KENNETH CHESEBRO AND THE ETHICS OF ELECTION SUBVERSION

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This Article examines the role of attorney Kenneth Chesebro in orchestrating the "fake electors plot" following the 2020 U.S. presidential election. It traces Chesebro's transformation from a Harvard-educated lawyer with Democratic ties to a key architect of Donald Trump's post-election strategy to derail the transfer of power to Joseph Biden. Part I provides a detailed chronology of Chesebro's activities between November 2020 and January 2021, revealing how his legal advice evolved from preserving legal rights in Wisconsin to a coordinated plan to impanel alternate electors across multiple battleground states as a pretext for the Vice President to intervene unilaterally in the Congressional certification of the national election on January 6. Part II analyzes the professional discipline case against Chesebro under Model Rule 8.4(c). It examines the principal elements of Chesebro's strategy and argues that his conduct appears to have involved dishonesty, fraud, deceit, or misrepresentation, warranting professional discipline. Part III interrogates Chesebro's moral culpability, contending that his actions represent not merely a violation of professional conduct rules but a profound betrayal of public trust and democratic principles. This Article concludes that Chesebro's moral culpability transcends his violations of the professional conduct rules. By pursuing increasingly aggressive strategies to overturn Biden's legitimate victory without evidence of outcome-changing fraud, by offering a would-be autocrat with a blueprint for how to subvert the collective will of the voters in contravention of the U.S. Constitution, federal and state laws, and by using his legal expertise to peddle implausible theories designed to exploit procedural leverage to advance a naked power grab, he

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demonstrated a mind-blowing willingness to undermine democracy itself. Chesebro betrayed the public trust in ways that existing professional conduct rules, which lack explicit duties to preserve democracy, cannot adequately capture or address.

TABLE OF CONTENTS

> Enjoy the history you have made possible today.
>
> Text Message from James Troupis to Kenneth Chesebro
> January 6, 2021, 11:04 AM[1]

INTRODUCTION

One of the puzzles that has emerged in the aftermath of the January 6 insurrection is how and why formerly reputable lawyers masterminded the effort to derail the transfer of power after the 2020 presidential election. One such lawyer was Kenneth J. Chesebro, who contrived the elaborate "fake electors plot,"[2] a conspiracy to impanel slates of alternate electors to support Donald J. Trump in seven battleground states won by Joseph R. Biden, Jr.[3] Chesebro's legal career

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1 Luke Broadwater & Maggie Haberman, *Newly Released Messages Detail Roots of the 'Fake Electors' Scheme*, N.Y. TIMES (Mar. 4, 2024), https://www.nytimes.com/2024/03/04/us/politics/chesebro-troupis-jan-6-messages.html [https://web.archive.org/web/20250211101121/https://www.nytimes.com/2024/03/04/us/politics/chesebro-troupis-jan-6-messages.html].

2 Zachary Cohen et al., *January 6 Committee Releases Final Report, Says Trump Should Be Barred from Office*, CNN (Dec. 23, 2022, 12:24 PM), https://www.cnn.com/2022/12/22/politics/jan-6-committee-final-report/index.html [https://perma.cc/YRV5-74MZ] (reporting that the January 6 Committee identified Chesebro as the architect of the fake electors plot).

3 Memorandum from John Eastman 1 (n.d.) (on file with author) [hereinafter First Eastman Memo] ("7 states have transmitted dual slates of electors . . . ."); Jeffrey Toobin, *Legal Weasel*, AIR MAIL (Aug. 12, 2023), https://airmail.news/issues/2023-8-12/legal-weasel [https://perma.cc/K5CN-7D4C]. This memo, completed on December 23, 2020, was drafted by John Eastman and edited by Chesebro. *See* Email from John Eastman to Kenneth Chesebro (Dec. 23, 2020, 10:16 AM), *reprinted in* Complaint Exhibit F at 2, Eastman v. Thompson, No. 22-cv-99 (C.D. Cal. May 26, 2022) (referring to "Ken's edits" and noting "[h]ere's the final"). Unless and until they are certified, persons seeking to cast ballots in the Electoral College are technically "elector-nominees." *See*

had an auspicious start as a student at Harvard Law School in the 1980s.[4] Professor Laurence Tribe tapped Chesebro to serve as one of his research assistants, alongside future Supreme Court Justice Elena Kagan and future President Biden's White House chief of staff Ron Klain.[5] After law school, Chesebro clerked for federal district court Judge Gerhard Gesell, who had famously presided over the Watergate and Oliver North cases.[6] After his judicial clerkship, Chesebro declined to follow the herd by going into Big Law.[7] Instead, he opened his own law firm in Cambridge, Massachusetts, where he developed a friendship with Professor Tribe and occasionally worked with him on high-profile cases, such as *Bush v. Gore*,[8] on the side of the Gore presidential campaign.[9] Chesebro became a supporter of Democratic politicians, including former Presidents Bill Clinton and Barack Obama and former Senators John Kerry and Russ Feingold.[10]

But Chesebro seemingly underwent a dramatic transformation when he entered his early fifties.[11] In 2014, he made a lucrative investment in Bitcoin, divorced his wife of more than two decades, purchased a penthouse apartment in Manhattan, and remarried.[12] In 2016, he switched his voter registration from Democrat to unaffiliated.[13] He lent his legal efforts to support conservative causes, including filing a U.S. Supreme Court amicus brief that referred to birthright citizenship as a

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MATTHEW A. SELIGMAN, ANALYSIS OF THE LAWFULNESS OF KENNETH CHESEBRO'S ELECTOR PLAN UNDER FEDERAL ELECTION LAW (2023). For purposes of brevity, this Article will refer to all elector-nominees as "electors."

4 *See* Toobin, *supra* note 3.

5 Isaac Stanley-Becker, *The 'Brains' Behind Fake Trump Electors Was Once a Liberal Democrat*, WASH. POST (Aug. 16, 2023), https://www.washingtonpost.com/national-security/2023/08/16/kenneth-cheseboro-trump-indictment-fake-electors [https://web.archive.org/web/20230816175527/https://www.washingtonpost.com/national-security/2023/08/16/kenneth-cheseboro-trump-indictment-fake-electors]; Toobin, *supra* note 3.

6 Toobin, *supra* note 3; Bruce Lambert, *Judge Gerhard Gesell Dies at 82; Oversaw Big Cases*, N.Y. TIMES, Feb. 21, 1993, at 39.

7 Elizabeth Williamson, *From Bush v. Gore to 'Stop the Steal': Kenneth Chesebro's Long, Strange Trip*, N.Y. TIMES (Oct. 25, 2023), https://www.nytimes.com/2023/10/21/us/politics/chesebro-trump.html [https://web.archive.org/web/20250108032231/https://www.nytimes.com/2023/10/21/us/politics/chesebro-trump.html].

8 *Id.*; *see* 531 U.S. 98 (2000) (per curiam).

9 Josh Kovensky, *Exclusive: Trump Lawyer Kenneth Chesebro Talks About His Role in the Runup to Jan. 6*, TALKING POINTS MEMO (June 16, 2022), https://talkingpointsmemo.com/feature/exclusive-trump-lawyer-kenneth-chesebro-talks-about-his-role-in-the-runup-to-jan-6 [https://perma.cc/MUD6-K9E9].

10 Toobin, *supra* note 3.

11 *Id.*

12 *Id.*

13 Stanley-Becker, *supra* note 5.

"vestige of feudalism."[14] In 2020, he donated to the election campaigns of Trump and other extremist Republican politicians, such as former Senator J.D. Vance and Senator Ron Johnson.[15]

In November 2020, Chesebro began working pro bono for the Trump campaign in Wisconsin.[16] He drafted three memoranda for former Wisconsin judge James R. Troupis, the Trump campaign's representative in Wisconsin, and one email to Trump's advisor Rudolph W. Giuliani, which together laid out Chesebro's legal strategy for a Trump post-election victory.[17] In essence, this strategy proposed impaneling false pro-Trump electors in the purportedly contested battleground states for the purpose of setting up an illusory controversy that would prevent Biden's victory from being certified at the joint session of Congress on January 6, 2021. Chesebro also provided comments on another notorious document—a short, undated memo completed by one of Trump's legal advisors, John C. Eastman, on December 23, 2020.[18] These documents, along with another longer memo completed by Eastman on January 3, 2021,[19] provided the blueprint for how to steal the 2020 presidential election.

On October 20, 2023, Chesebro pled guilty in a Georgia state court to a single felony charge of conspiracy to file false documents.[20] As a result

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14 Kovensky, *supra* note 9. In addition, in 2018, he represented Senators Ted Cruz and Mike Lee in a Utah voting rights case. Toobin, *supra* note 3.

15 Stanley-Becker, *supra* note 5; Toobin, *supra* note 3; Ed Pilkington, *'It Baffles Me': What Drew a Mild Lawyer with a Liberal Past into Trump's Election Plot?*, GUARDIAN (Oct. 21, 2023, 11:00 AM), https://www.theguardian.com/us-news/2023/aug/19/kenneth-chesebro-trump-georgia-indictment-fake-electors [https://perma.cc/L2FU-BVQP].

16 Toobin, *supra* note 3; Pilkington, *supra* note 15.

17 Stanley-Becker, *supra* note 5 (referring to the memos issued on November 18, December 6, and December 9); Email from Kenneth Chesebro to Rudy Giuliani (Dec. 13, 2020, 9:48 PM), *reprinted in* Complaint Exhibit A at 2, Eastman v. Thompson, No. 22-cv-99 (C.D. Cal. May 26, 2022). Giuliani was disbarred by a July 2024 order of the New York Appellate Division, First Department, based on his conduct in connection with the Trump campaign and the 2020 presidential election. Matter of Giuliani, 214 N.Y.S.3d 366, 387 (App. Div. 2024).

18 *See* Email from John Eastman to Kenneth Chesebro, *supra* note 3; First Eastman Memo, *supra* note 3. For a detailed examination of Eastman's memos, see Sung Hui Kim, *Reimagining the Lawyer's Duty to Uphold the Rule of Law*, 2023 U. ILL. L. REV. 781, 824–30.

19 Memorandum from John Eastman to Boris Epshteyn (Jan. 3, 2021) [hereinafter Second Eastman Memo], https://s3.documentcloud.org/documents/21066947/jan-3-memo-on-jan-6-scenario.pdf [https://perma.cc/2MMJ-B39R]; Ryan Goodman, Jacob Glick, Mary B. McCord & Rupa Bhattacharyya, *Comprehensive Timeline on False Electors Scheme in 2020 Presidential Election*, JUST SEC. (May 15, 2024), https://www.justsecurity.org/81939/timeline-false-electors [https://perma.cc/7ZRP-MDQ4].

20 State v. Chesebro, No. 23-sc-188947, 2023 WL 7103220 (Ga. Super. Ct. Oct. 20, 2023); Richard Fausset & Alan Feuer, *Kenneth Chesebro, a Trump-Aligned Lawyer, Pleads Guilty in Georgia*, N.Y. TIMES (Oct. 20, 2023), https://www.nytimes.com/2023/10/20/us/kenneth-chesebro-

of this plea, Chesebro was suspended from legal practice in some of the jurisdictions where he was licensed, including New York and California.[21] In September 2024, after a Georgia state court judge dismissed charges against Trump for election interference, Chesebro attempted unsuccessfully to invalidate his guilty plea.[22] As of this Article's writing, Chesebro, Troupis, and Michael Roman (Trump's director of Election Day operations) currently face felony charges in Wisconsin for forgery.[23] Although news reports indicated that Chesebro "emerged as a key witness" for other prosecutions,[24] at least some of those prosecutions have been scuttled as a result of Trump's victory in the 2024 presidential election.[25]

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trump-guilty-plea-georgia.html [https://web.archive.org/web/20250307183718/https://www.nytimes.com/2023/10/20/us/kenneth-chesebro-trump-guilty-plea-georgia.html] (explaining that, in exchange for a light sentence that included no prison time, Chesebro agreed to turn over documents and other evidence relating to the case and to "truthfully testify" against the remaining codefendants, including Trump, Giuliani, and Mark Meadows, Trump's former White House chief of staff).

21 According to the New York state appellate court, which indefinitely suspended Chesebro from law practice, as of March 2024, Chesebro's license to practice law was "temporarily suspended" in Massachusetts, "listed as not eligible to practice law in California[,] inactive and not eligible to practice law in Florida[,] and voluntarily inactive in Illinois." Matter of Chesebro, 220 N.Y.S.3d 493, 495 n.1, 499 (App. Div. 2024). Also, effective February 19, 2024, Chesebro was suspended from law practice in California pending final disposition. *See Attorney Profile: Kenneth John Chesebro*, STATE BAR CAL., https://apps.calbar.ca.gov/attorney/Licensee/Detail/236022 [https://perma.cc/97Q4-QNCR].

22 Scott Bauer, *Trump Lawyers and Aide Hit with 10 Additional Felony Charges in Wisconsin over 2020 Fake Electors*, AP NEWS (Dec. 10, 2024, 1:08 PM), https://apnews.com/article/wisconsin-trump-fake-electors-5624cb3e441f6866da4f2dd452a902bc [https://perma.cc/T2MJ-XEMH] (reporting Chesebro's attempt to invalidate his guilty plea in Georgia); Jared Eggelston, *Georgia Judge Denies Motion to Overturn Guilty Plea from Former Trump Lawyer in Election Interference Case*, CBS NEWS (Dec. 13, 2024, 5:25 PM), https://www.cbsnews.com/news/georgia-judge-kenneth-chesebro-guilty-plea-trump [https://perma.cc/9HST-GNZ5].

23 *See* Neil Vigdor & Danny Hakim, *Wisconsin Charges 3 Trump Allies in Fake Electors Scheme*, N.Y. TIMES (June 4, 2024), https://www.nytimes.com/2024/06/04/us/politics/wisconsin-charges-3-trump-allies-in-fake-electors-scheme.html [https://web.archive.org/web/20250211101119/https://www.nytimes.com/2024/06/04/us/politics/wisconsin-charges-3-trump-allies-in-fake-electors-scheme.html]; Complaint at 1–2, Wisconsin v. Chesebro, No. 2024-cf-1293 (Wis. Cir. Ct. June 4, 2024); Bauer, *supra* note 22.

24 *See, e.g.*, Vigdor & Hakim, *supra* note 23.

25 For example, Chesebro was listed as "Co-Conspirator 5" in the revised federal indictment against Trump issued on August 27, 2024. *See* Superseding Indictment at 4, 19–20, United States v. Trump, No. 23-cr-257 (D.D.C. Aug. 27, 2024), https://static01.nyt.com/newsgraphics/documenttools/c2e75a4e04dc1b34/242c685f-full.pdf [https://perma.cc/XK3S-FDZS] (noting that Co-Conspirator 5 is "a private attorney who assisted in devising and attempting to implement a plan to submit fraudulent slates of presidential electors to obstruct the certification proceeding" and describing acts known to be undertaken by Chesebro). In the aftermath of Trump's presidential election victory in November 2024, that federal indictment has been withdrawn. Alan Feuer, Charlie Savage & Devlin Barrett, *Jack Smith Seeks Dismissal of Two Federal Cases Against Trump*,

This Article argues that the weight of evidence suggests that Kenneth Chesebro's legal representation of the Trump campaign not only merits professional discipline for attempting to deceive election officials but also reveals a profound moral failing that our existing legal ethics frameworks cannot adequately address. Part I provides a chronology of Chesebro's work on behalf of the Trump campaign in the aftermath of the November 2020 election. Part II explores some bases for the professional discipline case against Chesebro. Part III interrogates Chesebro's moral culpability for his representation of the Trump campaign and briefly highlights the failure of professional conduct rules to reflect the moral gravity of conduct that undermines fundamental democratic processes.

I. THE EVOLUTION OF THE FAKE ELECTORS PLOT

In the early morning hours of November 4, 2020, Biden overtook Trump in the battleground state of Wisconsin by about 20,000 votes after Milwaukee finally reported its absentee votes, which overwhelmingly leaned Democratic.[26] The nationwide media projected Biden to win Wisconsin, which added ten electoral votes to Biden's then-projected tally of 227 electoral votes (compared to Trump's running tally of 213 electoral votes).[27] This win inched Biden closer to the 270 electoral vote threshold needed to secure his national victory, which the media called on November 7.[28]

November 8 Email to Troupis. The next day, on November 8, Kenneth Chesebro emailed Troupis, the Trump campaign's representative in Wisconsin, to pitch an idea.[29] (Troupis's law firm sought

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N.Y. TIMES (Nov. 25, 2024), https://www.nytimes.com/2024/11/25/us/politics/jack-smith-trump-election-documents-charges.html [https://perma.cc/SN89-EWQJ].

26 Craig Gilbert, *Biden Declared Winner in Wisconsin with 20,000 Vote Margin; Trump Campaign Vows Request for Recount*, USA TODAY (Nov. 4, 2020, 3:14 PM), https://www.usatoday.com/story/news/politics/elections/2020/11/04/wisconsin-election-results-biden-leads-milwaukee-kenosha-totals/6158417002 [https://perma.cc/5CDF-ZSTY].

27 *See CNN Projection: Biden Wins Wisconsin*, FACEBOOK (Nov. 4, 2020), https://www.facebook.com/cnn/videos/cnn-projection-biden-wins-wisconsin/902286210304757 [https://perma.cc/78FY-VFEV] (showing that Biden's Wisconsin win resulted in Biden leading with 237 electoral votes over Trump's 213).

28 Stephen Battaglio, *How the Networks Decided to Call the Election for Joe Biden*, L.A. TIMES (Nov. 7, 2020, 5:08 PM), https://www.latimes.com/entertainment-arts/business/story/2020-11-07/joe-biden-president-elect-television-news-networks [https://web.archive.org/web/20250116201235/https://www.latimes.com/entertainment-arts/business/story/2020-11-07/joe-biden-president-elect-television-news-networks].

29 Broadwater & Haberman, *supra* note 1; Email from Kenneth Chesebro to James R. Troupis (Nov. 8, 2020, 10:26 AM), https://www.wpr.org/wp-content/uploads/2024/03/Pages-from-Troupis-008910-Troupis-010348-2.pdf [https://perma.cc/9HYW-UWCB].

to invalidate the use of absentee ballots in Milwaukee and Dane counties—counties that one Wisconsin Supreme Court justice subsequently described as "the 'most nonwhite, urban' parts of the state."[30]) Chesebro believed that the Wisconsin Election Commission overstepped its authority when it introduced COVID-era absentee ballot election procedures, which—he thought—may have swung the vote in favor of Biden in key locales.[31]

In that November 8 email to Troupis, Chesebro suggested that the Trump campaign could allege "various systemic abuses" and that state legislatures could intervene and certify pro-Trump electors on their own.[32] This plan would "[a]t minimum" create a "cloud of confusion," whereby "no votes from W[isconsin] (and perhaps also M[ichigan] and P[ennsylvania]) should be counted, perhaps enough to throw the election to the House."[33] On November 13, the nationwide media projected Biden would receive 306 electoral votes to Trump's mere 232.[34] On November 15, Chesebro told Troupis that he had "some thoughts about how [state] legislators might . . . make findings that Trump supporters . . . could rely on to cast doubt on the validity of electoral votes cast for Biden."[35]

In raising the possibility that state legislatures could intervene in the presidential election,[36] Chesebro was referring to the Trump campaign's emerging plan to recruit Republican-leaning state legislatures to certify their own slates of Trump-Pence electors to compete with those certified by state governors based on the election results.[37] Even prior to Election Day, the media identified state legislatures as a potential weapon for Republicans because significant swing states, such as Michigan and Pennsylvania, maintained Republican-controlled legislatures despite having Democratic governors.[38] Republicans attempted to capitalize on

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30 Alan Feuer, Maggie Haberman & Luke Broadwater, *Memos Show Roots of Trump's Focus on Jan. 6 and Alternate Electors*, N.Y. TIMES (Feb. 2, 2022), https://www.nytimes.com/2022/02/02/us/politics/trump-jan-6-memos.html [https://perma.cc/B7WC-VMLR].

