WHY COURTS SHOULD NOT DISCIPLINE TRUMP'S LAWYERS

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After the first Trump administration, there were multiple coordinated efforts to discipline lawyers in highly charged political cases. For example, a California bar court recommended that John Eastman be disbarred. Eastman helped craft the legal argument that then-Vice President Mike Pence had the right to delay or decline to certify the election results, and the disciplinary case concluded that he lied publicly, in his memos to his client and Pence, and to courts. This Article draws on Eastman's case to argue that disciplinary charges in politically charged cases are often unconstitutional and even when they are not, they are unwise and counterproductive because they chill useful advocacy and threaten democratic values.

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INTRODUCTION

Ever since President Trump attempted to overturn the results of the 2020 election, critics have called for accountability and retribution against the lawyers who helped. New organizations emerged with the seemingly sole purpose of filing disciplinary complaints against the lawyers for their role in the scheme.[1] One such organization, the 65 Project, has filed fifty-five attorney ethics complaints since its founding.[2] Lawyers Defending American Democracy (LDAD) has filed ethics complaints or supportive filings calling for disbarment of Sydney Powell, Kenneth Chesebro, Jenna Ellis, Rudy Giuliani, and Cassidy Hutchinson's first attorney, Stefan Passantino, among others.[3] These organizations are unabashedly political in that the sole purpose is to seek discipline against lawyers for Trump and they do not investigate or look into the conduct of lawyers representing democratic politicians.[4] While outrage about some of the attorneys' conduct and thirst for retribution is understandable, it is, for the most part misplaced. This Article explains why disciplinary sanctions in this context often create more problems than they solve.

Central to the mission of many of the organizations that have pushed for discipline after 2020 is the premise that lawyers have a special

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1 David Thomas, *Group Lodges More Ethics Complaints Against Trump-Affiliated Lawyers*, REUTERS (July 20, 2022), https://www.reuters.com/legal/legalindustry/group-lodges-more-ethics-complaints-against-trump-affiliated-lawyers-2022-07-20 [https://perma.cc/9M94-F5NK] (describing the 65 Project—named for the number of allegedly frivolous lawsuits that were filed to contest the election results—complaint against Kenneth Chesbro); Tara Suter, *Watchdog Groups Push for Disbarment of Ex Trump Attorney Jenna Ellis Over Georgia Charges*, HILL (Dec. 16, 2023), https://thehill.com/regulation/court-battles/4363534-watchdog-groups-push-disbarment-ellis-over-georgia-charges [https://perma.cc/K7PD-F6AA] (describing a complaint filed by Lawyers Defending American Democracy and Stand United Democracy Center).

2 David Thomas, *Lawyer Group Says Trump Attorney Broke Ethics Rules in Fake Elector Plan*, REUTERS (Oct. 12, 2022), https://www.reuters.com/legal/legalindustry/lawyer-group-says-trump-attorney-broke-ethics-rules-fake-elector-plan-2022-10-12 [https://perma.cc/5K8N-QBXH].

3 *Our Work*, LAWS. DEFENDING AM. DEMOCRACY, https://ldad.org [https://perma.cc/WC3D-G2WH].

4 Some of the organization's Tweets are overly hostile to Republican organizations, like the Federalist Society. Lawyers Defending American Democracy (@LDADemocracy), X (Oct. 3, 2022, 11:48 AM), https://www.x.com/LDADemocracy/statuts/1576962481385533441.

obligation to protect the Constitution or defend democracy. LDAD, whose name is a nod to this understanding, states on its website under a "Who We Are" heading, "We believe that as members of the legal community, we have a unique responsibility to defend the Constitution . . . ."[5] This statement seems uncontroversial at first, but it is incorrect and misleading in an important way. Lawyers do not have a general obligation to democracy but instead indirectly protect our system of government by serving as officers of the court. Their obligation is not to democracy writ large, which is a contested concept, but rather to the proper administration of justice, which, among other things, defines the contours of our democratic government. Lawyers' duty to democracy can be defined modestly as an obligation to represent clients diligently within the bounds of the law. Their ethical duties derive from this basic obligation and their duty to democracy, in turn, follows from this understanding of the lawyer's role.

This Article argues that many of the efforts to sanction lawyers and the breathless search for accountability are based on a misconception of lawyers' roles. Lawyers do not have a general obligation to government, democracy, or the Constitution.[6] Because regulators and critics have their own definitions of democracy that are inevitably shaped by political bias, this misunderstanding leads to problematic efforts to sanction lawyers for legitimate advocacy or political speech. Whatever one thinks of these lawyers or their clients, many of these sanctions threaten to chill political speech, deter lawyers from representing controversial clients, and invite regulators to act when there is a very real danger that their own political bias will dictate the result. This potential downside is, as a structural matter, a greater threat to democracy than the lawyers' conduct and speech itself.

Without minimizing the danger of political lies, including lawyers' lies, this Article will argue that lawyer discipline should be used sparingly in the political context. Part I will explain that lawyers are officers of the court and so they have an obligation to preserve the administration of justice not to protect democracy or government in general. It will next explain the difference between the two and argue that it is critically important to democratic government that lawyers owe duties to courts not to government writ large. Part II will use this lens to analyze and critique the discipline imposed on John Eastman in March 2024. Eastman, an attorney for President Trump during his first term, provided a legal argument to support Trump's effort to convince the Vice President

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5 *Id.*

6 Renee Knake Jefferson has explicitly made the argument that lawyers have an obligation to government processes and democracy. Renee Knake Jefferson, *Lawyer Lies and Political Speech*, 131 YALE L.J. F. 114, 122 (2021).

to delay certification of the election. Part III will lay out the dangers of punishing these lawyers and inventing an obligation to democracy beyond the duty lawyers have to the courts. It will also highlight how representing clients (even ones who seek to reap havoc in the world) serves to preserve democratic values. This Article will conclude by suggesting that the best way to fight malignant political lies is by relying on institutions like the courts, the media, and other lawyers to convince the public as much as possible of the truth.[7] It highlights how lawyers can seek to use their role to this end and focuses on the importance of acculturating lawyers both in law school and in practice to embrace rule of law values.

Before I begin, I should note that I was retained by John Eastman's attorney as an expert in the bar proceedings against him. I researched the charges and was deposed in the case before the court excluded my testimony on the grounds that it concerned an ultimate question of law for the court to decide.[8] Part II will therefore contain much of what I would have said had I testified at the proceedings. There is a distinction between serving as an expert witness and writing as an independent scholar. I do not believe that distinction affects my analysis or argument in this essay, but I wanted to be transparent in case others disagree.

I. LAWYERS ARE OFFICERS OF THE COURT NOT HANDMAIDENS OF DEMOCRACY

Lawyers do not have any special duty to constitutional governance beyond the duty to represent their clients zealously within the bounds of the law. This is because constitutional governance itself is a contested notion, and lawyers are critical to the ongoing elaboration and articulation of its meaning. If lawyers had some substantive obligation to

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7 For more extensive discussion of potential solutions, see Renee Knake Jefferson, *Ethics Accountability: The Next Era for Judges and Lawyers*, 46 CARDOZO L. REV. (forthcoming 2025). Jefferson suggests greater consistency in lawyer discipline and funding nonpartisan ethics centers at law schools. This Article argues further that law schools and the legal profession as a whole need to embrace a nonpartisan commitment to rule of law values.

8 *In re* John Charles Eastman, No. SBC-23-O-30029, at 2 & n.3 (Cal. State Bar Ct. Mar. 27, 2024), https://discipline.calbar.ca.gov/portal/DocumentViewer/Index/VUJvWZ_iq5VOP34CGCQBdEnnvZZ_zPrtv8axGMYj9ZhXNlP-jrkczgHBYcNxy_p8HfbWZ9bYlmWcfZgWxdOU6bzKt7LQhLTO6caHFYsbb_U1 [https://perma.cc/43YY-YR9L]; 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; James Mills, *Ex. Circ. Judge, Law Prof Barred from Eastman's Ethics Case*, LAW360 (May 24, 2023, 4:45 PM), https://www.law360.com/pulse/articles/1681238/ex-circ-judge-law-prof-barred-from-eastman-s-ethics-case [https://perma.cc/T7DU-TQ4W].

constitutional governance or democratic principles, it would chill them from representing clients who wish to challenge an accepted meaning of those terms.

Imagine, for example, some not-so-distant future in which a lawyer wanted to challenge what has, at that point, come to be the accepted notion that the Constitution is "color blind." In this imagined future, any contrary view has come to be seen as taboo—the *Plessy v. Ferguson*[9] of the future. Then imagine this lawyer representing clients where the odds are stacked against them, losing case after case, until that lawyer finds a crack in the door, a way to reintroduce certain racial categories in ways that the lawyer and client feel would promote justice for marginalized groups. Now, imagine a state regulatory commission pursuing this lawyer's license. He would have, after all, betrayed his obligation to "constitutional governance."

Futuristic imaginings are not necessary. We can look back to the McCarthy Era where state bar associations followed the lead of federal authorities and targeted lawyers who represented communist or socialist clients for what was, in essence, their failure to uphold "constitutional governance."[10] The National Lawyers Guild, an organization of left leaning lawyers was decimated and nearly destroyed by this crusade pursued in the name of protecting our constitutional form of government.[11] While some of these lawyers may have posed a threat to democracy, most did not. Civil rights lawyers, anti-poverty lawyers, and lawyers who protected detainees in the war against terror faced similar threats.[12] The ideological position of the bar with regard to unpopular defendants may have shifted but the underlying principle has not.

Funneling challenges to accepted understandings of the Constitution and democracy into legal forums is the safest way to ensure the longevity of American institutions. And giving lawyers leeway to challenge the status quo is the only way to accomplish that.[13] This means

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9 163 U.S. 537 (1896).

10 *See, e.g.*, Schware v. Board of Bar Examiners, 353 U.S. 246 (1957).

11 JEROLD AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 231–63 (1976) (arguing that an emphasis on means or process is just a convenient excuse for inaction on the major social issues of the day or a significant thumb on the scale for the status quo); James E. Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U. L.Q. 725 (2005) (cataloguing the politically motivated disciplinary proceedings in American history); Jerold Simmons, *The American Civil Liberties Union and the Dies Committee, 1938–1940*, 17 HARV. C.R.-C.L. L. REV. 183, 186 (1982) (discussing how the Dies Committee targeted the National Lawyers Guild and tarnished the reputation of any lawyer associated with left wing causes).

12 Moliterno, *supra* note 11, at 741–44.

13 The Supreme Court has recognized the importance of this principle. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 417–45 (1963) (striking down a statute that targeted NAACP efforts to provide lawyers to challenge racial discrimination).

that we must tolerate and give wide latitude to lawyers in politically charged contexts even when the positions the lawyers take on behalf of clients are socially dangerous and destructive. It is far more dangerous to stifle dissent than to let it make its way through the justice system.

