THIS REPORT IS NOT A FINAL ORDER OF DISCIPLINE*

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE NUMBER TWELVE

In the Matter of:	:	
	:	
JEFFREY B. CLARK,	:	
	:	
Respondent.	:	Board Docket No. 22-BD-039
	:	Disciplinary Docket No. 2021-D193
A Member of the Bar of the	:	
District of Columbia Court of Appeals	:	
(Bar Registration No. 455315)	:	

REPORT AND RECOMMENDATION OF
HEARING COMMITTEE NUMBER TWELVE

Respondent, Jeffrey B. Clark, is charged with attempted dishonesty and attempted serious interference with the administration of justice, in violation of District of Columbia Rules of Professional Conduct ("Rules") 8.4(a), 8.4(c) and 8.4(d), arising from his efforts to cause the United States Department of Justice to (sometimes referenced as "Justice Department" or "DOJ") send a letter to elected officials in Georgia expressing the Department of Justice's purported concern about various issues relating to the 2020 Presidential election. Disciplinary Counsel ("ODC") contends that Mr. Clark committed all of the charged violations and should be disbarred. Mr. Clark contends that he did not violate any ethics rules. He asserts that a "draft letter proposed but never sent on behalf of [a] client" does not breach "a duty to a client or the court," and that the case involves a "factual and policy dispute amongst the highest-ranking lawyers in the Justice Department," in which

* Consult the 'Disciplinary Decisions' tab on the Board on Professional Responsibility's website (www.dcattorneydiscipline.org) to view any subsequent decisions in this case.

Mr. Clark exercised independent judgment, and sought to represent President Donald Trump in his official capacity, "zealously and diligently within the bounds of law." Respondent's Post-Hearing Brief ("Mr. Clark's Br.") at 1-3.

In identifying what the charges in the case are, we also identify what they are not. As Disciplinary Counsel notes "[i]t is no secret that the 2020 presidential election was hotly contested and that passions ran high on all sides of the election." ODC Opening Br. at 39. The parties' oral arguments and briefs reflect some of that passion. We agree with Mr. Clark that Disciplinary Counsel engages in "emotionally overheated rhetoric," when he calls Mr. Clark's conduct "the second greatest internal threat" to democracy, behind only the Civil War. Mr. Clark's Br. at 79-80. But Mr. Clark does too when he seeks to cast any attempt to hold Mr. Clark accountable under the ethics rules he took an oath to follow as a "systematic campaign" involving "a dictatorial crushing of dissent." *Id.* at 80-81.

Our job, however, is not to embrace that passion. It is to issue a report and recommendation based on what was charged and proved by the evidence.

This case is not about what other people did in events outside the evidence: such as what took place on January 6, 2021 or at the congressional hearings concerning January 6; or the circumstances behind the current prosecutions of former President Trump.

This case is not a referendum on who won the 2020 Presidential election. There are numerous cases in which courts have addressed various allegations concerning the election. But we are not called on either to agree with or to dispute

their determinations. We are focused on Mr. Clark's conduct, at the time he acted, based on the information he had. This focus on Mr. Clark's knowledge and not the outcome of the election limits the evidence relevant to Disciplinary Counsel's charges. We consider only what Mr. Clark knew while he advocated sending the letter at issue, which effort ended in a January 3, 2021 Oval Office meeting. Thus, we do not consider election-related information that became available after January 3 or information not known to Mr. Clark during the relevant period.

This case is also not about potential violations that Disciplinary Counsel might have charged but did not. Disciplinary Counsel asks that Mr. Clark be sanctioned because he "betrayed his oath to support the Constitution of the United States of America." ODC Opening Br. at 3. But Mr. Clark has not been charged with betraying that oath and Disciplinary Counsel does not identify the constitutional provisions he is supposed to have violated. *See id.* at 41. Our role is to review the conduct for which Mr. Clark was charged. *See In re Giuliani*, Board Docket No. 22-BD-027, at 51-54 (May 31, 2024) (limiting sanction analysis to charged misconduct).

Nor is this case about theories that *might* be true (but have not been proven) or evidentiary conclusions reached on different records. Disciplinary Counsel has urged a theory that Mr. Clark knowingly engaged in conduct as culpable as that described in cases involving President Trump's own attorneys, Rudolph Giuliani and John Charles Eastman. As explained below, we do not believe that Disciplinary Counsel proved by clear and convincing evidence that Mr. Clark was as culpable as

the respondents were in those two cases. We cannot recommend sanctioning Mr. Clark from what might be true or what evidence was presented in other cases. We can only recommend sanctioning him for what has been proven in this case by clear and convincing evidence.

This case is also not about inventing new law – either (as Disciplinary Counsel urges) to find Mr. Clark to have attempted substantial interference with the administration of justice because he engaged in conduct expected to result in lawsuits or (as Mr. Clark urges) to insulate him from responsibility for violating disciplinary rules because his violation arose under different circumstances than those involved in other cases or on any of several theories that urge that our attorney disciplinary system cannot be used to hold Mr. Clark responsible for his conduct.

As set forth below, we find Disciplinary Counsel has proven by clear and convincing evidence that Mr. Clark attempted dishonesty and did so with truly extraordinary recklessness. Mr. Clark was an environmental and civil litigator. He had no experience with criminal investigations and in his position as Acting Assistant Attorney General had no responsibility for and no involvement in any investigations relating to election matters. At the eleventh hour of the Trump Administration, he sought to take over responsibility for investigations into election matters, and relying on what was, at best, a fraction of the information any reasonable attorney would expect to act on, to insist on sending a letter – with significant false and misleading statements – to officials in the State of Georgia, urging extraordinary action to intervene in the electoral process. He did this,

notwithstanding the emphatic statements that the letter was false from those within the DOJ most knowledgeable about the situation, and warnings from the advisors closest to President Trump that sending the letter would be not just a mistake, but a catastrophic event leading to the resignation of a huge swath of the Justice Department and riots in the streets. Nonetheless, he pushed for this letter to be sent even after President Trump himself said "no."

As explained below, we accept the testimony that Mr. Clark was sincere in his belief that sending the letter was appropriate. We accept that Mr. Clark believed he was in a unique position to act and believed it was his duty to do so. But his sincerity of belief does not make him less reckless. To the contrary, we conclude that his personal beliefs blinded him from objectively assessing the facts and the reality of his proposed course of action, and caused him to rationalize a broader role for the Department of Justice, failing to distinguish President Trump from candidate Trump. Mr. Clark's reaction to the circumstances completely overtook his judgment.

As both Disciplinary Counsel and Mr. Clark note, we have limited guidance on what sanction is appropriate for this extraordinary conduct, and we cannot endorse what either side proposes. Disciplinary Counsel admits that the law requires us to look for comparable sanctions, but urges that there is nothing comparable and we should consider the broader circumstances beyond that charged or proven. Mr. Clark cites no case law or factual considerations but urges that "[t]here should be no discipline imposed in this case. But if discipline is recommended by the Committee,

it should be *de minimis* or minor considering all relevant circumstances." Mr. Clark's Br. at 83.

As explained below, we believe that a two-year suspension from the practice of law with a requirement to show fitness for readmission is an appropriate sanction for what was charged and proven.

I. PROCEDURAL HISTORY

On July 22, 2022, Disciplinary Counsel served Mr. Clark with a Specification of Charges ("Specification"). The Specification alleges that Mr. Clark violated:

A. Rules 8.4(a) and (c), in that Respondent attempted to engage in conduct involving dishonesty, by sending the Proof of Concept letter containing false statements; and

B. Rules 8.4(a) and (d), in that Respondent attempted to engage in conduct that would seriously interfere with the administration of justice. Specification ¶ 31.

On August 29, 2022, Mr. Clark filed a Request for Deferral Under Board Rule 4.2. The Board Chair denied that request on September 27, 2022.

On September 1, 2022, Mr. Clark filed an Answer and a Motion to Dismiss. We include a recommended disposition of Mr. Clark's motion below.

Mr. Clark removed this case to the United States District Court for the District of Columbia on October 17, 2022. The District Court granted Disciplinary Counsel's motion to remand, and proceedings resumed before Hearing Committee Number Twelve (the "Hearing Committee") on October 6, 2023.

On October 11, 2023, Mr. Clark filed a Renewed Request for Deferral Under Board Rule 4.2 (and Related Rule 4.1). The Board Chair denied that renewed request on November 3, 2023.

Mr. Clark also filed a number of other motions framed as motions to strike, to dismiss, or *in limine*. As Board Rule 7.16 provides, the Hearing Committee Chair ruled on all motions that were directed to the manner in which the hearing is to be conducted and ruled that other motions would be considered in this Report and Recommendation. We rule below on these outstanding motions and others Mr. Clark raised immediately before, during or after the hearing.

The evidentiary hearing was initially scheduled for January 2023. After the removal and remand motions were resolved, the hearing was rescheduled for January 9-10, 16-17, and 24-25, 2024, but was later continued. The evidentiary hearing was held on March 26-28, 2024 and April 1-4, 2024, before the Hearing Committee. Disciplinary Counsel was represented at the hearing by Disciplinary Counsel Hamilton P. Fox, III, Esquire and Jason R. Horrell, Esquire. Mr. Clark was present during the hearing and was represented at the hearing by Harry W. MacDougald, Esquire; Charles Burnham, Esquire; and Robert A. Destro, Esquire.

During the hearing, Disciplinary Counsel exhibits ("DCX") 5-15, 33-43, and 78 were admitted into evidence. DCX 7 and 78 were admitted over Mr. Clark's objection. Disciplinary Counsel called as witnesses Richard Peter Donoghue, Patrick Philbin, Jeffrey Alan Rosen and Mr. Clark.

Mr. Clark's exhibits ("RX") 23, 42, 57, 71, 89, 95, 99, 101, 166, 178, 207-08, 219, 222, 258, 333-40, 500, 524, 538, 559, 561, 563 and 566 were admitted into evidence. Mr. Clark called as fact witnesses Susan Foster Voyles, Andrew Richard Kloster, Matthew Lewis Gaetz II, Mark Wingate, Heidi Hiltgen Stirrup, Heather Honey and submitted testimony from Scott G. Perry by declaration (given exhibit number RX 3000). Mr. Clark called as expert witnesses E. Donald Elliott, John R. Lott, Jr., Sidney Stanley Young, Shawn Alan Smith, Garland Favorito, Edwin Meese III and Harry R. Haury III.

Upon conclusion of the violation phase, the Committee heard approximately three-and-a-half hours of closing arguments, Tr.[1] 1808-2005, and then made a preliminary non-binding determination that Disciplinary Counsel had proven at least one of the ethical violations set forth in the specification of charges. Tr. 2006; *see* Board Rule 11.11. In the sanctions phase of the hearing, Disciplinary Counsel submitted no additional exhibits and called no witnesses. Mr. Clark submitted and we admitted, Exhibit RX 568, and called as witnesses Paul Emmanuel Salamanca and Andrew Charles Emrich. Tr. 2009-28.

Disciplinary Counsel submitted Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction on April 29, 2024, and Mr. Clark filed his Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction on May 24, 2024. Disciplinary Counsel filed a Reply on June 7, 2024.

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[1] "Tr." refers to the transcript from the hearing held on March 26-28, 2024 and April 1-4, 2024.

II. FINDINGS OF FACT

The following factual discussion is based on the testimony and documentary evidence admitted at the hearing. The findings of facts in Subparts A, B, C and D reflect our findings on the evidence presented by Disciplinary Counsel and Mr. Clark regarding issues germane to the charged Rule violations. This evidence includes evidence of Mr. Clark's conduct and knowledge during the relevant time period, which ended with a January 3, 2021 meeting in the Oval Office. These facts are established by clear and convincing evidence, and provide the factual basis for our recommended conclusion that Disciplinary Counsel proved that Mr. Clark violated Rule 8.4(a) by attempting to violate Rule 8.4(c). *See* Board Rule 11.6; *In re Cater*, 887 A.2d 1, 24 (D.C. 2005) ("clear and convincing evidence" is more than a preponderance of the evidence, it is "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the fact sought to be established").

In addition to evidence relating to the events that form the basis of Disciplinary Counsel's charges, Mr. Clark also presented fact and expert evidence of other information concerning the conduct of the 2020 election that he urges was available during the relevant time period. As we explain in more detail below, we do not view this evidence as contradicting the findings relevant to our conclusion. The evidence did not allow us to determine what of this information Mr. Clark knew at the time, and even if we were to assume that Mr. Clark was aware of all of it (which he clearly was not), it would not rebut the evidence upon which our findings

and recommendations rely. We have not applied any standard of proof to this evidence because Mr. Clark had no burden to prove any facts. We offer the summary in Subparts E and F to provide the Board and the Court with a comprehensive discussion of the evidence presented. Subpart G below presents our analysis of evidence Mr. Clark offered in the sanctions phase of the proceeding. We accept this unrebutted testimony as true.

A. Jeffrey Bossert Clark

1. Jeffrey Bossert Clark was admitted to the District of Columbia Bar by motion in February 1997, Tr. 496 (Clark), and was assigned bar number 455315.

2. Mr. Clark served as the Senate-confirmed Assistant Attorney General in charge of the Environmental and Natural Resources Division of the Justice Department from November 2018 to January 2021, and was also the Acting Assistant Attorney General for the Civil Division from September 5, 2020 to January 2021. RX 568 at 1; Tr. 77 (Donoghue), 496-98 (Clark).

3. Mr. Clark received an A.B. from Harvard University, *Cum Laude*, in 1989, an M.A. in Public Policy from the University of Delaware, *Summa Cum Laude*, in 1993, and a J.D. from Georgetown University Law Center, *Magna Cum Laude*, in 1995. RX 568 at 1. After a clerkship on the United States Court of Appeals for the Sixth Circuit, he worked as an associate at Kirkland & Ellis, LLP from 1996-2001 and, then, a partner from 2005 to October 2018, *id.* at 2; he engaged in various areas of civil practice and specialized in environmental and regulatory litigation. *Id.*; Tr. 254 (Philbin), 496-98 (Clark).

4. After providing general background of his positions up until being appointed Acting Assistant Attorney General for the Civil Division on September 5, 2020, Mr. Clark invoked the Fifth Amendment in response to the question "[w]hat experience have you had in conducting criminal investigations?" and also asserted that his answer would be privileged under the law enforcement privilege. Tr. 498-99 (Clark).

5. Thereafter, Mr. Clark invoked the Fifth Amendment privilege and claimed executive privilege, law enforcement privilege, deliberative process privilege and attorney-client privilege in response to all but one other question, sometimes referring to invoking the Fifth Amendment "at this time." Tr. 500-26 (Clark). In response to a question from the panel, Mr. Clark testified that when he asserted attorney-client privilege, his client was "President Trump, the head of the executive branch, the sole head, the unitary head of Article 2, the executive branch of the United States government," Tr. 527, but then invoked the same privileges when asked whether that answer applied throughout the times he responded with "attorney-client privilege" during his testimony. Tr. 527-30 (Clark).

B. <u>The United States Department of Justice</u>

6. The United States Department of Justice is led by the Attorney General, who is appointed by the President and (unless designated as "acting") is confirmed by the Senate. The second highest ranking person in the Department is the Deputy Attorney General (who is also appointed in the same way). The Deputy Attorney General's staff includes 12 Associate Deputy Attorneys General, with the first

among equals being the Principal Associate Deputy Attorney General. Tr. 74 (Donoghue).

7. Among the responsibilities of the Deputy Attorney General and the Associate Attorney General (the #3 person in the Department, Tr. 1521(Meese)) is to supervise the Assistant Attorneys General who lead the Department's Divisions – including, among others, the Environmental and Natural Resources Division, the Civil Division, the Civil Rights Division (which has responsibility, among other things, for investigating civil rights violations involved in voting, Tr. 86 (Donoghue), 937 (Kloster)), and the Criminal Division (which contains a Public Integrity Section, that, in turn, has an Election Crimes Branch, Tr. 78-81 (Donoghue)). The President also appoints Assistant Attorneys General, and, unless designated as "acting," they must be Senate confirmed. Tr. 1520-22 (Meese).

8. The Department also includes a number of other entities, including the Federal Bureau of Investigation (which has a public corruption branch that has independent authority to conduct investigations, Tr. 86 (Donoghue)), and also United States Attorneys' Offices in each of the 94 federal district court jurisdictions. Tr. 85 (Donoghue). Each of these 94 Offices is led by a Presidentially-appointed United States Attorney, or an Acting United States Attorney during times of vacancy; each also has a prosecutor designated as District Election Officer responsible for election investigations. *Id.*

9. The Department of Justice's role in election matters is based on the statutes and rights it has been delegated authority to enforce. "[T]he Department

should only be doing things that are statutorily or under the Constitution assigned to it." Tr. 429 (Rosen). The Criminal Division has assigned responsibilities under the criminal laws to prosecute election fraud and the Civil Rights Division has authority under several laws to enforce voting rights. Tr. 428-29, 440-41, 449-50 (Rosen). The Justice Department does not have general authority to oversee elections nationwide. It is not the "all-purpose national secretary of elections." Tr. 444-45 (Rosen). The Civil Division does not have any role to play in election investigations, unless the Department of Justice is sued. Tr. 358 (Rosen).