31 Kovensky, *supra* note 9 ("[Chesebro] focused on a more staid argument: that election measures taken to run the election in Wisconsin during COVID-19 invalidated Biden's victory.").

32 Email from Kenneth Chesebro to James R. Troupis, *supra* note 29.

33 *Id.*

34 Glenn Thrush & Matt Stevens, *Highlights from the Transition: Biden Wins Georgia and Trump Wins North Carolina as Final States Are Called*, N.Y. TIMES (Nov. 25, 2020), https://www.nytimes.com/live/2020/11/13/us/joe-biden-trump [https://perma.cc/YDJ9-LCEE].

35 Text Message from Kenneth Chesebro to James R. Troupis (Nov. 15, 2020, 9:39 PM), https://www.lawforward.org/wp-content/uploads/2024/03/Chesebro-Troupis.pdf [https://perma.cc/N2EE-2E93].

36 *See supra* note 32 and accompanying text.

37 *See infra* notes 123–125, 272–278 and accompanying text.

38 For example, Michigan and Pennsylvania had Democratic governors and Republican-controlled legislatures. *Party Control of Michigan State Government*, BALLOTPEDIA,

this partisan advantage through lawsuits. For example, on November 20, the Trump-allied Wisconsin Voters Alliance filed a lawsuit, arguing that the Electoral Count Act of 1887, which generally privileges the electoral slates certified by state governors, violated Article II of the U.S. Constitution because the statute impermissibly disempowered *state legislatures* in post-election certification matters.[39] This complaint was finally dismissed on January 4, 2021, in part on standing grounds.[40]

The plan to recruit state legislatures to certify their own slates of electors to compete with the certified Biden-Harris electors appears to have derived from the so-called "independent state legislature theory," a theory that was embraced by John Eastman and discredited by legal academics—most notably, Akhil Amar and Vikram Amar.[41] The independent state legislature theory generally holds that "because [Article II, section 1, clause 2 of] the Constitution gives state legislatures the power to select the 'manner' by which electors are chosen, no other branch of the state government (the courts or the executive) or even the state constitution may alter or constrain what the legislature does."[42] More controversially, a version of the theory also insists that *only* federal courts have the power to determine how and whether the state legislature's election laws are or have been followed.[43] In his subsequent

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https://ballotpedia.org/Party_control_of_Michigan_state_government [https://perma.cc/9L5C-D3PZ]; *Party Control of Pennsylvania State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Pennsylvania_state_government [https://perma.cc/M4SK-53BT]. Republicans controlled the majority of state legislatures nationwide. *State Legislative Elections, 2020*, BALLOTPEDIA (Jan. 11, 2021), https://ballotpedia.org/State_legislative_elections,_2020 [https://perma.cc/5G7C-4A76] ("Heading into the 2020 elections, Republicans held a majority in more chambers than Democrats. There was a Republican majority in 59 chambers and a Democratic majority in 39 chambers. In the Alaska House, there was a power-sharing agreement between the parties as part of a coalition.").

39 Complaint at 6, Wis. Voters All. v. Pence, 514 F. Supp. 3d 117 (D.D.C. 2020) (No. 20-cv-3791).

40 *Wis. Voters All.*, 514 F. Supp. 3d at 120–21 (denying a motion for a preliminary injunction for lack of "a concrete and particularized injury" and lack of personal jurisdiction over the state official defendants "because [plaintiffs'] central contention is flat-out wrong"); *see also* Wis. Voters All. v. Pence, No. 20-cv-3791, 2021 WL 686359, at *2 (D.D.C. Feb. 19, 2021) (referring plaintiffs' counsel to the United States District Court for the District of Columbia's Committee on Grievances for possible discipline), *aff'd*, 28 F.4th 1282 (D.C. Cir. 2022).

41 Marshall Cohen, *How the 'Independent State Legislature' Theory, Now Rejected by SCOTUS, Fueled Chaos in 2020 and Could Influence 2024*, CNN (June 27, 2023, 3:39PM) https://www.cnn.com/2023/06/27/politics/supreme-court-2020-2024-legal-theory/index.html [https://perma.cc/TR7D-9RH5]; *see, e.g.*, Vikram David Amar & Ahil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1; Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052 (2021).

42 LAWRENCE LESSIG & MATTHEW SELIGMAN, HOW TO STEAL A PRESIDENTIAL ELECTION 104 (2024).

43 *Id.*

correspondence, Chesebro repeatedly made passing references to the tactic of using state legislatures as a back-up alternative to a resolution by court ruling.[44]

November 18 Memo. As the Trump campaign announced that it would seek recounts in both Milwaukee and Dane counties,[45] Chesebro completed the first of his memos, which contained the key elements of the Wisconsin fake electors plot. In that memo, dated November 18, Chesebro argued that, unless one side concedes the race to the other, "the real deadline for a finding by the Wisconsin courts (or, possibly, by its Legislature)" of the winner of the election in Wisconsin was January 6 at the joint session of Congress.[46] (While the Twelfth Amendment prescribed Congress's duty to certify the results of the presidential election in a joint session,[47] the Electoral Count Act penned January 6 as

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44 *See, e.g., infra* note 46 and accompanying text; Memorandum from Kenneth Chesebro to James R. Troupis 2 (Dec. 6, 2020), https://int.nyt.com/data/documenttools/chesebro-dec-6-memo/ce55d6abd79c2c71/full.pdf [https://perma.cc/45AH-MB26] ("[E]ven if Trump has not managed by then to obtain court decisions (*or state legislative resolutions*) invalidating enough results to push Biden below 270." (emphasis added)); *id.* at 3 ("If disputes over mail-in votes are dragging on in court when it comes time for the Electoral College to meet on Dec. 14, it's possible legislators could put up their own slates." (quoting Herb Jackson, *What Happens When a State Can't Decide on Its Electors*, ROLL CALL (Oct. 26, 2020, 10:30 AM), https://rollcall.com/2020/10/26/we-the-people-what-happens-when-a-state-cant-decide-on-its-electors [https://perma.cc/625P-483A])); *id.* at 4 ("[A]sking the electors pledged to them to please assemble in their respective States and cast their votes . . . so that they might be counted in Congress if their slates are later declared the valid ones, by a court and/or state legislature."); Memorandum from Kenneth Chesebro to James R. Troupis 11 (Dec. 9, 2020), https://www.nytimes.com/interactive/2022/02/02/us/trump-electors-memo-december.html [https://perma.cc/G4QG-L9KJ] ("[S]o that the votes might be eligible to be counted if later recognized (by a court, the state legislature, or Congress) as the valid ones that actually count in the presidential election."); Email from Kenneth Chesebro to Rudy Giuliani, *supra* note 17, at 4 ("[I]f Arizona wants to be represented in the electoral count, either it has to rerun the election, or engage in adequate judicial review, or have its legislature appoint electors.").

45 Jeff Zeleny & Casey Tolan, *Trump Campaign Seeks Partial Recount in Wisconsin*, CNN (Nov. 18, 2020, 4:38 PM), https://www.cnn.com/2020/11/18/politics/trump-campaign-wisconsin-recount/index.html [https://perma.cc/DYG7-2FPP].

46 Memorandum from Kenneth Chesebro to James R. Troupis 2 (Nov. 18, 2020), https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-memorandum-to-james-r.-troupis-attorney-for-trump-campaign-wisconsin-November-18-2020.pdf [https://perma.cc/9RXZ-A86F]. This memo was allegedly sent by Troupis to "an individual affiliated with the Trump campaign" on November 25, 2020. *See* Complaint, *supra* note 23, ¶ 26.

47 U.S. CONST. amend. XII. The Twelfth Amendment provides that the Vice President in their role as "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted." *Id.* The Twelfth Amendment superseded Article II, Section 1, Clause 3 of the Constitution, which established the Electoral College. *Overview of Twelfth Amendment, Election of President*, CONST. ANN., https://constitution.congress.gov/browse/essay/amdt12-1/ALDE_00013668 [https://web.archive.org/web/20250307130903/https://constitution.congress.gov/browse/essay/

the date on which this certification had to take place.[48]) For Chesebro, setting the hard deadline at January 6 was strategically advantageous because it would buy the Trump campaign more time to conduct its election challenges. To make the case that this strategy was lawful, however, Chesebro had to explain why the two other important Electoral Count Act deadlines, which suggested the need for an earlier resolution of election challenges, could be ignored.

The first important deadline was the so-called "safe-harbor" date—the date by which each state had to issue its certificate of ascertainment in order to receive the benefit of congressional deference.[49] A certificate of ascertainment identifies the electors appointed to cast the state's electoral votes at the Electoral College meeting.[50] According to the Electoral Count Act, once the certificate of ascertainment is received by Congress, the state's electors identified therein would be recognized by Congress as "conclusive."[51] For the 2020 election cycle, the safe harbor

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amdt12-1/ALDE_00013668]. But the Twelfth Amendment retained a key sentence from Article II, Section 1, Clause 3, which governed how the federal government would process the electoral votes received from the states: "The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted." U.S. CONST. art. II, § 1, cl. 3 (amended 1804); U.S. CONST. amend. XII.

48 *See* Act of June 25, 1948, ch. 644, 62 Stat. 675 (current version at 3 U.S.C. § 15) ("Congress shall be in session on the sixth day of January succeeding every meeting of the electors."). The Electoral Count Act, which governed the events discussed in this Article, is codified at 3 U.S.C. §§ 5–77, 15–18. Electoral Count Act of 1887, ch. 90, 24 Stat. 373. Also known as "Section 15," 3 U.S.C. § 15 outlines the procedures for counting electoral votes for President and Vice President in a joint session of Congress on January 6. 3 U.S.C. § 15 (2020) (amended 2022). The 2020 version of the statute was in effect during the events discussed in this Article. The Electoral Count Act was repealed and replaced by the Electoral Count Reform Act of 2022. *See* 62 Stat. 675.

49 Memorandum from Kenneth Chesebro to James R. Troupis, *supra* note 46, at 4–5; *see, e.g.*, Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1659–60 (2002) (referring to the 3 U.S.C. § 5 as "the so-called 'safe harbor' provision").

50 3 U.S.C. § 5(a) (2020); *Electoral College*, NAT'L ARCHIVES (Nov. 7, 2024), https://www.archives.gov/electoral-college/electors [https://perma.cc/Y6NC-6EEC].

51 3 U.S.C. § 5(a)–(c) (2020). However, the Electoral Count Act did provide for the possibility of a different certificate of ascertainment to be issued pursuant to a court order so long as that issuance occurs "prior to the date of the meeting of electors." *See* 3 U.S.C. § 5(c)(1)(B). On the nature of the safe harbor:

> This was the date mandated by the Electoral Count Act by which states had to get their acts together, in order to prevent Congress from possibly rejecting a slate of presidential electors. . . . [I]t was *not* a requirement ordained by either the U.S. Constitution, the Florida constitution, or even Congress itself. It was only in the nature of a benefit offered, with no penalty other than the absence of a benefit—sort of a no-risk offer. Any electoral slate determined thereafter simply would not be immune from congressional examination in a close election.

DAVID A. KAPLAN, THE ACCIDENTAL PRESIDENT: HOW 413 LAWYERS, 9 SUPREME COURT JUSTICES, AND 5,963,110 FLORIDIANS (GIVE OR TAKE A FEW) LANDED GEORGE W. BUSH IN THE WHITE

deadline was December 8, 2020.[52] Inconveniently, the most recent relevant Supreme Court precedent, *Bush v. Gore*, cited the need to respect the safe harbor deadline as a key factor in the decision to halt the ongoing Florida recount.[53] That precedent raised doubts about the validity of Chesebro's current strategy to string out election challenges as long as possible until January 6.

Chesebro diminished the importance of the Electoral Count Act's safe harbor provision and the inconvenient *Bush v. Gore* precedent in two ways. First, he argued that, unlike Florida, Wisconsin favored accuracy in its election results above all and thus lacked a strong interest in resolving election challenges by the safe harbor deadline.[54] Second, citing Tribe's constitutional law treatise for support, Chesebro suggested in a footnote that the Electoral Count Act was not binding on the current Congress because it had impermissibly "t[ied] the Senate's hands" by establishing rules for resolving electoral vote disputes.[55] In other words, Chesebro implied that the Electoral Count Act could justifiably be flouted. This latter point has since been criticized by Tribe, who accused Chesebro of grossly distorting his work to support a conclusion opposite to the one Tribe actually embraced.[56] Tribe also described Chesebro's

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HOUSE 142–43 (2001); *see also* PRINCIPLES OF THE L., ELECTION ADMIN.: NON-PRECINCT VOTING AND RESOL. OF BALLOT-COUNTING DISPS. pt. III Intro. Note (AM. L. INST. 2019).

52 3 U.S.C. § 5(a) (2020) ("Not later than the date that is 6 days before the time fixed for the meeting of the electors . . . ."); Memorandum from Kenneth Chesebro to James R. Troupis, *supra* note 46, at 4.

53 531 U.S. 98, 110–11 (2000) (per curiam). In 2000, the Supreme Court halted the recount on the date of the safe harbor deadline—December 12, 2000. *Bush*, 531 U.S. at 110–11. The Court found that the recount ordered by the Florida Supreme Court could not meet the safe harbor deadline without violating the Equal Protection Clause. *Id.* ("Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.").

54 Memorandum from Kenneth Chesebro to James R. Troupis, *supra* note 46, at 5 ("[N]owhere has the Wisconsin Legislature placed any priority on ensuring that post-election procedures in presidential contests are completed by the safe-harbor date.").

55 *Id.* at 4 n.4 (citing LAURENCE H. TRIBE, AM. CONST. L. § 2-3, at 125–26 n.1 (3d ed. 2000)). Chesebro's position is controversial. *Compare* Kesavan, *supra* note 49, at 1719 (observing that 3 U.S.C. § 17 "is patently unconstitutional—Congress may not bind by statute either House in the rules of its proceedings"), *with* Laurence H. Tribe, *Anatomy of a Fraud: Kenneth Chesebro's Misrepresentation of My Scholarship in His Efforts to Overturn the 2020 Presidential Election*, JUST SEC. (Aug. 8, 2023), https://www.justsecurity.org/87498/kenneth-chesebros-misrepresentation-of-laurence-tribe-scholarship-in-his-efforts-to-overturn-the-2020-presidential-election [https://perma.cc/BP7K-Q4VA] (arguing that the Electoral Count Act is "binding unless and until a future Congress decided to revise or revoke the statute").

56 Tribe, *supra* note 55 (arguing that Chesebro cited Tribe's work to support the "very opposite conclusion to undercut the status of the Electoral Count Act" and that Chesebro's assertion "grossly misrepresent[ed]" his work).

position, which "undercut the constitutional status of the Electoral Count Act," as "outlandish" and "ludicrous."[57]

The second important deadline that Chesebro had to explain away was the date on which the Electoral College was scheduled to meet, which—for the 2020 election cycle—was December 14, 2020.[58] As provided by the Electoral Count Act, on such date, the electors appointed by the various states would meet—not in a central location but in their respective states—to cast their electoral votes to reflect the electoral outcome of their own state.[59] (Article II of the Constitution required that all electors throughout the nation vote on the same day.[60]) In addition, the governor of each state was required to certify the appointed presidential electors by December 14.[61] As Chesebro surely appreciated, there was no guarantee that Biden's wins in Wisconsin (and other states) would be reversed by courts or governors before December 14. So, what could the Trump campaign do if Biden was still ahead on December 14—the date on which the Electoral College was set to vote?

Chesebro recommended "that the ten electors pledged to Trump and Pence meet and cast their votes on December 14," regardless of whether "the Trump-Pence ticket is [still] behind in the vote count, and no certificate of election has been issued in favor of Trump and Pence."[62] Chesebro acknowledged that such actions "may seem odd" but concluded that "a fair reading of the federal statutes suggests that this is a reasonable course of action."[63] In support of his legal theory, he pointed to the fact that "nothing in federal law requires States to resolve controversies over electoral votes prior to the meeting of the electors" and that "there is no set deadline for a State to transmit to Congress a certification of which

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57 *Id.* ("What's worse, as a result of this misrepresentation, Chesebro put me in the (outlandish) camp of those suggesting that the Electoral Count Act can be disregarded—for example, by a unilateral vice presidential decision to deem it 'unconstitutional.'"); *id.* ("My own conclusion is that . . . Chesebro had contrived a scheme . . . which included misusing the very parts of my treatise that Chesebro had helped me with as a research assistant . . . thereby casting me falsely as a supporter of a ludicrous reading of the Constitution . . . .").

58 3 U.S.C. § 7 (2020) ("The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct."); Memorandum from Kenneth Chesebro to James R. Troupis, *supra* note 46, at 4.

59 3 U.S.C. § 7 (2020).

60 U.S. CONST. art. II, § 1, cl. 4 ("The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.").

61 3 U.S.C. §§ 6–7 (2020); Memorandum from Kenneth Chesebro to James R. Troupis, *supra* note 46, at 4.

62 Memorandum from Kenneth Chesebro to James R. Troupis, *supra* note 46, at 2.

63 *Id.*

slate of electors has been determined to be the valid one."[64] For Chesebro, these omissions would seem to countenance the possibility that an alternate and uncertified slate of electors could cast their votes in good faith on December 14 and then have their votes properly counted in the joint session of Congress on January 6, so long as any legal controversy about the outcome of the election was resolved in favor of that alternate slate before the outside deadline of January 6.[65]

The next several weeks witnessed the filing and dismissal of a barrage of Republican-led lawsuits in Wisconsin challenging election practices and even the constitutionality of the Electoral Count Act.[66] On November 27, the recounts for Milwaukee and Dane counties were concluded, with Biden increasing his lead over Trump in Wisconsin.[67] On November 30, the Wisconsin Election Commission officially confirmed Biden's victory, and Wisconsin Governor Anthony Evers signed a certificate of ascertainment, "nam[ing] the ten Biden-Harris electors as the 'duly appointed Presidential Electors for the State of Wisconsin.'"[68] On December 2, Trump filed a lawsuit in the U.S. District Court for the Eastern District of Wisconsin, *Trump v. Wisconsin Elections Commission*, challenging the election result.[69] On December 3, Troupis filed notices to appeal the recount on behalf of the Trump campaign, Trump, and Mike Pence.[70] The lawsuits, known as *Trump v. Biden*,

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64 *Id.* at 3.

65 *Id.* at 1 ("[A]ny state judicial proceedings which extend past [December 14, 2020], working toward resolution of who has won Wisconsin's electoral votes, are entirely compatible with federal law provided that they are completed by January 6.").