It is not an oversight that the Preamble to the Model Rules of Professional Conduct begins by saying that lawyers are officers of the legal system, not officers of the government more broadly.[14] As officers of the court, lawyers are expected to uphold our system for resolving disputes while playing an active role as partisans within it. As representatives of clients, lawyers often challenge the government. This is most obviously true of criminal defense attorneys and civil rights advocates, but all lawyers may find themselves representing a client who seeks to challenge the government, to question some accepted notion of what constitutional governance means or requires. The judiciary holds other branch officials accountable and ensures a government of laws not men.[15] By serving the judiciary both as advocates of clients and as officers with certain special obligations to the judicial process, lawyers play a critical role in the ensuring the rule of law.

The preamble designates lawyers "public citizens," but it goes on to elaborate that this imposes an obligation to improve "the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession."[16] Notably absent is a general obligation to the other branches of government or democracy. This is no accident because the status of lawyers as public citizens derives from their role as officers of the court. The preamble goes on to explain that lawyers should further "public[] . . . confidence in the . . . law and [legal institutions and] the justice system because legal institutions in a constitutional democracy depend on public perception and support to maintain their legitimacy."[17] The obligation that lawyers owe to constitutional democracy is fulfilled by serving clients within the bounds of the law and promoting faith in courts, law, and the administration of justice.

The California bar court recognizes this role for lawyers, stating that their special obligation is to the administration of justice, not government or democracy generally.[18] After establishing this role, however, the court goes on to insist that lawyers' speech can be restricted even if it occurs

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14 MODEL RULES OF PRO. CONDUCT, pmbl. ¶¶ 1, 8 (AM. BAR ASS'N 1983).

15 John Adams famously represented British soldiers who opened fire against a crowd that was attacking them. By doing so, he embraced and promoted the principle that all men, even those who challenge the very basis of the society, deserve representation. DAVID MCCULLOUGH, JOHN ADAMS 65–68 (2001).

16 MODEL RULES OF PRO. CONDUCT, pmbl. ¶ 6 (AM. BAR ASS'N 1983).

17 *Id.*

18 *In re* John Charles Eastman, No. SBC-23-O-30029, at 76 (Cal. State Bar Ct. Mar. 27, 2024).

outside of the courtroom, citing rules regulating solicitation and advertising.[19] These rules, however, are justified precisely because this sort of speech has an impact on the administration of justice. Not to mention that they regulate commercial speech, which is entitled to less protection than the political speech at issue in Eastman's discipline.[20] The court insists that the California rule against moral turpitude passes the *Gentile* balancing test, when of course the rule sweeps so broadly that at least some applications might offend the notion that speech outside the court can only be punished if it substantially impacts the administration of justice.[21]

The California bar court's First Amendment analysis is superficial. It concludes that lawyers have no right to make knowingly false statements of fact or law in public.[22] This conclusion is inconsistent with case law and would restrict lawyers from doing what all other individuals are entitled to do even if the administration of justice is not at issue.[23]

Rather than engaging with the Supreme Court's most recent case on false speech, *United States v. Alvarez*,[24] the California bar court chose to cite a case addressing criminal libel laws from 1964.[25] While the Court in *Alvarez* was divided over the statute at issue in that case, the Justices agreed that knowingly false political speech deserves full First Amendment protection.[26] The California court also relied on Ninth Circuit cases that suggest that the attorney must have a reasonable basis for statements made in public.[27] This standard is not only inconsistent with *Alvarez* and other case law,[28] it would muzzle attorneys in all sorts of situations and prevent them from advocating effectively for their clients before fully investigating the case. There is a reason why the rules against frivolous arguments, arguments not based in law and fact, only apply to court filings. Once a lawyer has filed a claim or defended a proceeding, it is reasonable to expect a lawyer to have done some research

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19 *Id.* at 77.

20 Fla. Bar v. Went For It, Inc., 515 U.S. 615, 632 (1995) (applying intermediate scrutiny to rules governing solicitation because it is a form of commercial speech).

21 Gentile v. State Bar of Nevada, 501 U.S. 1030, 1074–1075 (1999).

22 *Eastman*, No. SBC-23-O-30029, at 79.

23 United States v. Alvarez, 567 U.S. 709 (2012); Bruce A. Green & Rebecca Roiphe, *Lawyers and the Lies They Tell*, 69 WASH. U. J.L. POL'Y 37, 42–66 (2022) (arguing that there is no reason to treat lawyers differently from others when the administration of justice is not at issue).

24 567 U.S. 709 (2012).

25 *Eastman*, SBC-23-O-30029, at 78 (citing Garrison v. State of Louisiana, 379 U.S. 64, 75 (1964)). The *Garrison* case is also inapposite in that it concerns libelous comments about judges, not false political speech. *See Garrison*, 379 U.S. 64.

26 Green & Roiphe, *supra* note 23, at 43–50.

27 *Eastman*, No. SBC-23-O-30029, at 79.

28 Green & Roiphe, *supra* note 23, at 42–66.

and investigation, but it would be quite a stretch to expect them to do this work prior to making any comments to the public or opposing counsel. If this standard were broadly applied, it would radically alter the way law is practiced in the United States.

In making its First Amendment argument, the California court also relies on cases that address commercial speech to argue that courts engage in a balancing test, weighing the state's interest in regulation with the speaker's rights.[29] This reliance is misplaced because commercial speech is entitled to less protection than political speech and this type of balancing test has never been applied to the latter. Regulation of political speech is subject to strict scrutiny instead.[30]

The court rightly points out that the First Amendment does not protect speech that is part of criminal conduct.[31] But nowhere in the decision does the court lay out evidence that Eastman furthered a crime. The underlying alleged crimes were the subject of the indictment in Washington, D.C. and Georgia.[32] The California court was in no position to weigh the relevant evidence before those cases are resolved and in the midst of litigation over what evidence is admissible and which counts are valid. Even if it were in a position to assess the potentially criminal conduct, it does not do so.

The First Amendment analysis is based on this faulty notion that the "administration of justice" includes all government functions.[33] But the preamble to the Model Rules of Professional Conduct emphasizes the independence of a more-or-less self-regulating legal profession and notes that "ultimate authority over the legal profession is vested largely in the courts."[34] This separation of lawyers from other branches of government serves to buttress the independence of the judiciary, which in turn is critical to the rule of law. If lawyers had a separate obligation to "constitutional governance" or "democracy," who would define those terms? The current administration? The lawyers themselves? The state bars or the ABA? A central aspect of our democratic system is that the

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29 *Eastman*, No. SBC-23-O-30029, at 77.

30 *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 163–164 (2015).

31 *Eastman*, SBC-23-O-30029, at 79–80.

32 Indictment, United States v. Trump, No. 23-cr-257 (D.D.C. Aug. 1, 2023); Indictment, State of Georgia v. Trump, No. 23SC188947 (Fulton Sup. Ct. Aug. 14, 2023). Donald Trump was indicated after he was elected to office for his second term. United States v. Trump, No. 23-257 (D.D.C. Nov. 25, 2024). The Georgia indictment was stalled after the lead prosecutor was disqualified. Danny Hakin & Richard Fausset, *Appeals Court Disqualifies Fani Willis from Prosecuting Georgia Trump Case*, N.Y. TIMES (Dec. 19, 2024), https://www.nytimes.com/2024/12/19/us/fani-willis-georgia-trump-case.html [https://web.archive.org/web/20250506172246/https://www.nytimes.com/2024/12/19/us/fani-willis-georgia-trump-case.html].

33 MODEL RULES OF PRO. CONDUCT pmbl. ¶ 6 (AM. BAR ASS'N 1983).

34 *Id.*

nature of constitutional governance itself is open to debate and challenge. The courts and laws are critical to this ongoing iterative process and lawyers are key to making sure that the everyone can participate. While lawyers have a duty not to lie or make frivolous claims in court, they are not gatekeepers who determine which meaning of the Constitution is acceptable.[35]

Of course, there are limits to what lawyers can do when it comes to attacks on government, but those limits come not from some broader obligation to democracy or governance, but rather from a duty to act lawfully and conduct themselves in accordance with the rules of professional conduct. It is hard enough to define these limits without introducing a new vague obligation to protect government functions more broadly. The difficulty in assessing the criminal aspects of Eastman's conduct is perhaps most easily illustrated by the court's failure to address the elements of the crime.

Recent empirical studies of prosecutors, the judiciary, and lawyers in Taiwan have shown that these professional groups emerged as defenders of democracy against authoritarian threat, not because they entertained some general sense of obligation to democracy, but rather because they embraced a professional allegiance to the courts.[36] In the United States, it might be hard to recognize this allegiance because the public might assume that our long history of democratic self-governance protects us from authoritarian threat.[37] But studies of the legal profession in Taiwan makes it clear: In order to challenge a corrupt or authoritarian "government" on behalf of clients, organizations, or entities, lawyers must be agents of the one branch dedicated to defining and applying the law and free from ties to government officials, the executive, or legislative branches.[38] Lawyers are embedded within the judiciary because they play a critical part in this process, but it would be a grave error to mistake this role as a general obligation to police the boundaries of democratic government in some more general way.

The rules of professional conduct reflect this role as officers of the court. They require lawyers to behave differently in courts than outside

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35 *Id.* rr. 3.1, 3.3.

36 *See generally* Ching-Fang Hsu, *The Political Origins of Professional Identity: Lawyers, Judges, and Prosecutors in Taiwan's State Transformation*, 6 ASIAN J.L. & SOC. 321 (2019) (describing how the lawyers embedded in the judicial system served to help protect democracy).

37 TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 13 (2017).

38 *See supra* note 36.

of them.[39] Or, put more precisely, they impose more restrictions on lawyers when the administration of justice is at issue.[40] The rules for instance require lawyers to remedy false statements of fact to courts when they might not be required to do so if the false statement was made to a third person or the public at large.[41] Lawyers are barred from making frivolous arguments to courts when there is no such prohibition against making far-fetched legal arguments to a third party or in a public forum.[42] The parameters of these rules are not mere chance. They reflect a deliberate understanding of the dual role lawyers play as representatives of parties and officers of the court.[43] It is difficult enough to balance these conflicting obligations. They require lawyers to be independent of corrupting forces that might lead them to betray their clients' interests and independent of their clients such that they serve as a check if the client wishes them to break the law or disobey an ethical mandate.[44] These obligations are in tension with one another and often prove difficult to balance.[45]

While it is true that much of what we mean when we refer to American democracy derives from law, the distinction between an obligation to the legal system and an obligation to democracy writ large is critical. If lawyers had a special obligation to democracy, new rules could justify restricting lawyers' speech if it challenged or questioned the legitimacy of our democracy, regardless of whether the lawyer was representing a client or not. This expansive understanding of the lawyer's role could justify rules that punished lawyers for speeches, radio shows,

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39 For a discussion of lying inside or outside of courts, see, for example, Green & Roiphe, *supra* note 23, at 66–87; MODEL RULES OF PRO. CONDUCT r. 3.3(a) (AM. BAR ASS'N 1983) (requiring lawyers to correct false statements and evidence introduced in court); *id.* r. 3.1 (barring frivolous arguments in court).