C. Disciplinary Counsel's Witnesses

Jeffrey Alan Rosen

10. Jeffrey Alan Rosen was the Senate-confirmed Deputy Attorney General from approximately 2019 to December 2020. Tr. 354 (Rosen). Mr. Rosen was Acting Attorney General from December 2020 to January 2021. Tr. 357-58 (Rosen).

11. Mr. Rosen graduated from law school in 1982 and worked at Kirkland & Ellis for a little under 22 years until he left to go into the government in 2003. Tr. 353 (Rosen). He knew Mr. Clark not only from Kirkland & Ellis (where he worked with Mr. Clark on litigation, Tr. 421-23 (Rosen), 497 (Clark)) but also from working in the George W. Bush Administration. Tr. 357 (Rosen). In 2003, Mr. Rosen became General Counsel of the United States Department of Transportation, and, after approximately three years, left to become General Counsel and Senior Policy Advisor at the White House Office of Management and Budget. Tr. 353 (Rosen). In 2009, he took some time off and then rejoined Kirkland & Ellis, and worked there

for another eight years. Tr. 353-54 (Rosen). In 2017, Mr. Rosen became Deputy Secretary of Transportation until he left to become Deputy Attorney General. Tr. 354 (Rosen).

12. After he left the Justice Department in January 2021 and took some time off, Mr. Rosen became a nonresident fellow at the American Enterprise Institute, and continues in that role until today. *Id*. In 2022 and 2023, he Chaired the Virginia Commission to Combat Anti-Semitism, and since Summer 2023 has also been of counsel at Cravath, Swaine & Moore. *Id.*

13. Mr. Rosen was a credible witness made particularly so because he knew Mr. Clark from prior experience. Although on one or two matters his recollection of specific details, such as whether points were raised in one conversation as opposed to another, might be mistaken, the material elements of his testimony are both credible in their own context and supported by the testimony of others.

Richard Peter Donoghue

14. Richard Peter Donoghue reported to Mr. Rosen as Principal Associate Deputy Attorney General beginning in July 2020. Tr. 73-74 (Donoghue), 355-36 (Rosen). In December 2020, when Mr. Rosen became Acting Attorney General, Mr. Donoghue began performing the work of the Deputy Attorney General. Tr. 356-57 (Rosen).

15. Mr. Donoghue spent approximately 20 years in the Army (from 1985 to 2006), 13 of these years in the Army Reserves, and seven, beginning in January 1993, on active duty as Judge Advocate General Corps officer. Tr. 72-73

(Donoghue). He was admitted to the New York bar in 1992 shortly before he became a JAG. *Id.*

16. In January 2000, after serving in many roles as a JAG, including prosecutor and defense attorney, Mr. Donoghue left active military service and became a prosecutor at the United States Attorney's Office for the Eastern District of New York. Tr. 73 (Donoghue). He left in 2011 to work for a software company and then returned to the office in January 2018 as United States Attorney before moving to become Principal Associate Deputy Attorney General in July 2020. Tr. 73-74 (Donoghue).

17. Mr. Donoghue was a credible witness. In addition to testifying credibly and consistently with other witnesses, on some particularly critical matters, he supported his testimony with contemporaneous notes.

Patrick Philbin

18. Patrick Philbin was Deputy White House Counsel from December 2018 to January 20, 2021. Tr. 250 (Philbin). From September 2001 to November 2005, Mr. Philbin worked in the Justice Department – first as a Deputy Assistant Attorney General in the Office of Legal Counsel and then an Associate Deputy Attorney General. Tr. 252-53 (Philbin). He has also worked in private practice in the District of Columbia, including for two periods of time at Kirkland & Ellis (1995-2001 and 2006-2018) doing general commercial litigation, largely on briefing, appeals and client advice. Tr. 249-52 (Philbin). During his first stint at Kirkland & Ellis, from 1995 to 2001, he worked with Mr. Clark, who started at about the same time. Tr.

253 (Philbin). Mr. Clark began at Kirkland & Ellis doing similar work to Mr. Philbin, but then specialized in regulatory challenges, particularly environmental regulation. *Id.*

19. As Deputy White House Counsel in the Trump Administration, Mr. Philbin provided legal advice to the Executive Office of the President on important policy questions and coordinated legal strategy among the departments and agencies. Tr. 250-51 (Philbin).

20. Mr. Philbin was also a credible witness. In some respects, his testimony is especially telling, because he had worked closely with Mr. Clark, considered him a friend and approached the circumstances with sympathy and respect, even as Mr. Philbin thought Mr. Clark's proposed course of action would be not merely misguided, but catastrophic. *See* Tr. 266-73 (Philbin).

21. Mr. Rosen, Mr. Donoghue and Mr. Philbin were all high-level appointees in the Trump Administration. There is no reason to believe that they were at the time or are now hostile to President Trump and to the extent they had a personal stake, their jobs depended on President Trump being reelected.

D. Conduct that Forms the Basis of the Charge

November 3, 2020-November 9, 2020: The 2020 Election Takes Place; Mr. Donoghue Notifies Assistant Attorneys General of White House Contacts Policy; Attorney General Barr Issues Memorandum Allowing for Investigations of Election Allegations Before the Election is Certified with Mr. Donoghue Serving as Clearinghouse for the Investigations

22. The 2020 presidential election was held on November 3, 2020. Tr. 75 (Donoghue).

23. After the November 3, 2020 election, on the suggestion of Attorney General William Barr's chief of staff, William Levi, Mr. Donoghue sent a memorandum to the Assistant Attorneys General in the Justice Department (including Mr. Clark) reminding them about the Department's longstanding White House Contacts Policy. Tr. 75 (Donoghue). The Contacts Policy is embodied in memoranda at both the Justice Department and the White House. Tr. 76 (Donoghue). The Policy is designed to put "a little bit of a buffer between the Department and the White House" especially in criminal matters, by requiring that, absent approval, contact between the two take place only at the highest levels – between the Attorney General or Deputy Attorney General (on the one hand) and White House Counsel or Deputy White House Counsel (on the other). *Id.* The Contacts Policy also applies to contacts between members of Congress and the Department. Tr. 366-67 (Rosen).

24. The Contacts Policy is memorialized in the Justice Department's Justice Manual[2] (the operating rules and procedures for the Department). This Justice Manual explains the rationale for the policy:

> The rule of law depends upon the evenhanded administration of justice. The legal judgments of the Department of Justice must be impartial and insulated from political influence. It is imperative that the Department's investigatory and prosecutorial powers be exercised free from partisan consideration. It is a fundamental duty of every employee of the Department to ensure that these principles are upheld in all of the Department's legal endeavors. In order to promote the rule of law and to ensure that the Department's actions are free from the

[2] Available at https://www.justice.gov/jm/justice-manual.

> appearance of political influence, this Chapter sets out guidelines to govern all communications between representatives of the Department and representatives of Congress, and procedures intended to implement those guidelines."

Justice Manual §1-8.100 (2019).

25. The Policy is also memorialized in a manual that applies to the Criminal Division Public Integrity Section, which contains the Election Crimes Branch – the part of the Justice Department directly responsible for investigating election fraud subject to criminal prosecution. Tr. 359-60 (Rosen).

26. The Contacts Policy is not a constitutional requirement. Tr. 302-04 (Philbin). The President can choose to contact lower level Justice Department officials directly and it is understandable that a lower level official would accept a call from the President. *Id.* But that does not make the policy unimportant. The policy is one of the safeguards that helps to ensure the integrity of criminal investigations by making it possible to know what information has or has not been shared with the White House and limiting it to a group that can set appropriate norms for those communications. It helps to mitigate both the reality and the appearance that politics rather than the merits will drive criminal prosecution. Tr. 366-67 (Rosen). The Contacts Policy is also part of the traditions the Department designed to ensure public confidence in the Department. Tr. 359-60 (Rosen).

27. On November 9, 2020, shortly after the November 3, 2020 presidential election, then-Attorney General William Barr sent a memorandum to all of the United States Attorneys, the Assistant Attorneys General for the Criminal, Civil Rights, and National Security Divisions, and the Director of the FBI entitled "Post-

Voting Election Irregularity Inquiries." RX 559; Tr. 77-78 (Donoghue). In this Memorandum, Attorney General Barr authorized all of the recipients "to pursue substantial allegations of voting and vote tabulation irregularities prior to the certification of elections in your jurisdictions in certain cases, as I have already done in specific instances. Such inquiries and reviews may be conducted if there are clear and apparently-credible allegations of irregularities that, if true, could potentially impact the outcome of a federal election in an individual State." RX 559 at 1-2.

28. The Memorandum represented a significant change from previous policy. Tr. 78-79 (Donoghue); RX 559 at 1. The Memorandum noted that the Election Crimes Branch had historically had a "passive and delayed enforcement approach," in which it would conduct no investigations until the elections were over and the result certified. RX 559 at 1; Tr. 78-79 (Donoghue). The goal of criminal enforcement was to deter future violations, rather than to change the result of elections. Tr. 79 (Donoghue).

29. As a practical matter the memo moved the date for facilitating initial election reviews six to eight weeks earlier than they otherwise might have. Tr. 362-63 (Rosen). Attorney General Barr's memo made sure that United States Attorneys knew they had authority to investigate election allegations immediately after the vote. Tr. 79 (Donoghue). Some people in the Election Crimes Branch objected to the policy and the branch chief resigned his position (although he stayed in the Department). Tr. 80-83 (Donoghue), 442-43 (Rosen); DCX 5.

30. The Department made public the November 9 Barr Memorandum and every United States Attorney's Office issued a press release identifying their Designated Election Officer by name and providing hotline and other contact information for the general public to submit concerns. Tr. 86-87 (Donoghue).

Effect of the Barr Memorandum and Nature of the Justice Department's Investigations

31. The Department of Justice, the FBI and the United States Attorneys' Offices received and investigated election allegations throughout the country. Tr. 80-86 (Donoghue). As detailed below, the White House also raised numerous concerns directly with the Attorney General and Mr. Donoghue.

32. Mr. Donoghue served as a clearinghouse for the investigations into the election and reported to the Attorney General and Deputy Attorney General on their status. Tr. 87-88 (Donoghue), 365-66 (Rosen). He knew almost all of the United States Attorneys. Tr. 87 (Donoghue). He received all of the daily reports on significant matters in each jurisdiction. *Id*. He oversaw the Criminal Division, including the Public Integrity Section and Elections Crime Branch, so a lot of the reporting went to him. Tr. 87-88 (Donoghue). He also worked closely with the Deputy Director of the FBI, David Bowdich, and received a lot of information on election investigations directly from him. *Id*. While there were individuals more familiar with the particular investigations they were conducting, Mr. Donoghue had the most comprehensive overall view of the investigations of anyone in the Justice Department. Tr. 92 (Donoghue).

33. Mr. Donoghue reported information about election investigations on a "real-time" basis to Deputy Attorney General Rosen – meeting with him every day at 9:00 am and several times during the day. Tr. 92-93 (Donoghue).

34. Based on his knowledge of the Department's various investigations, Mr. Donoghue concluded, for example, that an allegation of document shredding in Fulton or a neighboring county in Georgia actually involved lawfully shredded ballots from an earlier election. Tr. 88-89 (Donoghue). He concluded that the machine error rate in Antrim County, Michigan was not 68% but about one in 15,000 or .0063 percent, Tr. 89-91 (Donoghue), and that interviews and reviews of the manifest did not support the allegation that someone had driven a tractor-trailer full of ballots from Long Island to Pennsylvania. Tr. 91-92 (Donoghue).

35. What is referred to as State Farm Arena allegations were investigated (at least in part) by the FBI. The allegations arose in part from a video clip played on news outlets that people claimed showed fraudulent ballots brought into the State Farm Arena facility in Fulton County, Georgia. Tr. 150 (Donoghue); *see also* Tr. 145, 151-52 (Donoghue). Over the objection of the Election Crimes Branch, the Justice Department had the FBI review the entire 15 hours of video and interview the people who were on the video as part of the investigation. Tr. 81-83, 150 (Donoghue).

36. None of the investigations that Mr. Donoghue was aware of found matters that might have had a significant effect on the outcome of the election.

Tr. 93 (Donoghue). There were instances of fraud or misconduct, but not on the scale to affect an individual state or the election as a whole. Tr. 93-94 (Donoghue).

37. Mr. Clark had no role in any of the Justice Department investigations. Tr. 94 (Donoghue). The Civil and Environmental and Natural Resources Divisions had no responsibility for conducting this type of investigation. Tr. 358-59, 387-88 (Rosen).

38. These investigations do not appear to have run to ground all the irregularities brought forward – especially those related to alleged violation of state election rules, for example, whether election workers in Fulton County, Georgia conducted verifications of the signatures on absentee ballots. *See, e.g.*, Tr. 113 (Donoghue).

39. At the same time, however, the evidence showed that the Justice Department generally responded to allegations of which they were aware. The evidence did not support Mr. Clark's assertion that Attorney General Barr first, faced the ire of long-time Justice Department criminal enforcement staff by issuing the Barr Memorandum, immediately encouraging scores of Justice Department employees to investigate allegations of fraud or irregularities, but then "***actively suppressed***" investigations into irregularities. *See, e.g.*, Mr. Clark's Br. at 3. Mr. Clark does not suggest any reason for such implausible (even irrational) conduct by the Attorney General President Trump appointed.

40. Nor did the evidence support Mr. Clark's similar (and also implausible) assertion that, the Barr Memorandum announced that the Justice Department would

investigate "irregularities," only to have the Department then refuse to investigate anything besides "fraud." *See, e.g.*, Mr. Clark's Br. at 3, 8, 14-15, 22, 24-25.

41. Mr. Clark derives these assertions about supposed limitations of the Justice Department's investigations from a combination of sources none of which lead us to accept these assertions. Mr. Clark (Br. at 3) cites a portion of Mr. Donoghue's cross-examination in which counsel's questions intimated that Mr. Barr had testified before the Congressional Committee investigating the events of January 6, 2021 that the Justice Department investigated only fraud. Mr. Donoghue's answer, however, did not accept that assertion. Instead, he disagreed with the premise that there were two categories of investigations "irregularities" (which the Justice Department refused to investigate) versus "fraud" (which it did):

> Q [From Mr. Clark's Counsel] But [Mr. Barr's] testimony to [the January 6th] committee and his press statements were they only looked at fraud and not irregularities. We talked about that before, didn't we?
>
> A You asked me questions previously about that.
>
> Q Yeah. And that was the answer, that his position, and your position and Rosen's position was that the department would not be looking into irregularities apart from criminal matters, and civil rights matters?
>
> A Again, irregularities is not really a term of art, so people may perceive it differently. ***But to me, fraud was a subsection of irregularities***. There are irregularities that could initially not look like they are criminal and upon further investigation turn out to be criminal, so that's possible. And then you've got civil rights issues, whether people have access to the ballot, et cetera. So it's certainly a broader term, but it's not a term, to my knowledge and experience, that's normally used within the department. So it might be meaning different

> things to different people. But the title of his memo is post-voting election irregularities inquiries.

Tr. 235-36 (Donoghue) (emphasis added).

42. A complicating factor is that the term "investigation" can be a term of art. The testimony reflects that the Department uses different terms: an "initial assessment" or "review" that may get elevated to some other status, and an "investigation" may be more formal still. Thus, the fact that the Department has not opened an "investigation" does not mean that it is not looking into a matter. Tr. 362-64 (Rosen).

43. In any event, the Justice Department did not decide it would ignore allegations of "irregularities." Rather, it obtained facts about them to determine whether the irregularity involved the type of fraud that would rise to a criminal (or civil rights) proceeding. Tr. 234-35 (Donoghue). As Mr. Rosen put it, credibly, the "Department had looked at a whole series of allegations in different states as to there having either been either election fraud or some other kind of anomaly," like the allegation that Pennsylvania had more voters than registered voters, Tr. 475, or whether voters were not legally registered or voters who moved out of state to see if these irregularities might amount to election fraud. Tr. 440-41 (Rosen).

44. This testimony did suggest, and we find, that in looking at allegations, it mattered to the Justice Department whether the irregularities involved possible violations of state election procedures or whether there was evidence of either a civil rights violation or criminal fraud sufficient to warrant federal prosecution. The evidence did not show this limitation to be an act of nonfeasance or suppression of

investigations. The evidence showed this was a recognition that the Department of Justice has a limited role in elections. As Mr. Rosen put it, "the Department has assigned responsibilities by laws, in the criminal laws and the civil rights laws. . . . It's not the all-purpose national secretary of elections." Tr. 445. *See* Tr. 458-59 (Rosen).

45. Mr. Donoghue testified that the Department received many allegations related to instances in which states were not following their own election laws and procedures – such as, procedures for verifying signatures on absentee ballots. Tr. 112-13, 132-36, 184. But Mr. Donoghue testified that the Department would not get involved in prosecuting violations of procedure unless it rose to the level of criminal conduct. Tr. 113; *see also, e.g.*, Tr. 115 (Donoghue) ("[S]ignature validation or verification" was "within the authority of the Department of Justice . . . [i]f it rose to the level of criminal conduct. But routine signature validation was not something [the Justice Department] got involved in."); Tr. 187 (Donoghue) ("the DOJ mission [is] limited [in] scope. . . . It was no business of the Justice Department to tell the state whether their election got it right."); Tr. 193-95 (Donoghue) (deciding whether to use "non-criminal" tools was not a "policy decision" by the Justice Department or a question of statutory authority); Tr. 231-33 (Donoghue); Tr. 428-29 (Rosen).