66 *See Ballotpedia's 2020 Election Help Desk: Presidential Election Results Subject to Lawsuits and Recounts*, BALLOTPEDIA (2020), https://ballotpedia.org/Ballotpedia%27s_2020_Election_Help_Desk:_Presidential_election_results_subject_to_lawsuits_and_recounts [https://perma.cc/H92Y-WLDT] (listing some court challenges to Wisconsin's and other states' 2020 presidential election results); *see also 2020 Wisconsin Presidential Election Timeline*, OFF. OF WIS. STATE REP. BARBARA DITTRICH (on file with author) (listing more Wisconsin-specific lawsuits).

67 In Milwaukee County, Biden gained 132 votes in the recount, while in Dane County, Trump gained 45 votes. Patrick Marley, *Biden Gains 87 Votes in Trump's $3 Million Wisconsin Recount as Dane County Wraps Up Review. President Plans Lawsuit.*, MILWAUKEE J. SENTINEL (Nov. 29, 2020, 6:59 PM), https://www.jsonline.com/story/news/politics/2020/11/29/dane-county-recount-show-biden-won-wisconsin-trump-prepares-lawsuit/6455880002 [https://perma.cc/3M2H-PWYY] (noting that Biden's statewide margin became 20,695 after the partial recount).

68 Complaint, *supra* note 23, ¶ 18; *see also* Scott Bauer, *Wisconsin Certifies Joe Biden as Winner Following Recount*, AP NEWS (Nov. 30, 2020, 6:50 PM), https://apnews.com/article/election-2020-joe-biden-donald-trump-wisconsin-lawsuits-2e9cf60550f519537d31b6b71aa32c3c [https://perma.cc/282W-3J2R].

69 Complaint for Expedited Declartory [sic] and Injunctive Relief Pursuant to Article II of the United States Constitution, Trump v. Wis. Elections Comm'n, 506 F. Supp. 3d 620 (E.D. Wis. 2020) (No. 20-cv-1785), 2020 WL 7079398.

70 Letter from James R. Troupis to Patience Roggensack, C.J., Wis. Sup. Ct. (Dec. 3, 2020) (on file with author).

challenged the administration of the election as violating Wisconsin election law and sought "to set aside, modify and overturn certain findings and conclusions of the Boards of Canvassers of Milwaukee and Dane [c]ounties."[71]

December 6 Memo. Despite the significant setbacks, Chesebro's position that Biden's victory was illegitimate appeared to have ossified. A memo dated December 6 suggests an increasingly radical legal posture in two ways.[72] First, Chesebro formally redefined the objective of his legal assistance. He no longer merely recommended, as he did in his November 18 memo, that the Trump campaign preserve its rights in Wisconsin until the recount concluded and the election dispute was finally resolved.[73] Instead, he advised that the Wisconsin alternate elector strategy be extended to five other purportedly contested states (Arizona, Georgia, Michigan, Nevada, and Pennsylvania).[74] This shift in strategy reflects an apparent change in purpose from rectifying perceived election irregularities in a single state to preventing Biden from securing the presidency outright. For example, he wrote:

> [I]t seems feasible that the Trump campaign can prevent Biden from amassing 270 electoral votes on January 6 . . . . I believe that what can be achieved on January 6 is not simply to keep Biden below 270 electoral votes. It seems feasible that the vote count can be conducted

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71 *See* Dane County Complaint at 2, Trump v. Biden, No. 2020-cv-2514 (Wis. Cir. Ct. Dec. 7, 2020); Milwaukee County Complaint at 5, Trump v. Biden, No. 2020-cv-7092 (Wis. Cir. Ct. Dec. 7, 2020). The two cases were consolidated into one case in Milwaukee County Circuit Court. In essence, the complaint asked the court to "toss[] [out] more than 220,000 absentee ballots cast in [Milwaukee and Dane] counties, while leaving votes cast in the other 70 counties untouched." Shawn Johnson, *Wisconsin Supreme Court Rejects Trump Bid to Overturn Biden Victory*, WIS. PUB. RADIO (Dec. 14, 2020), https://www.wpr.org/justice/wisconsin-supreme-court-rejects-trump-bid-overturn-biden-victory [https://perma.cc/PP6U-ZFF7].

72 Memorandum from Kenneth Chesebro to James R. Troupis, *supra* note 44. The memo was allegedly emailed to Troupis on December 7, 2020. Complaint, *supra* note 23, ¶ 27. Troupis subsequently sent it to the White House. *Id.* ¶ 28–29; *see also* Text Message from then J. James R. Troupis to Kenneth Chesebro (Dec. 7, 2020), https://www.lawforward.org/wp-content/uploads/2024/03/Chesebro-Troupis.pdf [https://perma.cc/TJ8B-EKBV] ("I have sent it to the White House this afternoon. The real decision makers.").

73 *See infra* notes 170–172 and accompanying text.

74 Memorandum from Kenneth Chesebro to James R. Troupis (Dec. 6, 2020), *supra* note 44, at 1. Note that the strategy was subsequently expanded to include New Mexico. *See* Alan Feuer & Katie Benner, *The Fake Electors Scheme, Explained*, NY TIMES (Aug. 3, 2022), https://www.nytimes.com/2022/07/27/us/politics/fake-electors-explained-trump-jan-6.html [https://web.archive.org/web/20250308073340/https://www.nytimes.com/2022/07/27/us/politics/fake-electors-explained-trump-jan-6.html].

> so that at no point will Trump be behind in the electoral vote count . . . ."[75]

Second, Chesebro added a legally aggressive element that depended on former Vice President Pence using his power in nakedly political ways. In the December 6 memo, which was subsequently transmitted to the White House,[76] Chesebro advocated that "Pence, presiding over the joint session" of Congress on January 6, should "take[] the position" that he alone has the "constitutional power and duty . . . to open *and* count the [electoral] votes, and that anything in the Electoral Count Act to the contrary is unconstitutional."[77] (Under the provisions of the Electoral Count Act, both chambers of Congress are vested with significant legal authority to resolve disputes about the validity of electoral votes.[78]) Taken alone, such a brazen assertion of the Vice President's unilateral authority is shocking enough. But Chesebro linked this assertion to a more subtle but equally significant shift in strategy. Whereas previously, Chesebro suggested that a final resolution of its electoral dispute would be necessary in order for the alternate electors to be properly counted on January 6,[79] he now suggested that such a resolution was unnecessary and that the alternate electors could properly be counted on January 6 so long as a legal controversy was still active.[80] Specifically, Chesebro argued that so long as a federal court challenge was *pending* in each of the six states,[81]

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75 Memorandum from Kenneth Chesebro to James R. Troupis, *supra* note 44, at 1–2. *But see infra* notes 168–174 and accompanying text (discussing evidence suggesting that the purpose all along was to overturn Biden's win).

76 Complaint, *supra* note 23, ¶ 28.

77 Memorandum from Kenneth Chesebro to James R. Troupis (Dec. 6, 2020), *supra* note 44, at 1.

78 *See* Kesavan, *supra* note 49. Under the Electoral Count Act of 1887, any objections to the results of a presidential election must be sustained by both the House of Representatives and Senate, which would have been impossible with a Democratic-led House. *See* 3 U.S.C. § 15 (2020); *see also Election Results, 2020: Control of the U.S. House*, BALLOTPEDIA (Feb. 8, 2021), https://ballotpedia.org/Election_results,_2020:_Control_of_the_U.S._House [https://perma.cc/EC5Z-DE7B] ("Heading into the November 3, 2020, election, Democrats held a 232–197 advantage in the U.S. House."); *United States Senate Elections, 2020*, BALLOTPEDIA (Jan. 6, 2021, 5:10 PM), https://ballotpedia.org/United_States_Senate_elections,_2020 [https://perma.cc/X52R-RMKY] ("Heading into the November 3, 2020, elections, Republicans held 53 seats in the U.S. Senate, with Democrats holding 45 and independents who caucus with Democrats holding the remaining two.").

79 *See supra* note 65 and accompanying text.

80 Memorandum from Kenneth Chesebro to James R. Troupis (Dec. 6, 2020), *supra* note 44, at 2.

81 *Id.* at 1 ("There is pending, on January 6, in each of the six States, at least one lawsuit, in either federal or state court, which might plausibly, if allowed to proceed to completion, lead to either Trump winning the State or at least Biden being denied the State (of course, ideally by then Trump will have been awarded one or more of the States) . . . ."); *id.* at 2 ("Specifically—but only if

Pence could count the not-yet-certified Trump-Pence electoral votes, "even if Trump has not managed by then to obtain court decisions (or state legislative resolutions) invalidating enough results to push Biden below 270."[82] The same recommendation would later be made and defended by John Eastman in his infamous memos.[83]

As Chesebro continued to participate in the execution of his alternate elector plan, the Trump campaign suffered additional legal setbacks. On December 11, in *Texas v. Pennsylvania*, the U.S. Supreme Court rejected Texas's attempt to challenge the 2020 presidential election results in four other states (Pennsylvania, Georgia, Michigan, and Wisconsin).[84] That same day, the state circuit court in *Trump v. Biden* affirmed the Wisconsin Election Commission's certification of the election results.[85] On December 12, the federal district court dismissed *Trump v. Wisconsin Elections Commission*.[86]

December 13 Email to Giuliani. During this period, Chesebro seemed to have come to the realization that his original plan to have Pence open the envelopes and count the alternate elector votes on January 6 was too risky as a political matter. In an email sent on December 13 to Trump's personal lawyer, Giuliani, Chesebro continued to maintain that Pence ought to vigorously assert his sole constitutional power to open and count the electoral votes.[87] But Chesebro now recommended that Pence should then recuse himself, because "as a candidate for election himself, and given that there is dispute about the electoral votes of some of the States, . . . he has a conflict of interest" and thus "cannot participate

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all six States are still contested, . . . I think the count could be managed so that Biden would have to seek Supreme Court review . . . ."). Later, Chesebro no longer insisted that there be pending lawsuits on January 6. *See* Complaint, *supra* note 23, ¶ 30 (quoting email from Chesebro to Troupis stating, "[c]ourt challenges pending on Jan[uary] 6 really not necessary").

82 Memorandum from Kenneth Chesebro to James R. Troupis, *supra* note 44, at 2.

83 First Eastman Memo, *supra* note 3; Second Eastman Memo, *supra* note 19.

84 141 S. Ct. 1230 (2020) (mem.). The Court denied Texas's motion for leave to file a bill of complaint. *Id.* The case was filed with the Supreme Court on December 7, 2020. Bill of Complaint, Texas v. Pennsylvania, No. 155 (Dec. 7, 2020).

85 Complaint, *supra* note 23, ¶ 21; *see also* Trump v. Biden, 2020 WI 91, ¶ 70, 394 Wis. 2d 629, 663, 951 N.W.2d 568, 585 (Roggensack, C.J., dissenting) (referring to the circuit court's decision on December 11, 2020, to "affirm[] the recount determinations").

86 Trump v. Wis. Elections Comm'n, 506 F. Supp. 3d 620, 625 (E.D. Wis. 2020).

87 Email from Kenneth Chesebro to Rudy Giuliani, *supra* note 17 ("[A]t minimum this seems a defensible interpretation of the Twelfth Amendment, and one that ought to be asserted, vigorously, by whoever has the role of President of the Senate."); *see* Maggie Haberman & Luke Broadwater, *'Kind of Wild/Creative': Emails Shed Light on Trump Fake Electors Plan*, N.Y. TIMES (July 26, 2022), https://www.nytimes.com/2022/07/26/us/politics/trump-fake-electors-emails.html [https://web.archive.org/web/20250130124347/https://www.nytimes.com/2022/07/26/us/politics/trump-fake-electors-emails.html] (noting that Giuliani is Trump's personal lawyer).

in the proceeding."[88] This recusal, Chesebro believed, would "politically . . . insulate [Pence and Trump] from what w[ould] happen next."[89]

According to this emerging plan, the President Pro Tempore, Senator Chuck Grassley (or another senior Republican), would assume the role of Acting President of the Senate in the joint session, open the envelopes of electoral certificates, and begin counting the votes.[90] Unless the U.S. Supreme Court has intervened, the Acting President of the Senate, when confronted with the first set of dual slates from a "contested" state—i.e., Arizona—should then refuse to count the electoral votes from that state *at all* on the ground that due process was violated.[91] In other words, Arizona's electoral votes would not be counted unless and until the alleged election irregularities were fully addressed by (1) the state rerunning the election, (2) the state courts conducting "adequate judicial review," or (3) the state legislature unilaterally appointing electors.[92]

Chesebro declined to make a firm prediction about who would ultimately win the contest but speculated about various outcomes. These outcomes included a standoff that could end in

> Trump and Pence . . . winning the vote after some legislatures appoint electors, or . . . a negotiated solution in which the Senate elects Pence [to be] Vice President, and Trump agrees to drop his bid to be elected President in the House, so that Biden and Harris are defeated, even though Trump isn't reelected.[93]

Of course, some of these potential solutions would likely have delayed the certification of the election beyond January 6. The ultimate goal, as clarified in a separate email to Mike Roman, Director of Election Day Operations for the Trump campaign, was that Pence "would become acting [P]resident on Jan[uary] 20."[94]

For Chesebro, using the "enormous leverage" of the power to open ballots to disrupt the congressional certification of the election was "preferable to allowing the Electoral Count Act to operate by its terms, with Vice President Pence being forced to preside over a charade in which Biden and Harris are declared the winner of an election in which none of

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88 *Id.* Chesebro also argued that Pence should refuse to serve in the merely ceremonial role of "presiding officer," as set forth in the Electoral Count Act. *Id.*

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.*

94 Complaint, *supra* note 23, ¶ 43.

the serious abuses that occurred were ever examined with due deliberation."[95] In sum, the December 13 email clearly evidenced Chesebro's embrace of the naked use of political leverage for partisan gain, as well as his willingness to defer the resolution of the election well past the so-called "hard" deadline of January 6.

As the Electoral College deadline was approaching, Chesebro continued to act as the field marshal coordinating the alternate elector plan. On the evening of December 13, Troupis asked Chesebro, whether "everything [was] under control for tomorrow['s] electors vote," to which Chesebro responded that it was and that "[o]ther states are all fine," reporting that he "fielded questions" from individuals in Pennsylvania, Arizona, and Georgia.[96] On December 14, shortly before Wisconsin's presidential electors were scheduled to vote,[97] the Wisconsin Supreme Court, in a four-to-three decision, rejected Trump's lawsuit to nullify the state's election results and affirmed the circuit court's decision in *Trump v. Biden*.[98] This decision paved the way for Wisconsin's ten Democratic electors to cast the state's electoral votes for Biden and Harris. While the Democratic electors met at the state capitol to cast their votes, ten Republican electors also cast their votes for Trump and Pence at a meeting attended by Chesebro.[99] Chesebro sent a text message to Troupis and Roman, stating "W[isconsin] meeting of the *real* electors is a go!!!"[100]

Two days later, on December 16, as the Wisconsin alternate electoral certificates were being mailed out, Troupis and Chesebro met with Trump in the Oval Office.[101] This meeting was arranged by Reince

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95 Email from Kenneth Chesebro to Rudy Giuliani, *supra* note 17.

96 Text Message from Kenneth Chesebro to James R. Troupis (Dec. 13, 2020, 9:53 PM), https://www.lawforward.org/wp-content/uploads/2024/03/Chesebro-Troupis.pdf [https://perma.cc/TJ8B-EKBV].

97 Johnson, *supra* note 71.

98 Trump v. Biden, 2020 WI 91, ¶¶ 18, 20–22, 31–32, 394 Wis. 2d 629, 642–43, 645–46, 951 N.W.2d 568, 575–77 (reasoning that the election challenge should have been brought before the election because the alleged problems were previously known); *see also* Joe Forward, *Wisconsin Supreme Court Majority Rules Against President Trump, Won't Invalidate Ballots*, STATE BAR OF WIS.: INSIDETRACK (Dec. 16, 2020), https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=12&ArticleID=28118 [https://perma.cc/8HL7-9NRD].

99 Complaint, *supra* note 23, ¶¶ 46–47, 49–50.

100 Text Message from Kenneth Chesebro to James R. Troupis, (Dec. 14, 2020, 12:25 PM), https://www.lawforward.org/wp-content/uploads/2024/03/Chesebro-Troupis.pdf [https://perma.cc/TJ8B-EKBV]; *see also* Complaint, *supra* note 23, ¶ 55.

101 Broadwater & Haberman, *supra* note 1 (noting documents referring to an Oval Office meeting on December 15, 2020); Marshall Cohen, *Exclusive: Recordings Describe 2020 Oval Office Photo-Op Where Trump Was Briefed on Fake Electors and January 6*, CNN (Dec. 13, 2023, 1:19 PM), https://www.cnn.com/2023/12/13/politics/trump-2020-oval-office-fake-electors-recordings/index.html [https://perma.cc/2X97-ZTY6] (referring to an Oval Office meeting on December 16, 2020).

Priebus, Trump's former White House chief of staff.[102] Priebus urged Chesebro and Troupis not to raise Trump's hopes about a potential victory.[103] While Troupis complied with Priebus's admonition and told Trump that his election challenge in Wisconsin was over,[104] Chesebro told Trump that "Arizona was still "hypothetically possible[] because the alternate electors had [already] voted," thus buying the campaign more time.[105] Priebus was reportedly dismayed by Chesebro's behavior, which seemed to only encourage Trump to press on with his challenge.[106] On December 18, Troupis sent an email to Chesebro, reminding him of Priebus's admonition that "nothing about our meeting with the President can be shared with anyone."[107] On December 19, Trump infamously posted on Twitter: "Statistically impossible [for him] to have lost the 2020 Election. Big protest in D.C. on January 6th. Be there, will be wild!"[108] Soon after this tweet, Chesebro wrote to Troupis, "Wow. Based on 3 days ago, I think we have a unique understanding of this."[109] On December 21, Wisconsin Governor Anthony Evers signed a certificate of final determination in which he cited the Wisconsin Supreme Court's decision in *Trump v. Biden* as resolving any conflict regarding the appointment of the Biden-Harris electors and confirmed that Biden and Harris had won the popular vote in Wisconsin.[110]

The Eastman Memos. As Trump's chances for victory diminished further, Chesebro tacitly endorsed an even more brazen articulation of the plan to throw the election to Trump. Chesebro provided comments to a short, undated memo, completed on December 23 by John C. Eastman,[111] one of Trump's legal advisors and the former dean of the Chapman University, Dale E. Fowler School of Law.[112] (In March 2024,

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102 Broadwater & Haberman, *supra* note 1.

103 *Id.*

104 Cohen, *supra* note 101.

105 *Id.* Chesebro later relayed these details to Michigan state prosecutors. *Id.*

106 *Id.* (reporting that Priebus was "extremely concerned").

107 Email from James R. Troupis, to Kenneth Chesebro (Dec. 18, 2020, 11:46 AM) (on file with author).

108 Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 19, 2020, 1:42 AM), https://x.com/realDonaldTrump/status/1340185773220515840 [https://perma.cc/XE4K-YTV6].

109 Broadwater & Haberman, *supra* note 1.

110 TONY EVERS, STATE OF WIS. OFF. OF THE GOVERNOR, CERTIFICATE OF FINAL DETERMINATION CONCERNING PRESIDENTIAL ELECTORS GENERAL ELECTION–NOVEMBER 3, 2020, https://www.archives.gov/files/electoral-college/2020/ascertainment-wisconsin.pdf [https://perma.cc/78JA-B5LL].