40 Green & Roiphe, *supra* note 23, at 66–79.

41 *Compare* MODEL RULES OF PRO. CONDUCT r. 3.3(a) (AM. BAR ASS'N 1983) (requiring a lawyer to take remedial measures when the lawyer learns that the lawyer, the lawyers' client, or a witness called by the lawyer has offered false evidence), *with* MODEL RULES OF PRO. CONDUCT r. 4.1 (AM. BAR ASS'N 1983) (forbidding lawyers from making a knowingly false statement of fact to a third party but requiring the lawyer to disclose the falsehood only when the failure to do so would amount to fraud).

42 MODEL RULES OF PRO. CONDUCT r. 3.1. The federal government and states have adopted statutes and court rules prohibiting frivolous arguments. *See, e.g.*, FED. R. CIV. P. 11. For a discussion of this rule's application, see Green & Roiphe, *supra* note 23, at 75–76.

43 David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 815 (1992) ("It is axiomatic that lawyers are expected to be both zealous advocates for the interests of their clients and officers of the court.").

44 *Id.* at 815–16.

45 Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 40–41 (1989); MODEL RULES OF PRO. CONDUCT pmbl. ¶¶ 8, 9 (AM. BAR ASS'N 1983) (noting that most difficult problems of legal ethics arise from a conflict between a lawyer's obligation to his client and to the legal system).

or advocacy that was deemed contrary to democracy but could not otherwise be sanctioned because it did not amount to treason or an incitement to violence would be fair game. Because lawyers play a critical role in helping clients express and channel their grievances, this would be a grave loss.

Because state rules of professional conduct are often vague, a great deal of discretion rests with state bars and courts in how to interpret these rules.[46] They ought to exercise this discretion conservatively and use the rules in light of the lawyers' obligations to represent clients within the bounds of the law and their obligations to the administration of justice. To do so, state courts and bar disciplinary authorities should avoid sanctioning lawyers for dishonest speech outside of the courtroom that does not impair the administration of justice or interfere with the lawyer-client relationship.[47]

Further, in the context of lawyers' political speech, state regulators should be wary of discipline that is novel or unusual, which might deter lawyers from legitimate advocacy in politically charged contexts. Thus even though it is not a violation of the First Amendment to discipline lawyers for making frivolous arguments in court,[48] it may be unwise for state bar authorities to pursue such charges when the courts at issue have chosen not to. This is true for two reasons. First, the regulators' bias might lead them to pursue these claims only in cases where the politics of the client is opposed to their own, and second, this might deter lawyers from seeking redress for political grievances in court. Even when those complaints are invalid, litigation is preferable to other forms of resolution ranging from the destabilization of democratic institutions to political violence.[49]

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46 *See, e.g.*, Ronald D. Rotunda, *The New Illinois Rules of Professional Conduct: A Brief Introduction and Comment*, 78 ILL. B.J. 386, 287 (1990); *see also* Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court*, 64 GEO. WASH. L. REV. 460, 460 (1996) (arguing that the ABA Model Rules of Professional Conduct, which are similar to those in most states, are vague).

47 MODEL RULES OF PRO. CONDUCT r. 3.3(a) (AM. BAR ASS'N 1983) (forbidding false statements and evidence in court).

48 The federal rules and most states forbid frivolous arguments in court. *See, e.g.*, Fed. R. Civ. P. 11(b)(2); *see also* Yuri, Linetzky, *A Rule 11 for Prosecutors*, 87 TENN. L. REV. 1, 44 n.287 (2019) (listing state rules barring frivolous arguments in court).

49 Bruce A. Green & Rebecca Roiphe, *Trump's Lawsuits Are Good for American Democracy*, HILL (Nov. 9, 2020, 9:30 AM), https://thehill.com/opinion/white-house/525008-trumps-lawsuits-are-good-for-american-democracy [https://web.archive.org/web/20240210124442/https://thehill.com/opinion/white-house/525008-trumps-lawsuits-are-good-for-american-democracy].

II. THE CASE AGAINST JOHN EASTMAN

In disciplining John Eastman, the State Bar Court of California explained that the case "boils down to" whether Eastman

> acted dishonestly in his comments and advice given regarding the issue of whether then-Vice President Mike Pence . . . had authority to unilaterally reject certain states' slate of electors and/or delay or recess the electoral count during the Joint Session of Congress on January 6, 2021, and the manner in which he pursued legal action aimed at obstructing the lawful electoral process.[50]

In doing so, it interpreted its vague rules against moral turpitude and imperative to uphold the laws and Constitution broadly to bar false political speech outside of the courtroom.[51] As a general matter, this will chill lawyers from legitimate advocacy and hinder democratic principles rather than help preserve them. It will undermine confidence in the impartiality of state bar regulators and cast a shadow on the profession as a whole.

John Eastman served as counsel to former President Trump during the 2020 presidential campaign and in the months before President Biden took office.[52] Eastman, who is a lawyer and former professor and dean of Chapman University School of Law, has been criminally indicted in Georgia for helping Trump seek to overturn the results of the 2020 election.[53] A state bar court in California has recommended disbarment for similar conduct.[54] This Section criticizes the state bar court's decision to recommend that Eastman be disbarred for lying to the public, to Pence's lawyer, and to courts about the law and facts. The bar disciplinary

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50 *In re* John Charles Eastman, No. SBC-23-O-30029, at 4–5 (Cal. State Bar Ct. Mar. 27, 2024).

51 *Id.*

52 Tierney Sneed, *Ex-Trump Attorney to Face Disciplinary Proceedings for 2020 Election Plot, Aimed at Pence*, CNN (June 20, 2023, 7:11 AM), https://www.cnn.com/2023/06/20/politics/john-eastman-trump-election-ethics/index.html [https://perma.cc/B4G5-BGMG].

53 Indictment, State v. Trump, No. 23SC188947, 2023 WL 5210805 (Ga. Super. Aug. 14, 2023); *see also* Justin Stabley, *What You Need to Know About John Eastman's 2020 Election Charges*, PBS NEWSHOUR (Sept. 21, 2023, 4:47 PM), https://www.pbs.org/newshour/politics/what-you-need-to-know-about-john-eastmans-2020-election-charges [https://perma.cc/VY67-5KS3] (providing more background on Eastman and laying out the criminal charges against him). He is also widely assumed to be one of the unindicted coconspirators in the federal indictment of Donald Trump for attempting to overturn the election on January 6. Holly Bailey et al., *Here Are the Trump Co-Conspirators Described in the DOJ Indictment*, WASH. POST (Aug. 1, 2023, 11:30 PM), https://www.washingtonpost.com/national-security/2023/08/01/doj-trump-indictment-trump-coconspirators [https://web.archive.org/web/20231113175227/https://www.washingtonpost.com/national-security/2023/08/01/doj-trump-indictment-trump-coconspirators].

54 *Eastman*, SBC-23-O-30029, at 1–2.

authority should have waited for the criminal case to conclude and then if he were convicted, it could have disbarred him for engaging in criminal conduct that reflects poorly on his fitness to practice law. Alternatively, the committee could have sought to discipline him for the alleged criminal conduct independently and established the crimes using the lesser standard of proof required for bar discipline. Rather than doing so, the court employed a shortcut by relying on its broadly written rules to discipline Eastman for much of the speech and advocacy at issue in the criminal cases without establishing the criminal conduct.[55]

A. *Background: Criminal Cases and Court Recommended Disbarment*

Eastman was indicted in Georgia on August 14, 2023.[56] The criminal case alleges that Eastman, along with the eighteen other defendants, conspired to keep President Trump in power despite his legitimate loss to Joe Biden.[57] As part of this effort, Eastman is accused of seeking to persuade former Vice President Mike Pence to delay the certification or reject legitimate slates of electors.[58] Two weeks earlier, a federal grand jury indicted President Trump for corruptly seeking to interfere with the certification of the 2020 election.[59] Eastman was not named in the indictment but is widely reported to be an unnamed co-conspirator in that case as well.[60]

While Eastman was not yet criminally charged when the California state disciplinary authority accused him of violating the state ethics code, it was well known that both Georgia state and federal prosecutors had been looking into events in which he took part. The criminal prosecutions were underway by the time the state bar court issued its opinion in March 2024. The eleven charges in the complaint related to Eastman's work on behalf of Trump and Trump's campaign to challenge the election results, but they did not allege that Eastman criminally sought to overturn an

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55 *See generally id.* (focusing on Eastman's alleged lies).

56 Indictment, State v. Trump, No. 23SC188947, 2023 WL 5210805 (Ga. Super. Aug. 14, 2023).

57 Richard Fausset & Danny Hakim, *Trump Indicted in Georgia: Prosecutors Accuse Trump of 'Criminal Enterprise' to Overturn Election*, N.Y. TIMES (Aug. 23, 2023), https://www.nytimes.com/live/2023/08/14/us/trump-indictment-georgia-election [https://web.archive.org/web/20250228015405/https://www.nytimes.com/live/2023/08/14/us/trump-indictment-georgia-election].

58 *See* Indictment ¶¶ 23, 34, 35–36, 39, 44, 94, 109, 123–25, 129, 131, 137, 141, State v. Trump, No. 23SC188947, 2023 WL 5210805 (Ga. Super. Aug. 14, 2023).

59 Indictment, United States v. Trump, No. 23-cr-257 (D.D.C. Aug. 1, 2023).

60 Jaclyn Diaz, *The Latest Trump Indictment Lists 6 Unnamed Co-conspirators. Here's What We Know*, NPR (Aug. 3, 2023, 11:22 AM), https://www.npr.org/2023/08/03/1191587086/jan-6-trump-case-co-conspirators [https://perma.cc/P9UH-W287].

election or interfere with an act of Congress.[61] Instead, most of the allegations involved lies about the election or about the law related to the counting electoral votes.[62] The state bar court concluded that Eastman committed ten of these offenses.[63] The court determined that Eastman committed one count of failing to support the laws and Constitution of the United States,[64] two counts of seeking to mislead a court,[65] and seven counts of moral turpitude, six of which were based on dishonesty.[66]

This Section will organize the charges against Eastman into four categories. First, several of the offenses involve lies to the public. Second, he was disciplined for making false or negligent representations of fact and law to Vice President Pence and his attorney. Third, the court found that Eastman made false or negligent statements of law and fact to the Trump campaign. Finally, two of the changes involved findings that Eastman made false legal and factual arguments in court filings. In response to these allegations, among other things, Eastman argued that his statements about the election fraud were not false and if they were, he did not know that they were false.[67] The court rejected this argument as a factual matter, and the critique below assumes that the factual finding is correct. This Article does, however, at times, question what the rules of professional conduct mean and ought to mean when they proscribe dishonesty.