46. Mr. Rosen also testified credibly that the Justice Department did not refuse to look at allegations they received, but that they did not find evidence of fraud of the sort that the Justice Department would prosecute. Tr. 433-36, 440-44. Even in states that were close, like Georgia, which was decided by 12,000 votes, the

Justice Department could not confirm fraud on a level that would change the outcome. Tr. 201-02 (Donoghue). If the Justice Department had found fraud on that scale in any state, it would have prosecuted the matter even if a switch in the vote in that state would not have changed the overall election results. Tr. 202 (Donoghue).

47. Contrary to Mr. Clark's assertion, we find Mr. Rosen and Mr. Donoghue's testimony about how the Justice Department approached these investigations to be both credible and consistent.

48. There was no evidence, and Mr. Clark cites no authority that suggests that the Justice Department had authority to pursue allegations of state law violations that were not either federal civil rights violations or potential criminal fraud. Indeed, the limited role of the Justice Department is evident from the fact that people who spent their careers at the Justice Department investigating election fraud were willing to resign over instructing Justice Department officials that they could even consider election allegations before the results were certified. Tr. 80-83 (Donoghue), 442-43 (Rosen); DCX 5.

49. There is also no evidence that the Justice Department suggested to any state that it refrain from investigating irregularities to see if they violated state law or not to enforce their law if they so found.

50. Nor do we find the evidence Mr. Clark cites in support of his assertion that Attorney General Barr "actively suppressed" investigations to provide a credible reason for disbelieving Mr. Rosen's and Mr. Donoghue's testimony. Mr. Clark cites the testimony of Representative Matthew Gaetz, Harry Haury, and Andrew Kloster.

Mr. Clark's Br. at 3-4. We discuss their testimony in detail below, but each of them presented anecdotal, secondhand, isolated and limited information. At most, this information suggests that Attorney General Barr did not want the Justice Department (or a private party) to conduct some inquiries into some particular matters. The testimony of these individuals does not provide sufficient information to know what inquiries the Justice Department might have already conducted or any indication of what reason Attorney General Barr had. And there is no evidence from which to believe that Mr. Clark was ever aware of any of this particular information.

51. Moreover, the extent of the work that the Justice Department did belies the contention that it simply ignored evidence of wrongdoing. As described below, the Department conducted dozens of investigations and hundreds of interviews. Tr. 110 (Donoghue); DCX 6 at 5. It is not plausible that the Justice Department did this work as part of an effort to suppress investigation of the election, and Mr. Clark offered neither evidence nor logic for why the Justice Department would act in such a way.

December 1, 2020-December 13, 2020: Attorney General Barr Makes Initial Report that No Fraud Has Been Discovered Sufficient to Alter the Election and Georgia's Governor Certifies that Joseph Biden Won that State's Election.

52. On December 1, 2020, Attorney General Barr told an Associated Press reporter that the Justice Department had conducted investigations and not found any fraud on a scale that would change the outcome of the election. Tr. 94 (Donoghue). This was in accord with the information that Mr. Rosen and Mr. Donoghue had been receiving. Tr. 368-69 (Rosen).

53. On December 7, 2020, the Governor of Georgia certified the results of the presidential election in that state, showing that Joseph Biden had won, and appointed electors pledged to Joseph Biden. DCX 35.[3]

December 14, 2020-December 26, 2020: Attorney General Barr Resigns Effective Midnight December 24, 2020 and Later Reiterates Statement about there being No Fraud on a Scale to Change the Election; President Trump Names Deputy Attorney General Rosen as Acting Attorney General; President Trump Has More Discussions Concerning Election Allegations and Mr. Clark's Name Comes Up.

54. On December 14, 2020, Attorney General Barr met with President Trump and submitted his resignation effective midnight December 24. Tr. 94-95 (Donoghue). At the time the relationship between the two was clearly strained and

[3] Disciplinary Counsel proposed this finding as No. 13, but Mr. Clark appears to respond to it as No. 16. *See* Mr. Clark's Br. at 5. Mr. Clark's response does not dispute that it is true, but rather claims that it is "[l]argely irrelevant" because "the Georgia State Legislature was free under *McPherson v. Blacker*, 146 U.S. 1, 26 (1892), to reconsider its electors; and the U.S. Congress was required to decide whether to certify or not certify the Electoral College vote on January 6, 2021." Mr. Clark's Br. at 5. We question this legal analysis. *McPherson* affirmed a decision of the Michigan Supreme Court upholding the constitutionality of a law passed by the state legislature *in advance of an election* calling for Presidential and Vice Presidential electors to be chosen in separate districts. It did not rule that, when Art. II, Section 1, Clause 2 of the Constitution said in relevant part "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress" it meant that a state legislature dissatisfied with the result of the election could pass a law *after the fact* to choose whichever delegates the legislature preferred. Nor does it suggest that Congress was free on January 6, 2021 to ignore the authority of all the legislatures of all the states under this clause, and the voters as well, and simply choose whoever Congress preferred. But even if the legal analysis were correct, arguing that a fact is "largely irrelevant," does not counter the assertion that it is a fact.

there was thought that President Trump might fire Attorney General Barr on the spot. Tr. 96 (Donoghue). During that meeting, President Trump told Attorney General Barr that he was thinking of appointing Mr. Donoghue as Acting Attorney General. *Id.*

55. Shortly thereafter, President Trump called Mr. Donoghue and asked Mr. Donoghue whether he wished to be Acting Attorney General. Tr. 96-97 (Donoghue). Mr. Donoghue said that he thought it would be better to follow the regular succession plan and to name Mr. Rosen as Acting Attorney General. Tr. 97-98 (Donoghue). President Trump said he would call Mr. Rosen. Tr. 98 (Donoghue).

56. Mr. Donoghue then went to a meeting Deputy Attorney General Rosen was having with the Associate Deputy Attorneys General and was there when Mr. Rosen received the call from President Trump offering him the position of Acting Attorney General. Tr. 98-99 (Donoghue). Mr. Rosen's appointment was announced on December 14, 2020. Tr. 370 (Rosen).

57. Also on December 14, 2020, the electoral college voted to elect Joseph Biden President. Tr. 118 (Donoghue). The only step left was for the vote to be certified by Congress on January 6. *Id*. Georgia had certified its electors for Joseph Biden. DCX 35. The Justice Department was not aware of any state (Georgia included) that had certified two sets of electors to send to Washington. Tr. 134-35 (Donoghue).[4]

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[4] Mr. Clark's Brief (at 10) asserts that, "[i]t is factually correct that an alternate slate of electors did meet and vote and their votes were transmitted to Washington,

58. The next day, December 15, 2020, Mr. Rosen and Mr. Donoghue discussed the election fraud investigations at a meeting in the Oval Office with President Trump, the Chief of Staff, the White House Counsel, the Deputy White House Counsel and the Secretary of Homeland Security. Tr. 99-100 (Donoghue), 370 (Rosen). The meeting focused mainly on the voting machine allegations involving Antrim County, Michigan. Tr. 100 (Donoghue). At the time, the hand recount was underway there and, although the report of a 64% machine error rate would create a big problem both there and other places where the machines were used, Homeland Security Secretary Kenneth Cucinelli advised the President to wait until the recount was completed. Tr. 100-01 (Donoghue), 371-72 (Rosen). The President also raised an allegation about suitcases of ballots appearing in Atlanta; that allegation had been investigated and debunked. Tr. 373 (Rosen).

59. On December 21, 2020, Attorney General Barr had a press conference in which, when asked, he reiterated that the Department still believed that there was no fraud on a scale to change the outcome of the election. Tr. 101-02 (Donoghue), 369 (Rosen).

60. On December 23, 2020, Attorney General Barr's resignation became effective and Jeffrey Rosen became Acting Attorney General. Tr. 102 (Donoghue), 373 (Rosen). Mr. Donoghue's title did not change, but he assumed the responsibilities of the Deputy Attorney General, Tr. 356-57 (Rosen), and, in that

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D.C." However, Mr. Clark cites no evidence in the record to support this statement and we can find none.

capacity, supervised the Assistant Attorneys General, including Mr. Clark, as well as the United States Attorneys, the FBI Director and others. Tr. 102-03 (Donoghue).

61. On December 24, 2020, President Trump called Mr. Rosen to talk more about the election. Tr. 374 (Rosen). During the course of the conversation, the President asked if Mr. Rosen knew Jeffrey Clark and Mr. Rosen told him yes, that Mr. Clark was the head of the Civil Division. Tr. 375 (Rosen). The reference was brief, and Mr. Rosen did not ask the President why he had asked about Mr. Clark. *Id.* But after the conversation, Mr. Rosen was quizzical as he was unaware that the President had met Mr. Clark. *Id.*

62. Later,[5] Mr. Rosen spoke with Mr. Clark and asked him about why the President had raised his name, and was "flabbergasted" to hear that Mr. Clark had

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[5] There is a discrepancy about the timing of this conversation. Mr. Rosen testified that it occurred on December 26. Tr. 375-76. Mr. Donoghue testified that he and Mr. Rosen spoke about Jeffrey Clark's name having arisen after conversations that took place with President Trump and Congressman Perry on December 27 (*see infra* FF 63), and that Mr. Rosen, who worked with Mr. Clark in private practice said at that time he ***would*** call Mr. Clark to find out what was going on. Tr. 122-23. This suggests that this discussion with Mr. Clark took place on the evening of December 27 or the day of December 28, before a joint meeting the two had with Mr. Clark on December 28 (*see infra* FF 101), or that, Mr. Rosen is mistaken about having two initial conversations about the Contacts Policy and that the issue came up only at that joint meeting on December 28. Our conclusion does not require reconciling this discrepancy. Whether the communications occurred in one meeting or two, or on December 26 or 28, the evidence is undisputed that (1) both Mr. Rosen and Mr. Donoghue told Mr. Clark that Mr. Clark's direct contract with the White House without prior notice or even notice afterwards was inappropriate; (2) Mr. Clark promised not to do that again; but (3) again spoke directly with President Trump afterwards without providing the notice he promised to provide before or afterwards.

met with the President shortly before Christmas in violation of the White House Contacts Policy. Tr. 376 (Rosen). Mr. Clark had not informed Mr. Rosen or Mr. Donoghue about this, either before or afterwards. Tr. 375-76 (Rosen). Mr. Clark was "somewhat apologetic" and said that it had not been his original intention but he had been with Congressman Scott Perry from Pennsylvania and they had just wound up meeting with the President. Tr. 376 (Rosen).[6] Mr. Rosen told Mr. Clark that it was not appropriate for Mr. Clark to have the conversation without notifying Mr. Rosen before or after. Tr. 376-77 (Rosen). Mr. Clark assured him that it would not happen again, and that if he even got a request for something like that, he would alert Mr. Rosen or Mr. Donoghue. Tr. 377 (Rosen).

Sunday December 27, 2020: President Trump Speaks with Acting Attorney General Rosen and Acting Deputy Attorney General Donoghue About Election Fraud Allegations and Suggests Possibility that Mr. Clark Might Lead Justice Department.

63. On Sunday, December 27, 2020, Mr. Rosen spoke twice with President Trump, with the second time being a substantive call towards the evening. Tr. 377-78 (Rosen). At some point fairly early in this call, Mr. Rosen conferenced in Mr. Donoghue, who was at his home in New York. Tr. 103 (Donoghue), 378 (Rosen). Mr. Donoghue then joined the call, which continued for some 90 minutes. *Id.* During the call, the President raised a lot of issues and allegations related to the

[6] Congressman Perry had told President Trump that Mr. Clark was a good guy and could be trusted to take a "hard look" at things that were potentially questionable in the election. Tr. 255-58 (Philbin).

election, some were issues raised in private civil litigation, others raised on the Internet or on cable news. Tr. 104 (Donoghue). Mr. Donoghue took notes on the conversation to make sure he was on top of the issues, particularly because the first allegation President Trump raised was one he had not heard before – that there were 205,000 or 250,000 more votes certified in Pennsylvania than had actually been cast. Tr. 104-07 (Donoghue). Mr. Donoghue's notes reflect comments from President Trump and responses from Mr. Rosen and himself. Tr. 104-06 (Donoghue); DCX 6.

64. According to Mr. Donoghue's notes, President Trump began by saying "country is up in arms over the corruption." DCX 6 at 1. Later, after discussing the Pennsylvania vote certification discrepancy allegations, the President said "people are angry – blaming DOJ+ for inaction." *Id.* at 2. "Statistically – election night it was a done deal – somehow, overnight the outcome changed bec. all the ballots showed up – AZ, GA, PA." *Id.* "GA, NV, AZ, MI – all corrupted elections." *Id.* "People are complaining to him constantly." *Id.* "Thousands of people called their USAOs and FBI." *Id.* "DOJ failing to respond to legitimate complaints/report of crimes." *Id.* at 3; *see also* Tr. 378-79 (Rosen).

65. President Trump also discussed allegations involving the recount that took place at the "State Farm Arena" in Fulton County – including that an election worker involved in the hand recount in Fulton County closed the facility and then came back with ballots hidden under a table. DCX 6 at 3. Mr. Donoghue told President Trump that the Justice Department had already looked at this allegation

and it was not true. Tr. 108 (Donoghue). The President said "[y]ou guys may not be following the Internet the way I do." Tr. 107-08 (Donoghue), DCX 6 at 3.

66. The notes reflect that President Trump also said "Georgia legislature is on our side. They want to bring a case but the governor won't let them." Tr. 108-09 (Donoghue), DCX 6 at 4.

67. Mr. Rosen responded that "we will look at this issue obviously, but understand that the DOJ can't and won't snap its fingers and change the outcome of the election. It doesn't work that way." Tr. 109 (Donoghue), 379-80 (Rosen); DCX 6 at 4-5.

68. President Trump replied, "I don't expect you to do that. Just say the election was corrupt and leave the rest to me and the Republican Congressmen." Tr. 109-10 (Donoghue); DCX 6 at 4-5.

69. Mr. Donoghue responded "Sir, we've done dozens of investigations, hundreds of interviews. The major allegations are not supported by the evidence developed. We've looked at Georgia, Pennsylvania, Michigan and Nevada. We're doing our job. Much of the information you're getting is false." Tr. 110 (Donoghue); DCX 6 at 5. He then told the President about some particular investigations – that the Antrim County voter machine had an error rate of .0063%, not 68%; that interviews conducted at both ends of the truck shipment showed there were no ballots shipped from Long Island to Pennsylvania and the truck driver could

not even identify the envelopes ballots would have come in[7]; and that in Georgia, they had looked at the tapes of the State Farm Arena, interviewed the employees and there was not double scanning. Tr. 110-11 (Donoghue); DCX 6 at 5-6.

70. The President asked about Arizona – saying words to the effect "I only lost by 9000 votes. There's clearly more fraud than that," and adding "the judges keep saying where is the DOJ? Why are they not filing these cases?" Tr. 111-12 (Donoghue); DCX 6 at 6.

71. Mr. Rosen and Mr. Donoghue explained that the Justice Department has an important but limited role in elections and does not file lawsuits on behalf of campaigns or anyone else. Tr. 112 (Donoghue). The President had the impression that the Department represents the American People and therefore if the people were misled by erroneous outcomes, they had an interest in correcting that and the Department should be filing lawsuits at least to correct that. *Id.*

72. Mr. Rosen and Mr. Donoghue explained to the President that their client is the American government, not the American people. *Id*. They said that the Department does not do quality control for the states and if the states screw up their elections, that is the state's responsibility to fix it. *Id*. The Justice Department does criminal and civil rights enforcement. Tr. 112-13, 183-84 (Donoghue).

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[7] The President said "[n]ote, I didn't mention that one." Tr. 111 (Donoghue).

73. The President responded to Mr. Rosen's and Mr. Donoghue's discussion about the Justice Department's role at the meeting "we have an obligation to tell people that this was an illegal, corrupt election." Tr. 113 (Donoghue).

74. The President was "obviously frustrated." Tr. 114 (Donoghue). He said "you know, people tell me Jeff Clark is great and that I should put him in. People want to replace DOJ leadership." Tr. 114 (Donoghue), Tr. 380-81 (Rosen); DCX 6 at 6. Mr. Donoghue did not know why the President was bringing up Mr. Clark's name. To Mr. Donoghue it was "odd" and "out of left field." Tr. 117-18.

75. In response to the President's reference to Mr. Clark, Mr. Donoghue said that the President should have the leadership he wants, but that the President should understand that the Department can only operate on facts and evidence so changing the leadership is really not going to change anything. Tr. 114 (Donoghue), 381-84 (Rosen).

76. The President then said that Mr. Donoghue should go to Fulton County to do a signature verification and that he would find tens of thousands of fraudulent votes. DCX 6 at 7. Then, he quickly rephrased it and said that he was "requesting" that Mr. Donoghue go to Fulton County. *Id*. At no point had the President ever directed them to do anything. As soon as he said it, he caught himself and made it clear it was a request, not a direction. Tr. 114-16 (Donoghue); DCX 6 at 7.