111 *See* Email from John Eastman to Kenneth Chesebro, *supra* note 3.

112 Michael S. Schmidt & Maggie Haberman, *The Lawyer Behind the Memo on How Trump Could Stay in Office*, N.Y. TIMES (Oct. 13, 2022), https://www.nytimes.com/2021/10/02/us/politics/john-eastman-trump-memo.html [https://web.archive.org/web/20250301132224/https://www.nytimes.com/2021/10/02/us/politics/john-eastman-trump-memo.html].

the Hearing Department of the California State Bar recommended Eastman's disbarment.[113]) In the memo, Eastman proposed that, at the January 6 joint session of Congress, Vice President Pence should refuse to count the certified electoral votes of the seven states for which dual slates of electors would have been submitted.[114] This refusal would leave Trump ahead in the electoral vote count, at which point Pence would then "gavel[] President Trump as re-elected," or—alternatively—"send[] the matter to the House [of Representatives]" where Trump was guaranteed to win because Republicans control the majority of state delegations (twenty-six to the Democrats' twenty-five).[115] According to Eastman, "Pence should do this without asking for permission," based on the legal theory (for which "[t]here is very solid legal authority") that "the Vice President [i]s the ultimate arbiter" of the validity of electoral votes.[116] Chesebro sent Eastman his comments on the memo, noting, "Really awesome."[117] This memo, along with another one drafted by Eastman and

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113 *In re* John Charles Eastman, No. SBC-23-O-30029 (Cal. State Bar Ct. Mar. 27, 2024); *see also* Press Release, State Bar of Cal., State Bar Court Hearing Judge Recommends John Eastman's Disbarment(Mar. 27, 2024), https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-court-hearing-judge-recommends-john-eastmans-disbarment [https://perma.cc/E9P3-3JXW]; Mary Kay Mallonee, *Judge Denies Ex-Trump Election Lawyer John Eastman's Request to Reactivate Law License While He Fights Disbarment*, CNN (May 2, 2024, 11:54 AM), https://www.cnn.com/2024/05/02/politics/john-eastman-law-license/index.html [https://perma.cc/F7ZH-4ZYH]. A decision from the Review Department of the California State Bar is expected in 2025. *See* STATE BAR OF CAL., ANNUAL DISCIPLINE REPORT, FISCAL YEAR 2024, at 3 (Nov. 27, 2024), https://www.calbar.ca.gov/Portals/0/documents/reports/2024-Annual-Discipline-Report.pdf [https://perma.cc/8RLA-SQZY].

114 First Eastman Memo, *supra* note 3, at 2. Chesebro seemed to have warmed up to the idea of Pence refusing to count votes. *See* Broadwater & Haberman, *supra* note 1 ("'If Georgia is pending before the Supreme Court on January 6, a fairly boss move would be for Pence, when he gets to Georgia, to simply decline to open any of the Georgia envelopes,' Mr. Chesebro wrote on Dec[ember]] 26, 2020.").

115 First Eastman Memo, *supra* note 3, at 2 ("At the end, he announces that because of ongoing disputes in the 7 states, there are no electors that can be deemed validly appointed in those States. . . . There are at this point 232 votes for Trump, 222 votes for Biden. Pence then gavels President Trump as re-elected."); *see* Joel K. Goldstein, *The Ministerial Role of the President of the Senate in Counting Electoral Votes: A Post-January 6 Perspective*, 21 U.N.H. L. REV. 369, 376–77 (2023) (noting the hypothetical that "the election might be thrown into the House of Representatives with each state having one vote and Republicans controlling twenty-six delegations").

116 First Eastman Memo, *supra* note 3, at 1–2.

117 Email from Kenneth Chesebro to John Eastman (Dec. 23, 2020, 9:36 AM), *reprinted in* Complaint Exhibit A at 6, Eastman v. Thompson, No. 22-cv-99, (C.D. Cal. May 26, 2022), https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-email-to-rudy-giuliani-december-13-2020.pdf [https://perma.cc/CF6H-VQ3R].

shown to Pence on January 4,[118] were deployed to exert pressure on Pence to obstruct the timely certification of the Electoral College count.[119]

The Road to January 6. As judicial developments dimmed hopes of resolving the contest in Trump's favor by January 6, the "hard deadline" of January 6 softened. On December 24, the U.S. Court of Appeals for the Seventh Circuit affirmed the federal district court's dismissal in *Trump v. Wisconsin Elections Commission.*[120] On December 26, Chesebro sent an email to Troupis, Eastman, and others, stating that the January 6 proceedings could be delayed if Pence "simply decline[d] to open" the envelopes containing the electoral votes from Georgia, Pennsylvania, and Wisconsin.[121] He opined that this "fairly boss move" would "force the [Supreme] Court to act on the petitions" for certiorari soon to be filed.[122] On December 29, Chesebro joined Troupis in filing on behalf of the Trump campaign, a petition for certiorari with the U.S. Supreme Court, seeking review of the Wisconsin Supreme Court's decision in *Trump v. Biden.*[123] The complaint argued that the Wisconsin Supreme Court decision, which upheld the counting of more than 50,000 absentee ballots cast in Milwaukee and Dane counties, violated the U.S. Constitution.[124] According to the complaint, this violation caused the Wisconsin election to "fail" within the meaning of 3 U.S.C. § 2 and thus afforded the Wisconsin state legislature the authority to appoint presidential electors in Wisconsin.[125] On December 30, Trump filed a certiorari petition with the U.S. Supreme Court, seeking review of *Trump v. Wisconsin Elections Commission.*[126]

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118 First Eastman Memo, *supra* note 34; Second Eastman Memo, *supra* note 19.

119 *See* BOB WOODWARD & ROBERT COSTA, PERIL 224–27 (2021).

120 983 F.3d 919, 927 (7th Cir. 2020).

121 Email from Kenneth Chesebro, to James R. Troupis, Bruce Marks, Joe Olson, George Burnett & John Eastman (Dec. 26, 2020, 6:57 PM) (on file with author).

122 *Id.* ("[Pence] could decline to open the envelopes for [Georgia,] Pennsylvania and Wisconsin . . . . This would effectively force the [Supreme] Court to act on the petitions."). Chesebro also wrote, "[o]bviously the discussion of such tactical options is highly confidential." *Id.*

123 Petition for a Writ of Certiorari, Trump v. Biden, 141 S. Ct. 1387 (2020) (No. 20-882), 2020 WL 7870528.

124 *Id.* at 27. Plaintiffs also made a motion to expedite consideration of the petition. *See* Motion for Expedited Consideration of the Petition for a Writ of Certiorari and Expedited Merits Briefing and Oral Argument in the Event that the Court Grants the Petition, Trump v. Biden, 141 S. Ct. 1387 (2020) (No. 20-882), 2020 WL 7870529. On January 11, 2021, the U.S. Supreme Court denied the motion to expedite consideration of the petition and on February 22, 2021, the Court denied the petition. Trump v. Biden, 141 S. Ct. 1045 (2021) (mem.); Trump v. Biden, 141 S. Ct. 1387 (2021) (mem).

125 Petition for Writ of Certiorari, *supra* note 123, at *30–31.

126 Petition for Writ of Certiorari, Trump v. Wis. Elections Comm'n, 141 S. Ct. 1516 (2020) (No. 20-883), 2020 WL 7870530.

Although the Wisconsin alternate electoral certificates were mailed to Congress on December 16, they reportedly "got lost in the mail."[127] Therefore, arrangements were made for Chesebro to receive the certificates on January 5, 2021, from an individual flown in to Washington, D.C. that day.[128] Chesebro received the certificates and transmitted them to an aide to Representative Mike Kelly, a Republican from Pennsylvania, who then handed them to the Senate Parliamentarian.[129] On January 6, after Chesebro informed Troupis that the certificates were successfully delivered, Troupis responded, "Excellent. Tomorrow let's talk about SCOTUS strategy going forward. Enjoy the history you have made possible today."[130] After Troupis confirmed to Chesebro that an objection to Arizona was made at the joint session of Congress, Chesebro texted Troupis photos of himself among the crowd at the Capitol, including one with far-right conspiracy theorist Alex Jones standing in the background.[131] After Congress adjourned and then reconvened in the aftermath of the January 6 riot, Pence defied Trump's wishes and refused to consider the alternate electors.[132] Biden's electoral victory was certified.[133]

Aftermath of January 6. Even after the January 6 riot, Chesebro showed no remorse for orchestrating his scheme or for giving Trump reason for optimism. Text messages transmitted the next day show Chesebro blaming Pence "for this fiasco" and continuing to strategize

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127 Complaint, *supra* note 23, ¶ 83 (citing a 60 Minutes interview of an anonymous individual who was told "that the Trump campaign wanted documents delivered to Washington, D.C., because they 'got lost in the mail'").

128 Email from Mike Roman, Dir. of Election Day Operations, Trump Campaign, to Kenneth Chesebro & Alesha Guenther, then-GOP Staffer (Jan. 5, 2021, 6:14 AM) (on file with author) ("[Guenther] has the W[isconsin] Electors slate. Please make arrangements to meet.").

129 Text Message from Kenneth Chesebro to James R. Troupis (Jan. 6, 2021, 11:45 AM), https://www.lawforward.org/wp-content/uploads/2024/03/Chesebro-Troupis.pdf [https://perma.cc/TJ8B-EKBV] ("Mike had me drop off 2 originals yesterday at 4, to a Rep. Kelly aid, who walked it over to Senate Parliamentarian.").

130 Text Message from James R. Troupis to Kenneth Chesebro (Jan. 6, 2021, 11:45 AM), https://www.lawforward.org/wp-content/uploads/2024/03/Chesebro-Troupis.pdf [https://perma.cc/TJ8B-EKBV].

131 Text Message from Kenneth Chesebro to James R. Troupis (Jan. 6, 2021, 11:45 AM), https://www.lawforward.org/wp-content/uploads/2024/03/Chesebro-Troupis.pdf [https://perma.cc/TJ8B-EKBV]

132 Melissa Quinn et al., *Pence Announces Biden's Victory After Congress Completes Electoral Count*, CBS NEWS (Jan. 7, 2021, 7:05 AM), https://www.cbsnews.com/live-updates/electoral-college-vote-count-biden-victory [https://perma.cc/GNW7-2UP3].

133 *See, e.g.*, Feuer & Benner, *supra* note 74; Mary Clare Jalonick, *What if? Path Was Uncertain if Pence Objected to Biden's Win*, AP NEWS (Jan. 5, 2022, 3:38PM), https://apnews.com/article/capitol-siege-joe-biden-donald-trump-nancy-pelosi-elections-0281a48d836208d1ea23491f3f9df157 [https://web.archive.org/web/20220105205130/https://apnews.com/article/capitol-siege-joe-biden-donald-trump-nancy-pelosi-elections-0281a48d836208d1ea23491f3f9df157].

about how Trump could still win.[134] On February 22, the U.S. Supreme Court denied certiorari in *Trump v. Biden* and other similar cases in swing states.[135] The next day, Chesebro sent the following message to Troupis: "I am honored you invited me to help at all. Would have been worth it even if we'd gotten no votes and had never met the President—just being on a team with the guts to represent someone with an important case who other lawyers shunned was worth it."[136]

On March 8, 2021, the U.S. Supreme Court effectively extinguished Trump's legal challenges by denying Trump's petition in *Trump v. Wisconsin Elections Commission*.[137] In June 2022, when confronted by a reporter about criticisms that his legal advice was circumventing the will of the voters, Chesebro demurred, "We have a system where the courts ultimately resolve these issues, and people can live with how the courts resolve them."[138]

As recounted above, through a series of increasingly aggressive legal memoranda and communications between November 2020 and January 2021, Chesebro demonstrated his role as a key architect in the scheme to thwart the certification of Biden's electoral victory. He developed the plan to coordinate submissions of alternate elector slates across multiple battleground states, promoted an extreme theory about former Vice President Pence's unilateral powers, and attempted to exploit procedural mechanisms to derail the January 6 certification. Even after the January 6 riot at the U.S. Capitol and the decisive failure of the Trump campaign's legal challenges, Chesebro continued to defend these efforts.

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134 Text Message from Kenneth Chesebro to James R. Troupis (Jan. 7, 2021, 12:14 PM), https://www.lawforward.org/wp-content/uploads/2024/03/Chesebro-Troupis.pdf [https://perma.cc/TJ8B-EKBV] ("I think Pence is a lot to blame for this fiasco."); *see* Text Message from Kenneth Chesebro to James R. Troupis (Jan. 10, 2021, 12:17 PM), https://www.lawforward.org/wp-content/uploads/2024/03/Chesebro-Troupis.pdf [https://perma.cc/TJ8B-EKBV] ("Jim, in their Jan[uary] 6 speech to the crowd, Rudy and Eastman said they had letters from 5 state legislatures asking to be able to review and vote on the electoral votes. We should press to have the judiciary committees do reports saying the state statutes were violated and that the majority of lawful votes went to Trump—and that in light of this, statutory changes guaranteeing rapid review on the merits (no laches doctrine), and tightening up on absentee ballots, must be made.").

135 141 S. Ct. 1387 (2021) (mem.); *see, e.g.*, Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732 (2021) (mem.).

136 Text Message from Kenneth Chesebro to James R. Troupis (Feb. 22, 2021, 10:26 AM), https://www.lawforward.org/wp-content/uploads/2024/03/Chesebro-Troupis.pdf [https://perma.cc/TJ8B-EKBV].

137 141 S. Ct. 1516 (2021) (mem.).

138 Kovensky, *supra* note 9.

II. THE PROFESSIONAL DISCIPLINE CASE AGAINST CHESEBRO

Following his actions after the 2020 election, Chesebro faced disciplinary proceedings in multiple jurisdictions where he held law licenses.[139] Each state's removal law establishes distinct requirements for attorney suspension following a criminal conviction. In New York, for example, Chesebro's suspension was based on a provision that requires suspension if the attorney has been convicted of a "serious crime" as defined by the New York removal law.[140] In California, Chesebro's suspension was premised on the prior "[c]onviction of a felony or misdemeanor, involving moral turpitude."[141] These state-specific provisions are parallel to but differ from Rule 8.4(b) of the American Bar Association's Model Rules of Professional Conduct, which defines professional conduct as including the commission of "a *criminal act* that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."[142]

We should not be surprised that bar prosecutors have sought discipline through the expeditious path of prior convictions. But the language of Rule 8.4(b) and its state counterparts begs a fundamental question: What is the nature of a crime, the commission of which would reflect adversely on the lawyer's fitness as a lawyer, such that suspension or disbarment is warranted? What makes an offense eligible for disbarment? This Part shifts the focus from the specific crimes or

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139 *See infra* Part II (discussing California and New York disciplinary proceedings); *see also* Deborah Becker, *Trump Lawyer Has His Massachusetts Law License Suspended*, WBUR (Mar. 13, 2024), https://www.wbur.org/news/2024/03/14/kenneth-chesebro-law-license-massachusetts [https://perma.cc/F5YS-VGDM].

140 *In re* Chesebro, 220 N.Y.S.3d 493, 498–99 (App. Div. 2024); N.Y. JUD. LAW § 90(4)(f) (McKinney 2024) ("Any attorney . . . convicted of a serious crime, . . . whether by plea of guilty or nolo contendere or from a verdict after trial or otherwise, shall be suspended upon the receipt by the appellate division of the supreme court of the record of such conviction until a final order is made . . . ."). The term "serious crime" is defined as

> any criminal offense denominated a felony under the laws of any state, district or territory or of the United States which does not constitute a felony under the laws of this state, and any other crime a necessary element of which, as determined by statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a serious crime.

N.Y. JUD. LAW § 90(4)(d).

141 State Bar Ct. of Cal. Review Dept., No. 23-c-31017 (2024) (en banc), https://discipline.calbar.ca.gov/portal/DocumentViewer/Index/f14OxmgtKlIM6xUdQmmJ3cjdw0o8uebyZ8enOYorCJbKStAcjSOSrF6yw_UnlbPEvO8nfLtQDrUMThPoEOZ2LJaQyY_FiDLlCu5LyV3sJzE1?caseNum [https://perma.cc/YS2F-8R6Y]; CAL. BUS. & PROF. CODE § 6101(a) (2020).

142 MODEL RULES OF PRO. CONDUCT r. 8.4(b) (AM. BAR ASS'N 2020) (emphasis added).

categories of crimes that may have been committed under various state and federal laws to the more general issue of the *nature* of the misconduct that warrants professional discipline. This approach makes sense for several reasons.

First, this approach avoids getting entangled in the intricacies and idiosyncrasies of various states' criminal laws. For example, Chesebro's suspension in New York did not proceed on the more straightforward basis that his out-of-state felony conviction would constitute a felony in New York if it had been committed in New York, because New York's crime of conspiracy to offer a false instrument is classified as a misdemeanor, whereas the analogous crime in Georgia is classified as a felony.[143] Also, state criminal laws may pose difficult questions of first impression for the courts, such as how discipline would be impacted if, for example, Chesebro is reinstated to practice law in some states by operation of Georgia's peculiar First Offender Act, which exonerates first-time defendants who successfully complete their probationary sentences.[144]

Second, emphasizing prior crimes as the basis for bar discipline runs the risk of depending too much on the discretion of state or federal prosecutors and the vagaries of those judicial systems. If, for example, Chesebro had been successful in his efforts to invalidate his guilty plea in Georgia,[145] what impact would that have had on his suspensions elsewhere? Also, how should we assess the strength of the disciplinary case against Chesebro in light of the myriad other crimes he may have committed but will likely never be prosecuted for? Given political trade winds, Chesebro may never be prosecuted or even investigated for conspiracy to defraud the United States in violation of 18 U.S.C. § 371, a violation that has been established against Eastman,[146] conspiracy to obstruct an official proceeding in violation of 18 U.S.C. § 1512(k), or obstruction of and attempt to obstruct an official proceeding in violation of 18 U.S.C. § 1512(c)(2).[147]

Third, focusing on the nature of the misconduct makes it much more difficult for the legal profession to dodge its nondelegable responsibility to regulate and police its own members.[148] The issue of who

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143 *See In re Chesebro*, 220 N.Y.S.3d at 498–99.

144 GA. CODE ANN. § 42-8-60(a), (e) (2019).

145 *See supra* note 22 and accompanying text.

146 *See In re* John Charles Eastman, No. SBC-23-O-30029, at 110 (Cal. State Bar Ct. Mar. 27, 2024).

147 These are charges have been previously made against Trump. *See* Superseding Indictment at 1–2, 34–35, United States v. Trump, No. 23-cr-257 (D.D.C. Aug. 27, 2024).

148 The responsibility is not delegable, though it may be shared. *See* Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1148–53 (2009).

should retain the privilege of practicing law goes to the heart of the legal profession's values and thus should not be wholly entrusted to courts or administrative agencies. The profession must exercise and enforce its own judgment about what type of conduct is sufficiently serious so as to warrant suspension or disbarment.

Fortunately, there is wide agreement that deceptive conduct, regardless of whether a crime has been committed, qualifies as potentially warranting professional discipline, including suspension or disbarment.[149] The California Business and Professions Code provides that "[t]he commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension."[150] The statute does not define "moral turpitude," but California case law makes clear that fraudulent conduct typically involves moral turpitude.[151] To be sure, not all deceptive conduct qualifies as actionable "fraud" under state or federal law. The point is merely that deceptive or dishonest conduct, regardless of its classification as a crime, *may* serve as the basis for professional discipline, depending on the severity and context of that conduct.

