with his representation of a client.”²⁴⁵ As the court explained, “speech by an attorney is subject to greater regulation than speech by others,” including because, “[u]nlike lay persons, an attorney is “a professional trained in the art of persuasion,” and “[a]s officers of the court, attorneys are ‘an intimate and trusted and essential part of the machinery of justice.’”²⁴⁶ Similarly, Colorado courts have recognized that an attorney’s First Amendment interest in a given kind of speech is weighed against the state’s “interest in the regulation of a specialized profession,” and that the state’s interest in regulating attorney speech is “at its strongest when the regulation is necessary to preserve the integrity of the justice system or to protect clients.” *In re Abrams*, 488 P.3d 1043, 1051 (Colo. 2021) (quoting *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1073 (1991)).

Finally, to the extent that Ms. Ellis knowingly assisted Mr. Trump in any unlawful actions, Colorado courts recognize that the First Amendment does not protect speech that is part of an otherwise unlawful course of conduct, such as the commission of or aiding and abetting of a crime or fraud. *See, e.g., People v. Shell*, 148 P.3d 162, 173 (Colo. 2006) (citing with approval, among others, *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 243 (4th Cir. 1997)). Those principles would defeat any First Amendment defense to a claim of aiding and abetting unlawful or fraudulent conduct.

For all these reasons, if the OARC finds that Ms. Ellis crossed the boundaries established by the Rules of Professional Conduct through the conduct described above, her conduct was not entitled to protection under the First Amendment.

V. A Subjective Belief in the Justness of Her Cause Would Not Justify Ms. Ellis’s Conduct

Ms. Ellis may assert that she truly believed in the justness of her cause and that this affords a defense to her violations of the ethical rules. Not so. Lawyers have been disciplined for violation

²⁴⁴ *See, e.g., supra* notes 65-94 and accompanying text.

²⁴⁵ *Giuliani*, 197 A.D.3d at 7.

²⁴⁶ *Id.* (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991)).

of the above rules while representing a client notwithstanding their sincere subjective beliefs that their actions are legally and morally justifiable. *See People v. Maynard*, 238 P.3d 672, 690 (Colo. O.P.D.J. 2009) (upholding discipline under, among others, RPC 1.1 and 3.1, and remarking, “[r]espondent’s subjective belief that she and her clients are victims of a criminal conspiracy . . . does not relieve her of her duties to the court and the legal system, which all lawyers must honor”); *cf. Collins v. Daniels*, 916 F.3d 1302, 1320 (10th Cir. 2019) (remarking, in context of Rule 11 sanctions, “[W]e employ an objective standard ‘intended to eliminate any ‘empty-head pure-heart’ justification for patently frivolous arguments.’” (quoting Fed. R. Civ. P. 11 advisory committee’s note to 1993 amendments)).

VI. Ms. Ellis’s Conduct Caused and Threatened to Cause Substantial Harm

Ms. Ellis’s conduct has caused substantial harm and threatened to cause even more. The ethical violations described above occurred in the course of a scheme to corrupt the legitimate transfer of presidential power in our country. It is difficult to imagine a more serious context in which a lawyer could violate their ethical duties. Numerous Americans still believe the false claims that the 2020 election was irredeemably infected by fraud and corruption. And if Ms. Ellis had successfully urged Mr. Pence to follow her advice, it could have permanently ended the peaceful transition of power in our country. To this day, Ms. Ellis shows no remorse for her role in the efforts to overturn the election.²⁴⁷

As described above, Ms. Ellis’s conduct calls for a thorough investigation and, if the case outlined in this complaint is sustained, for substantial professional discipline.

* * *

For the reasons set forth above, we respectfully request that the Office of Attorney Regulation Counsel open an ethics investigation into Ms. Ellis’s conduct.

Very truly yours,

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STATES UNITED DEMOCRACY CENTER

James C. Coyle
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²⁴⁷ For example, the day after the House Select Committee investigating the January 6th attack sent Ms. Ellis a subpoena concerning her role in interfering with the certification of the 2020 election results, Ms. Ellis tweeted: “The committee is just mad they can’t date me.” Julia Fennell, *Colorado Lawyer Jenna Ellis Subpoenaed by Jan. 6 Committee*, Colorado Newsline (Jan. 19, 2022), <https://coloradonewsline.com/briefs/colorado-lawyer-jenna-ellis-subpoenaed-jan-6-committee/>.

²⁴⁸ Mr. Coyle’s biography is available here: <https://lawweb.colorado.edu/profiles/profile.jsp?id=1059>.