77. Mr. Rosen said that they would take the request under advisement. Tr. 115 (Donoghue). Mr. Donoghue did not go to Fulton County. Tr. 117 (Donoghue).

78. The conversation ended with the President being obviously unhappy. Tr. 115 (Donoghue). He complained that the election was stolen from him and the Department was not doing enough about it. *Id*. Mr. Rosen and Mr. Donoghue tried to assure him that they were doing their job and knew their job and that they have a limited role, that they would continue to do. Tr. 115-16 (Donoghue).

79. The President said that people had all kinds of things that showed fraud and asked whether he could send information to them. Tr. 116 (Donoghue). The President added "Not much time left." DCX 6 at 7.

80. Mr. Donoghue responded that they could take information from all sources at all times and, at the President's request, gave him his cell phone number (which the President already had). Tr. 116 (Donoghue); DCX 6 at 7.

81. It was Mr. Donoghue's general practice to take down information on any allegations the President asked about, investigate it and report in general terms when the investigation was concluded – such as "[w]e interviewed people, we did what we had to do, but that's not true." Tr. 116-17 (Donoghue).

82. Later that evening, Congressman Perry called Mr. Donoghue, and Mr. Donoghue also took notes of that conversation. Tr. 118-20 (Donoghue); DCX 7. Congressman Perry said that the President asked him to call. DCX 7 at 1. Congressman Perry was concerned about the election, especially Pennsylvania, that people do not trust the FBI and said that he likes Jeff Clark a lot and thinks that Mr. Clark would do something about this. Tr. 120 (Donoghue). Congressman Perry also repeated what the President said about there being more votes certified in

Pennsylvania than were actually cast and said he had a forensic accountant who was drafting a report to establish this. *Id.* Mr. Donoghue said that the Congressman should feel free to send this to him and gave Congressman Perry his email address. Tr. 120-21 (Donoghue).

83. Mr. Donoghue emailed Scott Brady, the United States Attorney for the Western District of Pennsylvania and asked him to investigate. Tr. 121 (Donoghue). A couple of days later, Mr. Donoghue reported that the numbers Congressman Perry and, it seemed, the President were using came from a public-facing database called SURE (State Uniform Reporting on Elections database), and four counties had not reported their results into the database. Tr. 121-22 (Donoghue). The Secretary of State who certified the election was using the actual county reports and when you added in the missing votes from the four counties, the numbers matched. Tr. 122 (Donoghue).

Monday December 28, 2020: Mr. Clark Emails the Initial Version of the Proof of Concept Memo to Mr. Rosen and Mr. Donoghue, and Is Told that It Contains False Statements and Is Admonished About and Promises to Follow the White House Contacts Policy.

84. On the morning of December 28, 2020, President Trump called Mr. Donoghue again to repeat some of the allegations they had discussed the day before. Tr. 123-24 (Donoghue).

85. At 4:40 in the afternoon of December 28, Mr. Clark sent an email to Mr. Rosen and Mr. Donoghue with the subject line "Two Urgent Action Items." Tr. 124-25 (Donoghue); DCX 8 at 1. Both the email and the letter it attached said "FOR INTERNAL SJC USE ONLY DO NOT DISTRIBUTE." DCX 8.

86. The cover email stated, in relevant part:

> (1) I would like to have your authorization to get a classified briefing tomorrow from ODNI [the Office of Director of National Intelligence, *see* Tr. 125] led by DNI [Director of National Intelligence John, *see id.*] Radcliffe on foreign election interference issues. I can then assess how that relates to activating the IEEPA [International Executive Emergency Powers Act, Tr. 125-26] and 2018 EO [Executive Order, Tr. 126] powers on such matters (now twice renewed by the President). If you had not seen it, white hat hackers have evidence (in the public domain) that a Dominion machine accessed the internet through a smart thermostat with a net connection trail leading back to China. ODNI may have additional classified evidence.
>
> (2) Attached is a draft letter concerning the broader topic of election irregularities of any kind. The concept is to send it to the Governor, Speaker, and President pro temp of each relevant state to indicate that ***in light of time urgency*** and sworn evidence of election irregularities presented to courts and to legislative committees, the legislatures thereof should each assemble and make a decision about elector appointment in light of their deliberations. I set it up for signature by the three of us. ***I think we should get it out as soon as possible. Personally, I see no valid downsides to sending out the letter.*** I put it together quickly and would want ***to do formal cite check*** before sending but ***I don't think we should let unnecessary moss grow on this. . . .***
>
> * * * *
>
> I have a 5 pm internal . . . . But I am free to talk on either or both of these subjects circa 6 pm+.
>
> Or if you want to reach me after I reset work venue to home, my cell # . . .

DCX 8 at 1 (emphasis added).

87. The attached letter stated, among other things:

> The Department of Justice is investigating various irregularities in the 2020 election for President of the United States. The Department will update you as we are able on investigatory progress, but at this time we have identified significant concerns that may have impacted the

outcome of the election in multiple States, including the State of Georgia. No doubt, many of Georgia's state legislators are aware of irregularities, sworn to by a variety of witnesses, and we have taken notice of their complaints. *See, e.g.*, The Chairman's Report of the Election Law Study Subcommittee of the Standing Senate Judiciary Committee Summary of Testimony from December 3, 2020 Hearing, http://www.senatorligon.com/THEFINAL%20REPORT.PDF (Dec.17, 2020) (last visited December 28, 2020); Debra, Heine, *Georgia State Senate Report: Election Results Are 'Untrustworthy;' Certification Should be Rescinded*, THE TENNESSEE STAR (Dec. 22, 2020), *available at* https://tennesseestar.com/2020/12/22/georgia-state-senate-report-election-results-are-untrustworthy-certification-should-be-rescinded/ (last visited Dec. 28, 2020).

In light of these developments, the Department recommends that the Georgia General Assembly should convene in special session so that its legislators are in a position to take additional testimony, receive new evidence, and deliberate on the matter consistent with its duties under the U.S. Constitution. . . .

* * * *

The Constitution mandates that Congress must set the day for Electors to meet to cast their ballots, which Congress did in 3 U.S.C. § 7, and which for this election occurred on December 14, 2020. The Department believes that in Georgia and several other States, both a slate of electors supporting Joseph R. Biden, Jr., and a separate slate of electors supporting Donald J. Trump, gathered on that day at the proper location to cast their ballots, and that both sets of those ballots have been transmitted to Washington, D.C., to be opened by Vice President Pence. . . .

* * * *

The Department also finds troubling the current posture of a pending lawsuit in Fulton County, Georgia, raising several of the voting irregularities pertaining to which candidate for President of the United States received the most lawfully cast votes in Georgia. *See Trump v. Raffensperger*, 2020cv343255 (Fulton Cty. Super. Ct.). . . . Given the urgency of this serious matter, including the Fulton County litigation's

> sluggish pace, the Department believes that a special session of the Georgia General Assembly is warranted and is in the national interest.
>
> * * * *
>
> The purpose of the special session the Department recommends would be for the General Assembly to (1) evaluate the irregularities in the 2020 election, including violations of Georgia election law judged against that body of law as it has been enacted by your State's Legislature, (2) determine whether those violations show which candidate for President won the most legal votes in the November 3 election, and (3) whether the election failed to make a proper and valid choice between the candidates, such that the General Assembly could take whatever action is necessary to ensure that one of the slates of Electors cast on December 14 will be accepted by Congress on January 6.
>
> While the Department of Justice believes the Governor of Georgia should immediately call a special session to consider this important and urgent matter, if he declines to do so, we share with you our view that the Georgia General Assembly has implied authority under the Constitution of the United States to *call itself into special session* for the limited purpose of considering issues pertaining to the appointment of Presidential Electors.
>
> * * * *
>
> Therefore whether called into session by the Governor or by its own inherent authority, the Department of Justice urges the Georgia General Assembly to convene in special session to address this pressing matter of overriding national importance.

DCX 8 at 2-5. The letter included signature blocks for Mr. Rosen (as "Acting Attorney General"); Mr. Donoghue (as "Acting Deputy Attorney General") and Mr. Clark (as "(Acting) Assistant Attorney General Civil Division"). DCX 8 at 6.

88. The letter references one principal source related to irregularities in Georgia: a report by a Georgia State Senator William Ligon ("Chairman Ligon's

Report"), dated December 17, 2020. The Report summarizes testimony given in person and by affidavit at a December 3, 2020 Hearing before an Election Law Subcommittee that Senator Ligon chaired. RX 42.

89. After citing the testimony and affidavits of a number of witnesses concerning a number of different potential violations of Georgia law, Chairman Ligon's Report found that "the November 3, 2020 election" for President in Georgia "was chaotic and the results cannot be trusted." RX 42 at 12. Chairman Ligon concluded that the legislature should "carefully consider its obligations under the U.S. Constitution," and "[i]f a majority of the General Assembly concurs with the findings of this report, the certification of the Election should be rescinded and the General Assembly should act to determine the proper Electors to be certified to the Electoral College in the 2020 presidential race." *Id.* at 15.

90. In referencing Chairman Ligon's Report, however, Mr. Clark's draft letter does not discuss (or indicate any awareness of) some significant limitations in the Report. This is a report by Chairman Ligon of the Election Law Subcommittee. It emphasizes at the outset that "[t]his Report by the Subcommittee Chair has not been formally approved by the Subcommittee or the standing Judiciary Committee. It is submitted for informational purposes to be a part of the record at the request of the Judiciary Chair. It is a summary of testimony given in person and by affidavit." RX 42 at 2.

91. In addition, the testimony and affidavits that the Report summarizes, appear to be taken only from witnesses who raised concerns about election

procedures. *See* Tr. 575-76 (Voyles) (testifying that the Ligon report accurately summarized all of the evidence that the Subcommittee heard). The Report does not suggest there was any testimony from Governor Brian P. Kemp, who by the date of the Report had certified the electors in favor of President Biden, DCX 35, or the Georgia Secretary of State (Brad Raffensperger), or other election officials, who both before and after the December 3 hearing of Chairman Ligon's Committee, publicly declared the reliability of the election results. *Compare* RX 42, *with* DCX 37, 38, 39, 42, 43 (after-the-fact summary).

92. Also, Chairman Ligon's assertion that the Georgia Legislature could, after the fact, rescind the certification of the election and create a different way to pick electors than what the law had provided at the time of the election was supported only by the opinion of President Trump's own attorney, John C. Eastman, RX 42 at 9-10, without any attempt to consider any other opinion, or any case law supporting the conclusion. Neither Chairman Ligon's Report, nor the draft letter Mr. Clark prepared, mentions that Georgia Governor Kemp, and Lt. Governor Geoff Duncan already had issued a statement of December 7, 2020, that "convening of a special session of the General Assembly . . . in order to select a separate slate of presidential electors is not an option that is allowed under state or federal law." DCX 40 at 1. Nor do they note that on December 8, 2020, before Chairman Ligon issued his report, the majority of the Georgia Senate Republican Caucus, issued a statement that "[o]ur state constitution precludes us from calling a special session due to the lack of a

three-fifths majority in both chambers. As constitutionalists, we must respect that." DCX 41 at 1.

93. Although Mr. Donoghue was unsure whether he had read Chairman Ligon's Report in its entirety, he was aware of the contents of the Report and had watched some of the testimony. Tr. 183-84. He had concluded that matters the Report raised were process issues that were not appropriate for further Justice Department investigation. Tr. 184.

94. When Mr. Donoghue received Mr. Clark's email, he went to Mr. Rosen's office and when he realized Mr. Rosen was not there, Mr. Donoghue composed an email in response to Mr. Clark. Tr. 136-37 (Donoghue). He sent the email at 5:50 pm, a little over an hour after Mr. Clark sent his email. Tr. 137 (Donoghue); DCX 9. Mr. Donoghue's email stated among other things that "there [was] no chance that I would sign this letter of anything remotely like this." DCX 9 at 1. Mr. Donoghue explained that the statements in the letter were false:

> While it may be true that the Department 'is investigating various irregularities in the 2020 election for President' . . . the investigations that I am aware of relate to suspicions of misconduct that are of such a small scale that they simply would not impact the outcome of the Presidential Election. AG Barr made that clear to the public only last week, and I am not aware of intervening developments that would change that conclusion. Thus, I know of nothing that would support the statement, 'we have identified significant concerns that may have impacted the outcome of the election in multiple states.'

Id.

95. Mr. Donoghue also thought there were "significant downsides" to sending such a letter to Georgia officials. Tr. 127-28 (Donoghue).

96. Mr. Donoghue told Mr. Clark that sending this letter would be an extraordinary new role for the Justice Department:

> I do not think the Department's role should include making recommendations to a State legislature about how they should meet their Constitutional obligation to appoint Electors. Pursuant to the Electors Clause, the State of Georgia (and every other state) has prescribed the legal process through which they select their Electors. While those processes include the possibility that election results may 'fail[] to make a choice', it is for the individual State to figure out how to address that situation should it arise. But as I note above, there is no reason to conclude that any State is currently in a situation in which their election has failed to produce a choice. . . . I have not seen evidence that would indicate that the election in any individual state was so defective as to render the results fundamentally unreliable. Given that, I cannot imagine a scenario in which the Department would recommend that a State assemble its legislature to determine whether already-certified election results should somehow be overridden by legislative action.

DCX 9 at 1.

97. Mr. Donoghue told Mr. Clark that sending this letter would be "momentous" step that could not be taken lightly based on limited research and investigation:

> Despite the references to the 1960 Hawaii situation (and other historical anomalies, such as the 1876 Election), I believe this would be utterly without precedent. Even if I am incorrect about that, this would be a grave step for the Department to take and it could have tremendous Constitutional, political and social ramifications for the country. I do not believe that we could even consider such a proposal without the type of research and discussion that such a momentous step warrants. Obviously [the Office of Legal Counsel] would have to be involved in such discussions.

Id.

98. Mr. Donoghue also told Mr. Clark that aspects of the draft letter reflected a lack of familiarity even with basic information about how criminal investigations are conducted. He told Mr. Clark that "typically" the Department would not state publicly what matters it was investigating, and would not "typically update non-law enforcement personnel on the progress of any investigations." DCX 9 at 1.

99. After sending the email, Mr. Donoghue went back into Mr. Rosen's office; Mr. Rosen had returned from his meeting and said that he had already instructed his assistant to have Mr. Clark come to the office. Tr. 138-39 (Donoghue).

100. In addition to disagreeing with the letter itself, Mr. Donoghue and Mr. Rosen did not see any reason why Mr. Clark should be getting any briefing, much less a briefing from the Director of National Intelligence, himself. "As the acting [head] for the civil division," Mr. Clark "had no responsibilities relating to intelligence matters, election matters or anything else that would touch upon this," Tr. 127 (Donoghue), 385-87 (Rosen), and it "would be extremely unusual to have a mid-level bureaucrat in one agency briefed by the head of another department." Tr. 127 (Donoghue); *see also* Tr. 358-59, 386-88, 394 (Rosen).

101. Mr. Rosen, Mr. Donoghue and Mr. Clark spoke after 6:00 pm that evening (December 28). Tr. 138-39 (Donoghue). This was a contentious meeting. Tr. 139 (Donoghue). Mr. Rosen and Mr. Donoghue spoke about why they believed the letter was inappropriate. *Id.* They spoke at length about how the Department had done investigations, taken in allegations, had the FBI and others run them down

and just had no basis to make these claims. *Id*. Mr. Rosen explained that the things Mr. Clark had been hearing on the Internet were just not supported by evidence. *Id.*; *see also* Tr. 391-92 (Rosen).

102. Mr. Clark talked about the allegations he was focusing on. Tr. 139-41 (Donoghue). He talked about the smart thermostat theory. Tr. 140 (Donoghue). Mr. Donoghue told him that the intelligence community had extensively briefed them before the election and it was just not something they believed was true. *Id.* They discussed Mr. Clark's request for the security briefing and whether he had the right security clearances for that. *Id.*

103. Mr. Clark also raised some other allegations, including the State Farm Arena allegations, most of which Mr. Donoghue and Mr. Rosen were already familiar with. Tr. 140-41 (Donoghue). Mr. Clark did not explain a factual basis for the statements in the letter about irregularities that "may" affect the result, except to express skepticism about the work that had been done. Tr. 478-79 (Rosen).

104. Mr. Donoghue asked Mr. Clark where he was getting this from, and noted that he was not involved in these investigations. Tr. 141 (Donoghue). Mr. Clark said that he had been reading filings in civil cases and said things to the effect that "it's all over the place, . . . it's all over the news; it's all over the Internet. There were all these affidavits being filed, and we need to do something about it." *Id.*; *see also* Tr. 473-74 (Rosen).

105. Mr. Rosen asked Mr. Clark "where is this coming from, why are you raising this, . . . this isn't your responsibility." Tr. 390 (Rosen). Mr. Clark was not

very forthcoming and indicated "these were his ideas, he thought they were good ones, and if [Mr. Rosen and Mr. Donoghue] didn't agree, okay." Tr. 390-91 (Rosen); *see also* Tr. 473-74 (Rosen).