1. Lies to the Public

Eastman was disciplined in large part for lies he made to the public.[68] At the time that he made these statements, Eastman represented Trump and his campaign, but it is not entirely clear whether the public statements were made in his representative capacity or as a private citizen.

Eastman's discipline was based in part on false statements he made on "Bannon's War Room," a right-wing radio show hosted by Trump's longtime ally, Steve Bannon.[69] The court concluded that he was acting on

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61 Notice of Disciplinary Charges, *In re* John Charles Eastman, SBC-23-O-30029 (Cal. State Bar Ct. Mar. 27, 2024).

62 *Id.*

63 *In re* John Charles Eastman, SBC-23-O-30029, at 1–2 (Cal. State Bar Ct. Mar. 27, 2024).

64 CAL. BUS. & PROF. CODE § 6068(a) (West 2019); *Eastman*, No. SBC-23-O-30029, at 110–14.

65 CAL. BUS. & PROF. CODE § 6068(d) (West 2019); *Eastman*, No. SBC-23-O-30029, at 81–87, 90–94.

66 CAL. BUS. & PROF. CODE § 6106 (West 1939); *Eastman*, No. SBC-23-O-30029, at 87–90, 94–108. The court dismissed one count with prejudice. *Id.* at 108–10.

67 *Eastman*, No. SBC-23-O-30029, at 98, 103.

68 *Id.* at 96–97, 102–03.

69 *Id.* at 48–53.

behalf of Trump because Bannon referred to him repeatedly as Trump's "constitutional lawyer."[70] On January 2, 2021, Eastman stated that there was "massive evidence" of fraud involving absentee ballots in the November 2020 presidential election.[71] He further insisted that there was more than enough fraud to have affected the outcome of the election.[72] Eastman continued to maintain the truth of these allegations through the bar court's proceedings.[73] The court concluded nonetheless that Eastman knew these statements were false because he lacked hard evidence of outcome determinative fraud and ignored credible evidence to the contrary.[74]

Four days later, on January 6, Eastman spoke at the "Save America" rally where tens of thousands of people had gathered at the Ellipse of the National Mall in Washington D.C.[75] He was introduced by Rudy Giuliani as "one of the preeminent constitutional scholars in the United States."[76] At the televised rally, Eastman stated, "We know there was fraud. Traditional fraud that occurred. We know that dead people voted."[77] He also claimed that the electronic voting machine company, Dominion, had fraudulently altered the vote tallies.[78] The court found that Eastman knew that there was no fraud that could have affected the outcome of the election when he made these statements to the crowd.[79] But throughout its factual determinations, the court suggested that the problem is not that he knew his statement was false, but rather that he "had not seen conclusive proof that Dominion voting machines were used to fraudulently flip votes in the 2020 presidential election."[80] The court also suggested it was wrong of Eastman not to consider the effect of his words on the audience.[81] These are different conclusions. The first is that he deliberately lied and the second and third imply an obligation on the part of lawyers to find proof or to convince themselves of the truth of the assertions before they make public statements and also imply that lawyers ought to consider the effect of their words on third parties, a standard that is not and cannot possibly be adopted by the ABA or state courts,

70 *Id.* at 48.
71 *Id.* at 49.
72 *Id.*
73 *Id.* at 51–52.
74 *Id.* at 95–97.
75 *Id.* at 62.
76 *Id.* at 63.
77 *Id.* at 63–64 (emphasis omitted).
78 *Id.* at 65.
79 *Id.* at 65–66.
80 *Id.* at 65.
81 *Id.*

prior to making public statements. The court made other determinations that imply that Eastman was negligent in his statements and that he should have known they were false. This may be an aspiration for members of the bar, but it is certainly not a rule that should result in discipline.

The charges rested on one more public statement. On January 18, 2021, Eastman published an article in *The American Mind*, a publication of the Claremont Institute, a right wing think tank located in California. In the article, Eastman claimed that illegal and fraudulent conduct had occurred during the 2020 presidential election.[82] The disciplinary complaint alleges that he knew these statements were false at the time.[83]

2. Lies to the Trump Campaign and Its Attorney

In addition to lying to the public, the court concludes that Eastman lied to Trump and the Trump campaign.[84] Eastman began working for Trump in his capacity as a presidential candidate and the Trump reelection campaign in November 2020 and officially became their lawyer on December 6, so this basis for the bar discipline amounts to a conclusion that he lied to own client.[85]

The court discusses two memorandums that Eastman sent to Trump and the campaign. The first was a two-page memorandum that Eastman wrote on December 23, 2020, to an attorney and advisor to the Trump campaign.[86] The memo argued that Vice President Mike Pence had unilateral authority to resolve disputed electors and choose which ones to count at the Joint Session of Congress.[87] First, it suggested that Pence could defer counting these states' electoral votes because he had received multiple slates from those states.[88] It then proposed two potential courses of conduct.[89] Under the first, Pence would declare that because there were multiple slates, there were no valid electors from those seven states and base his count on the remaining 43 states.[90] This would hand the election

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82 *Id.* at 71.

83 *Id.* at 73–75.

84 *Id.* at 42.

85 Answer to Notice of Disciplinary Charges ¶ 2, *In re* John Charles Eastman, No. SBC-23-O-30029 (Cal. State Bar Ct. Mar. 27, 2024).

86 Memorandum from John Eastman to Boris Epshteyn and Kenneth Chesebro (Dec. 23, 2020), https://s3.documentcloud.org/documents/21066248/eastman-memo.pdf [https://perma.cc/K7DA-7RXC] (attributed to Eastman by CNN).

87 *Eastman*, No. SBC-23-O-30029, at 43; Memorandum, *supra* note 86.

88 Memorandum, *supra* note 86, at 2.

89 *Id.*

90 *Id.*

to Donald Trump because without the seven states, Trump's 228 electors would constitute a majority of 454 total. Pence could then declare Trump as the elected President.[91] In the second scenario, Pence would concede that a candidate needed 270 electoral votes to win.[92] Under the Twelfth Amendment, when no candidate receives a majority of the electoral vote, the House of Representatives decides based on state delegations.[93] Because Republicans controlled 26 state delegations, President Trump would win according to this plan, as well.[94] Eastman claims that the two-page memo was merely a draft laying out ideas which would later be explored in more depth.[95]

In support of its conclusion that these legal interpretations were deceptive, the court pointed to earlier statements Eastman made in 2000, reaching the opposite result about the meaning of the Electoral Act and the Twelfth Amendment.[96] It also discussed the federal law and Constitution extensively.[97] Eastman was disciplined for stating in the two-page memo that there were dual slates of electors. The court explains that he knew there was only one "legitimate" slate of electors.[98] But this allegation rests on context and the intended meaning of "slates." Eastman might defend himself by stating that he knew that one slate of electors was not certified but still found the fact of its existence relevant to the argument for delay.

Eastman also drafted a six-page memorandum, which he sent to an attorney and advisor for Trump's campaign on January 3, 2021.[99] This memo elaborated the scenarios in the two-page memo. In one of the options, Pence would determine on his own which slate of electors were valid and in another, he would adjourn the joint session of Congress while the states sorted out the dueling slates of electors.[100] The memo stated that the election was tainted by alteration of state election laws in "key swing states."[101] Eastman's memo explained that, while the plan was "BOLD," "th[e] Election was Stolen by a strategic Democrat plan to systematically

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91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

96 *In re* John Charles Eastman, No. SBC-23-O-30029, at 44–45 (Cal. State Bar Ct. Mar. 27, 2024); Memorandum from John Eastman to Boris Epshteyn (Jan. 3, 2021), https://s3.documentcloud.org/documents/21066947/jan-3-memo-on-jan-6-scenario.pdf [https://perma.cc/2MMJ-B39R].

97 *Eastman*, No. SBC-23-O-30029, at 5–8.

98 *Id.* at 88.

99 *Id.* at 45–57.

100 Memorandum, *supra* note 96, at 4–5.

101 *Id.* at 1–2.

flout existing election laws for partisan advantage; we're no longer playing by Queensbury Rules, therefor."[102] The memorandum concluded with a final scenario in which if Pence would determine that he could not ignore the votes from the contested states and declare Trump the winner, he could adjourn the session and let states investigate and determine which slate of electors was valid.[103]

The court concluded that both memorandums contained advice to Trump and Pence, over Eastman's objection that the memorandums were not intended as advice, but rather a survey of the alternatives that were being discussed in public for the purpose of internal deliberation.[104] The court rejected Eastman's argument that the six-page memorandum, like the two-page memorandum, was meant as an internal brainstorming document, providing potential options rather than advocating any of them.[105]

The court concluded that Eastman knew at the time that there were not dual slates of electors, and that all seven states had sent proper slates reflecting that Biden had won the popular vote. Thus, Eastman made knowing misrepresentations of fact. It further found that he knew that there was no fraud on a scale that could have affected the outcome of the election. The court also determined that Eastman misrepresented the law.[106] Specifically, it concluded that Eastman made unreasonable legal arguments and relied on law review articles that were based on faulty reasoning. Eastman wrote in the memos that there was "solid legal authority" to support the fact that the president of the Senate can determine which electors are valid, and the court concluded that he knew there was no such precedent.[107]

3. Lies to Vice President Pence and His Attorney

The court also based its discipline on lies that Eastman made to President Trump at a meeting in the oval office on January 4, 2021.[108] After he had presented his memos to the attorney and advisor for the Trump campaign, Eastman convened a meeting with Mike Pence, his lawyer Greg Jacob, and his chief of staff, Marc Short, in the Oval Office.

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102 *Id.* at 5.

103 *Id.* at 5–6.

104 Answer to Notice of Disciplinary Charges ¶ 8, *In re* John Charles Eastman, No. SBC-23-O-30029 (Cal. State Bar Ct. Mar. 27, 2024).

105 *Id.* ¶ 12.

106 *Eastman*, SBC-23-O-30029, at 47.

107 *Id.* (emphasis omitted).

108 *Id.* at 53–54.