Similarly, the New York Judiciary Law authorizes the Appellate Division "to censure, suspend from practice or remove from office any attorney . . . admitted to practice who is guilty of," among other things, professional misconduct, fraud, and deceit.[152] Also, both California and New York Rules of Professional Conduct largely follow the ABA Model

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149 *See* Rebecca Aviel & Alan K. Chen, *Lawyer Speech, Investigative Deception, and the First Amendment*, 2021 U. ILL. L. REV. 1267, 1287 (2021) ("[M]ost jurisdictions continue to adhere to the Model Rules formulation of Rule 8.4(c)."); *see also infra* note 157 and accompanying text (discussing California definition of professional misconduct).

150 CAL. BUS. & PROF. CODE § 6106 (2024) (emphasis added).

151 *See, e.g.*, *In re* Crooks, 800 P.2d 898, 900, 906 (Cal. 1990) (discussing that a conviction for conspiracy to defraud the United States based on tax-shelter investment scheme, which under "the facts and circumstances . . . involved moral turpitude" and warrants disbarment); *In re* Chernik, 777 P.2d 631, 631–35 (Cal. 1989) (finding that a "convict[ion] of conspiracy to defraud the United States by impeding the lawful function of the Internal Revenue Service," through "illegal use of backdated documents in a tax shelter scheme to allocate partnership losses to a partner prior to his entry into the partnership," was an offense involving moral turpitude); *In re* Schwartz, 644 P.2d 833, 834–36736 (Cal. 1982) (finding that the crime "of using a fictitious name for the purpose of conducting by means of" a United States mail scheme "to defraud and obtain property by false pretenses" constituted "a crime involving moral turpitude" for which an attorney may be disciplined); *In re* Hallinan, 307 P.2d 1, 1–2 (Cal. 1957) ("Criminal acts involving intentional dishonesty for the purpose of personal gain are acts involving moral turpitude." (citing *In re* Hallinan, 272 P.2d 768, 771 (Cal. 1954))).

152 N.Y. JUD. LAW § 90(2) (McKinney 2024).

Rule 8.4(c), which provides that "conduct involving dishonesty,[153] fraud,[154] deceit[155] or misrepresentation"[156] qualifies as professional misconduct.[157] In New York, to establish a violation of its Rule 8.4(c), a lawyer must have "[k]nowingly" engaged in such conduct, though actual knowledge "may be inferred from circumstances."[158] To the extent that the conduct in question qualifies as "fraud" under the applicable substantive or procedural law of fraud, a showing of recklessness, rather than actual knowledge that the statements were false, generally meets this standard.[159] Importantly, however, New York's definition of "fraud" is broader than the Model Rules, encompassing any conduct that "has a purpose to deceive," even if the conduct is not deemed to be "fraud" under substantive or procedural law.[160] In California, a "reckless"

153 CAL. RULES OF PRO. CONDUCT r. 8.4(c) (STATE BAR OF CAL. 2020) (defining professional misconduct to include "conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation"); N.Y. RULES OF PRO. CONDUCT r. 8.4(c) (N.Y. BAR ASS'N 2020) ("A lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]"); Raymond J. McKoski, *Counsel's Duty of Candor to a Client: It's Time for a Model Rule*, 22 PRO. LAW. 37, 41 (2014) ("'Dishonesty' includes fraud, deceit, and misrepresentation, but goes further to proscribe any conduct evidencing a lack of honesty, probity, integrity, fairness, or straightforwardness.").

154 MODEL RULES OF PRO. CONDUCT r. 1.0(d) (AM. BAR ASS'N 2020) (defining "[f]raud" or "fraudulent" as "denot[ing] conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive").

155 McKoski, *supra* note 153, at 41 (classifying "[d]eceit" as "a subcategory of fraud," which "expands misconduct to include 'the suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact'" (quoting *In re* Shorter, 570 A.2d 760, 767 n.12 (D.C. App. 1990))).

156 *Id.* ("'[M]isrepresentation' encompasses fraudulent and deceitful statements and further includes 'statement[s] made by a party that a thing is in fact a particular way when it is not so.'" (internal quotation marks omitted) (quoting *In re* Shorter, 570 A.2d at 767 n.12)).

157 MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR ASS'N 2020); CAL. RULES OF PRO. CONDUCT r. 8.4(c) (STATE BAR OF CAL. 2020) (defining professional misconduct to include "conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation"); N.Y. RULES OF PRO. CONDUCT r. 8.4(c) (N.Y. BAR ASS'N 2020) ("A lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.").

158 *In re* Giuliani, 146 N.Y.S.3d 266, 271(App. Div. 2021) (holding that a violation of New York Rule 8.4(c) must satisfy a "knowing" standard, where "[a] person's knowledge "may be inferred from circumstances" (quoting N.Y. RULES OF PRO. CONDUCT r. 1.0(k) (N.Y. BAR ASS'N 2022)).

159 *See* George M. Cohen, *The Discipline of Rudy Giuliani and the Real Fraud of the 2020 Election*, 73 CATH. U.L. REV. 325, 388 (2024).

160 *Compare* N.Y. RULES OF PRO. CONDUCT r. 1.0(d) (N.Y. BAR ASS'N 2020) (defining "fraud" or "fraudulent" as "denot[ing] conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another"), *with* MODEL RULES OF PRO. CONDUCT r. 1.0(d), *supra* note 154. Therefore, under the New York rules, a court need only find that Chesebro "made his false statements with a 'purpose to deceive'" in order to conclude that he engaged in fraud. Cohen, *supra* note 159, at 378.

misrepresentation will suffice for a violation of its Rule 8.4(c).[161] For the purposes of this discussion, this Article will adopt the reasonable assumption that the state of mind of "recklessness" is sufficient for discipline under Rule 8.4(c), and, for the sake of brevity, this Article will refer to the Model Rule 8.4(c), which is very similar to the parallel rules in California and New York. While other provisions of the Model Rules of Professional Conduct may be relevant—for example, Model Rules 4.1 and 3.3—this discussion will refer only to Model Rule 8.4(c), because doing so avoids some of the interpretive and practical problems characteristic of those other rules.[162]

This Part will review the evidence supporting that Chesebro's conduct falls under the Model Rule 8.4(c) definition of conduct involving "dishonesty, fraud, deceit or misrepresentation."[163] Although there is a strong case to be made that Chesebro's conduct could be classified as "procedural fraud" based on its apparent purpose to undermine government functions,[164] the following discussion will not attempt to prove that it is procedural fraud or, for that matter, any other category under Model Rule 8.4(c). Instead, the discussion will focus—more generally—on the common element of dishonesty and deceit that all of these categories share. The analysis will discuss the principal elements of the alternate electors strategy: (1) the impaneling of alternate electors in the swing states, (2) the theory that the Vice President or, as later modified, the Acting President of the Senate has the sole power to both open and count the electoral votes, and, briefly, (3) the plan to recruit state legislatures to certify pro-Trump alternate electors without prior legal authorization.

Empanelment of Alternate Electors. Examined in isolation, Chesebro's November 18 memo to Troupis could support the view that his plan to appoint alternate electors and transmit their votes to be counted on January 6 was based on a good faith dispute about the accuracy of the reported electoral results and was part of a nondeceptive course of conduct seeking to resolve the contest through lawful procedures under state and federal law. It was, after all, conceivable that the plan was intended to serve as a precautionary measure, designed merely to preserve the possibility that the "contingent" votes cast by the

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161 CAL. RULES OF PRO. CONDUCT r. 8.4(c) (STATE BAR. OF CAL. 2020) (defining "professional misconduct" to include "reckless or intentional misrepresentation"); *see also id.* at cmt. 4 ("A lawyer may be disciplined under Business and Professions Code section 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.").

162 For a good discussion of those interpretive problems, see Cohen, *supra* note 159, at 343–77.

163 MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR ASS'N 2020).

164 *Cf.* Cohen, *supra* note 159, at 381 (arguing that Giuliani's conduct amounted to procedural fraud).

Trump-Pence electors could lawfully be counted on January 6—if and only after a recount or a court order had determined Trump to have won the election in the state.[165] Chesebro seemed to acknowledge the conditionality of his plan when he wrote, for example, that "any state judicial proceedings which extend past [December 14] . . . are entirely compatible with federal law provided that they are completed by January 6,"[166] suggesting that the Trump-Pence electors could be ratified by a court resolution in Trump's favor by January 6. He also emphasized the precautionary nature of his plan: "*Prudence dictates* that the ten electors pledged to Trump and Pence meet and cast their votes on December 14 (unless by then the race has been conceded)."[167] However, the weight of the available evidence tends to support that the purpose of the plan to appoint alternate electors was to mislead, misdirect, and disrupt the lawful certification of Biden's victory on January 6.

First, Chesebro's overarching objective from the beginning was to use the alternate electors as a *pretext* for overturning Biden's victory, rather than as a legitimate means of preserving the Trump campaign's legal rights and options. As early as November 8, Chesebro proposed that the Trump campaign allege "various systemic abuses" and press state legislatures to appoint pro-Trump electors in a sufficient number of swing states to manufacture a "cloud of confusion" on January 6, which would then be exploited to divert the election to the House of Representatives, where a Trump victory would invariably be secured.[168] In other words, the day after Biden's national victory was called by the nationwide media, Chesebro suggested that pro-Trump electors be appointed for the purpose of obfuscating the election results and disrupting the certification on January 6 such that Congress would have to resort to the extraordinary process of determining the winner through the House of Representatives. Even later, in a text message to Roman on December 13, Chesebro basically acknowledged that the derailment of the January 6 certification, made possible by the alternate electoral votes, was the "possible endgame [that he] saw *early on*."[169] While the details of how the alternate electors would be appointed and how January 6 would unfold would remain murky until a later time, it seems clear that, as early

165 *See* SELIGMAN, *supra* note 4, at 3 (noting that an alternate slate of elector-nominees would be consistent with federal law only "as part of a course of conduct . . . seeking to resolve the contest through the lawful procedures . . . under state law. . . .").

166 Memorandum from Kenneth Chesebro to James R. Troupis, *supra* note 46, at 1.

167 *Id.* at 2 (emphasis added).

168 *See supra* notes 32–33 and accompanying text.

169 Text Message from Kenneth Chesebro to Mike Roman, Dir. of Election Day Operations, Trump Campaign (Dec. 13, 2020), *reprinted in* Complaint, *supra* note 23, ¶ 43 (emphasis added).

as November 8,[170] Chesebro intended to sow confusion. A purpose to cultivate doubt when doubt is not warranted by the national election results,[171] tends to support an intent to deceive.

Second, Chesebro's subsequent legal advice supports that the purpose of appointing alternate electors was pretextual. In his December 6 memo, he adopted a modification that would render the alternate electors plan clearly unlawful under the Electoral Count Act. He expressly predicated the appointment of alternate electors and the transmission of their votes to Congress on litigation merely being "pending" on, and thus not resolved by, January 6.[172] In other words, Chesebro took the position that a definitive resolution of the election results in Trump's favor—by way of a court order or a completed recount in each of the six "contested" states—was *not* necessary to block the certification of Biden's national victory on January 6. Accordingly, the Trump-Pence electoral votes, though lacking in any official state endorsement by virtue of a final resolution in Trump's favor, would still be used as the ostensible grounds for rejecting the Biden-Harris electoral votes on January 6. Consistent with this intention, Chesebro sent an email to Troupis and clarified, "Court challenges pending on Jan[uary] 6 really not necessary."[173] By December 6, it was clear that the alternate electoral votes would be used to derail the certification of Biden's victory on January 6, *regardless of whether there was a live dispute about the election results in any swing state*. The problem with these radical modifications was that, under Section 15 of the Electoral Count Act, those uncertified Trump-Pence electoral votes could not lawfully be recognized as valid reasons for rejecting the state-certified Biden-Harris electoral votes.[174] Lacking any

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170 *See supra* note 35.

171 As discussed *infra* Part III, there was never any credible factual basis to support that Biden's national victory had been tainted by a massive number of fraudulent votes so as to cast serious doubt on the validity of the reported election results.

172 Memorandum from Kenneth Chesebro to James R. Troupis, *supra* note 44, at 1 ("*There is pending, on January 6*, in each of the six States, at least one lawsuit, in either federal or state court, which might plausibly, if allowed to proceed to completion, lead to either Trump winning the State or at least Biden being denied the State (of course, ideally by then Trump will have been awarded one or more of the States) . . . ." (emphasis added)); *see also id.* at 2 ("Specifically—*but only if all six States are still* contested, and all six slates of Trump-Pence electors had voted on December 14—I think the count could be managed . . . ."(emphasis added)); *see also supra* notes 79–83 and accompanying text.

173 Complaint, *supra* note 23, ¶ 30 (quoting Email from Kenneth Chesebro to James R. Troupis (Dec. 8, 2020)).

174 Alternate electoral votes that lack a certificate of ascertainment or certificate of final determination issued after the resolution of dispute cannot lawfully be counted on January 6. *See* SELIGMAN, *supra* note 4, at 44 ("Under the plain text of 3 U.S.C. § 15 in force in 2020, Congress could not lawfully count the purported electoral votes cast by Trump elector-nominees in the states

basis in law, those Trump-Pence electoral votes could only be deployed as a ruse for overturning Biden's victory.

Moreover, Chesebro seemed to appreciate the illegitimacy of his plan and that the alternate electoral votes were legally deficient in material respects, supporting the claim that he apprehended the misleading nature of his plan. For example, in his December 6 memo, which advocated that the Trump-Pence electors in the six "contested" states vote on the Electoral College meeting date, he expressly acknowledged that the Trump-Pence electors would lack the "certificate of ascertainment that the governor is directed to give the winning electors," as "ordinarily contemplated by [3 U.S.C. §] 9."[175] He also characterized his strategy as "bold" and "controversial."[176] Another example comes from his third memo to Troupis, dated December 9, in which he detailed the logistics of how the Trump-Pence electors in the six swing states would meet, vote, and transmit their results to Congress "without any involvement by the governor or any other state official."[177] While maintaining that his scheme would be legally "unproblematic" in two states and only "slightly problematic" in another, he openly conceded that it would be "somewhat dicey in Georgia and Pennsylvania" in certain circumstances and "very problematic in Nevada"—states in which the formal ratification or supervision of the selection of electors was expressly mandated under state law.[178]

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that Mr. Chesebro characterized as disputed, nor could it lawfully reject the Biden electors' votes."); *id.* at 44, n.152 (noting the presupposition that a governor can lawfully "issue a superseding certificate of ascertainment naming the Trump elector-nominees . . . only if litigation, a recount, or other state procedure determine[s] that Mr. Trump had prevailed"); *see also* 3 U.S.C. § 6 (2020) (requiring the governor of each state to issue a certificate of ascertainment or, after the resolution of a "controversy or contest concerning the appointment of all or any of the electors," a certificate of final determination identifying who the appointed presidential electors are for that state). Even conservative legal scholars agree that the uncertified pro-Trump alternate electoral votes could not count on January 6. *See, e.g.*, *In re* John Charles Eastman, No. SBC-23-O-30029, at 89 (Cal. State Bar Ct. Mar. 27, 2024) (citing the testimony of Dr. John Yoo, who "affirmed that despite the ambiguity in language and scholarly opinions, the absence of certification by state executive officers meant there was no constitutional dilemma on January 6, 2021").

175 Memorandum from Kenneth Chesebro to James R. Troupis, *supra* note 44, at 6; *see also* 3 U.S.C. § 9 (2020) ("The electors shall make and sign six certificates of all the votes given by them, each of which certificates shall contain two distinct lists, one of the votes for President and the other of the votes for Vice President, and shall annex to each of the certificates of votes one of the certificates of ascertainment of appointment of electors which shall have been furnished to them by direction of the executive of the State.").

176 Memorandum from Kenneth Chesebro to James R. Troupis (Dec. 6, 2020), *supra* note 44, at 2.

177 Memorandum from Kenneth Chesebro to James R. Troupis (Dec. 9, 2020), *supra* note 44, at 1.

178 *Id.* at 5.

In another email to Troupis, sent on December 10, Chesebro noted, "It would be nice to get some of those official-looking gold seals!"[179] This offhand remark evidences Chesebro's clear awareness that the alternate electoral documents lacked an important indicium of legitimacy. That awareness appeared to have given Chesebro second thoughts about his failure to include a disclaimer along with those documents. Properly drafted, such a disclaimer would have provided recipients with clear notice that the enclosed electoral certificates had been *provisionally* cast—that is, that those certificates were invalid unless duly ratified according to applicable law.[180] Indeed, on December 12, he began to recommend the inclusion of a disclaimer to clarify the conditional legal status of the alternate electoral documents in the various states.[181]

Yet, Chesebro ultimately failed to include any qualifying language in the alternate electors documents for Wisconsin.[182] In the transmittal memorandum addressed to the President of the U.S. Senate, the U.S. Archivist, the Wisconsin Secretary of State, and the chief federal judge of the U.S District Court for the Western District of Wisconsin and enclosing the "duplicate originals of Wisconsin's electoral votes for President and Vice President," no qualifying language was added.[183] Indeed, on January 5, 2021, Chesebro received the uncertified and unqualified Wisconsin alternate electoral certificates from an individual flown into Washington, D.C. and hand delivered them to a Republican senator, who then delivered them to the Senate Parliamentarian.[184]

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179 Email from Kenneth Chesebro to James R. Troupis (Dec. 10, 2020, 11:58 AM), https://www.wpr.org/wp-content/uploads/2024/03/Pages-from-Troupis-008910-Troupis-010348-4-1.pdf [https://perma.cc/7VPT-XCRJ].

180 Because those alternate electors lacked the actual authority to cast their electoral votes when they cast them on December 14, those votes could not legally count as electoral votes unless they were subsequently ratified by authorized state officials in accordance with state and federal laws.

181 On December 12, 2020, Chesebro sent Mike Roman "tweaked language" to insert into "the certificate[s] to be signed by the Trump-Pence electors in Pennsylvania." The proposed tweaked language highlighted "that the electors 'might later [be] determined' as the 'duly elected and qualified' electors." He also advised that the proposed language would "be worth suggesting to Electors in other states." Complaint, *supra* note 23, ¶ 40 (quoting Email from Kenneth Chesebro, to Mike Roman, Dir. of Election Day Operations, Trump Campaign (Dec. 12, 2020)). On December 13, 2020, he sent Roman "documents for the Trump-Pence electors in New Mexico, with 'the new qualifying language at the start of the Certificate.'" He further noted, "Might be good to have it added in all states." Complaint, *supra* note 23, ¶ 41 (quoting Email from Kenneth Chesebro to Mike Roman, Dir. of Election Day Operations, Trump Campaign (Dec. 13, 2020)).

182 Complaint, *supra* note 23, ¶ 42; *id.* ¶ 53 ("The Unappointed Elector Certificate did not contain any statement making it contingent in any way.").