106. Mr. Rosen asked Mr. Clark why they were hearing his name from the President and what was going on there. Tr. 142 (Donoghue). Mr. Clark said he had been to the Oval Office within the previous few days and that the President was very concerned that "we don't have the right leadership in place." *Id.* Mr. Clark said words to the effect that these are trying times, and you need leaders for trying times and the President does not think he has those leaders right now, meaning Mr. Rosen and Mr. Donoghue, and he's thinking about making a leadership change – which Mr. Donoghue took to mean that Mr. Clark would be part of the leadership and Mr. Rosen and Mr. Donoghue would not be. Tr. 142-43 (Donoghue).

107. When Mr. Clark said that he had met with the President, Mr. Donoghue was taken aback and said "you violated the White House contacts policy," and Mr. Clark said words to the effect that "there's more at stake here than a policy." Tr. 143-44 (Donoghue).

108. Mr. Donoghue said words to the effect of "[y]ou know what the policy says, you know what it requires. Do not violate it again," and Mr. Clark said that he would not. Tr. 144 (Donoghue), 392-93 (Rosen).

109. There were two takeaways that came out of either this meeting, or later developments on December 30.[8] One, Mr. Clark was supposed to get a briefing from someone in the Office of the Director of National Intelligence and that he would presumably hear, as Mr. Donoghue had heard before the election, that there was no significant reason to be concerned about foreign interference. Tr. 144 (Donoghue). Two, Mr. Clark was supposed to call the United States Attorney in Atlanta to discuss the investigation into the State Farm Arena allegations, so he could see "we actually looked at it, we actually interviewed the witnesses, we actually looked at the tape and that we determined that these allegations were not well-founded." Tr. 145 (Donoghue). *See* Tr. 401-04 (Rosen).

110. At 11:41 that night, Mr. Donoghue sent an email to Office of Legal Counsel Assistant Attorney General Steven Engel telling him that he wanted to talk with him for ten minutes before the regular morning meeting the next day. Tr. 145-

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[8] Again, there is an arguable timing discrepancy in the testimony. Mr. Donoghue recalls that he and Mr. Rosen told Mr. Clark at this December 28 meeting that he would get a briefing from someone in the Office of the Director of National Intelligence (but at the time, not the Director) and that he was to contact the United States Attorney for the Northern District of Georgia, Byung Jin ("BJ") Pak to find out what information they had obtained by investigation allegations in Fulton County. Tr. 144-45. Although not necessarily differing, Mr. Rosen testified that these two takeaways came up after White House Chief of Staff Meadows sent an email on December 30 specifically asking that Mr. Clark investigate signature verification in Fulton County. Tr. 401-04. Again, the timing difference (if there is one) is not material. As explained below, there is no dispute however that eventually, Mr. Clark was given an intelligence briefing from the Director and was told to, but did not, contact United States Attorney Pak.

46 (Donoghue); DCX 10. Mr. Donoghue wanted to speak to Mr. Engel because the normal DOJ succession provided that if the Attorney General left, the person who would take over was the highest-ranking person who was not in an "acting" position and that was Mr. Engel. Tr. 146 (Donoghue). Although the President could name someone else, Mr. Donoghue wanted to make sure the Mr. Engel knew what was going on in case he ended up as Acting Attorney General unexpectedly. Tr. 146-47 (Donoghue).

Tuesday, December 29, 2020-Friday, January 1, 2021: Continued Conversations about Possible Allegations.

111. Mr. Donoghue met with Mr. Engel the next morning. Tr. 147 (Donoghue).

112. Between December 29, 2020 and January 1, 2021, Mr. Donoghue and Mr. Rosen continued to have additional contacts with the White House (in one instance with President Trump personally and others with others at the White House) about possible election investigations. Tr. 147-48 (Donoghue).

113. On Tuesday, December 29, 2020, Mr. Rosen had a prescheduled lunch with White House Counsel Patrick Cipollone. Tr. 395 (Rosen). During the lunch, Mr. Rosen told Mr. Cipollone that Mr. Clark had met with the President and asked whether Mr. Cipollone knew about it; Mr. Cipollone said it was total news to him and he was not happy about it. *Id.* He said he would probably do some follow up about that. Tr. 395-96 (Rosen).

114. On Wednesday, December 30, 2020, White House Chief of Staff Mark R. Meadows sent an email to Mr. Rosen containing a forwarded email, a press

release and a "Verified Petition," dated December 4, 2020, by the Trump Campaign in Superior Court in Fulton County "to Contest Georgia's Presidential Election Results for Violations of the Constitution and Laws of the State of Georgia, and Request for Emergency Declaratory and Injunctive Relief." Tr. 148-49 (Donoghue), 396-97 (Rosen); DCX 11. Among other things, this Petition alleged that various election officials in Georgia had failed to comply with Georgia Law provisions for matching signatures and confirming voter identity for electors seeking to vote absentee. DCX 11 at 31-40, 50-52.

115. Mr. Rosen looked at the email and recognized it as being derived from the Trump campaign. Tr. 397 (Rosen). He had two concerns. First, it was a civil filing from the Trump campaign, and the Department had no role in the two campaigns' civil litigation. *Id*. The other was that some of the allegations in the Complaint were matters the Justice Department had already investigated. "[T]his looked to me to be something that had on the one hand already been addressed and on the other hand, a campaign thing that wasn't really our responsibility." *Id*. However, it would have been a matter of routine to share the complaint with Mr. Donoghue regardless. *Id.*

116. On Thursday, December 31, 2020, in the mid- to late-afternoon Mr. Rosen and Mr. Donoghue met at the White House with the President, the Chief of Staff, the White House Counsel and Deputy Counsel. Tr. 153-54 (Donoghue). They again discussed the results of the Antrim County Michigan election machine allegations and President Trump brought up other allegations mostly in swing states

– Georgia, Pennsylvania, Nevada. Tr. 154 (Donoghue). President Trump was "obviously very frustrated" and said that he felt the Justice Department needed to do something. *Id.*

117. Mr. Rosen and Mr. Donoghue again said to the President that they understood. *Id*. They reiterated the Department's role: "to the extent we get allegations and they appear to be credible, we're looking at them. We're doing our job." Tr. 154-55 (Donoghue).

118. President Trump again referred to his previous statement that "maybe I don't have the right leadership," and Mr. Rosen and Mr. Donoghue again told the President that he should have the leadership he wanted, but facts and evidence are not going to change. Tr. 155 (Donoghue). Mr. Donoghue believes Mr. Clark's name was also referenced at this meeting. *Id.*

119. On Friday, January 1, 2021, Mr. Meadows sent another email to Mr. Rosen stating "[t]here have been allegations of signature match anomalies in Fulton [C]ounty, Ga. Can you get Jeff Clark to engage on this issue immediately to determine if there any truth to this allegation." DCX 12; Tr. 151-52 (Donoghue).

120. Mr. Rosen forwarded the email to Mr. Donoghue with a note "Can you believe this? I am not going to respond to message below." DCX 12; Tr. 152-53 (Donoghue). As he explained, Mr. Meadows had "lobbed a whole bunch of stuff over that afternoon and evening," including a request to meet with President Trump's campaign counsel Rudolph Giuliani. Tr. 398, 438-39 (Rosen). This email was notable because it specifically called for Jeffrey Clark to be involved. Mr.

Rosen saw this as some confirmation that Mr. Clark was being chosen to pursue allegations. Tr. 398-400 (Rosen). As to the signature match issue, Mr. Meadows provided no evidence – just a general allegation that there were anomalies – and it came from the President's Chief of Staff in what appeared to be in an "election role" not a "governance role." Tr. 400-01 (Rosen). "[T]he Department . . . is not there to assist one campaign or the other campaign, it's to pursue its statutory duties in accordance with the law and the facts." Tr. 433-35, 438-40 (Rosen).

121. Mr. Donoghue replied "At least it's better than the last one, but that doesn't say much." DCX 12.

122. Mr. Clark argues that this exchange shows Mr. Rosen's and Mr. Donoghue's indifference or hostility to efforts to prove a violation of signature verification procedures – and even a "refus[al]" of a "Presidential directive" to have Mr. Clark investigate them. Mr. Clark's Br. at 4, 27. However, neither the credible testimony, nor the circumstances, support ascribing these motives to them.

123. Mr. Donoghue testified that their disbelief was not directed to Chief of Staff Meadows' interest in the signature verification allegations (which were part of the complaint he had sent them on December 30, DCX 11), but to the fact that he was continuing to seek to have these allegations referred to Mr. Clark for investigation. Tr. 153. Mr. Donoghue had already explained to Mr. Meadows that Mr. Clark did not have a position within the Department that would include him in criminal investigations, nor did he have any criminal investigation background or

experience. *Id*. They had thought Mr. Clark's involvement had been put to rest. *Id.*; *see also* Tr. at 227-28 (Donoghue).

124. This testimony is credible. Mr. Rosen and Mr. Donoghue were not President Trump's sworn enemies. They were top officials President Trump had appointed. In the preceding three weeks, President Trump had made Mr. Rosen Acting Attorney General after offering that post to Mr. Donoghue. It is not surprising that Mr. Rosen and Mr. Donoghue would find it difficult to understand the efforts by the White House from what to them was "out of left field," Tr. 117-18, to now involve the acting head of the Civil Division who had no experience with criminal investigations and no prior role in the election investigations.

125. There is no evidence that Mr. Clark ever "investigated" signature verification in the sense of finding out what information the Justice Department had obtained or contacting witnesses or otherwise attempting to obtain any information that was not public.

126. On January 1, 2021, at 8:24 pm, Mr. Rosen emailed Mr. Clark with United States Attorney B.J. Pak's cell phone number and Mr. Clark responded "Thanks." DCX 13. The next morning, Mr. Rosen asked whether Mr. Clark was able to follow up, but Mr. Clark responded "I spoke to the source and [I'm] on with the guy who took the video right now. Working on it. More due diligence to do." *Id.* This was not what Mr. Rosen had asked Mr. Clark to do. Tr. 403-04 (Rosen).

127. Meanwhile, at the White House, there had been further discussions about whether Mr. Clark should be made Acting Attorney General. "[T]here was a

concept swirling around that perhaps Jeff Clark would be made acting attorney general to replace Jeff Rosen because Jeff Clark would go to further lengths to pursue some of these ideas about voter fraud." Tr. 264-65 (Philbin). But there was a meeting on December 31 or January 1 in which the idea of making Mr. Clark Acting Attorney General appeared to be "put to bed." *Id.*

Saturday, January 2, 2021: Mr. Clark Tells Mr. Rosen that He Has Had Another Direct Private Discussion with President Trump; Mr. Clark is Considering Accepting President Trump's Offer to Acting Attorney General; But Will Not if Mr. Rosen and Mr. Donoghue Agree to Sign the Proof of Concept Letter.

128. On Saturday, January 2, 2021, however, the idea of appointing Mr. Clark as Acting Attorney General was revived at the White House. Tr. 265 (Philbin).

129. That day, Mr. Rosen called Mr. Donoghue to ask him to come into the office. Tr. 155 (Donoghue). Mr. Rosen said he had just spoken to Mr. Clark and needed Mr. Donoghue to come in to figure out what to do about it. Tr. 155-56 (Donoghue). Mr. Rosen said that he and Mr. Clark were going to meet again later in the day and Mr. Rosen did not want to meet with Mr. Clark alone. Tr. 156 (Donoghue); *see also* Tr. 388-89 (Rosen); DCX 15 (email from Mr. Rosen to Mr. Donoghue at 7:13 pm on January 2, 2021, thanking Mr. Donoghue for sending his December 28 response to Mr. Clark explaining that there was "no chance that" he "would sign" the Proof of Concept letter "or anything remotely like this," and stating that Mr. Rosen "confirmed again today that I am not prepared to sign such a letter.").

130. Mr. Rosen and Mr. Donoghue met with Mr. Clark later in the day at the Secure Compartmentalized Information Facility – a room where authorized Justice

Department personnel can discuss classified information. Tr. 156-57 (Donoghue), 404-05. Mr. Donoghue took notes of the meeting. Tr. 161-62 (Donoghue); DCX 14.

131. The meeting was contentious and everyone was angry. Tr. 161 (Donoghue), 406-08 (Rosen). Mr. Clark reported that he did obtain the Office of the Director of National Intelligence briefing and received the same information they had reported before the election – that there was no evidence of ballot or data tampering in the intelligence community, just efforts to influence the election – not to change data or tamper with ballots. DCX 14; Tr. 157, 163 (Donoghue). Mr. Clark expressed dissatisfaction with the quality of the report, but did not say there was contrary evidence. Tr. 405-06 (Rosen).

132. Mr. Clark reported that he had not spoken to United States Attorney Pak in Georgia, but not did not offer a reason that appeared to justify it. Tr. 157-58 (Donoghue), 405-06, 470-71 (Rosen); DCX 14. Instead, Mr. Clark said he did other things. In response to questions about what he had found, Mr. Clark was unable to identify any credible allegations. Tr. 158-60 (Donoghue); Tr. 405-06, 470-71 (Rosen). He reported that he interviewed over the phone the largest bail bondsmen in Georgia, who had been doing some investigation of his own and had some video surveillance of shred trucks at an election facility. Tr. 158 (Donoghue). He related that the Georgia Bureau of Investigation and the United States Attorney for the Southern District of Georgia knew about the allegations but had not taken action. DCX 14. Mr. Donoghue commented that Mr. Clark's wanted to send the Proof of

Concept letter based on what amounted to "two allegations of ballot shredding in Georgia." DCX 14.

133. Mr. Donoghue told Mr. Clark that this was "entirely unacceptable," DCX 14, and the letter should "absolutely not" be sent. Tr. 159-60 (Donoghue). He told Mr. Clark that he should know better now than he did a few days before why it should not be sent. Tr. 159 (Donoghue). At this point, the Office of the Director of National Intelligence had briefed Mr. Clark; even with his own investigation, Mr. Clark could not find anything substantial and he did not speak with the people who actually investigated State Farm Arena allegations. Tr. 159-60 (Donoghue). They would have told him that at least some of the allegations Mr. Clark was discussing were not substantiated. *Id*. Mr. Rosen said that the letter was not something that would ever be approved on their watch. Tr. 407 (Rosen).

134. There is no evidence that after this January 2 meeting, Mr. Clark obtained or identified to anyone else any additional information that would support the statements the Proof of Concept letter would make.

135. During this January 2 meeting, Mr. Clark said that he had again spoken to the President. Tr. 160 (Donoghue). This upset both Mr. Rosen and Mr. Donoghue because Mr. Clark had broken his promise not to do that. *Id.* Mr. Clark then reported that the President was interested in a leadership change and offered him the position of Acting Attorney General. *Id.*

136. Mr. Clark said that he had promised to give the President an answer by Monday (January 4), but that Mr. Rosen and Mr. Donoghue could avoid all that if

they would agree to sign onto the letter. Tr. 160-61 (Donoghue), 471 (Rosen). Mr. Rosen and Donoghue responded absolutely not. Tr. 161 (Donoghue). *See* DCX 14 ("DAG and I make it clear that the Department will not send out such a letter as long as we are in charge of it"); Tr. 162 (Donoghue).

137. Mr. Donoghue's notes end "[a]nother difficult meeting." DCX 14.

Summary of Mr. Clark's Due Diligence

138. There is no evidence to suggest that at any time between December 28, 2020 and January 3, 2021, Mr. Clark had reviewed the report of any investigation into the allegations discussed in Chairman Ligon's report or had spoken with anyone who had investigated those allegations – whether at the FBI, the United States Attorneys' Offices, the Georgia Bureau of Investigation, the Georgia Secretary of State's Office or even the Subcommittee that Senator Ligon chaired. Nor apart from the references (discussed above) is there evidence of what, if any, information he had reviewed concerning the election in any other state besides Georgia.

139. Mr. Clark's cover email requested the opportunity to obtain a classified briefing from the Director of National Intelligence. DCX 8 at 1. He did not request any other information, including reviewing the Justice Department's investigative files. *Id*.

140. After the December 28 meeting, Mr. Clark conducted some limited investigation on his own. Tr. 158-59 (Donoghue). Mr. Clark's investigation appears to be limited to reviewing publicly available civil pleadings and what he, as one person, could obtain in the short period of time between December 28, 2020 to

January 3, 2021. There is no reason to believe that any of the investigation Mr. Clark conducted resulted in obtaining information that could reasonably be said to justify the letter's reference to "significant concerns" about irregularities that "may have impacted the outcome" of the election. DCX 8 at 2.

141. In the January 2, 2021 meeting with Mr. Rosen and Mr. Donoghue, described above, Mr. Clark reported that he had interviewed by phone a witness Mr. Clark described as the largest bail bondsman in Georgia. Tr. 158 (Donoghue). This person had been doing some investigations on his own and said he had video surveillance of shred trucks at the election facility. *Id*. The interviewee said the Georgia Bureau of Investigation was not interested and that he called United States Attorney for the Southern District of Georgia Bobby Christine, "but nothing [was] done." Tr. 158, 163-64 (Donoghue); DCX 14. Mr. Donoghue did not consider this interview to be close to the support necessary to justify the statements in the letter about "significant concerns" that "may have impacted the outcome" of the election. Tr. 159-60 (Donoghue). Given the nature of the information and the fact that Mr. Clark did not call the bail bondsman as a witness, we agree with this conclusion.