At this meeting Eastman attempted to convince Pence, Jacob, and Short that Pence could either refuse to count the electors of the contested states or adjourn the Joint Session of Congress while the states sorted out the issue.[109] In doing so, he repeated the allegations of election fraud that the bar disciplinary complaint alleges are lies.[110] He relied on legal arguments about the Electoral Count Act and Twelfth Amendment that the court concluded are unreasonable interpretations of the law.[111]

Prior to this meeting, Vice President Pence had his own lawyers do extensive research into this issue.[112] Among other things, he had discussions with his counsel, White House Counsel, and an expert, John Yoo.[113] After consulting these experts, Pence concluded that he did not have the power to unilaterally choose which electors to count or to delay the proceedings while state legislatures conducted further investigation into voter fraud.[114]

Eastman denied that he convened this meeting and insisted that he never presented the memos to Mike Pence, Greg Jacob, Marc Short, or anyone else on their team. He did, however, admit that he discussed the Vice President's role in counting electoral votes.[115] At this meeting, Trump asked Eastman if Pence had authority to unilaterally choose a set of electors and Eastman replied that the law was unclear and even if Pence had that power, he should refrain from using it because state legislatures had not sent a second set of certified electors.[116]

On January 5, there was another meeting attended by Eastman, Pence, and Pence's advisors.[117] Eastman began the meeting by urging Pence to reject the slates of electors from contested states but ultimately backed off, trying to convince them to delay the counting instead.[118] Prior to this meeting, Pence's lawyer Jacob had prepared a memo and explained his view of the law to Pence.[119] At this point, Eastman acknowledged that this option would violate federal law and would likely be declared

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109 *Id.* at 54.

110 *Id.*

111 *Id.*

112 *Id.* at 53.

113 *Id.*

114 *Id.*

115 Answer to Notice of Disciplinary Charges ¶ 20, *In re* John Charles Eastman, No. SBC-23-O-30029 (Cal. State Bar Ct. Mar. 27, 2024).

116 *Id.*

117 *Eastman*, No. SBC-23-O-30029, at 54–55.

118 *Id.* at 54.

119 *Id.* at 54–55.

unconstitutional, but Eastman denies the latter part of the allegation.[120] Later that day, Eastman met with Jacob and Pence advisor Marc Short. This time, he encouraged them to advise Pence to reject the Biden electoral votes from several of the states entirely.[121] After an extensive discussion of the law and precedent, Jacob rejected Eastman's arguments and insisted that the Vice President had no authority to reject certified slates of electors and Eastman ultimately requested that Pence delay counting rather than reject the certified slates of electors.[122]

Later that day, Eastman met with two rally organizers who presented him with a chart of alleged improprieties and fraud in voting.[123] The court concluded that Eastman did not inquire into their credentials, do internet research on them, or double check the information they provided.[124]

During the morning of January 6 and throughout the day, Eastman argued with Jacob about the Electoral Count Act, the Twelfth Amendment, and the Vice President's role.[125] In an email sent to Jacob after the rioters had breached the Capitol, Eastman blamed Pence and Jacob for the siege, claiming that it was due to their unwillingness to allow the American people to air their concerns in a legitimate way in the face of "compelling" and "overwhelming" evidence that the election was stolen.[126] In addition to the alleged lies, the court concluded that Eastman knew that the arguments were flawed or he was grossly negligent in advancing these theories.[127]

4. Lies and Frivolous Arguments in Court

The court concluded that Eastman made false and frivolous statements in several lawsuits that Eastman joined. The first of these was a suit filed by the State of Texas in the Supreme Court.[128] The lawsuit alleged that Pennsylvania, Georgia, Michigan, and Wisconsin had used the COVID-19 pandemic to illegally usurp the power of the state

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120 Notice of Disciplinary Charges ¶ 20, *In re* John Charles Eastman, No. SBC-23-O-30029 (Cal. State Bar Ct. Mar. 27, 2024); Answer to Notice of Disciplinary Charges ¶¶ 8, 20, *In re* John Charles Eastman, No. SBC-23-O-30029 (Cal. State Bar Ct. Mar. 27, 2024).

121 *Eastman*, SBC-23-O-30029, at 55.

122 *Id.*

123 *Id.* at 59.

124 *Id.* at 59–60.

125 *Id.* at 68–70.

126 *Id.*

127 *Id.*

128 *Id.* at 9–24 (discussing Eastman's motion to intervene in the case that was ultimately dismissed by the Supreme Court in *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (mem.)).

legislatures by revising the election statutes.[129] Texas' Motion for Leave to File a Bill of Complaint contained factual assertions that the California bar court determined were knowingly false.[130] In December 2020, John Eastman filed a motion to intervene in the lawsuit on behalf of Trump.[131] The court concluded that the arguments in the Texas lawsuit were false and misleading, that Eastman knew that the factual allegations were misleading, and that there was no evidence on which a reasonable attorney might rely to make these claims.[132] Implicit in its assumption is that the motion to intervene constituted an endorsement of the legal and factual statements made in the case. The California bar court specifically addressed the expert statistical analysis that suggested that Biden's chances of winning the contested states was less than one in a quadrillion, stating that other experts had been highly critical of the analysis.[133]

On December 20, 2020, Eastman provided legal advice on a complaint filed on behalf of Trump requesting that the Georgia court decertify the election.[134] The complaint was based on specific factual allegations about fraud in the election that the court concluded Eastman knew were false. The complaint based this charge on the argument that no reasonable lawyer would rely on these evidentiary claims.[135] The parties ultimately reached a settlement in the case and the complaint was dismissed on January 7, 2024.[136] While this case was pending, Eastman was involved in another case in Georgia seeking an injunction ordering Governor Brian Kemp and Secretary of State Brad Raffensperger to decertify the election results.[137] The court concluded that specific statements in these court filings were knowingly false.[138]

The California bar court cited Eastman's testimony about lax verification procedures as well as some of the risk analysis conducted by experts as a sign that Eastman was equating poor voting procedures with outcome determinative fraud and did not in fact know that such fraud had occurred. In essence, the court concluded that Eastman failed to

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129 *Id.* at 9–10.

130 *Id.* at 23–24.

131 *Id.* at 19.

132 *Id.* at 23.

133 *Id.* at 17–19.

134 *Id.* at 26; *see also* Verified Complaint for Emergency Injunctive and Declaratory Relief, Trump v. Kemp, No. 20-cv-5310, 2020 WL 7872546 (N.D. Ga. Dec. 31, 2020). The motion for expedited declaratory and injunctive relief was denied. *Trump v. Kemp*, 511 F. Supp. 3d 1325, 1328 (N.D. Ga., Jan. 5, 2021)).

135 Notice of Disciplinary Charges ¶¶ 44–46, *In re* John Charles Eastman, SBC-23-O-30029 (Cal. State Bar Ct. Mar. 27, 2024).

136 *Eastman*, No. SBC-23-O-30029, at 25.

137 *Id.* at 26.

138 *Id.* at 26–36.

investigate these allegations and was negligent in making the allegations about election fraud. But this is an unusual standard. The court does not conclude that the factual statements were knowingly false or even frivolous as much as unverified at an early stage of litigation. Eastman's defense offered evidence supporting a reasonable belief that direct evidence of fraud would be found.[139] The professional conduct rule requires that a legal argument made to a court be based in law or fact.[140] The fact that a claim has not been fully substantiated does not violate the standard.[141] Instead, a lawyer must inform himself of the facts to the extent necessary to make a good faith argument.[142] The court in Eastman's case imposed a higher burden.[143] By imposing a higher burden in a politically charged and controversial case, the court will chill lawyers representing controversial clients. If the standard were adopted more generally, the court might make it such that clients with claims that are difficult to verify without significant investigation and discovery may have difficulty obtaining representation.

The California bar court concluded that this amounts to deception in violation of Section 6068(d).[144] It explained that this rule forbids deceiving courts in any way.[145] It insisted that there is no difference between concealment, half-truths, and false statements, as all three violate the rule. But of course, lawyers frequently engage in the manipulation of truth on behalf of clients as a part of zealous advocacy. Spinning facts in favor of a client is not antithetical to the craft of lawyering so it cannot be true that all forms of deception are prohibited and the court does not explain where the line between acceptable and sanctionable distortion lies.[146] The lack of an established line opens the court up to accusation of political bias.

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139 Answer to Notice of Disciplinary Charges ¶ 23, *In re* John Charles Eastman, No. SBC-23-O-30029 (Cal. State Bar Ct. Mar. 27, 2024).

140 MODEL RULES OF PRO. CONDUCT r. 3.1 & cmt. 2 (AM. BAR. ASS'N 1983).

141 *Id.*

142 *Id.*

143 *Eastman*, SBC-23-O-30029, at 93–94.

144 *Id.* at 84–85; CAL. BUS. & PROF. CODE § 6068(d) (West 2023).

145 *Eastman*, SBC-23-O-30029, at 84–85; CAL. BUS. & PROF. CODE § 6068(d) (West 2023).

146 Green & Roiphe, *supra* note 23, at 66–87.

B. *A Critique of the Charges*

In a public statement, chief trial counsel for the California state bar explained:

> There is nothing more sacrosanct to our American democracy than free and fair elections and the peaceful transfer of power. . . . For California attorneys, adherence to the U.S. and California Constitutions is their highest legal duty. The Notice of Disciplinary Charges alleges that Mr. Eastman violated this duty in furtherance of an attempt to usurp the will of the American people and overturn election results for the highest office in the land—an egregious and unprecedented attack on our democracy—for which he must be held accountable.[147]

As compelling as this rhetoric might seem at first, a lawyer's obligation is not to the Constitution or democracy, but rather to the courts, as explained in Part I. Lawyers should be allowed to advance poor, and even laughable, positions on behalf of their clients when no court proceeding is involved. They should be given even more leeway when clients may be advancing a controversial political position or interpretation of the Constitution. And of course, any challenges in the context of presidential elections will inevitably involve these sorts of charged issues. This Section will explain why disciplining lawyers in this context is dangerous. In short, democracy depends not only on the coexistence of diverse views but also an ongoing contest over the meaning of the Constitution. By putting the thumb on the scale, even when the viewpoint at issue seems obviously mistaken, state bar regulators usurp too much power over this process. There may come a time when the dominant view, held by state regulators, is destructive, wrong, or dangerous and the discipline of Eastman and lawyers like him offers precedent for those regulators to control the range of acceptable political views.