183 Memorandum from Andrew Hitt, Chairperson, Electoral Coll. of Wis., to President of the U.S. Senate, Archivist of the U.S., Sec'y of State, State of Wis. & Chief Judge, U.S. Dist. Ct. W. Dist. of Wis. (Dec. 14, 2020), https://www.govinfo.gov/content/pkg/GPO-J6-DOC-CTRL0000037949/pdf/GPO-J6-DOC-CTRL0000037949.pdf [https://perma.cc/79NQ-JBZX].

184 *See supra* notes 127–129 and accompanying text.

Without any qualifying language, Chesebro would appear to be palming off uncertified and unauthorized electoral votes as legitimate, authorized ones. At minimum, the evidence lends support to the proposition that he either knew or was recklessly indifferent about the risk that election officials would be misled about the true legal status of the alternate electoral votes.

And even though Chesebro seemed to appreciate the unlawfulness of his alternate electoral plan, he continued to assert its legal validity. For example, in his November 18,[185] December 6,[186] and December 9 memos to Troupis,[187] Chesebro cited the closely contested Kennedy-Nixon presidential election in Hawai'i in 1960 as supporting the legal validity of his plan. A brief review of the facts of the 1960 presidential election contest in Hawai'i suggests that this claim is deeply misleading.

In the aftermath of the November 1960 presidential election, the initial results indicated that Nixon had prevailed in Hawai'i by 141 votes.[188] Consequently, the acting governor issued a certificate of ascertainment naming the Nixon electors on November 28, 1960.[189] A Hawai'i circuit court then ordered a recount of the entire state, which began on December 13.[190] As the recount was not completed by the December 19 Electoral College meeting date, both the Nixon and Kennedy electors separately convened and cast their votes to preserve their legal options.[191] The recount was concluded on December 28.[192] On December 30, a Hawaiian court issued a final order holding that the recount showed that Kennedy had won by 115 votes, which constituted a

185 Memorandum from Kenneth Chesebro to James R. Troupis (Nov. 18, 2020), *supra* note 46, at 1, 3–4.

186 Memorandum from Kenneth Chesebro to James R. Troupis (Dec. 6, 2020), *supra* note 44, at 3, 6.

187 Memorandum from Kenneth Chesebro to James R. Troupis (Dec. 9, 2020), *supra* note 44, at 4.

188 Kyle Cheney, *See the 1960 Electoral College Certificates That the False Trump Electors Say Justify Their Hambit*, POLITICO (Feb. 7, 2022, 10:59 AM), https://www.politico.com/news/2022/02/07/1960-electoral-college-certificates-false-trump-electors-00006186 [https://perma.cc/X7EX-BULZ].

189 The lieutenant governor was the acting governor because the governor was out of state. *See* JAMES K. KEALOHA, ACTING GOVERNOR OF STATE OF HAW., CERTIFICATE OF ASCERTAINMENT (Nov. 28, 1960), https://www.politico.com/f/?id=0000017e-d460-d1c5-a7ff-d6eed74c0000 [https://perma.cc/U9YR-G2B8]; *see also* Cheney, *supra* note 188.

190 *See* Lum v. Bush, No. 7029 (Haw. Cir. Ct. Dec. 30, 1960), *noted in* 107 CONG. REC. 290 (Jan. 6, 1961).

191 Al Goodfader, *Both Party Electors to Vote*, HONOLULU STAR-ADVERTISER, at A-9 (Dec. 19, 1960); *Kennedy Retakes Hawaii Lead*, N.Y. TIMES, at 36 (Dec. 18, 1960).

192 Cheney, *supra* note 188.

majority of the votes cast in the state.[193] On January 4, the governor issued a *superseding* certificate of ascertainment, naming the Kennedy electors and appending a copy of the Hawaiian court's final order.[194] These documents were promptly transmitted to Congress.[195] On January 6, 1961, in accordance with federal election laws, then-Vice President Nixon presided over the joint session of Congress in which the certified Kennedy electors were counted—without any objection from members of Congress.[196]

Crucially, prior to the January 6, 1961, joint session of Congress, the Hawaiian courts and the governor ultimately recognized the Kennedy votes as valid and, consequently, issued and transmitted to Congress a superseding certificate of ascertainment reflecting that conclusion.[197] And, in accordance with the Section 15 of the Electoral Count Act, those certified Kennedy votes were counted on January 6.[198] By contrast, for the 2020 election, neither courts nor governors ever recognized the alternate Trump-Pence electoral votes as valid and no superseding certificate of ascertainment was ever issued for the Trump-Pence electors in any of the six "contested" states. As election law expert Matthew Seligman observed,

> [E]ven if federal election law permits contingent electoral slates in the narrow circumstances exemplified by the Hawai[ʻ]i incident in 1960—where those contingent electors voted only so their votes might be counted by Congress pursuant to Section 15 of the Electoral Count Act after the state's lawful procedures for adjudicating disputes about electors resulted in a final determination in their favor—it does not follow that federal election law permits contingent electoral slates as part of a plan for their votes to be counted in a manner that circumvents the Electoral Count Act and the state's lawful dispute resolution procedures.[199]

Third, circumstantial evidence tends to confirm that Chesebro likely understood the misleading nature of what he was advocating. News reports indicate that Trump campaign associates regularly referred to the alternate electors as "fake" and that at least one lawyer, who had spoken with Chesebro, believed that the electors would "not hold up to legal

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193 *See* Lum v. Bush, No. 7029 (Haw. Cir. Ct. Dec. 30, 1960), *noted in* 107 Cong. Rec. 290 (Jan. 6, 1961).

194 Kesavan, *supra* note 49, at 1691; 107 CONG. REC. 289–90 (Jan. 6, 1961).

195 *See* KEALOHA, *supra* note 189; Kesavan, *supra* note 49, at 1691–92.

196 107 CONG. REC. 290; *In re* John Charles Eastman, No. SBC-23-O-30029, at 39 n.50 (Cal. State Bar Ct. Mar. 27, 2024).

197 Cheney, *supra* note 188.

198 Kesavan, *supra* note 49, at 1692.

199 SELIGMAN, *supra* note 4, at 38–39.

scrutiny."[200] On December 8, Jack Wilenchik, a Trump campaign lawyer in Arizona, sent an email to Trump aide Boris Epshteyn, in which Wilenchik recounted a conversation that he had just had with Chesebro.[201] As Wilenchik explained,

> [Chesebro's] idea is basically that all of us (G[eorgia], W[isconsin], A[rizona], P[ennsylvania], etc.) have our electors send in their votes (*even though the votes aren't legal under federal law—because they're not signed by the Governor*); so that members of Congress can fight about whether they should be counted on January 6th . . . . [W]e would just be sending in "fake" electoral votes to Pence so that "someone" in Congress can make an objection when they start counting votes, and start arguing that the "fake" votes should be counted.[202]

Finally, it is tough to imagine that a lawyer as sophisticated as Chesebro did not appreciate the misleading nature of the alternate Trump-Pence electoral votes. Even the Trump campaign's leading lawyers concluded as early as December 11—after the Trump campaign's loss in *Texas v. Pennsylvania*—that the alternate elector plan was no longer viable because the campaign's litigation options were exhausted;[203] hence, these lawyers immediately took steps to extricate themselves from Electoral College matters.[204] Also, no governor or state legislature in the purportedly contested states appointed and certified their own slate of Trump electors.[205] And local officials loyal to Trump in Pennsylvania and New Mexico were honest and prudent enough to include in their alternate electoral vote certifications "a caveat, saying that they should only be considered if Mr. Trump prevailed in the many lawsuits he and

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200 *See, e.g.*, Haberman & Broadwater, *supra* note 87.

201 *Id.*

202 *Id.* (emphasis added).

203 The Trump campaign's principal lawyers were Matthew Morgan, General Counsel for the Trump Campaign, and Joshua Findlay, Associate General Counsel for the Trump Campaign. Tom Joscelyn & Norman L. Eisen, *Kenneth Chesebro: A Chief Architect of the False Elector Scheme*, JUST SEC. (Nov. 28, 2023), https://www.justsecurity.org/90271/kenneth-chesebro-a-chief-architect-of-the-false-elector-scheme [https://perma.cc/T7M5-GQFZ].

204 Interview of Josh Findlay, Assoc. Gen. Counsel for the Trump Campaign, by Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, U.S. House of Reps., Washington, D.C., at 39–40, 42 (May 25, 2022).

205 *See* LESSIG & SELIGMAN, *supra* note 42, at 75 (noting that no governor certified the fake Trump electors); *id.* at 100 ("[N]o state legislature was remotely close to [doing Trump's bidding by] taking any official action."); Levitt, *supra* note 41, at 1070 (observing that "no legislative house took steps . . . to appoint electors" on its own); Haberman & Broadwater, *supra* note 87 ("The emails showed the group initially hoped to get Republican state legislatures or governors to join their plans and give them the imprimatur of legitimacy. But by December, it was clear no authorities would agree to go along, so the Trump lawyers set their sights on pressuring Mr. Pence, who was scheduled to preside over a joint session of Congress on Jan[uary] 6.").

his allies had filed challenging the election, and was legally the winner."[206] If these local officials thought it was prudential to include a disclaimer, why didn't Chesebro?

In sum, there is strong evidence to support that Chesebro's conduct is actionable under Model Rule 8.4(c), which defines professional misconduct to include "conduct involving dishonesty, fraud, deceit or misrepresentation."[207] The strategy to impanel alternate pro-Trump electors was designed from the beginning to create confusion and mislead election officials for the purpose of subverting the ordinary process of certifying the presidential election on January 6, rather than to merely preserve the Trump campaign's legal options. Moreover, Chesebro promoted the plan as being lawful while being aware of its significant legal deficiencies. Particularly, he grossly misrepresented the 1960 Hawai'i precedent and failed to include proper disclaimers on the Wisconsin electoral documents that would have cured any likely confusion. The evidence tends to support that he either knew or was recklessly indifferent about the misleading nature of the uncertified alternate electors.

The Vice President's Superpowers Theory.[208] This Article now turns to another element of Chesebro's overall strategy—one where, taken alone, professional liability is considerably more difficult to establish. As explained in Part I, by December 6, Chesebro embraced the theory that the Vice President or, as later specified, the Acting President of the Senate, "has [the] sole power to both open *and* count the [electoral] votes,"[209] including finally determining the validity of the electoral votes.[210] At that time, Chesebro apparently relinquished the goal of attempting to challenge the Wisconsin election results through lawful means.[211] Instead, he developed a plan that required the Vice President (or the Acting President of the Senate) to exercise a purported unilateral

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206 Feuer & Benner, *supra* note 74. Also, Rusty Bowers, the Republican speaker of the Arizona House of Representatives, told the committee that he refused Trump's orders to create a false slate of pro-Trump electors: "You are asking me to do something against my oath, and I will not break my oath." *Id.*

207 MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR ASS'N 2020).

208 *Cf.* LESSIG & SELIGMAN, *supra* note 42, at 22 (referring to this theory as "VP Superpowers").

209 Text Message from Kenneth Chesebro, to Mike Roman, Dir. of Election Day Operations, Trump Campaign (Dec. 13, 2020), *reprinted in* Complaint, *supra* note 23, ¶ 43.

210 Memorandum from Kenneth Chesebro to James R. Troupis (Dec. 6, 2020), *supra* note 44, at 1, 6. In the December 13 email to Giuliani, Chesebro clarified what he meant by "counting votes." *See* Email from Kenneth Chesebro to Rudy Giuliani, *supra* note 17 ("The bottom line is I think having the President of the Senate firmly take the position that he, and he alone, is charged with the constitutional responsibility not just to *open* the votes, but to *count* them—*including making judgments about what to do if there are conflicting votes*. . . ." (emphasis added)).

211 *See supra* notes 172–174 and accompanying text.

authority to intervene in the January 6 certification in ways that ran afoul of the Electoral Count Act. Accordingly, he insisted that, contrary to the Electoral Count Act, Congress lacked the authority to participate in the counting or to override any rulings made by the Vice President.[212] Indeed, he maintained that anything in the Electoral Count Act that conflicted with his theory about the Vice President's powers was unconstitutional.[213]

Let us be clear from the outset that Chesebro's legal theory about the Vice President's authority is wildly implausible. He purported to anoint a single person as the sole arbiter of a presidential election in which more than 158 million voters had participated.[214] Federal district court Judge David O. Carter explained the farfetched and unlawful nature of the theory:

> The illegality of the plan was obvious. Our nation was founded on the peaceful transition of power, epitomized by George Washington laying down his sword to make way for democratic elections. Ignoring this history, President Trump vigorously campaigned for the Vice President to single-handedly determine the results of the 2020 election. As Vice President Pence stated, "no Vice President in American history has ever asserted such authority." Every American—and certainly the President of the United States—knows that in a democracy, leaders are elected, not installed.[215]

The theory not only runs afoul of the very notion of democracy but also is deeply inconsistent with republican constitutional principles (that

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212 Email from Kenneth Chesebro to Rudy Giuliani (Dec. 13, 2020), *supra* note 17 ("[T]he Electoral Count Act is unconstitutional in dictating limits on debate and dictating who wins electoral votes when there are 2 competing slates and the House and Senate disagree."); *id.* ("[I]t seems entirely sensible to read this language as granting sole power to count the votes to the President of the Senate, with the Members of Congress having no power to influence the result."); *id.* (affirming the view that "[I]t seems that [Congress's] job is to watch the votes being opened and counted"); Complaint, *supra* note 23, ¶ 43 ("Only [the] Supreme Court could override that (cuz he'd refuse to open the envelopes of the 6 States unless Court orders him, at minimum buying time).").

213 Memorandum from Kenneth Chesebro to James R. Troupis (Dec. 6, 2020), *supra* note 44, at 1 ("[A]nything in the Electoral Count Act to the contrary is unconstitutional."); Email from Kenneth Chesebro to Rudy Giuliani, *supra* note 17 ("[T]he Electoral Count Act is unconstitutional in dictating [time] limits on debate and dictating who wins electoral votes when there are 2 competing slates and the House and Senate disagree.").

214 Drew DeSilver, *Turnout Soared in 2020 as Nearly Two-Third of Eligible U.S. Voters Cast Ballots for President*, PEW RSCH. CTR. (Jan. 28, 2021), https://www.pewresearch.org/short-reads/2021/01/28/turnout-soared-in-2020-as-nearly-two-thirds-of-eligible-u-s-voters-cast-ballots-for-president [https://perma.cc/LCW7-MSPH].

215 Eastman v. Thompson, 594 F. Supp. 3d 1156, 1192–93 (C.D. Cal 2022) (footnotes omitted).

is, the small-*r* republican intellectual tradition),[216] such as separation of powers and checks and balances, which informed the structure of our federal government. Testifying in a hearing before the House select committee investigating the January 6 attack on the Capitol, former general counsel to Vice President Pence, Greg Jacob, observed:

> There is just no way that the Framers of the Constitution, who divided power and authority, who separated it out, who had broken away from George III and declared him to be a tyrant—there was no way that they would have put in the hands of one person the authority to determine who was going to be President of the United States.[217]

Chesebro's defense of his theory, which can be found in the December 13 email to Giuliani, began with the relevant text of the Twelfth Amendment, which superseded but retained the critical sentence from Article II, Section 1, Clause 3 of the Constitution.[218] It states: "[T]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."[219]

Chesebro observed, "All that is required of the Senate and House is their 'presence.'. . . [I]t seems that their job is to watch the votes being opened and counted—this ensures *transparency*."[220] But Chesebro's assertion begs the question: Transparency for what purpose? If, as Chesebro claimed, the Vice President's decision is final and members of Congress have no power to challenge the Vice President's decision, then why would their presence be required and what would be the point of ensuring transparency?

Misleadingly citing a legal academic,[221] Chesebro argued,

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216 *See generally* Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988) (discussing the implications of the republican revival for constitutional theory). For a recent exposition on the republican perspective on legal ethics, see generally Sung Hui Kim, *Legal Ethics After #MeToo: Autonomy, Domination, and Nondisclosure Agreements*, 73 DUKE L.J. 463 (2023).

217 *Hearing on the January 6th Investigation Before the Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol*, 117th Cong. 3, 11 (2022) (statement of Greg Jacob, former general counsel to Vice President Mike Pence).

218 Email from Kenneth Chesebro to Rudy Giuliani, *supra* note 17.

219 U.S. CONST. amend. XII. The Twelfth Amendment was ratified in 1804 to supersede Article II, Section I, Clause 3. CONST. ANN., *supra* note 47.

220 Email from Kenneth Chesebro to Rudy Giuliani, *supra* note 17 (emphasis added).

221 Chesebro misleadingly suggested that his cited arguments were advanced by the author of the article, when in reality the author was merely depicting previously made arguments. *See, e.g.*, Edward B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 LOY. U. CHI. L.J. 309, 325 (2019) ("The Senate and House of Representatives, *on this view*, have an observational role only." (emphasis added)); *id.* at 325–26 ("Thus, *according to this argument*, the inevitable implication of the Twelfth Amendment's text is

> [T]he power to make an ultimate decision on the electoral votes of a state "must be lodged ultimately in some singular authority of the federal government." Because if it were lodged in two authorities—such as the House and Congress—then one could have a stalemate, with one authority disagreeing with the other.[222]

Chesebro's simplistic argument misunderstands one fundamental design principle of the U.S. Constitution: the deliberate division of political power to prevent unilateral control. The legislative process illustrates this perfectly: Neither the Senate, the House, nor the President can unconditionally be described as having the "final say" over legislation. While Congress can override a presidential veto with a two-thirds majority of both chambers, the President can block legislation supported by a simple majority. Rather than creating clear hierarchies of power, the Framers intentionally crafted a system of shared and conditional authority over many crucial decisions.

More pointedly, if a President does not even have the power to override a two-thirds vote of both chambers of Congress with respect to national legislation, how can a Vice President—or the Acting President of the Senate (in case of the Vice President's recusal)—override the objection of both chambers of Congress as to the outcome of a presidential election? Despite the problems in his reasoning, Chesebro concluded, "[I]t seems entirely sensible to read this language as granting sole power to count the votes to the President of the Senate, with the Members of Congress having no power to influence the result."[223]

There is an alternative and significantly more plausible reading of the Twelfth Amendment. This sentence strings together two independent clauses, separated by a comma. Independent clauses are complete sentences (as opposed to fragments).[224] The subject of the first independent clause is the President of the Senate, who is tasked to "open all the certificates."[225] The subject of the second independent clause is

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that it vests this ultimate singular authority . . . in the President of the Senate." (emphasis added)); *id.* at 326 ("*Whatever each of us personally thinks of this interpretative argument*, it is necessary to acknowledge that it has a significant historical pedigree." (emphasis added)). That said, Chesebro's distortion may have been facilitated by the author's peculiar, apparent reluctance to clearly dismiss these arguments as fanciful.

222 Email from Kenneth Chesebro to Rudy Giuliani, *supra* note 17.

223 *Id.*

224 According to the Merriam-Webster dictionary, an "independent clause" is "a clause that could be used by itself as a simple sentence but that is part of a larger sentence." *Independent Clause*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/independent%20clause [https://perma.cc/YZS9-9FPC].