142. Also in early January 2021, Mr. Clark spoke with Mr. Philbin about someone in Italy who the CIA knew. Tr. 259-61 (Philbin). This person claimed to know about some mechanism affecting voting machines. *Id*. This witness could not easily be interviewed because he had been in prison but might be released to U.S. custody. *Id.* Mr. Philbin thought that this story was "incredible" and "[t]he guy sounded like a fabulist." Tr. 262-63. After hearing the various allegations cited by

Mr. Clark, Mr. Philbin concluded that none of them warranted some kind of definitive action to change the outcome of the election. Tr. 270-71 (Philbin).

143. Subsequent testimony (described above) showed that Mr. Clark never spoke to the United States Attorney whose office had conducted investigations of Fulton County (including State Farm Arena allegations) or reviewed any of the DOJ investigative files in the matters. There is no evidence or reason to believe at the time or even afterwards that Mr. Clark spoke with a single United States Attorney's Office or the Election Crimes Branch in the Criminal Division or anyone at the FBI about any investigation they were conducting. It is not clear how many, if any, of what Mr. Donoghue testified were dozens of investigations and hundreds of interviews Mr. Clark ever knew of, much less reviewed.

Sunday January 3, 2021: Deputy White House Counsel Philbin Advises Mr. Clark that there will be Riots if the Proof of Concept Letter is Sent; Assistant Attorneys General Announce They Will Resign If the Letter Is Sent; President Trump Decides Not To Send it During an Extended Heated Evening Meeting at the White House and Holds to the Decision After Mr. Clark Continues to Press to Have the Letter Sent.

144. When the idea of Mr. Clark as Acting Attorney General had been revived, Mr. Philbin had a conversation with White House Counsel Cipollone and Mr. Rosen, and they had decided that Mr. Philbin, who had known Mr. Clark for a long time going back to their work at Kirkland & Ellis, would reach out to Mr. Clark and try to persuade him that it was not a good idea for him to become Acting Attorney General. Tr. 264-65 (Philbin).

145. Most likely during the day on January 3, although possibly on January 2, Mr. Philbin called Mr. Clark. Tr. 265-66 (Philbin). Mr. Clark's view was that

"there was a real crisis in the country" and he was "being given an opportunity to do something about it," and after struggling with the decision thought he had a duty to do something. Tr. 266 (Philbin).

146. Mr. Philbin tried to explain to him that it was a bad idea for multiple reasons. Tr. 267. They talked about some of the theories of fraud and that Mr. Philbin thought the theories had been debunked, explaining there was not "any 'there' there." *Id*. In his role of Deputy White House Counsel, Mr. Philbin spoke to Mr. Rosen and Mr. Donoghue about what the Department was finding. Tr. 268-69 (Philbin). It was important for him to be able to give the President accurate information and explain why what he was hearing is not true. There were allegations swirling around, people would come to the President with them, and there was a lot of bad information that led people to think things that were not accurate. Tr. 269-70 (Philbin).

147. Mr. Philbin and Mr. Clark discussed various theories of fraud, and Mr. Philbin told him none of the allegations warranted Mr. Clark becoming Acting Attorney General to investigate them. Tr. 268-70 (Philbin). Mr. Philbin did not think that any of the information suggested fraud that could have changed the outcome of the election – as he put it, it was "not as if there was a big smoking gun problem there and everyone was trying to turn a blind eye to it so the only way to solve that situation was to have someone else come in." Tr. 270-71. Although he was not as focused on the Proof of Concept letter, itself, he also did not believe the circumstances justified sending the letter to the State of Georgia and did not think

there was "back up" for an indication that the federal government had actually found irregularities in the Georgia election. Tr. 283-84 (Philbin).

148. Mr. Philbin explained to Mr. Clark that if the President made Mr. Clark Acting Attorney General, there would be a massive wave of resignations at the Justice Department, and people would not be willing to follow him to pursue these theories of fraud that the Justice Department had already debunked. Tr. 267, 271-72 (Philbin). Mr. Clark responded that he thought there were enough people who would stick with him for him to be successful. Tr. 272-73 (Philbin).

149. Mr. Philbin told Mr. Clark he would be tanking his career because the proposed path could not possibly succeed. Tr. 267 (Philbin). Mr. Philbin did not see a viable path to actually changing the vote in the electoral college. Tr. 273 (Philbin). Given all the things that would have to fall in line, he did not think it was a feasible plan. *Id*.

150. Then, Mr. Philbin told him that if, by some miracle somehow and he did something and found a way for the President to stay in the White House past January 20, there would be riots in every major city in the country. Tr. 267-68 (Philbin). It was just not an outcome the country would accept. Tr. 268 (Philbin).

151. Mr. Clark responded "well, Pat, that's what the Insurrection Act is for." Tr. 281 (Philbin). The "Insurrection Act" is a colloquial term for a provision that permits the President to call out federal troops and/or federalize the National Guard to restore order if there is an area in a state where normal civil authorities are not able to maintain order. Tr. 281-82 (Philbin).

152. Mr. Philbin thought that Mr. Clark's statements showed a lack of judgment, and were "off the chart." Tr. 282. He thought for the "obvious reason that if your planned course of action is one that will or has the high likelihood of triggering riots in every major city in America, you've got to be really sure about what you're doing and have no alternatives," and "be justified 100 percent, 1000 percent," and this was not the sort of situation he understood they were talking about. Tr. 282-83.

153. Mr. Philbin nonetheless also believed that Mr. Clark was "100 percent sincere in his views." Tr. 293. "[Mr. Clark] felt that he essentially had a duty . . . because [he thought] something wrong [was] happening . . . and he was the one who was sort of put on the spot to have the opportunity to do something." *Id*. When asked, Mr. Philbin said that he does not know many people with "that kind of courage." Tr. 293-94.

154. On Sunday, January 3, 2021[9], Mr. Clark asked to speak with Mr. Rosen alone. Tr. 408-09. Mr. Rosen had other meetings and was not able to meet with Mr.

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[9] At some point, Mr. Clark also created another version of the Proof of Concept letter, which bears the date January 3, 2021. DCX 34 at 2. Although the January 3, 2021 version is similar in substance to the draft dated December 28, 2023, there were some differences in the language. For example, what had read, "[DOJ ***has***] ***identified significant concerns*** that may have impacted the outcome of the election . . . ." DCX 8 at 2 (emphasis added), reads, "***As of today, there is evidence of significant irregularities*** that may have impacted the outcome of the election . . . ." DCX 34 at 2 (emphasis added). As justification for the Department recommending that the Georgia General Assembly should convene a special session, the January 3 draft letter referenced "the developing evidence, both in Georgia and nationwide." DCX 34 at 2-3. The January 3 draft also added a statement

Clark until around 3:00 pm. *Id*. Mr. Clark told him that he was going to accept the President's offer because he had a very different view of what the Department's posture should be. Tr. 408-10 (Rosen). Mr. Rosen told him it was a colossal mistake and both of them expressed that they were disappointed in the other. Tr. 409-10 (Rosen).

155. Mr. Rosen told him that he could not accept the news coming from Mr. Clark and needed to find out from the President. Tr. 410 (Rosen). Mr. Clark told Mr. Rosen during the conversation that if Mr. Clark became Acting Attorney General, he would like Mr. Rosen to stay on as his Deputy; Mr. Rosen told him that he did not agree with the things Mr. Clark was proposing to do and was not interested in staying on as Deputy Attorney General. Tr. 410-11 (Rosen).

156. Mr. Rosen then told Mr. Donoghue about the conversation; he reported that Mr. Clark had told him that he had decided to take the President up on his offer

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commending Georgia legislators, "In many instances, the Georgia legislators have helped bring evidence of such irregularities to light . . . We commend and encourage these efforts to bring sunlight and transparency to last November's election, emphasizing, as always, the need for fairness and perspective in pursuing the truth about that election." *Id*. The letter concludes with a sentence stating that the Georgia General Assembly convening a special session "would give Americans greater confidence in the integrity of the electoral results." DCX 34 at 6.

The timing and use of this version is unclear. Although January 3, 2021, appears at the top, it is not clear when the letter was drafted (as the date could have been automatically updated). There is also no evidence upon which to determine to whom the letter was sent or how it was presented, and the statements in this revised letter are not the basis of the charges. Accordingly, we do not rely on the version dated January 3, 2021.

to serve as Acting Attorney General, was not going to wait until Monday, January 4, to tell the White House, and expected that Mr. Rosen and Mr. Donoghue would be removed from the Department that day. Tr. 165-66 (Donoghue). Mr. Donoghue went to his office and began packing up boxes, expecting to be fired by tweet or other means. Tr. 166 (Donoghue).

157. According to White House telephone logs for January 3, 2021, it appears that Mr. Clark accepted the offer to become Acting Attorney General. According to the logs, "Mr. Jeffrey Clark" spoke with President Trump at 1:13 pm. DCX 33 at 5. President Trump had the White House switchboard leave a message for "Mr. Jeffrey Clark" at 3:47 pm. *Id.* at 7. When Mr. Clark called back at 4:19 pm the log refers to him as "Acting Attorney General Jeffrey Clark." *Id.*[10]

[10] During the hearing and in briefing, Mr. Clark's counsel relied on this evidence to represent that Mr. Clark had become Acting Attorney General for some time on January 3, 2021. *See* Tr. 857, 1207-09; Mr. Clark's Br. at 21 (Response to PFOF ¶ 52). However, Disciplinary Counsel urges that "there is no evidence that he actually assumed the position." ODC Reply Brief at 13. We agree that while it appears Mr. Clark accepted the offer, it is not clear whether Mr. Clark actually assumed the position of Acting Attorney General and there is no evidence that Mr. Rosen, Mr. Donoghue or Mr. Philbin believed that Mr. Clark actually was Acting Attorney General. The evidence also does not clearly and convincingly establish how the timing of Mr. Clark accepting the offer fits with the other events of the day. It is logical to think that Mr. Clark accepted the position after his conversation with Mr. Philbin, rather than before and after his conversation with Mr. Rosen, in which he said he was going to accept the offer. Accordingly, while Mr. Clark's willingness to become Acting Attorney General is relevant, our decision does not rest on whether or when he actually assumed the position.

158. Meanwhile, Mr. Rosen called Chief of Staff Meadows and said he wanted to meet with the President. Tr. 411 (Rosen). Mr. Meadows did not even ask what it was about; he said "fine." *Id*. Mr. Rosen also called Steven Engel, Assistant Attorney General for the Office of Legal Counsel, and White House Counsel Cipollone, and both said they would attend the meeting. Tr. 411-12 (Rosen). Senior Advisor to the President Eric Hershmann also called Mr. Rosen and said that he would attend the meeting. Tr. 412 (Rosen).

159. Mr. Rosen told Mr. Donoghue that he just spoke to White House Counsel Patrick Cipollone, who said that he did not think "this [was] a done deal and that we should go to the White House and fight for our jobs." Tr. 166-67 (Donoghue). After Mr. Meadows called him back, Mr. Rosen returned to say that they had scheduled a meeting at 6:15 pm at the White House, but that Mr. Clark had stipulated that he would attend the meeting only if Mr. Donoghue was not present. Tr. 167 (Donoghue).

160. At Mr. Rosen's request, Mr. Donoghue and another Associate Deputy Attorney General, Mr. Hovakimian set up a call with the Assistant Attorneys General who led the various Justice Department Divisions. Tr. 412 (Rosen). They managed to get all but one of the Assistant Attorneys General on a 4:30 pm call. Tr. 167-68 (Donoghue). During the call, Mr. Donoghue explained the situation, and that Mr. Clark wanted to send the letter that Mr. Rosen and Mr. Donoghue did not believe was accurate; he told the Assistant Attorneys General that the did not need to decide how they would react, but asked, if they did decide, that they let Mr. Donoghue

know. Tr. 168-69 (Donoghue). All of the Assistant Attorneys General said they were going to resign if this happened. Tr. 169-70 (Donoghue).

161. At 6:00 pm, as Mr. Rosen was leaving for the White House meeting, he told Mr. Donoghue that he needed him there at least to sit outside in case there were questions Mr. Rosen could not answer. Tr. 170 (Donoghue). Mr. Donoghue went to the White House and initially sat on a couch down the hall from the Oval Office. Tr. 170-71 (Donoghue). Chief of Staff Meadows came out of the meeting and about 25 minutes later an administrative assistant checked and told Mr. Donoghue the President wanted him in the meeting. Tr. 171 (Donoghue); *see also* Tr. 289-91 (Philbin) (President Trump asked that Mr. Donoghue be brought in and often wanted to hear debate on conflicting views).

162. The other attendees at the meeting were White House Counsel Cipollone, Deputy White House Counsel Philbin, Senior Advisor to the President Hershmann, Mr. Rosen, Mr. Clark, and the Assistant Attorney General for the Office of Legal Counsel Engel. Tr. 172 (Donoghue), 284-85 (Philbin). During the meeting, the President said that Mr. Rosen and Mr. Donoghue had failed to do their job, but was not advocating one way or the other on whether to have Mr. Clark replace Mr. Rosen. Tr. 172-73 (Donoghue).

163. Everyone else at the meeting, however, opposed having Mr. Clark replace Mr. Rosen as Acting Attorney General and opposed sending the letter. Tr. 173 (Donoghue), 285 (Philbin), 413-14 (Rosen).

164. Mr. Rosen and Mr. Donoghue said that they had done the investigations and the interviews, searched everything they ought to, and the evidence did not pan out. Tr. 173 (Donoghue). People had been telling the President things that were not true for some time. Tr. 173-74 (Donoghue).

165. Mr. Cipollone and Mr. Philbin said that sending the letter was a terrible idea and that it would undermine confidence in the President's Administration. Tr. 174 (Donoghue). Mr. Cipollone called the letter "a murder-suicide pact." *Id*.

166. Mr. Hershmann said that Mr. Clark would never be able to do what he says he can do and pointed out that "Mr. Clark was basically saying that he was going to conduct these large-scale nationwide investigations in record time within a few days and he was going to uncover significant fraud that was going to completely change the election, and that was completely unrealistic . . . ." *Id.*

167. In response, Mr. Clark expressed that he would conduct "real investigations [that] needed to be done," without identifying any specific investigations or set of allegations he thought were worth investigating. Tr. 415 (Rosen).

168. At one point, President Trump asked "What do I have to lose, if I put this guy in, at least he can give it a shot." Tr. 175 (Donoghue). Mr. Donoghue responded that the President had a lot to lose because he was looking at mass resignations in the Justice Department. *Id*. Mr. Donoghue said that all of the Assistant Attorneys General were going to resign – people who the President chose

and who believed in the administration. *Id*. He added that President Trump was going to lose a lot of the United States Attorneys. *Id*.

169. White House Counsel Cipollone said that he would resign. Tr. 176-77 (Donoghue), 286 (Philbin). Mr. Hershmann said "see, this is a disaster, . . . [n]o good will come of this." Tr. 176-77 (Donoghue). Mr. Philbin also said he could not countenance sending the letter and did not want to be in the White House any longer participating in that. Tr. 286-87 (Philbin); *see also* Tr. 417-18 (Rosen).

170. The President said to Mr. Engel words to the effect that "Steve, there's all this talk of resignation, you wouldn't resign, you've been here the whole time." Tr. 419 (Rosen). Mr. Engel told the President that he had been in place since the beginning of the administration but that he "couldn't stick around for this." Tr. 176 (Donoghue). He would resign. Tr. 176 (Donoghue), 419 (Rosen). Mr. Donoghue and perhaps Mr. Engel predicted that others in the Justice Department would resign as well, including the Solicitor General and the Principal Deputy Associate Attorney General. Tr. 419 (Rosen).

171. Mr. Clark responded with words to the effect of "well, you know, if we have to suffer some resignations, so be it, you know, we'll get the job done." Tr. 177 (Donoghue).

172. It was a very intense discussion. People raised their voices and used impolite conversation. Tr. 174 (Donoghue). The meeting lasted for about two-and-a-half hours. Tr. 177 (Donoghue), 413 (Rosen). In the last fifteen minutes or so, the

President had clearly made up his mind and said that this is not going to be worth "the breakage." Tr. 177 (Donoghue).

173. At that point, Mr. Clark began imploring the President to reconsider. Tr. 177-78 (Donoghue). He said expressed that "history is calling, we can do this, we can get it done, just put me in charge, I'll get it done." *Id.* Then the President "sort of doubled down," and said "no, I've already said I'm not going to do it." Tr. 178 (Donoghue); *see also* Tr. 215-16 (Donoghue) (the letter was never sent because the President overruled Mr. Clark's request); Tr. 287-88 (Philbin) (the President determined that the letter would not be sent and that was the end of it).

174. At about 11:00 pm that night, President Trump called Mr. Donoghue and told him he had heard that the Department of Homeland Security had impounded a truck in Georgia that might have contained fraudulent or shredded ballots. Tr. 178 (Donoghue). Mr. Donoghue told President Trump that he would let Homeland Security Secretary Cuccinelli know; and he did that. Tr. 178-79 (Donoghue).

E. <u>Mr. Clark's Fact Witnesses</u>

175. Mr. Clark did not call any live witnesses who had personal knowledge of Mr. Clark's conduct between November 3, 2020 and January 3, 2021. The only witness who had some knowledge of what took place was Representative Scott Perry. However, Mr. Clark submitted Representative Perry's testimony through a brief and general declaration, with no specifics on the exchanges that occurred between them or exchanges Mr. Perry had with the White House or with others at the Justice Department. RX 3000. Although we admitted this declaration in

evidence, we do not believe it has any significant probative value and provides no basis for disputing the evidence presented during Disciplinary Counsel's case.