1. Chilling Political Speech

Many of the allegations in the complaint target protected speech. As Bruce Green and I have argued elsewhere, lawyers' lies that do not interfere with the administration of justice or harm the fiduciary

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147 Press Release, George Cardona, Chief Trial Counsel for the State Bar of California Attorney John Eastman Charged with Multiple Disciplinary Counts by the State Bar of California (Jan. 26, 2023), https://www.calbar.ca.gov/About-Us/News/News-Releases/attorney-john-eastman-charged-with-multiple-disciplinary-counts-by-the-state-bar-of-california [https://perma.cc/ZFS9-GZVX].

relationship between attorney and client are protected speech.[148] The California bar court's analysis of the First Amendment implications of the charges was superficial and flawed. It concluded that lawyers' free speech rights do not extend to knowingly false or reckless statements of fact or law made outside of the court and arguably even outside of a lawyer-client relationship.[149] This is incorrect. There are two relevant questions in assessing whether Eastman's statements about election fraud, even assuming he were to concede they were lies, are protected by the First Amendment. First, would his lies have been protected if he were not a lawyer? Next, does his status as a lawyer alter that analysis?[150]

If Eastman were not a lawyer, his speech would have been protected even if he was lying because it was made in a political context. In *United States v. Alvarez*,[151] the Court invalidated a federal law that criminalized lying about military honors on First Amendment grounds. While the Court was divided about the statute at issue in the case, all justices agreed that political lies deserve the most stringent protection.[152] In *New York Times v. Sullivan*, the Court explained why it is so important not to designate lies as worthless speech, especially in the political context:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.[153]

In highly charged contexts, like politics, people tend to view facts through a distorted lens and government regulators are no exception. In fact, they may be more likely to have a biased view due to their own connection to politics or membership in the mainstream legal profession. This may be due to self-interest or unconscious bias. Either way and for this reason, the government is a bad and dangerous arbiter of truth. The risk is that regulators with certain political views will be quick to designate the statements of their opponents false and pursue the speakers. Even if

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148 Green & Roiphe, *supra* note 23, at 42–66.

149 *Eastman*, No. SBC-23-O-30029, at 79.

150 *See* Green & Roiphe, *supra* note 23, at 42–66.

151 567 U.S. 709, 709 (2012).

152 Green & Roiphe, *supra* note 23, at 43–51.

153 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) (quoting Cantwell v. Connecticut, 310 U.S. 296, 310 (1940)).

most would agree that Eastman lied, giving this power to state bar regulators would open the door to other efforts to suppress unpopular speech. And no doubt at some point the targeted speech will be useful, productive opposition. Without First Amendment protection, the public would be powerless in the face of such an effort to control public discourse. Thus, the Court in *New York Times Co. v. Sullivan* made clear that defamation and libel were the exceptions and that government ought to be cautious about regulating lies.[154]

In invalidating a statute making it a crime to lie about medals of honor, the Court in *Alvarez* sought to determine what sorts of lies can be punished.[155] The Justices disagreed on this point but shared the view that lies on topics of public concern, like political lies, are fully protected speech.[156] In his opinion, Justice Anthony Kennedy, joined by Justices John Roberts, Ruth Bader Ginsburg, and Sonia Sotomayor, asserted that only traditionally regulated lies that result in legally cognizable harm can be regulated.[157] Justice Stephen Breyer, joined by Justice Elena Kagan, reasoned that lies about easily verifiable facts are not fully protected as long as they do not concern charged subjects like religion, philosophy, and the arts.[158] Presumably politics would fit into this list of taboo topics. Justice Samuel Alito, joined by Justice Clarence Thomas, dissented, insisting that lies about military valor were not worthy of protection.[159] But even the dissent noted that lies about issues of public concern would be subject to the strongest protection.[160] Given the Court's relatively recent analysis of this issue and unanimity on the question of political lies, the California bar court's reliance on a 1964 defamation case was misplaced. Relying on that case ignored more recent and relevant precedent but also overlooked the fact that defamation is an exception to the general rule that lies are protected speech and missed the complexity of the issue entirely when it comes to political lies.[161]

The next question pertinent to the First Amendment analysis is whether Eastman ought to be treated differently because he is a lawyer. Much of the rhetoric calling for sanctions seems to convey this idea that lawyers who helped Trump should be punished not because any individual could be sanctioned for these lies but because they betrayed

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154 *Id.*; Green & Roiphe, *supra* note 23, at 44.

155 United States v. Alvarez, 567 U.S. 709, 719–22 (2012).

156 *Id.*

157 *Id.* at 717.

158 *Id.* at 731–32.

159 *Id.* at 746–55.

160 *Id.* at 753.

161 *In re* John Charles Eastman, No. SBC-23-O-30029, at 78 (Cal. State Bar Ct. Mar. 27, 2024) (citing Garrison v. Louisiana, 379 U.S. 64, 75 (1964)).

their obligation as a members of the bar.[162] The California bar court's decision similarly focused on the unique nature of the legal profession, leaping from lawyers' duties to the administration of justice to a broader obligation to tell the truth in all contexts.[163] Without presenting evidence or data, the court assumed that when a lawyer lies it implicates the administration of justice. This is not only unsupported by evidence but contrary to common sense. Most people would not necessarily assume that because a lawyer has lied in a context in which lies are rampant that they will therefore lie in court. Nor is it clear that the public would hold the entire profession accountable for a particular lawyer's lie. Obviously, we cannot prevent lawyers from lying in all contexts. For example, telling a child that Santa Claus exists would certainly be a tolerable lie. The court offers no rationale for distinguishing this sort of lie from impermissible ones. To survive strict scrutiny, the First Amendment analysis would need a more direct link between Eastman's lies and the administration of justice than the California bar court supplies.[164]

While lawyers are held to higher standards than most individuals when the administration of justice is at issue, they are not categorically different.[165] They should not be and are not held to a higher standard in all contexts. In invalidating a law restricting the speech of pregnancy centers, the Supreme Court explained, "[s]peech is not unprotected merely because it is uttered by 'professionals.'"[166] In other words, there is no separate category of "professional speech" subject to greater limitation, and so any effort to stifle the content of such speech is suspect. As the Court noted in *Becerra*, there are only two types of professional speech which can be regulated without the most searching kind of review: false statements in advertising or professional commercial speech and conduct.[167] Eastman's public statements do not fall into either of these two categories and in fact constitute core political speech. Because this is

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162 The 65 Project, for instance, states, "Lawyers take an oath to stand as officers of the court, bound by a code of conduct and ethical requirements that do not apply to the public more broadly. They cannot uphold that duty while lying to the court or the public about the factual grounds for phony claims." *About Us*, 65 PROJECT, https://the65project.com/about [https://perma.cc/R9CA-9J4P]. LDAD similarly proclaims, "We believe that as members of the legal community, we have a unique responsibility to defend the Constitution and the values on which our democracy depends." *Lawyers Defending American Democracy Is a Coalition of Lawyers United in the Defense of Our Democracy*, LAWS. DEFENDING AM. DEMOCRACY, https://ldad.org [https://perma.cc/Z58R-L2JN].

163 *Eastman*, No. SBC-23-O-30029, at 76–80.

164 Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268–69 (2007) (analyzing the application of strict scrutiny review).

165 Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 771 (2018).

166 *Id.* at 767.

167 *Id.* at 768.

the case with the speech at the basis of Eastman's discipline, efforts at regulation must pass strict scrutiny.

When Eastman spoke at the Ellipse and on Bannon's War Room, it is not clear whether he was speaking on his own behalf or as lawyer for Trump. The California bar court concluded that it was the latter because he was introduced as a great constitutional lawyer.[168] But, whether he appeared in a representative capacity is not dispositive. What matters instead is whether his words were likely to interfere with the administration of justice or otherwise hamper one of the core functions of a lawyer.[169] If this were the case, the government would have a compelling interest that might justify a narrow restriction on speech to obtain its goal. The government has a legitimate interest in preserving the administration of justice and protecting the fiduciary relationship between lawyers and clients and so it can regulate attorneys' speech to the extent necessary to further those goals. Given that Eastman's words did not relate to—let alone undermine—a court proceeding this application of the rule must fail on First Amendment grounds.[170] Punishing Eastman's speech in public like this targets core protected political speech without justification.

In *Gentile v. State Bar of Nevada*, the Court upheld the part of a trial publicity rule that was used to punish a criminal defense lawyer for engaging in speech that had a substantial likelihood of prejudicing a proceeding.[171] While the Court was divided on some of the issues in the case, all justices agreed that in order to sanction a lawyer's speech outside of the courtroom, there had to be some nexus between that speech and court case.[172] In his plurality opinion, Justice Kennedy emphasized that the lawyer's speech at issue was critical of state power, which lies at the "very center of the First Amendment."[173] Justice Kennedy acknowledged that the administration of justice is an important function but also insisted that public vigilance over that function is also important and such oversight is even more critical when it involves allegations of public corruption.[174] Lawyers are in a particularly good position to monitor state power so stifling their speech when it is not necessary risks crippling a core means of government accountability. Unlike *Gentile*, Eastman's words ran no risk of interfering with an ongoing proceeding. His speech

168 *Eastman*, No. SBC-23-O-30029, at 101–02.

169 Green & Roiphe, *supra* note 23, at 51–54.

170 *See generally* Gentile v. State Bar of Nev., 501 U.S. 1030, 1074–75 (1991).

171 *Id.* at 1074–76.

172 *Id.* at 1074; *id.* at 1082 (O'Connor, J., concurring in part and dissenting in part); *id.* at 1088 (Rehnquist, J., dissenting); *id.* at 1089 (Scalia, J., dissenting).

173 *Id.* at 1034–35.

174 *Id.* at 1035.

was, however, critical of government and therefore constitutes core political speech deserving the highest form of protection.

The statements that Eastman made to Vice President Pence, Greg Jacob, and Marc Short were in a professional setting and therefore at least at first glance, more susceptible to regulation. Unlike the statements at the Ellipse or on a radio show, these words could potentially implicate Eastman's role as a lawyer. But, like his public remarks, these statements were all unrelated to any judicial proceeding. While there may have been a few last challenges to the election results lingering in courts, Eastman's words were not widely publicized and would not have interfered with those court cases. Relatedly, it is not clear that these were even statements of fact as much as they were a repetition of allegations that his client and others were making.[175] There is no rule against making false allegations in public or to a third party; nor is there a rule against echoing a client's false accusation. If there were, lawyers would be far more hampered in their advocacy than they are today. At the early stages of a representation, before court filings, a statement to a third party is often not perceived as a statement of fact by the lawyer for the other side, but rather a statement of the client's allegation. Pence was represented by his own lawyer who was capable of investigating the claims on his own, which is precisely what Greg Jacob did. Comments to the rule that bar knowingly false statements of fact to third parties explains that the rule only proscribes statements of fact.[176] Whether something is a statement of fact depends on context. The comment uses the example of puffery during negotiations as assertions that are often not considered statements of fact. Eastman's statements similarly could be viewed as the echoed allegations of a client, rather than statements of fact.