225 U.S. CONST. amend. XII. "Subject" is "[t]he part of a sentence of which the rest of the sentence is predicated (i.e., about which a statement is made, a question asked, etc.); a noun, noun phrase,

different: the "votes."[226] Peculiarly, this second clause switches to the passive voice.[227] The choice of the passive voice to describe the counting of votes implicitly suggests at the very least that this (second) task is not one to be performed solely by the subject of the first clause—the President of the Senate.[228]

If the drafters of the Twelfth Amendment intended the President of the Senate to take on the sole responsibility for counting the votes, as Chesebro claimed, the most natural way of articulating this intention would be to retain the active voice throughout and place the second action (the counting of votes) into a *dependent* clause,[229] where it would be clear that the subject of the first action (the President of the Senate) is also responsible for performing the second action (the counting of votes). That alternative hypothetical sentence would read as follows: "The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates and count the Votes." The choice *not* to write the above sentence suggests that the drafters did not intend that the President of the Senate be solely responsible for counting the votes.

Of course, the foregoing textual analysis fails to address the key question: If not the President of the Senate, then *who* bears final responsibility for counting the votes? Based on historical practice, the most plausible answer is *Congress*, whose presence is explicitly required in the Twelfth Amendment and its predecessor provisions in Article II, Section 1, Clause 3 of the Constitution. In every election since 1792, Congress participated in the counting of the electoral votes through its appointed agents, known as "tellers"—members of Congress selected from both major parties.[230] As reported by the official records of Congress's proceedings, "the tellers . . . 'counted' and 'examined' the votes, 'ascertained the number of votes,' and 'delivered the result' to the

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or clause which typically denotes the agent and with which a finite verb agrees." *Subject*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/subject_n?tab=meaning_and_use#20054314 [https://perma.cc/S9YM-5GTJ].

226 U.S. CONST. amend. XII.

227 *Id.* "The passive voice makes the subject the person or thing acted on or affected by the action represented by the verb." *Active vs. Passive Voice: What's The Difference?*, MERRIAM-WEBSTER, https://www.merriam-webster.com/grammar/active-vs-passive-voice-difference [https://perma.cc/RSZ3-RQ5M].

228 *See* U.S. CONST. amend. XII.

229 According to the Merriam-Webster dictionary, a "dependent clause" is "a clause that does not form a simple sentence by itself and that is connected to the main clause of a sentence: subordinate clause." *Dependent Clause*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/dependent%20clause [https://perma.cc/5VNK-HLJN].

230 LESSIG & SELIGMAN, *supra* note 42, at 18, 25.

[P]resident of the [S]enate,"[231] the presiding officer over the joint session.[232] The President of the Senate then announced the results to the joint session.[233] As Lawrence Lessig and Matthew Seligman noted,

> Congress . . . structured the procedures for counting electoral votes to ensure fair counting. By giving both sides a chance to review and report on the 'Votes,' the process guaranteed that any abuse would at least be noticed and that the abused party would have a chance to object to any irregularities.[234]

That Congress is ultimately responsible for counting the votes and resolving disputes is consistent with draft legislation relating to electoral disputes in 1800. In that year, which was three years prior to the proposed Twelfth Amendment, the House and Senate each passed "a bill that would have created a congressional committee to resolve all disputes regarding the counting of electoral votes."[235] Although the House and Senate never agreed on a final version of the law, both House and Senate versions of "the bill . . . unequivocally asserted Congress's sole power to resolve disputes regarding the counting of electoral votes."[236] When the Twelfth Amendment was subsequently proposed and ratified, "Congress incorporated its settled understanding of that text's meaning into the Twelfth Amendment"—i.e., that Congress, and not the President of the Senate, possessed the final "authority to resolve disputes about electoral votes."[237]

When the electoral process was modified in 1887 with the passage of the Electoral Count Act, Congress memorialized historical practice and a congressional rule into statute by according a formal opportunity for each chamber of Congress to opine on the validity of any disputed electoral votes.[238] Unfortunately, the Electoral Count Act is very convoluted,[239] so this Article will not explain its provisions in any detail here. Suffice it to say that, according to the Electoral Count Act, an agreement of both chambers based on reasons permitted by the statute can override the Vice

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231 SELIGMAN, *supra* note 4, at 41.

232 LESSIG & SELIGMAN, *supra* note 42, at 19, 27.

233 *Id.* at 25.

234 *Id.* at 18.

235 SELIGMAN, *supra* note 4, at 40.

236 *Id.*

237 *Id.*

238 LESSIG & SELIGMAN, *supra* note 42, at 58 (describing situations in which "Congress ha[s] the power to select among competing slates").

239 *Id.* at 59 (describing the Electoral Count Act statute as "a mess").

President's reported tally of votes.[240] The important point is that Chesebro's legal theory, which imputes superpowers onto the Vice President, is not supported by more than two centuries of historical practice.

To be sure, one can be wrong about a legal theory without being liable for professional misconduct, and lawyers are generally not liable for merely giving wrong advice. But Chesebro also mischaracterized the support for his legal theory. For example, Chesebro insisted that his legal theory was "well supported by the [Twelfth] Amendment in the historical era in which it was enacted, according to the original understanding of the Constitution,"[241] "consistent with clear indications that this [sic] what the Framers of the Constitution intended and expected, and consistent with precedent from the first 70 years of our nation's history."[242] Due to space constraints, this Article will focus on one of Chesebro's more specific claims—that his theory was "well supported by the [Twelfth] Amendment in the historical era in which it was enacted."[243]

By "historical era," what was Chesebro referring to? He was likely referring to the 1800 election and its certification at the joint session of Congress in 1801—events that precipitated the adoption of the Twelfth Amendment.[244] In the December 13 email to Giuliani, he referred to the "crises of the 1800 election" as creating "the need for the Twelfth Amendment."[245] In that email, he also specifically referred to the 1801 joint session of Congress in which former "Vice President Jefferson purportedly [counted improper votes] from Georgia."[246] Although the Twelfth Amendment was not ratified until 1804, the relevant passage of the Twelfth Amendment ("the Votes shall then be counted") was already part of the U.S. Constitution in 1787 and thus governed the 1801 joint session.[247]

After the contentious 1800 election, in which then-Vice President Thomas Jefferson was a candidate, Jefferson presided over the joint

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240 *See id.* at 52–59.The Electoral Count Act specifies on what bases each chamber of Congress may object. For example, chambers may object that the votes were or were not "regularly given," or that the votes were or were not "supported by the decision of such State so authorized by its law" or which the slate "represented the 'lawful electors appointed in accordance with the laws of the State.'" *Id.* at 52–53, 57.

241 Complaint, *supra* note 23, ¶ 43.

242 Memorandum from Kenneth Chesebro to James R. Troupis (Dec. 6, 2020), *supra* note 44, at 1.

243 Complaint, *supra* note 23, ¶ 43.

244 U.S. CONST. amend. XII; CONST. ANN., *supra* note 47; Kesavan, *supra* note 49, at 1700, 1707.

245 Email from Kenneth Chesebro to Rudy Giuliani, *supra* note 17.

246 *Id.*

247 U.S. CONST. art. II, § 1, cl. 3, *repealed by* U.S. CONST. amend. XII; Foley, *supra* note 221, at 325 n.34.

session of Congress.[248] According to Professors Bruce Ackerman and David Fontana, perhaps the world's leading experts on this historical episode, Georgia's four electors "indisputably voted" for the candidates of the Democratic-Republican party—Jefferson and Aaron Burr (Jefferson's ally who became his Vice President).[249] However, Georgia's "Certificate of Electoral Votes" failed to comply with the formal requirements specified in the Constitution,[250] although the certificate did clearly evince the intention to vote for Jefferson and Burr.[251] Counting the Georgia votes would result in then-Vice President Jefferson winning the presidency over rival John Adams. Not counting the Georgia votes would have led, most likely, to Adams winning the presidency.[252] Contemporaneous newspapers reported that the congressional "[t]ellers declared there was some informality in the votes of Georgia" but that they were accepted and counted.[253] Then, according to the official report of the proceedings, Jefferson announced the tally, which included the votes of Georgia.[254] At the end of the proceedings, including a run-off in the House of Representatives, Jefferson won the presidency.[255]

This historical episode cannot provide support for Chesebro's legal theory as he claimed, because the key issue—whether the Vice President has the final authority to judge the validity of the electoral votes—was never confronted. The issue was never squarely addressed because no one objected. There was ample incentive for Jefferson's political opponents in the room to object to the counting of the votes from Georgia if they believed them to be invalid, but the historical record indicates that no one objected to counting the Georgia votes.[256] Indeed, two of the three congressional tellers belonged to the opposition party—the Federalist Party[257]—but did not object to those votes being tallied.[258]

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248 Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 567 (2004).

249 *Id.* at 612.

250 For a summary of the form-related deviations, see *id.* at 592–93.

251 *Id.* at 592 (noting that the deficiencies of the Georgia electoral votes "are purely technical").

252 LESSIG & SELIGMAN, *supra* note 42, at 21.

253 Ackerman & Fontana, *supra* note 249, at 601–02; *see also id.* at 603 ("Strong evidence demonstrates that the tellers told Jefferson (apparently loud enough for the news to get out to the public) that there was a problem with the Georgia vote. Our inspection of the original documents tells us that they were right." (footnote omitted)).

254 *Id.* at 599–600.

255 *Id.* at 567, 579.

256 LESSIG & SELIGMAN, *supra* note 42, at 23; Ackerman & Fontana, *supra* note 248, at 603 ("[N]obody rose to protest.").

257 Ackerman & Fontana, *supra* note 248, at 605.

258 LESSIG & SELIGMAN, *supra* note 42, at 24.

There was also no evidence that Jefferson himself believed that he was exercising final constitutional authority to count the votes when he announced the votes for Georgia and the final tally.[259] Most likely, there was a tacit consensus among the participants in the joint session that a mere violation of form should not disenfranchise Georgia's voters. Because there was no discernible disagreement about whether the votes from Georgia should be counted, this episode cannot even serve as a test, let alone support, for Chesebro's legal theory. Fontana recently expressly confirmed that the evidence does not support the conclusion that the Vice President has the constitutional power to determine which electoral votes will count.[260]

Based on the evidence, Chesebro's claim that his theory is "well supported by the [Twelfth] Amendment in the historical era in which it was enacted" seems false or misleading.[261] Instead of providing a candid presentation of the legal and historical foundation for his theory, he offered a one-sided and distorted account. Contrary to his claim, there was no such historical support for this theory.

Of course, a violation of Rule 8.4(c) also requires a culpable state of mind—typically knowledge or recklessness.[262] What evidence is there that Chesebro knowingly or recklessly misrepresented the support for his legal theory?

Admittedly, there is no "smoking gun" evidence of Chesebro's state of mind; unless such evidence is forthcoming, disciplinary liability for his claims about the legal support for his theory is unlikely, notwithstanding the implausibility of the theory. That said, Chesebro's inconsistent characterizations of the basis of his legal theory suggests that he appreciated the flimsy foundation for his theory—or at least that he may have been consciously indifferent (and thus reckless) about his expressed level of confidence about the support for his theory. For example, when he first introduced his January 6 strategy in his December 6 memo, he admitted that his strategy was "bold, controversial."[263] But, when communicating with Roman, he claimed that his theory was "well supported by the [Twelfth] Amendment in the historical era in which it

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259 In fact, contemporaneous newspapers reported that Jefferson remarked that it was "meaningful that the Federalists did not object," which suggests that he believed they had the constitutional power to object. *See id.* at 25 (quoting David Fontana).

260 *Id.* at 24–25.

261 Complaint, *supra* note 23, ¶ 43.

262 MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR ASS'N 2020).

263 Memorandum from Kenneth Chesebro to James R. Troupis (Dec. 6, 2020), *supra* note 44, at 2.

was enacted."[264] When explaining his theory to Giuliani, he seemed to downplay the legal support for it. He repeatedly described his theory as merely "defensible" and emphasized its utility as "leverage"[265] for the President of the Senate to disrupt the proceedings in accordance with the Electoral Count Act. For example, he wrote:

> But at minimum this seems a defensible interpretation of the Twelfth Amendment, and one that ought to be asserted, vigorously, by whoever has the role of President of the Senate.
>
> And, in terms of Republicans having leverage on Jan[uary] 6 to force closer reexamination of what happened in this election, a defensible interpretation may be all that's needed . . . .[266]

In light of his desire, expressed as early as November 8, to create a "cloud of confusion" on January 6,[267] the most plausible explanation is that Chesebro appreciated that he was advocating a far-fetched legal theory as a pretext for forcing a disruption of the joint session in order to overturn or at least significantly delay Biden's victory. His understanding of the theory's tenuousness seems underscored by the fact that later, on December 17, he expressed reservations about his January 6 plan.[268] He sent a message to Roman, acknowledging that "the idea of the President of the Senate throwing a wrench into the Electoral Count Act process seems even less plausible than before, for both legal and political reasons."[269]

Although Chesebro's claim that his Vice President's superpowers theory is "well supported by the [Twelfth] Amendment in the historical era in which it was enacted" seems false and misleading,[270] it may be difficult to prove that Chesebro possessed the requisite state of mind for proving a violation of Model Rule 8.4(c).[271] That said, a reasonable judge could conclude, based on his one-sided and sloppy interpretation of historical precedents, that Chesebro knowingly or recklessly claimed a false level of confidence about the support for his theory.

Certification by State Legislatures. As noted in Part I, Chesebro suggested in passing that the Trump campaign recruit Republican-controlled state legislatures to unilaterally certify their own slates of

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264 Text Message from Kenneth Chesebro to Mike Roman, Dir. of Election Day Operations, Trump Campaign (Dec. 13, 2020), *supra* note 169.

265 Email from Kenneth Chesebro to Rudy Giuliani, *supra* note 17.

266 *Id.*

267 *See supra* note 35.

268 Complaint, *supra* note 23, ¶ 62.

269 *Id.*

270 *Id.* ¶ 43.

271 MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR ASS'N 2020).

Trump-Pence electors to compete with the slates certified by their governors based on the outcome of their state elections. He casually referred to this tactic in his November 8 email to Troupis, his December 6 and December 9 memos to Troupis, and his December 13 email to Giuliani.[272] More dramatically, Chesebro and Troupis argued unsuccessfully in their petition for certiorari in *Trump v. Biden*, filed on December 29, that the Wisconsin legislature possessed the legal authority to unilaterally appoint presidential electors in the aftermath of the decision of the Wisconsin Supreme Court.[273]

Remarkably, Chesebro never offered any argument in his memos to support that state legislatures could lawfully appoint electors after Election Day.[274] He never addressed the objection that the plan violates the timing requirement that states must appoint electors based on the outcome of electoral processes conducted *on* Election Day, as mandated by Congress pursuant to its constitutional authority to set the time at which states must appoint their electors.[275] Thus, a state electoral process (calculated to determine electors) conducted *after* Election Day would be considered untimely and unconstitutional. To be sure, there are extremely narrow exceptions to this rule—such as when no candidate receives a majority of the popular vote in a state with a majority-vote requirement; but, contrary to Chesebro's assertions in the *Trump v. Biden* certiorari petition, those exceptions do not apply here.[276] And, even

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272 *See supra* note 44 and accompanying text.

273 Petition for Writ of Certiorari, *supra* note 123, at 30–31.

274 This conclusion is based on my extensive review of the memos. Chesebro may have offered no support for his theory because there was no lawful support for it. *See* SELIGMAN, *supra* note 4, at 49 ("Mr. Chesebro's suggestion was itself unlawful. . . . [N]o reasonable attorney exercising diligence appropriate to the circumstances would conclude that a state legislature could lawfully appoint electors for the 2020 presidential election after December 14, 2020.").

275 *See* 3 U.S.C. § 1 (2020) ("The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President."); U.S. CONST. art. II § 1, cl. 4 ("The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.").

276 The exception to the rule is found in 3 U.S.C. § 2, which provides that a state could lawfully appoint electors after Election Day only if the state "has failed to make a choice" on Election Day. 3 U.S.C. § 2 (2020). Based on the legislative history of the statute and any natural extensions of the principles embraced by that legislative history, a state "fail[s] to make a choice" when "the state's laws set a mathematical requirement for victory in the popular election [such as winning a majority vote], and the popular election did not yield a result that satisfied that mathematical requirement." *Id.*; SELIGMAN, *supra* note 4, at 52; *see also* Michael L. Rosin, What Did the Twenty-Eight Congress Mean by a "Failed Election?" (Jan. 27, 2023) (unpublished manuscript), https://papers.ssrn.com/abstract=4339759 [https://perma.cc/T5ZZ-68A6]. In Chesebro's certiorari petition in *Trump v. Biden*, he argued that the Wisconsin Supreme Court's decision to uphold the counting of more than 50,000 absentee ballots cast in Milwaukee and Dane Counties, violated the U.S. Constitution,

if an exception did apply, the plan appears to violate the statutory manner restriction, which limits action by state legislatures to their regular *lawmaking* powers.[277] Determining the outcome of a presidential election, based on a review of the facts surrounding the election, after all, is more of an adjudicative function, rather than a lawmaking one.[278] Thus, in no event would the direct appointment of electors by state legislatures be legally valid.

Of course, legal advice that recommends, proposes, or endorses unlawful conduct, without more, would not subject lawyers to professional discipline.[279] Noncriminal conduct ordinarily requires an element of dishonesty, deceit, or prejudice to the administration of justice in order to be actionable,[280] all of which create difficult proof hurdles. And while one could make the case that Chesebro's legal theory in *Trump v. Biden* was frivolous in violation of Model Rule 3.1 and Federal Rule of Civil Procedure 11,[281] it would likely be tough to prove that he lacked "good faith" in arguing for an "extension, modification or reversal of existing law" and thus warranted professional discipline.[282]

Above, this Article has argued that a strong disciplinary case can be made against Chesebro, based on Model Rule 8.4(c) and its state counterparts.[283] The evidence suggests that Chesebro knowingly or recklessly misrepresented the legal status of unauthorized electoral votes by failing to include necessary disclaimers, by coordinating their submissions from multiple states as if they were legitimate, and by persisting in the scheme despite appreciating its serious legal deficiencies. While his communications reveal an evolution from possibly preserving

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causing the Wisconsin election to "fail[]"within the meaning of 3 U.S.C. § 2 and thus afforded the Wisconsin state legislature the authority to appoint presidential electors in Wisconsin. Petition for a Writ of Certiorari, *supra* note 123, at 27–31.

277 *See* Levitt, *supra* note 41, at 1072.

278 *See, e.g.*, Cohen, *supra* note 159, at 386–87.

279 Because of our tradition of civil disobedience, professional conduct rules do not impose a blanket ban on advice relating to unlawful conduct. *See, e.g.,* MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS'N 2020) ("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."); *id.* r. 3.1, cmt. 2 ("Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.").

280 *See* MODEL RULES OF PRO. CONDUCT r. 8.4(c)–(d) (AM. BAR ASS'N 2020).

281 *Id.* r. 3.1; FED. R. CIV. P. 11.

282 *E.g.,* MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS'N 2020).

283 *Id.* r. 3.1, cmt. 2; *see id.* r. 8.4(c); CAL. RULES OF PRO. CONDUCT r. 8.4(c) (STATE BAR OF CAL. 2020); N.Y. RULES OF PRO. CONDUCT r. 8.4(c) (N.Y. BAR ASS'N 2020).

legal rights to deliberately exploiting confusion for partisan advantage, there is persuasive support for the argument that the latter was his aim from the beginning. And while his dubious legal theories about vice presidential powers or state legislatures' powers in *Trump v. Biden* might raise eyebrows, establishing disciplinary violations for legal theories alone presents a higher, perhaps insurmountable, bar.