176. Instead, Mr. Clark presented testimony from several witnesses with information about possible violations of election laws or practices, including some who testified about risks of election results being tampered with generally (without evidence that tampering actually occurred) or other irregularities. There is no evidence that Mr. Clark spoke personally with these witnesses during the time between the November 3, 2020 election and January 3, 2021.

Susan Foster Voyles

177. Susan Foster Voyles was a poll manager who (in addition to a regular day job) worked in connection with polling during election season in Fulton County, Georgia for twenty years. Tr. 543-44 (Voyles). During her work on the 2020 election she saw a number of problems. *See generally* Tr. 545-74 (Voyles). Some voting machines arrived missing seals, and when she reported this, her supervisor told her this was not a problem. Tr. 547-48 (Voyles). (She, however, took the machines out of service anyway as she had seen done for twenty years.) Tr. 548 (Voyles).

178. Poll pads were incorrectly programmed for the precinct in which she worked and the technical support workers were able to have them fixed remotely, even though the polling place was (as a security feature) not supposed to be accessible by Wi-Fi. Tr. 548-56 (Voyles). Ms. Voyles observed ballots that were not maintained in a way that showed the chain of custody or maintained in boxes

with seals that would reflect tampering if that occurred. Tr. 557-64. Ms. Voyles saw one batch of absentee ballots that had 110 ballots, rather than 100, as it should have, with another 107 completed in the same way, with ballots that had never been folded as they would when submitted in an absentee envelope. Tr. 565-58. She was told that these were adjudicated ballots – meaning a ballot that had been torn while being opened – but they did not have the torn ballots stapled to them as they should under the procedures. Tr. 568-69 (Voyles). When Ms. Voyles left the first day, there were many pallets of ballots yet to be counted, but when she arrived the second day, the room was almost empty, and the few ballots left were counted quickly. Tr. 568-74 (Voyles).

179. Ms. Voyles testified before the Subcommittee Senator Ligon chaired and attests that Chairman Ligon's Report accurately summarized her testimony as well as that of the other witnesses who appeared at the hearing. Tr. 574-76. After this testimony and submitting an affidavit in another proceeding, she was aggressively interviewed by an investigator for the Georgia Secretary of State's Office. Tr. 577-78, 580-81 (Voyles). "[H]e was asking the same questions over, and over, and just turning it, just a little bit, to the place I was having to say, sir I've already answered that, or sir, that is in my affidavit . . . ." Tr. 578 (Voyles). In advance of the January 5 Senatorial run-off election, she received a letter from Fulton County Elections, thanking her for her years of service and telling her she would no longer be needed. Tr. 577-81 (Voyles).

180. Ms. Voyles was a sincere and credible witness about the matters she observed. Although there may have been violations of election law and procedure, the evidence does not establish to what extent, if any, these possible violations involved an actual attempt to influence the outcome, and to what extent any affected the actual count in the election or in which direction.

181. Mr. Clark had access to the summary of some of Ms. Voyles testimony in Chairman Ligon's Report. RX 42 at 6-7. However, there is no evidence or reason to believe that Mr. Clark ever spoke to her or attempted to speak with her either at the time he was drafting the Proof of Concept or urging that it be sent.

Andrew Richard Kloster

182. Mr. Kloster is currently the General Counsel for United States Representative Matthew Gaetz. Tr. 932-33 (Kloster). He has been barred in New York since 2011 and has worked as a legal fellow at the Foundation for Individual Rights in Education, then spent four years as a fellow at the Heritage Foundation, and then clerked for Judge Daniel Manion on the United States Court of Appeals for the Seventh Circuit. Tr. 933-34 (Kloster). He was the Associate General Counsel at the United States Department of Transportation from 2017-19, then, after a year teaching at George Mason's law school, began working for the Environmental Protection Agency as the Deputy Associate Administrator for Policy. Tr. 934 (Kloster). He then served on a detail in the White House Office of Presidential Personnel, and beginning in 2020 through the end of the Trump Administration, he was also Deputy General Counsel and later Acting General Counsel of the United

States Office of Personnel Management. *Id.* After the Administration ended, he worked with Compass Legal Group doing nonprofit tax work and started working in the House of Representatives in February 2023. Tr. 934-35 (Kloster).

183. While at the White House beginning in 2020, Mr. Kloster received information on election integrity issues beginning in March or April 2020, and in earnest in October 2020. Tr. 935 (Kloster). He had contacts at the Justice Department at the Civil Rights Division and in the Office of the Attorney General and Deputy Attorney General to whom he forwarded information he had received and vetted on election allegations. Tr. 936-37 (Kloster).

184. While at the Heritage Foundation, Mr. Kloster had contact with William Levi, who was then counsel to Senator Mike Lee and later became Chief of Staff to the Attorney General. Tr. 938-39 (Kloster). In October 2020, Mr. Kloster contacted Mr. Levi and Maureen Riordan about a public report that a woman had been arrested in Muskegon County, Michigan for idling outside of a drop box with a large number of ballots. Tr. 939-41 (Kloster). The junior officer who had arrested her had released her and by the time a senior officer came in to question the release, she was in Detroit, which refused an intrastate extradition request. Tr. 940 (Kloster). Mr. Kloster never heard back from Mr. Levi; and Ms. Riordan told him that she had put in a request to her superiors at the Civil Rights Division to interview the officer in charge, but that request was denied. Tr. 941-42 (Kloster). He later heard through others that the White House Counsel had received an angry phone call about Mr. Kloster "porting over [the] information for a look-see." Tr. 942-43.

185. There is no evidence that Mr. Clark was aware of this incident, or what the specific concerns were from the Justice Department.

Matthew Lewis Gaetz II

186. Matthew Lewis Gaetz II is a Member of the United States House of Representatives representing Florida's 1st Congressional District in the northwestern panhandle of Florida. Tr. 945 (Gaetz).

187. In summer 2020, Representative Gaetz heard that the supervisor of elections in Leon County was concerned that a political group started by Andrew Gillum had been requesting vote-by-mail ballots without actual voters making the requests. Tr. 945-46. Representative Gaetz raised the information with United States Attorney, Larry Keefe, a friend and former colleague. Tr. 946-47 (Gaetz).

188. Mr. Keefe told Representative Gaetz that Attorney General Barr was standing in the way of resourcing investigations to develop evidence and prohibiting the work. Tr. 947-48 (Gaetz).

189. Representative Gaetz took up the issue with colleagues on the floor of the House, including Representative Scott Perry, complaining that Attorney General Barr could not possibly be truthful in saying to the media that there was no fraud because he was inhibiting the work. Tr. 948 (Gaetz). Representative Gaetz pled directly with President Trump to "kick Bill Barr in the ass" and resource the investigations. Tr. 949 (Gaetz). Representative Gaetz acknowledged that he concluded Attorney General Barr was inhibiting the Department's work based on

the one conversation with Mr. Keefe in the summer of 2020 (prior to the election period), and "that he didn't see the work occurring." Tr 950-51 (Gaetz).

190. There is no evidence that Representative Gaetz spoke with Mr. Clark about this concern or that it was conveyed to Mr. Clark in any way.

Mark Wingate

191. Mark Wingate served on the Fulton County, Georgia Board of Registrations and Elections from July 1, 2017, to June 30, 2023. Tr. 1021 (Wingate). In that capacity, he was called on to vote on whether to certify the results of the 2020 Presidential election in Fulton County based on the statements of the election director. Tr. 1021-22 (Wingate). In 2020, he was asked to vote on two certifications for the Presidential election and in both instances voted "no." Tr. 1023 (Wingate).

192. Mr. Wingate identified several reasons for his votes. First, he explained that in 2020, "we were all dealing with this so-called thing called COVID," that "wreaked havoc . . . not only on the Fulton County election department, but . . . election departments across the state and probably across the nation." Tr. 1024. Before the election, he did what he referred to as "fairly simplistic research" that led him to understand that in Fulton County there were more voters on the active voting roles than there was population and then extrapolating for those of voting age. Tr. 1025 (Wingate). He testified that "there was nothing done to answer [his] questions." *Id.*

193. Second, after the election and before the certification votes, Mr. Wingate and other Board members requested chain of custody documents (reflecting

how absentee by mail ballots and memory cards, were received and transported), Tr. 1025-28, and surveillance tapes maintained of dropboxes. They did not receive any of this documentation by the time of certification. Tr. 1025-30 (Wingate).

194. Third, people saw on television a surveillance tape showing ballots underneath a table at the State Farm Arena. Tr. 1030-31 (Wingate). Mr. Wingate raised this issue, but received no explanation. Tr. 1031.

195. Fourth, the electronic signature verification system was not working, and Mr. Wingate was told that Fulton County officials did not do any signature verification. Tr. 1031-35 (Wingate). On direct examination, Mr. Wingate testified that this "floored" him because the law requires signature verification. Tr. 1034-35. On cross-examination, Mr. Wingate acknowledged that the minutes (which he and the rest of the Board of Registration and Elections later approved) quoted him as expressing concern only about the electronic system and saying that the absentee ballots were processed manually. Tr. 1043-44, 1047-49.

196. Mr. Wingate and the other Republican on the Board of Registration and Elections voted not to certify the Presidential election vote in Fulton County. Tr. 1035 (Wingate). The two Democrats and the independent/non-partisan chair voted to certify. *Id*.

197. There were 147,000 absentee votes in Fulton County and Mr. Wingate was never told how many were sent back to try to cure for lack of signature or otherwise. Tr. 1037-38 (Wingate).

198. Mr. Wingate was not interviewed about the absentee ballot signature verification by the Georgia Secretary of State, the Georgia Bureau of Investigation, the Federal Bureau of Investigation or the United States Department of Justice. Tr. 1038-39 (Wingate).

199. On cross-examination, Mr. Wingate acknowledged that he did vote to certify the other elections that were on the same ballot and that at the time he voted, he knew that the vote would be 3-2 in favor of certification and so he voted "no" knowing that it would not cause there to be no vote certified from Fulton County. Tr. 1044-45.

200. Mr. Wingate stated that he never met nor spoke to Jeffrey Clark. Tr. 1058-59.

201. Mr. Wingate also stated that he does not know what Georgia would do if the Fulton County vote had not been certified except that it would go the Secretary of State's Office. Tr. 1060. He respected the position of those who disagreed with him and testified that COVID created problems with the operation of the election. Tr. 1060-63.

Heidi Hiltgen Stirrup

202. In November 2020, Heidi Hiltgen Stirrup was the White House liaison to the United States Department of Justice. Tr. 1066 (Stirrup). Ms. Stirrup was responsible for political appointments at the Justice Department and reported to political appointees at the Justice Department (beginning with the Attorney General and Chief of Staff) and to Spencer Chretien in the Office of White House Personnel.

Tr. 1067 (Stirrup). Before moving to the Justice Department in October 2020, Ms. Stirrup was the Deputy White House liaison to the Department of Health and Human Services. Tr. 1067-68 (Stirrup).

203. Ms. Stirrup was concerned about the election because, as she recalls, the night of the election President Trump was ahead by something like 800,000 votes and the next morning the election was declared for Joe Biden, so she wondered what happened. Tr. 1068-69 (Stirrup).

204. As "a political appointee" Ms. Stirrup "felt free to talk to another political appointee about a political question, being the election." Tr. 1069 (Stirrup). On Monday, November 9, 2020, she spoke with Attorney General William Barr's Chief of Staff William Levi about what was going on to look into irregularities and fraud about the election, because of reports coming forward. Tr. 1069-70 (Stirrup).

205. Mr. Levi said that they had been looking into every allegation of fraud that was brought to their attention and that "everything that they had looked into turned out to be nothing" and that the Justice Department would do everything it legally could do to look into allegations. Tr. 1070, 1078 (Stirrup). Mr. Levi said that he had spent the weekend working on a memorandum giving further direction to the United States Attorneys to pursue allegations. Tr. 1070-71 (Stirrup).

206. Ms. Stirrup then reiterated her concerns about irregularities and possible fraud and wanted to know specifically what the Department had done. Tr. 1071 (Stirrup).

207. Mr. Levi became "very agitated and exasperated" at her questions, and asked her if she wanted to speak directly with the Attorney General. Tr. 1071 (Stirrup).

208. Ms. Stirrup said "sure." Tr. 1071 (Stirrup). She viewed herself as a "political appointee . . . wanting to hear from" other political appointees about how "they answer the allegations that are swirling around in the public domain about these irregularities." *Id.* And so they arranged a meeting with both Attorney General Barr and Mr. Levy for 4:00 pm or so. *Id.*

209. At the meeting, Ms. Stirrup asked the Attorney General to tell her whether or not the Justice Department was conducting investigations into the election, and was surprised to learn that there was not a federal role in elections. Tr. 1072 (Stirrup). The Attorney General left her with the impression that the Justice Department could not look into potential fraud, but added that that an investigation would take up to two years or longer and would not have the effect of overturning the election. Tr. 1072-73 (Stirrup). She was not necessarily interested in overturning the election, but was interested in learning "that everything and anything that could be done to look into these allegations of fraud" was done. Tr. 1073 (Stirrup).

210. However, she did think that the memo Mr. Levi discussed "was something." *Id.* That evening she received the Attorney General's November 9, 2020 Memorandum. Tr. 1074; RX 559. She thought it was helpful and that the United States Attorneys now had instructions that they could pursue allegations and investigate potential fraud and irregularities. Tr. 1074-75 (Stirrup).

211. Ms. Stirrup did not have any conversations with Mr. Rosen, Mr. Donoghue or Mr. Clark about election issues. Tr. 1075 (Stirrup).

212. Although we take at face value Ms. Stirrup's statement that she understood Attorney General Barr to be saying that there was no federal role in investigating fraud, it is likely that there was either a miscommunication between them or Ms. Stirrup is mis-recalling details from a conversation that took place over three years ago. Mr. Levi had told Ms. Stirrup that the Justice Department had already been investigating election allegations, Tr. 1078 (Stirrup), and the November 9, 2020 Barr Memorandum clearly identifies a federal role in conducting investigations through the United States Attorneys, and other law enforcement portions of the main Justice Department. RX 559; Tr. 1079-83 (Stirrup). It is extremely unlikely that Attorney General Barr would think or have told Ms. Stirrup that the Justice Department had no role in investigating election fraud a few minutes or hours before he sent the Memorandum saying otherwise. It is more likely that Attorney General Barr stressed that the federal role was limited and did not apply to all allegations of irregularities, but in this non-civil rights context, apply to only fraud that might rise to federal criminal prosecution.

Heather Honey

213. Ms. Honey is self-employed but is also the executive director of the Election Research Institute. Tr. 1545-46 (Honey). She has been an investigator for thirty years and has trained people in open source intelligence. Tr. 1546 (Honey).

214. She became interested in the 2020 election because it was the first year that Pennsylvania (where she lives) used no-excuse mail voting and this created issues, including at her own precinct. Tr. 1547 (Honey). At her voting location, Ms. Honey saw an elderly couple in front of her; when the wife attempted to sign in, she was told that she had already voted by mail and she insisted that she had not. Tr. 1548 (Honey). Since then, her main focus has been on Pennsylvania, Arizona and Georgia. *Id.*

215. Ms. Honey testified that Pennsylvania law requires county boards to certify the vote for each precinct and that the SURE system must contain a record of everyone who voted. Tr. 1549-50. Absentee ballots cannot be opened until they are scanned into the SURE system. Tr. 1550-51 (Honey). From following the SURE database each week, Ms. Honey reached the conclusion that the majority of counties certified their vote after reconciling it. Tr. 1551-52 (Honey). But, about a dozen certified before and had discrepancies. Tr. 1552 (Honey).

216. Ms. Honey testified that as of December 21, 2020, the discrepancy was 205,000 votes, as 63 out of 67 counties had closed out their election, but over time the discrepancy decreased as additional information was released. Tr. 1557-59. There is, however, still some discrepancy to this day. Tr. 1559-60 (Honey). Her report on this was posted on her organization's website on February 10, 2022. Tr. 1561-62 (Honey); *see also* RX 566 (reporting in December 2020 that the claimed discrepancy was false and relied on failure to take into account four counties whose votes had not been included in the SURE system).

217. There is no evidence that Ms. Honey spoke with Mr. Clark, or the Justice Department about elections prior to January 3, 2021.

Scott G. Perry

218. At the close of liability testimony, Mr. Clark submitted a Declaration from Representative Scott G. Perry. RX 3000. Representative Perry declares that he has represented Pennsylvania's Fourth and later Tenth Districts since 2013, *see id.* ¶ 1, and before that was in the military for nearly forty years rising to the rank of Brigadier General and Assistant Division Commander of the 28th Infantry Division. *Id.* ¶ 2.

219. Representative Perry declares that he voted not to certify Pennsylvania's electoral votes, states that allegations of fraud had widely circulated in the media, *id.* ¶ 3, and that efforts by the "opposing party," to impose "questionable measures," caused "considerable suspicion that the election had been compromised." *Id.* ¶ 4.