Even if these were statements of fact, they had no impact on any ongoing judicial proceeding. A nonlawyer would certainly be permitted to make such statements under *Alvarez*,[177] and it is not clear why punishing these statements by lawyers would further a government interest related to the administration of justice. Much like "puffery," lawyers overstate their client's cases before court proceedings as a means of negotiation and that does not undermine legal cases; it is simply a part of the way the profession operates.

The same is true of Eastman's statements to the Trump campaign. There may be an argument that by lying to his own client Eastman

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175 Green & Roiphe, *supra* note 23, at 70–79 (arguing that many statements that lawyers make in professional settings are not statements of fact but rather a repetition of allegations made by their client or others and that like, puffery, these are not considered "material misstatements of fact" for purposes of Rule 4.1).

176 MODEL RULES OF PRO. CONDUCT r. 4.1 cmt. 2 (AM. BAR ASS'N 2023).

177 United States v. Alvarez, 567 U.S. 709 (2012).

implicated a compelling government interest because lying to a client betrays the fiduciary relationship and his statements could be regulated as a result. Since Eastman's sophisticated client, his lawyers, and representatives were making these same statements in public before Eastman even took on the representation, this rationale for regulating his speech is not warranted. Just as his statements to Pence were not statements of fact, nor would the presentation of the memo to the client count as such.

The California bar court also concluded that there is no free speech right to make statements as part of criminal activity.[178] It pointed out that Eastman was charged with assisting President Trump in seeking to overturn the election in violation of 18 U.S.C. § 371 by obstructing the counting of votes.[179] While this is accurate as a statement of First Amendment law, the court's analysis of this complicated question of criminal law is lacking, not to mention the complex questions of what sorts of evidence would be admissible given the Supreme Court's recent immunity decision.[180]

Without addressing whether California's Business and Professional Code Section 6068(a) is overbroad, it is clear that applying it to punish Eastman's radio address, his message at the Ellipse, or his statements to Pence or Trump violates the First Amendment because his words, even if they were knowingly false statements, were protected speech.

2. Chilling Legitimate Advocacy

The complaint at times acknowledges that Eastman was not making false statements of fact. It alleges instead that no reasonable attorney in Eastman's position would conclude, as he did, that Pence had authority to either delay the electoral count or determine the outcome of the election by refusing to count the contested votes.[181] The charges toggle back and forth between alleging misstatements of fact and suggesting that there is no reasonable basis in fact or law for the statements that Eastman made, as if the distinction made no difference. For instance, in discussing Eastman's statements to Jacob after the rioters had breached the Capitol, the complaint states that there was no evidence on which a reasonable

178 *In re* John Charles Eastman, No. SBC-23-O-30029, at 79 (Cal. State Bar Ct. Mar. 27, 2024).

179 *Id.* at 114.

180 Trump v. United States, 603 U.S. 593 (2024).

181 Notice of Disciplinary Charges ¶ 24, *In re* John Charles Eastman, SBC-23-O-30029 (Cal. State Bar Ct. Mar. 27, 2024) ("[N]o reasonable attorney with expertise in constitutional or election law would conclude that Pence was legally authorized to delay the counting of electoral votes at the Joint Session of Congress to give states time to investigate purported voting irregularities.").

lawyer would rely that the election had been stolen or that Dominion's machines had manipulated the votes. It then states that Eastman knew that the statements about the election fraud were not true.[182] These are two distinct charges.

In another instance, the complaint alleges that Eastman

> did not act with intent to either reach an accurate and reasonable legal conclusion regarding the scope of Pence's authority under the Twelfth Amendment and the Electoral Count Act or to take adequate steps to form an accurate and reasonable determination of whether the election was affected by fraud or illegality involving enough votes to have affected the outcome of the election.[183]

This overstates a lawyer's obligation even when making arguments in court.[184] It is an inaccurate statement of lawyers' obligations outside of court. Lawyers are allowed and encouraged to be advocates. At times, at least, this enables them to take their clients' claims at face value, and articulate a one-sided, even aggressive position before they fully investigate or make an argument to a court. If this were not the case, certain types of lawyers would be at a distinct disadvantage, particularly those who represented clients with minimal access to evidence before discovery, like plaintiffs suing large corporations. There is no rule that forbids a lawyer from making frivolous statements to third parties outside of court proceedings and of course Rule 3.1, which forbids frivolous statements in court, would be superfluous if there was such a broad obligation.[185]

The comments to the rule barring misstatements to third parties explain that "puffery," or statements during negotiations about the price or value, are not statements of material fact.[186] The statements in the two memorandums are similarly not facts. They are allegations and interpretations of the law. It would be anomalous for a vague rule like Rule 8.4(c) or the broad rules against dishonesty in California to cover these sorts of false allegations when the more specific rules seem to intentionally leave them out.[187]

If the California bar court concluded that lawyers owe a duty to research the law and confirm facts prior to making public statements or statements to third parties, this is a novel argument with little basis in the

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182 *Id.* ¶ 28.

183 *Id.* ¶ 31.

184 MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2025) (barring any argument that lacks a good faith "basis in law and fact . . . that is not frivolous").

185 *Id.*

186 *Id.* r. 4.1, cmt. 2; ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. No. 93-370 (1993).

187 MODEL RULES OF PRO. CONDUCT r. 8.4

Rules of Professional Conduct or the general practice of lawyers. It asks the court to apply a negligence standard to Eastman's factual and legal representations even before he has made any official filing or arguments in court. While lawyers owe a duty of care to their clients, they have no such obligation to the general public or to their adversary. Court rules and rules of conduct impose an obligation not to present frivolous arguments in court, but this obligation does not bleed out to representations they make to the public or third parties.

Adopting this heightened standard would make it difficult for many lawyers to take on clients, especially ones with factually or legally complex cases. It would be especially burdensome for lawyers in smaller firms with fewer resources and those who represent clients on a contingency fee basis. If the California court adopts this theory more broadly, it would interfere significantly with the ability of lawyers to advocate for their clients in the court of public opinion, which at least one justice has acknowledged is a legitimate part of modern legal practice.[188]

By imposing a new obligation in a highly charged political case, the California bar court opens itself up to allegations of political bias and the weaponization of the lawyer regulatory system. If this is a new standard reserved for lawyers for controversial, high-profile clients then this might deter lawyers from representing these sorts of individuals, making it difficult for such clients to find representation. While it seems as if Trump has no difficulty finding lawyers to represent him, it is increasingly true that the lawyers who do take on his cases must also be political allies.[189] Political allies may be more likely to risk their licenses in exchange for helping an ideological or partisan ally.

There is historical precedent for this shift. As lawyers were targeted for representing accused Communists in the McCarthy Era,[190] the pool of lawyers for these controversial clients shrunk to those who shared the political commitments of their clients. This reality betrays the spirit of the rules that suggest that by representing a client, a lawyer does not embrace the values or goals of the client.[191] This rule reflects a general concern that conflating a lawyer's beliefs with those of his client will result in a lack of representation for unpopular or despised clients. The same values behind the First Amendment mandate against this. There is always a chance that

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188 Gentile v. State Bar of Nev., 501 U.S. 1030, 1043 (1991).

189 *See, e.g.*, Exec. Order No. 14,230, 90 Fed. Reg. 14,567 (Mar. 6, 2025) (addressing risks from Perkins Coie); Exec. Order No. 14,237, 90 Fed. Reg. 15,234 (Mar. 14, 2025) (addressing risks from Paul Weiss Rifkind Wharton & Garrison).

190 *See, e.g.*, Schware v. Bd. of Bar Examiners, 353 U.S. 246 (1957) (striking down a state's effort to deny bar membership to those with perceived Communist ties).

191 MODEL RULES OF PRO. CONDUCT r. 1.2(b) (AM. BAR ASS'N 2025).

a despised client has a valid claim or even more importantly a position that will benefit not only himself but the public broadly.

If the California court sanctions Eastman for statements he made on behalf of his client to Mike Pence to convince Pence to delay the vote count, this would set an odd and troubling precedent. It could deter lawyers from serving their clients diligently. Lawyers frequently present preliminary arguments and allegations to their clients' adversaries outside of court to convince them to take a desired action. If we impose a duty to research and investigate prior to doing so, representation would be even more expensive than it is now. Not to mention that the selective use of these novel allegations in a politically charged case could easily deter lawyers from taking on controversial clients who wish to challenge a prevailing view.

3. The Cost to the Legitimacy of Lawyer Regulation and the Legal Profession

Even if some of the speech at issue is not protected, like the false statements made in court fillings, there is reason for regulators to be conservative in using their power to investigate and charge lawyers who represent powerful political actors. This is not to say that the lawyers are beyond the reach of the disciplinary system, but rather to suggest that only lawyers who have clearly stepped over the line ought to be disciplined. Complaints that are novel, like the case against Eastman, invite the public to question whether or not the state regulatory system has been weaponized against political enemies. This is compounded by the many organizations that have set out with a partisan mission to investigate only lawyers for former President Trump.

While it is true that high profile cases often result in greater deterrence, these allegations are so unique it is hard to imagine whom the California court is trying to deter. Future lawyers for Trump or other powerful and unprincipled leaders? Perhaps both. But it hardly seems likely that these sorts of lawyers would be deterred by such a move. Instead, like their client, they will turn on the system. They will use their power and pulpit to turn others against the system. If a large group of individuals suspects that lawyer regulatory authorities have become captured by a particular ideological interest, they may not trust the bar. They may turn against the legal system, as this Article discuss below, or they may simply find a group of like-minded lawyers. These lawyers may instead isolate themselves by attending their own schools and practicing in their own law firms.

4. Avoiding Political Violence or Channeling Dissent into Courts

The California bar court concludes that Eastman made false allegations and representations of the law in court.[192] Eastman's motion to intervene in the states' election fraud cases as well as his motion in Georgia requesting the legislature not to certify the election do not involve the same First Amendment issues as the other counts. If true, these charges would not implicate the First Amendment because the administration of justice is at issue. State and federal court law, rules, and rules of professional conduct bar lawyers from making statements in court filings that have no reasonable basis in law or fact.[193]

It is nonetheless ill-advised to bring these disciplinary proceedings against lawyers in high profile, politically charged cases based on these sorts of allegations.[194] As a general matter, bar disciplinary agencies rarely sanction lawyers for this sort of conduct and when they do it is usually because they have received a referral from a judge. This may be because the state bar authorities recognize that courts are in a better position to evaluate the pleadings or filings and gauge how far afield they strayed. It is hard for courts to determine when the line has been crossed and even harder for anyone who was not involved in the underlying proceedings. The regulators in Eastman's case, for instance, had to sift through all the documents and evidence submitted in the underlying cases to evaluate just how far off these two motions were.