III. THE MORAL CULPABILITY OF CHESEBRO

As serious as disciplinary violations involving fraud, deceit, or misrepresentations are, they do not sufficiently reflect the moral gravity of Chesebro's misconduct. This Part considers Chesebro's moral culpability for his representation of the Trump campaign. It argues that his offenses are morally reprehensible not principally because of the deceptive nature of the strategies that he employed, but, rather, because of his willingness to betray public trust in the electoral system and his willingness to undermine democracy for naked partisan advantage.

By December, Chesebro had fleshed out most of the details of his plan. He advised that the Vice President unilaterally derail the ordinary process of certifying the national election by refusing to open the envelopes containing the certified electoral votes of the allegedly contested states, based on the pretext that there were unresolved disputes about the electoral votes in those states.[284] This hold-up would be used to either (1) send the election back to the states upon which the Republican-controlled state legislatures of those contested states would appoint Republican electors who would cast their electoral votes for Trump and Pence to be counted in lieu of the previously certified votes cast for Biden and Harris or (2) divert the election to the House of Representatives, which could eventually lead to a "negotiated solution" in which Pence would become the Acting President on January 20.[285] This plan, if successful, would have subverted the outcome of the national election and the collective will of the voters, "precipitat[ing] perhaps the most serious constitutional crisis in our history, rivaled only by the Civil War."[286]

There should be no question that diverting a presidential election to the House or to state legislatures is an extraordinary act of great moral consequence. Sending an election to state legislatures has no historical precedent and raises what leading legal academics believe are insuperable

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284 *See supra* Part I (discussing Chesebro emails and other evidence of this plan); *see, e.g.*, Memorandum from Kenneth Chesebro to James R. Troupis (Dec. 6, 2020), *supra* note 44, at 1; Email from Kenneth Chesebro to Rudy Giuliani, *supra* note 17.

285 Email from Kenneth Chesebro to Rudy Giuliani, *supra* note 17.

286 LESSIG & SELIGMAN, *supra* note 42, at 32.

constitutional objections.[287] Handing over an election to the House is rare: only twice in our nation's history has a presidential election been decided by the House.[288] Either route would have dispensed with the ordinary process of deciding our presidential elections, effectively setting aside the collective verdict of citizens about who should prominently govern them for the next four years. It would have disposed of the most visible way in which our democracy is demonstrated—where citizens exercise some voice in determining the shape of their future. For these reasons, a diversion to the House or to the state legislatures would have been perceived as extraordinarily disruptive and would have likely exacerbated the already growing distrust in our political system. Given these stakes and Biden's considerable margin of victory, the extraordinary measure of diverting a presidential election to the House or the state legislatures for the specific purpose of overturning the opponent's victory requires strong moral justification.

Did Chesebro have strong moral justification for his plan? This question can be answered at two junctures—in November, at the early stages of the plan's formation, and later—in December, after the details of the plan had been developed. As early as November 8, one day after Biden's national victory was called but five days before the margin of victory was projected, the basic building blocks of Chesebro's plan were in place. Crucially, from the outset, the goal of the plan was to reverse Biden's national victory, even as the extent of that victory was not yet known. Under the plan, state legislatures in swing states would appoint pro-Trump alternate electors while the Trump campaign would allege "various systemic abuses."[289] The resulting "cloud of confusion" on January 6 would be exploited to divert the election to the House, where a Trump victory would invariably be secured.[290]

Moral justification might have been supplied by a credible factual basis to support that Biden's national victory had been tainted by a massive number of fraudulent votes so as to discredit the validity of the reported election results. But there is no known evidence that Chesebro ever sought to conduct a factual investigation calculated to make that determination. From the beginning, he seemed preoccupied with the

287 Amar & Amar, *supra* note 41, at 17–18; Levitt, *supra* note 41, at 1069.

288 The first instance occurred in 1801, when the House of Representatives selected incumbent Vice President Thomas Jefferson as President pursuant to U.S. CONST. art. II, § 1, cl. 3, *repealed by* U.S. CONST. amend. XII. Ackerman & Fontana, *supra* note 248, at 553. The second instance occurred in 1825, when the House selected John Quincy Adams as President. Victor Williams & Alison M. MacDonald, *Rethinking Article II, Section 1 and Its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201, 218 (1994).

289 Email from Kenneth Chesebro to James R. Troupis, *supra* note 29.

290 *Id.*

procedural liberties allegedly taken by local election officials, which he closely followed.[291] All along, his argument was that these procedural liberties *opened the door* to fraud, not that fraud *actually* occurred.[292] Perhaps Chesebro was indifferent about whether any improprieties actually changed the outcome in Wisconsin. In a text message sent to Troupis on November 18, Chesebro openly considered alleging procedural due process and equal protection violations based on Republicans being "barred from having observers within a few feet of poll workers."[293] In a moment of candor, he remarked, "The beauty of a procedural due process objection is one needn't prove it changed the result."[294]

None of this is to deny that Chesebro may have had valid reasons to doubt that Wisconsin election officials conducted the election in strict compliance with the applicable regulations. Indeed, correspondence between Chesebro and Troupis reveal what appear to be genuine misgivings about the punctiliousness of the Wisconsin election. For example, one or both of them alleged that Republicans were barred from closely observing the count and recount,[295] that the Dane County clerk had mixed "bad" ballots with "good" ones,[296] that the Dane County clerk may have improperly distributed absentee ballots without receiving valid applications,[297] and that the Wisconsin Election Commission improperly loosened the rules to accommodate the COVID-19 pandemic.[298]

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291 *See, e.g.*, *infra* notes 293–298 and accompanying text.

292 *See, e.g.*, *infra* note 294 and accompanying text.

293 Text Message from Kenneth Chesebro to James R. Troupis (Nov. 18, 2020, 3:41 PM), https://www.lawforward.org/wp-content/uploads/2024/03/Chesebro-Troupis.pdf [https://perma.cc/TJ8B-EKBV] ("Jim, Trump's tweet leads me to ask: are we articulating due process and equal-protection objections to our being barred from having observers within a few feet of the poll workers during both the initial count and recount?").

294 *Id.*

295 *See id.*

296 *Id.* ("Seems to me that Dane County clerk mixing in bad ballots with good, to thwart an effective remedy, also is a procedural d[ue]p[rocess] problem[.]").

297 Text Message from James R. Troupis to Kenneth Chesebro (Nov. 18, 2020, 9:44 PM), https://www.lawforward.org/wp-content/uploads/2024/03/Chesebro-Troupis.pdf [https://perma.cc/TJ8B-EKBV] ("Ken, I think the Dane County clerk may have distributed ballots and ballot envelopes without a request.").

298 Text Message from Kenneth Chesebro to James R. Troupis (Nov. 23, 2020, 2:44 PM), https://www.lawforward.org/wp-content/uploads/2024/03/Chesebro-Troupis.pdf [https://perma.cc/TJ8B-EKBV] ("The Legislature directed that this presidential election be conducted in the normal 'manner,' with strict regulation of absentee balloting, and close scrutiny of the counting and recounting. It didn't alter its statutes to allow relaxation of these rules due to C[OVID]-19. Maybe the Legislature should have relaxed the rules due to COVID-19, but it didn't. The Dem[ocrat] election officials and operatives who failed to follow the usual 'manner' for conducting elections therefore violated Article I[I].").

But, even if all of these allegations had been true, the nature of those procedural irregularities could hardly suffice to justify the extreme measure of overturning the nationwide results of the election. Take, for example, Chesebro's allegation that the Wisconsin Election Commission may have violated the law when it adopted emergency COVID-19 measures due to the pandemic.[299] Even if the Commission significantly deviated from the rules that prescribed the manner of elections, there was no evidence that any uptick in votes cast had skewed to favor Biden over Trump. It is also hard to argue that the so-called "offense" of temporarily liberalizing the rules to expand citizen access to absentee ballots in the midst of the COVID-19 pandemic could justify what would have been the intentional disenfranchisement of (otherwise) eligible voters who voted in good faith in Milwaukee and Dane counties or—for that matter—the disenfranchisement of the more than eighty-one million Biden voters in the national election.[300] After all, not all sins are equal, and moral judgments—like legal judgments—must distinguish between relatively trivial infractions as to form and procedure and more serious violations of the law that undermine the purpose of free and fair elections.

Moreover, if these COVID-19 measures were so egregious as to somehow invalidate Biden's victory, why did the Republicans not file a lawsuit when those measures were first introduced, as the Wisconsin Supreme Court queried?[301] Lacking a credible, factual basis to support that enough votes had been cast by ineligible voters to change the outcomes of the Wisconsin or national elections, Chesebro had insufficient moral justification for his radical objective to overturn the results of either election.

As weak as Chesebro's moral justification was, it became even weaker as Biden's projected margin of victory was announced and his win grew more certain. By December, it was clear that the Trump campaign was losing the litigation battle.[302] It lost sixty-two of sixty-three cases.[303] Some "court[s] ruled that even if Trump's wild conspiracy theories of

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299 As of June 2022, Chesebro still held this belief. *See* Kovensky, *supra* note 9 ("Instead, [Chesebro] focused on a more staid argument: that election measures taken to run the election in Wisconsin during COVID-19 invalidated Biden's victory.").

300 David Wasserman et al., *2020 National Popular Vote Tracker*, COOK POL. REPORT WITH AMY WALTER, https://www.cookpolitical.com/vote-tracker/2020/electoral-college [https://web.archive.org/web/20250309213918/https://www.cookpolitical.com/vote-tracker/2020/electoral-college].

301 Wis. Voters All. v. Wis. Elections Comm'n, No. 2020AP1930, at 2–3 (Wis. Dec. 4, 2020), https://unamericanbar.com/filings/WI/wisconsin-voters-alliance-v-wisconsin-election-com/WI_-_Wisconsin_Voters_Alli_MfTP6Fj.pdf [https://perma.cc/V4PD-MUPK].

302 *See, e.g.*, LESSIG & SELIGMAN, *supra* note 42, at 16–17.

303 *Id.* at 10.

voter fraud were true, he still wouldn't win."[304] The campaign's sole victory, which was eventually overturned, earned it a miniscule number of votes, which could not have come close to changing the outcome in a single state.[305] Of course, this reality was deliberately obscured by Trump, who waged a propaganda war that successfully convinced tens of millions of Americans that the election had been stolen from him.[306]

In the face of mounting evidence that Biden's margin of victory would be sustained, Chesebro refused to temper his legal advice or revise his ultimate objective. He retained his original goal of overturning Biden's win and, as recounted above, often recommended even more aggressive means by which this goal would be achieved.[307] In December, as he continued to participate in the implementation of his alternate elector scheme, Chesebro expressly recommended extending the Wisconsin alternate elector strategy to five other purportedly contested states and advocated that Vice President Pence declare his sole power to open and count the electoral votes in defiance of the Electoral Count Act—an unprecedented step based on an untenable legal theory.[308] As revealed in the memos drafted by Eastman, the alternate elector strategy was further expanded to contest the electoral votes of *seven* states.[309] An alternate elector strategy involving six or seven states that held the critical number of electoral votes needed to swing the national election seems like an opportunistic attempt to ram through a Trump victory.

Moreover, as he recommended more extreme means of achieving the campaign's goals, he made no attempt to conduct a factual investigation to determine whether a massive fraud could have changed the outcome of the national election. Frankly, he seemed uninterested in that question; his preoccupation, it seemed, was strategy. His former

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304 *Id.* at 16.

305 JOHN DANFORTH ET AL., LOST, NOT STOLEN: THE CONSERVATIVE CASE THAT TRUMP LOST AND BIDEN WON THE 2020 PRESIDENTIAL ELECTION 3 (2022) ("Only in one Pennsylvania case involving far too few votes to overturn the results did Trump and his supporters prevail."); *see also Case Tracker*, ELECTION L. AT OHIO ST. UNIV. MORITZ COLL. OF L., https://electioncases.osu.edu/case-tracker/?sortby=filing-date_desc&keywords=&status=all&state=all&topic=25 [https://perma.cc/WCC8-8BVL].

306 The success of Trump's disinformation gambit has been confirmed by polling. For example, a poll conducted in late 2021 by the University of Massachusetts Amherst revealed that "46 percent of Republicans" believed "that Joe Biden was 'definitely not' the legitimate [P]resident; 71 percent affirmed he was either 'definitely not' or 'probably not' the legitimate [P]resident." LESSIG & SELIGMAN, *supra* note 42, at 10; *see also* Press Release, Monmouth Univ. Poll, National: Most Say Fundamental Rights Under Threat (June 20, 2023), https://www.monmouth.edu/polling-institute/documents/monmouthpoll_us_062023.pdf [https://perma.cc/A2L4-CPL6].

307 *See supra* Part I.

308 *See supra* Part I (describing formulation of the alternate elector scheme); Part II (outlining the legal theory behind Chesebro's scheme).

309 First Eastman Memo, *supra* note 4; Second Eastman Memo, *supra* note 19.

mentor Tribe described Chesebro as a "legal nihilist . . . who remained focused on the 'gamesmanship' aspect of the law."[310] As Tribe perceived Chesebro's character: "I doubt that he cared whether the arguments were sound or not as long as that goal could be met of helping Trump to win the election."[311]

Even after the dust had settled, Chesebro seemed uncurious about the truth of whether the election was actually stolen. In an interview conducted on June 16, 2022, he expressed the hope that "there will be compromises over the next few years and people won't have to worry about election integrity."[312] But when asked by the interviewer why he believed "election integrity had become such a high-profile issue," Chesebro blithely responded, "I don't know enough about the field to comment."[313]

To be sure, Chesebro would likely object that he is not obligated under the professional rules to investigate whether there was any outcome-determinative fraud in the election. True, there is no professional obligation to conduct a factual investigation of the underlying facts when simply offering legal advice (as opposed to making court filings that allege voter fraud).[314] And it is true that lawyers are generally entitled to "limit the scope of the[ir] representation" of clients.[315] It is also common practice for lawyers to provide legal opinions premised on stated factual assumptions, even if those factual assumptions have not been proven. But Chesebro did not just provide legal advice; he implemented the plan. And, given the enormous consequences at stake, it was incumbent on Chesebro to determine the scope of the alleged fraud. His failure to do so not only demonstrated his failure to discharge his professional obligation to "exercise independent professional judgment and render candid advice,"[316] but it also deprived him of any moral justification for his actions.

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310 Kovensky, *supra* note 9.

311 *Id.*

312 *Id.*

313 *Id.*

314 The duty to investigate the underlying facts is generally applicable to litigation. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 3.1, cmt. 2 (AM. BAR ASS'N 2020) ("What is required of lawyers [for litigation filings], however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions."); FED. R. CIV. P. 11(b)(3) (providing that an attorney's court filing represents a certification that the attorney has conducted a reasonable inquiry that "the factual contentions have evidentiary support, or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery").

315 MODEL RULES OF PRO. CONDUCT r. 1.2(c) (AM. BAR ASS'N 2020).

316 *Id.* r. 2.1.

In the end, Chesebro's behavior was morally disturbing not principally because of the "Alice in Wonderland" character of his legal theories or the deceptive means he employed, but, as Tribe conveyed, "because of its willingness to trash democracy."[317] Without Chesebro's election law expertise and support, Trump's desire to entrench himself in office, despite having lost decisively to Biden, could only remain a fantasy. Weaponizing his legal education and experience, Chesebro concocted and presented a would-be autocrat a blueprint on how to steal a presidential election and overturn the expressed will of the voters—at a time when this autocrat's powers were still formidable. This blueprint exploited the lexical imprecision of Article II and the Twelfth Amendment with far-fetched legal theories for the purpose of forcing a constitutional crisis, the outcome of which could have been a near fatal blow to American democracy.

Chesebro used his legal expertise in election law to assist in an effort to undermine democracy. He demonstrated a shocking willingness to allow his outrage about the procedural liberties allegedly taken by Wisconsin election officials to fuel a plan to invalidate votes cast in good faith by citizens in Wisconsin and elsewhere. Yet, this grave moral offense is not adequately captured by the professional conduct rules that serve as the basis for discipline. Although the Preamble to the Model Rules of Professional Conduct reminds us of the important role that popular support has for legal institutions,[318] lawyers have no professionally recognized duty to preserve democracy or to protect the voting franchise of citizens. Similarly, the Model Rules implore to advance the public's confidence in the rule of law,[319] and, yet, there is no discernible rule-of-law obligation that is not redundant of the other existing (mostly client-centered) professional obligations.[320] While one must be careful not to overlearn lessons offered by an ethical outlier, the recent attempts to undermine democratic processes, often facilitated at the hands of lawyers, suggest the need for the legal profession to reevaluate its relationship to democracy.

In sum, Chesebro's moral culpability transcends his violations of the professional conduct rules. By pursuing increasingly aggressive strategies to overturn Biden's legitimate victory without evidence of outcome-changing fraud, by offering a would-be autocrat with a blueprint for how

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317 Kovensky, *supra* note 9.

318 *See* MODEL RULES OF PRO. CONDUCT, pmbl., para. 6 (AM. BAR ASS'N 2020) ("[A] lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.").

319 *See id.*

320 *See* Kim, *supra* note 18, at 785.

to subvert the collective will of the voters in contravention of the U.S. Constitution and federal and state laws, and by using his legal expertise to peddle implausible theories designed to exploit procedural leverage to advance a naked power grab, he demonstrated a mind-blowing willingness to undermine democracy itself. Chesebro betrayed the public trust in ways that existing professional conduct rules, which lack explicit duties to preserve democracy, cannot adequately capture or address.

CONCLUSION

Chesebro developed and helped to implement an elaborate scheme to prevent Biden's victory from being certified. Although Chesebro's overarching aim may have always been to reverse Biden's victory, his strategies evolved from preserving legal rights in Wisconsin to coordinating fake elector slates across multiple battleground states, promoting an extreme constitutional theory about Vice President Pence's unilateral powers, and ultimately attempting to exploit procedural mechanisms to delay or derail the January 6 certification. After the failure of numerous legal challenges and the January 6 riot, Chesebro remained committed to his efforts, blamed Pence for the "fiasco," and expressed pride in having been part of Trump's legal team.[321] His actions laid the groundwork for what would become one of the most significant attempts to subvert the peaceful transfer of presidential power in American history. Yet, eighteen months after the January 6 insurrection, when confronted with some of the ethical criticisms of his work on behalf of the Trump campaign, Chesebro demurred in typical lawyerly fashion and demonstrated a shocking ability to delude himself: "Lawyers have an ethical obligation to explore every possible argument that might benefit their clients. In my work for the Trump-Pence campaign, I fulfilled that ethical obligation."[322]

This Article has argued that the professional discipline case against Chesebro is strong because his conduct involved "dishonesty, fraud, deceit or misrepresentation." However, it has also argued that the moral case against Chesebro is significantly stronger. Chesebro's offenses are morally reprehensible not principally because of the deceptive nature of the strategies that he employed, but because of his willingness to betray the public trust in the electoral system and his willingness to undermine democracy for naked partisan advantage. At the very least, Chesebro's willingness to subvert democratic processes for partisan gain suggests a

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321 Text Message from Kenneth Chesebro to James R. Troupis (Jan. 7, 2021, 12:14 PM), *supra* note 134.

322 Kovensky, *supra* note 9.

need for the legal profession to reevaluate its relationship with democratic principles.