The California court cites an email Eastman sent to another lawyer stating that he did not have proof of outcome determinative fraud but was optimistic about finding it.[195] The court uses this as evidence that Eastman lied. The comments to the ABA Model Rules, however, state, "The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery."[196] Instead of a damning piece of evidence, the email seems to prove that Eastman's conduct was consistent with the standard in that he expected to be able to back up his client's allegations. The California court's decision demanded that Eastman exercise a kind of skepticism about his client's claims that many lawyers would find inimical to the

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192 *In re* John Charles Eastman, No. SBC-23-0-30029, at 81–82 (Cal. State Bar Ct. Mar. 27, 2024).

193 MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2025).

194 Bruce A. Green & Rebecca Roiphe, *Trump's Lawsuits Are Good for Democracy*, HILL (Nov. 9, 2020, 9:30 AM), https://thehill.com/opinion/white-house/525008-trumps-lawsuits-are-good-for-american-democracy [https://perma.cc/NGS7-9GUE].

195 *Eastman*, No. SBC-23-0-30029, at 84.

196 MODEL RULES OF PRO. CONDUCT r. 3.1, cmt. 2 (AM. BAR ASS'N 2025).

relationship.[197] The California bar court held Eastman to a higher standard than most courts would hold litigants appearing before them and therefore opens itself up to accusations of political bias that erode confidence in the state lawyer regulatory systems.

Other charges of misleading the court involve what many would consider persistence by a lawyer. The court concludes that because Eastman renewed arguments knowing that the Pennsylvania Supreme Court had considered and rejected them previously amounted to proof of knowing deception.[198] Eastman failed to reveal this fact to the court, further convincing the bar court of his intent to deceive. But valid advocacy often involves strategic omissions. If this were the standard for disbarment, there would be far fewer lawyers.

Regulators are in a poor position to evaluate the strength of the pleadings, but avoiding these sorts of novel disciplinary charges is also important because by pursuing legal redress, litigants affirm the institutions of democracy. While Trump and his allies took to Twitter and other public media to spread misinformation about the election, the court cases constituted a refreshing affirmation of the courts, a public endorsement of support for the judicial system. At the point at which many of these challenges to the election were filed, approximately one-third of the country believed the election was stolen.[199] While perhaps some core of that group would hold this view regardless of the outcome of the cases, others would likely abandon the myth. And it is no surprise that on January 6 and afterwards, many lawmakers and critics pointed to the results of these court cases to buttress their refutation of Trump's election lies.

The rule of law is built on the idea that when individuals have grievances against their fellow citizens, entities, or the government, they resolve their disagreements in court, where laws of evidence and rules of professional conduct govern. The judicial processes that we have created are not perfect, of course, but the system is designed to give each side a fair shot and ensure that there is a greater faith in the outcome than otherwise. At its heart, the judicial system is an alternative to the kind of violence that might occur if the option were not open. When individuals exercise this option in a volatile political context, it is far superior to, and forestalls, the alternative.

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197 Charles Fried, *Lawyer as Friend: The Moral Foundations of the Lawyer Client Relationship*, 85 YALE L.J. 1060 (1976).

198 *Eastman*, No. SBC-23-O-30029, at 85.

199 *More Americans Happy About Trump Loss Than Biden Win*, MONMOUTH UNIV. (Nov. 18, 2020), https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_111820 [https://perma.cc/BUT3-2LC4] (finding "32% say [Biden] only won [the election] due to voter fraud").

The legitimacy of the system of lawyer discipline also depends on consistency. Bar authorities rarely discipline lawyers for violating Rule 3.1.[200] This may be due to the difficulty in proving these violations or a perception that the court rules work adequately to deter lawyers.[201] Regardless of the cause, the fact that this is the practice subjects the use of the rule in a high profile politically charged case to allegations of ideological bias or capture.

CONCLUSION: WHY IT MATTERS

The charges underlying the California bar court's recommendation of disbarment are problematic for several reasons. First, the court relies on extremely vague statutes and applies them in a way to sanction protected speech. This is most clearly the case with Eastman's public statements, specifically his statements on a radio show, at the January 6 rally, and his discussion of and reliance on law review articles for legal arguments in the six-page memorandum.[202] Political lies are not unprotected speech as the court claims. They constitute core political speech, which deserves full protection. There is no separate category of professional speech and there is no compelling government interest that might justify punishing the speech.

The statements made to Pence and Trump in the memorandums laying out alternatives to certifying the election to Biden are also likely protected speech because they did not implicate the administration of justice in any way. But even if they did, they are also not clearly false statements of fact. They are more accurately allegations. Eastman was simply conveying Trump's factual allegations and making aggressive legal arguments on his behalf. There is no rule against making frivolous arguments outside of court.

To the extent that disbarment was based on Eastman's court fillings, the court seemed to once again confuse false statements with frivolous arguments. Even if the court determined that these arguments were in fact allegations that had no reasonable basis in law or fact, it is unwise to

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200 Lonnie T. Brown, Jr., *Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 OHIO ST. L.J. 1555, 1593 (2001).

201 *Id.* at 1593–94.

202 *See Eastman*, No. SBC-23-O-30029, at 47 (discussing Eastman's reference to Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551 (2004); Vasan Kesavan, *Is the Electoral Count Act Unconstitutional*, 80 N.C. L. REV. 1653 (2002); Edward B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 LOYOLA CHI. L.J. 309 (2019); and Nathan Colbin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475 (2010)).

pursue discipline in such a highly politicized case because doing so could deter lawyers from channeling political grievances to courts. The alternative is not that these grievances disappear but rather that they take a darker form and that adherents turn against the system entirely as a way of resolving such concerns. The fact that disciplinary authorities rarely discipline lawyers for this violation also casts doubt on the motivations of the regulators and opens them up to allegations of political bias.

It is particularly dangerous when government regulates the speech of professionals and experts. As the Court in *Becerra*, pointed out, authoritarian regimes have historically recruited professionals to control the population.[203] For example, in the Cultural Revolution, Chinese doctors were ordered to convince peasants to use contraception.[204] In Nazi Germany, doctors were told to prioritize the health of the Volk over that of their patients.[205] The dangers of interfering with lawyers' free speech rights might be even greater in that lawyers have an important role to play in policing the courts, ensuring that elected officials abide by the law, and representing controversial clients who challenge the administration or accepted views of democratic government.

One does not need to search across continents to find examples of politically motivated bar discipline. The bar disciplinary apparatus has been used to deny and revoke lawyers' licenses throughout American history and in each of these cases, the bar and courts put forth a seemingly neutral reason to do so.[206] Those seeking discipline have often had good intentions, hoping to preserve the role of lawyers as defenders of democracy, but in retrospect these instances cast shame on the professional regulatory system revealing the censorious and retributive nature of these acts.[207] During the McCarthy Era when civil institutions joined the state in seeking out and punishing alleged communists, lawyers who sympathized with or simply represented these clients were targeted.[208] Lawyers who represented civil rights activists and sought to assist the poor were similarly targeted.[209] Individuals and organizations in favor of disciplining Trump's lawyers might consider whether there is a principled way to distinguish these cases or whether, in fact, they are seeking discipline for politically motivated reasons.

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203 Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 771–72 (2018) (quoting Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right To Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 201–02 (1994)).

204 *Id.* at 772.

205 *Id.*

206 Moliterno, *supra* note 11, at 729.

207 *Id.* at 729–30.

208 *Id.* at 736–40.

209 *Id.* at 739–41.

In one example, Bernard Ades, a lawyer who represented organizations with communist ties, was charged with stirring up racial unrest and making false statements about a court.[210]

The danger with regard to all professional speech is that an orthodoxy becomes ossified and it turns out that view is erroneous.[211] Lawyer speech about the meaning of the functioning of democratic institutions outside of court has particularly high stakes in this regard. Lawyers represent individuals and entities that challenge the status quo. An erroneous understanding of the functioning of democratic institutions can itself pose significant danger to democracy. Without giving wide latitude to a core of lawyers to question this status quo on behalf of clients, we risk allowing these errors to become permanent. And a permanent error about the health of democratic institutions could itself represent the end of democracy. While the California bar court, the organizations that bring these complaints, and others may think they can distinguish between the two, it is possible to imagine sinister institutions, ideologies, and individuals taking their place and drawing on these incidents as precedent to crack down on lawyers who bring controversial challenges about the government.

Lawyers may disagree about the meaning of the law, democracy, and the Constitution. They may represent clients with wildly different interests and beliefs. The best way to resolve the disagreement among lawyers and the clients they represent is to allow the legal institutions and processes to sort it out.

If these lawyers have stepped over a line that separates the legitimate work of representing clients from assisting them in committing crimes then the bar should strip them of their licenses to practice law. But if, as has been the case, the state bars go after them for the outrageous and even dangerous words they say outside of court instead of waiting for the resolution of criminal cases (or seeking to establish the crimes themselves) the medicine will be worse than the disease. The bar regulators have chosen a dangerous shortcut. The reason that this strategy is dangerous is that it leaves state regulators to determine what is, and is not, dangerous to democracy. It leaves them to sift lies from truth in a highly charged political context. Others may agree with the conclusion of these particular regulators, but we should not be so shortsighted that we cannot imagine a different composition on a state bar disciplinary agency: a group of regulators with a less benign definition of constitutional democracy.

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210 *In re* Ades, 6 F. Supp. 467 (D. Md. 1934).

211 Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 771 (2018).

By training lawyers to honor the role they do have to clients and the judicial system, we can and will as a profession do more to protect "constitutional democracy" than if we try to police lawyers who have controversial definitions of its meaning. Depriving licenses to the lawyers we deem bad or disloyal or policing how aggressive lawyers can be on behalf of controversial clients outside of court is too dangerous a way of trying to protect democracy. Instead, the bar can train lawyers in a craft and acculturate them to a profession that values its pre-existing obligations to take the law seriously. We will never fully root out those who are bent on circumventing the law to obtain power, but we can try to cultivate different, better lawyers who will stand in their way. In other words, in each scandal we should expect to see lawyers who represent bad clients who seek to do ill to democracy or to society in some other way. Some of these lawyers will stretch the meaning of the law or come too close to an ethical line. The best way to address this is not to seek to eradicate the lawyers but rather to use education to try to encourage a greater adherence to the law and aspiration among lawyers. More attention should focus on the lawyers, like Greg Jacob and Rod Rosenstein, who stood in the way of those who wished to undermine democracy and former White House counsel Eric Herschmann, who acted against their own political interest to uphold the institutions in which they worked. The norms of the legal profession that motivated these lawyers depends on state bars that individuals across the political spectrum can trust. Using bar discipline in high profile, politically charged cases threatens the shared norms of the profession that help promote a robust understanding of the lawyer's role and adherence to ethical rules and norms.