220. Representative Perry also declares that following the election he met with President Trump and Jeffrey Clark and "discussed [their] sincere concerns about the integrity and fidelity of the election and how those concerns were being addressed. President Trump actively participated in the discussion, and shared the concerns he and many others had about the election." *Id.* ¶ 5.

221. Finally, Representative Perry states "Mr. Clark conducted himself honorably during that meeting and the other conversations we had about election integrity concerns. He did not in any way propose or suggest that he or anyone else

engage in any impropriety or unethical, illegal, or immoral conduct. He conducted himself appropriately under the unusual circumstances our nation was confronting at that time." *Id.* ¶ 6.

222. Disciplinary Counsel objected to the admission of Representative Perry's declaration without opportunity for live testimony and cross examination. Tr. 1765-69. Although we do not agree with all the statements Disciplinary Counsel made in connection with that objection, and admitted the declaration for what it is worth, we also noted that the declaration is of very limited value. Tr. 1770-71.

223. Representative Perry would have been a material witness to this proceeding. He could have provided information on which we received no first-hand testimony about discussions to which Mr. Donoghue, Mr. Rosen and Mr. Philbin were not party; the genesis of the Proof of Concept letter; how Mr. Clark came to be involved; and what information the President shared with Mr. Clark in meetings that (by virtue of Mr. Perry's presence) could not reasonably have been subject to a claim of attorney-client privilege.

F. Mr. Clark's Expert Witnesses

E. Donald Elliott

224. E. Donald Elliott is currently a partner at Earth & Water Law, a DC-based law firm, an adjunct (meaning formerly tenured) professor at Yale Law School, and a distinguished adjunct professor at Antonin Scalia School of Law. Tr. 684 (Elliott). He graduated from Yale College in 1970 and graduated first in his class from Yale Law School in 1974. Tr. 684-85 (Elliott). After clerking for Judges

Gerhard Gesell at the United States District Court for the District of Columbia and David Bazelon, Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, he worked for a law firm in the District of Columbia before joining the faculty at Yale Law School in 1981. Tr. 685-66 (Elliott). He also served for two years, 1989-91, as General Counsel and Assistant Administrator of the Environmental Protection Agency and in that capacity served as ethics officer. Tr. 687-88 (Elliott). Among other classes, he has taught ethics at Yale Law School. Tr. 690-91 (Elliott).

225. Mr. Elliott considers himself particularly an expert in administrative law. Tr. 692. And although he was permitted also to testify as an expert on ethics, his information in that area is limited. He testified that he was not familiar with any District of Columbia Court of Appeals opinion on Rule 8.4, Tr. 703-04, and did not cite the rule in his report. Tr. 707. He testified that, although he was familiar with concept of reckless dishonesty in the context of Rule 8.4, he was not familiar with it from any District of Columbia Court of Appeals Opinion. Tr. 704-05. Instead, he based his analysis on what obligations would exist under Rule 3.1 involving meritorious contentions to a tribunal. Tr. 722-24 (Elliott).

226. Although called by Mr. Clark, Mr. Elliott testified that he did not believe it was a good idea to send Mr. Clark's letter and would have sided with Mr. Donoghue, Mr. Rosen and Mr. Engel in opposing it. Tr. 709.

227. Mr. Elliott opined that administrative agencies benefit from having differing perspectives that challenge orthodox views, because that leads to better

decision-making and that even false ideas contribute to the debate. Tr. 695-96, 709-15. There is a risk that agencies will make decisions based upon conventional wisdom and there is a benefit to challenging it. Tr. 719-20 (Elliott).

228. Mr. Elliott believes that under comment 2 to Rule 3.1, if Mr. Clark sincerely believed there was something wrong with the election, Mr. Clark's ethical obligation would be merely to investigate the facts to determine if the belief was non-frivolous and if it would be reasonable to raise arguments with a tribunal "as long as there [is] some support for them." Tr. 723-24. The standard for finding that positions taken in internal discussions violate the standards of Rule 3.1 would be higher. Tr. 721-24, 747-51 (Elliott).

229. Applying Rule 3.1, Mr. Elliott testified that two facts led him to believe that Mr. Clark met this standard. First, Mr. Elliott opined that, an article that was not moved into evidence, RX 186, has been "misconstrued and misinterpreted." Tr. 734-35. He urged that the article reported Attorney General Barr as saying that the investigations "to date" had not shown criminal fraud, and this suggests that further investigation is necessary. *Id.* Second, he noted that Mr. Clark's Proof of Concept letter, DCX 8, stated that it was "predecisional and deliberative attorney-client or legal work product," and as originally drafted, contemplated that Acting Attorney General Rosen and Mr. Donoghue would sign the letter as well as Mr. Clark. Tr. 736-39.

230. Mr. Elliott testified that his view would be different if the letter had been sent, depending upon whether or not it was supported, Tr. 711, 721, and while

there would, in his opinion, be "adequate evidence to support at least the allegations of possible fraud," he is concerned about "some of the adjectives" describing how widespread it was and whether it would have affected the election. Tr. 739. Under academic literature, he considers the question of whether there were instances of irregularities to be "adjudicative facts" (like questions of "who struck John") and the questions about whether it was widespread or whether it affected the election to be "legislative facts" and a different standard applies to them. Tr. 739-41.

231. Mr. Elliott also added that he would have strongly opposed sending the letter. Tr. 752; *see also* Tr. 709, 741-42 (Elliott). Mr. Elliott does not believe it is appropriate for the Justice Department to "jawbone a state" about what it should do with its activities, Tr. 752, and would have opposed it even if it the letter did not seek the "extraordinary action" of recommending a state schedule a special legislative session to consider changing an election. Tr. 752-54. He also does not believe it would be appropriate to share the status of Justice Department investigations with state officials. Tr. 743. He also found it "troubling" that Mr. Clark did not speak with the United States Attorney in Atlanta or explain why he did not, and although Mr. Elliott believes it still passes muster as "not frivolous" under Rule 3.1, he believes that "if the letter had been sent," he would have analyzed the circumstances "differently." Tr. 762-63.

232. Mr. Elliott also is unsure whether it was "a step too far" for Mr. Clark to say to Mr. Rosen that unless Mr. Rosen agreed to send the letter, Mr. Clark would accept the position of Acting Attorney General and take Mr. Rosen's job. Tr. 751.

He considers it to be an "inappropriate threat," although not necessarily the basis for Bar Discipline. Tr. 771. "I haven't reached a conclusion on that." Tr. 751 (Elliott).

233. Mr. Elliott also disagreed, at least initially, with Mr. Clark that President Trump was his client. Tr. 773. He initially said that the client is the Department of Justice and the American people, not necessarily the occupant of the Office of the President, and it is "troubling" when "the incumbent president is also a candidate for office." Tr. 773-74. He then said that he does not agree that the Department of Justice was the client, but thinks the client was the executive branch of the government at a whole." Tr. 774-76. Then, he said he was "unaware" as he sat there of what the D.C. Rules of Professional Conduct say as to who is the client of a government lawyer. Tr. 777. Later, he added that he thinks Advisory Opinion 323 is relevant to the issue because it allows CIA lawyers to be dishonest if their job requires it. Tr. 778-79.

234. Mr. Elliott's testimony was of some assistance in some ways, but of limited value in others.

235. One limitation is that the testimony focuses on what is not in dispute rather than what is. Much of Mr. Elliott's testimony is directed to whether it was unethical for Mr. Clark to draft the Proof of Concept letter for Mr. Rosen and Mr. Donoghue's consideration. He concludes that it was not, stressing, for example that the letter was predecisional and, as originally drafted, contemplated that it would be sent only if Mr. Rosen and Mr. Donoghue also signed it. Tr. 737-39 (Elliott).

236. But Disciplinary Counsel does not dispute this point. At the outset of the proceeding, Disciplinary Counsel declared:

> ***Had Respondent merely suggested sending the so-called "Proof of Concept" letter to various Georgia officials, this case would not have been brought. It is generally not a disciplinary violation to make a stupid suggestion***. Rather, these charges arise from Respondent's conduct after he proposed sending the letter and was informed by his superiors that there was no factual basis for the claims made in it—most significantly that there was no evidence of fraud in the 2020 presidential election that might have affected to results in Georgia. The Department lawyers who were familiar with the investigations into election fraud told Respondent that there was no such evidence and attempted to put him in touch with the United States Attorney who had conducted the Georgia investigation. Respondent did not follow up with the U.S. Attorney. Nevertheless, he persisted in attempting to persuade and then coerce his superiors to send the letter asserting the false information, and when they still refused to do so, attempted to have himself appointed Acting Attorney General based upon his assurances to the President that if he were so appointed, he would send the letter.

ODC's Omnibus Response to Respondent's Sept. 1, 2022 Pleadings, Sept. 6, 2022, at 2-3 (emphasis added); *see also* Tr. 716.

237. The fact is, that by January 2, 2021, Mr. Clark was no longer seeking Mr. Rosen's or Mr. Donoghue's consideration. He was telling them that he would take over as Acting Attorney General unless they signed.

238. As Mr. Elliott recognizes, these facts present a different issue. He opined that Mr. Clark's "inappropriate threat," Tr. 771-73, on January 2, 2021, might be a "step too far," Tr. 751, and he would have "strongly opposed" sending the letter. Tr. 752; *see also* Tr. 709, 741-42, 752-53 (Elliott).

239. Mr. Elliott's (less than certain) suggestion that even these steps might not be enough to constitute an ethics violation, is not persuasive because it does not analyze the Rule that is at issue. Rule 3.1 is not at issue in this case, and, while some of his points may inform our analysis, we are bound by a body of case law interpreting Rule 8.4. As discussed below, this case law does not limit a lawyer's obligation merely to avoiding "frivolous," arguments. As discussed below, lawyers can and have been disciplined under Rule 8.4(c) for reckless dishonesty for disregarding the risk created by the attorney's actions.

240. Indeed, the fact that he was unfamiliar with case law under the Rule that does apply here seriously detracts from the strength of his opinion. And, Mr. Elliott's suggestion that nothing short of actually sending a dishonest letter could violate the ethics rules is contrary to Rule 8.4(a), which does make attempted dishonesty a violation of our rules.

241. Nor can we accept Mr. Elliott's premise that, so long as anyone alleges any irregularity that might have affected the vote at any level it is simply a matter of opinion ("legislative fact") whether those irregularities "may have" affected the outcome of the election. That assertion requires that there be a basis for it.

John R. Lott, Jr.

242. John R. Lott, Jr. is the President of the Crime Prevention Center. Tr. 792 (Lott). The Center conducts research into various types of crime including election fraud. *Id.* Dr. Lott has a PhD in Economics from UCLA. Tr. 792-93 (Lott). Previously, he held research and teaching positions at Stanford, Yale, the University

of Chicago, UCLA and Rice and, was the Chief Economist for the United States Sentencing Commission and, during 2020 and the beginning of 2021, a senior advisor for research and statistics in the Justice Department Office of Justice Programs and Office of Legal Policy. Tr. 793-94 (Lott). He has also published over 100 peer-reviewed articles, and another 30 book chapters and other things, and spoken at professional conferences over 400 times. Tr. 794-95 (Lott). Since the 1980s, he has published papers on elections, Tr. 798 (Lott), although not all of which discussed vote fraud. Tr. 805-08 (Lott). While he was an advisor at the Justice Department, he wrote an unpublished paper statistically analyzing aspects of the 2020 election. Tr. 800-02, 808-10 (Lott); RX 500. He has previously testified in court about 10 times. Tr. 802-03 (Lott).

243. Dr. Lott was permitted to testify as an expert in statistics, economics, and public choice, to discuss his analysis of voter fraud set forth in RX 500. Tr. 803, 810 (Lott).

244. Dr. Lott conducted a study that concluded on December 21, 2020 that compared the number of absentee voters in 2016 and 2020 in border precincts in counties where "fraud was alleged to have occurred" to those precincts across the border in a different county. Tr. 814-17 (Lott). The point of the comparison was to perform a simple preliminary test to determine what might warrant further study to analyze county-to-county differences. Tr. 844-47 (Lott). The premise of the test was that, while in-person ballots are counted at the precinct level in Georgia, absentee ballots were counted at the county level. Tr. 817 (Lott). He found there

was more of an increase in absentee voting, in, for example, the border precincts in Fulton County than the precincts that abutted them in other counties, Tr. 817-18 (Lott), and that Joseph Biden received more of the absentee ballots than Hillary Clinton did in 2016 and a larger percentage of the 2020 absentee ballots in Fulton County precincts than in the precincts abutting them in other counties. Tr. 826-28 (Lott). He concluded that this warranted further investigation. Tr. 818-21 (Lott). His impression was that the research was brought to the attention of the Acting Attorney General at the time. Tr. 821-24 (Lott).

245. Dr. Lott did not discuss his analysis with Mr. Clark at the time, but had the impression from talking with Mr. Clark recently that he had read it in December 2020. Tr. 825, 847 (Lott).

246. Dr. Lott's analysis focused only on counties in which Republicans had alleged fraud; he was not aware of any in which Democrats alleged fraud. Tr. 828-32 (Lott). His analysis does not identify in which county (Fulton or the neighboring counties), the difference might have occurred. Tr. 828-29, 849-50 (Lott).

Sidney Stanley Young

247. S. Stanley Young is a consultant on matters related to statistics. Tr. 869 (Young). Dr. Young has a PhD in statistics and genetics from North Carolina State University. *Id.* He worked for Eli Lilly and GlaxoSmithKline and then at the Institute of National Statistics in the Research Triangle before becoming a private consultant in 2004 or 2005. Tr. 869-70 (Young). He has written a book cited over

3,000 times on Resampling-Based Multiple Testing, and 60 or more publications. Tr. 870 (Young).

248. Dr. Young is a Fellow of the American Statistical Association and a member of the American Association for the Advancement of Science. Tr. 871-72 (Young). He taught introductory statistics at the college level early in his career and, since 2000 has co-led or mentored PhD thesis work for some students in statistics. Tr. 872 (Young). He and Dr. Eric Quinell signed affidavits filed on December 3 and 6, 2020 in *Pearson v. Kemp*, No. 1:20-cv-4809-TCB (N.D. Ga.). Tr. 872-74 (Young); RX 524, 538.

249. These affidavits are the first time that Dr. Young was involved with analyzing an election. Tr. 877-79 (Young). In the California bar discipline case brought against Mr. Eastman, Dr. Young was qualified as an expert on statistics, but not on how those statistics apply to election issues. Tr. 879-80 (Young).

250. We provisionally permitted Dr. Young to testify as an expert in this proceeding on the statistical analysis presented in Exhibits RX 524, 538, subject to further objection if his testimony went beyond his expertise. Tr. 874, 890-92 (Young).

251. Dr. Young analyzed data from Fulton County absentee balloting in the November 2020 election. Tr. 895 (Young). The first observation was the time stamps when ballots came in. Tr. 900-01 (Young). The main drops of data were November 4 and 5 with some additional ballots received for the next ten days. Tr. 901 (Young). He found it notable that the two data drops were almost exactly the

same size, and that although essentially all of the ballot data was in the hands of the counters on November 3, election officials segregated and dropped the Trump data on November 4 and the Biden data on November 5. Tr. 901-02; RX 524 at 3. Dr. Young's report offers "neither allegations nor hypotheses as to WHY the data sets exists in this unnatural state." RX 524 at 4.

252. Dr. Young testified that many forms of data distributions exhibit a bell curve, starting low, going to a peak and then going back down. Tr. 900, 905. He found it odd that the Trump data roughly had a bell-curve shape, but the Biden data did not have a normal (bell curve) distribution. Tr. 902-03, 905. If there is a data-generating process, one would expect both sets of data to follow the same distribution. Tr. 903-05 (Young); RX 524 at 9-15.

253. Dr. Young does not claim that there was election fraud. Tr. 908-09. Proving fraud would require a forensic analysis and there are other methods that people with different expertise could examine. Tr. 909-10 (Young).

254. Dr. Young was not familiar with the lawsuit in which his information was used. Tr. 913-15. He was directed to work on the project after the election results came in and while he did not ask whether all the participants voted for Mr. Trump, it appears that this was part of an effort to react to concern about the election being decided for Mr. Biden. Tr. 915-17 (Young). Dr. Young had been appointed during the Trump administration to a committee of statisticians at the Environmental Protection Agency; that committee was disbanded when President Biden assumed office. Tr. 917-18 (Young).

255. He is not familiar with election procedures in Georgia, including whether, for example, ballots received centrally are segregated in order to attribute them to particular precincts. Tr. 919-20. He also did not know whether party affiliation is randomly distributed across Fulton County, Tr. 921-23, or how many precincts voted for President Trump. Tr. 923-24. He does not know what procedures were used to count ballots and whether they might clump precincts in which people voted for one candidate or another. Tr. 924-27. He understands that there is a difference between when ballots are counted and when the information is posted. Tr. 927-29.

256. There is no evidence that Mr. Clark reviewed Dr. Young's affidavits. It is not clear what significance his analysis has. Ultimately, the testimony suggests that the reporting of votes for the two candidates did not take place at the same pace, and the reasons for that are unclear. It is not apparent that the counting would be expected to take place at the same pace in a process where ballots are separated by precincts that may have differing vote preferences. And it is clear that counting and reporting took place at different times. As a result, his testimony does not allow for a conclusion about whether there was a genuine problem with the counting of absentee votes in Fulton County, or the extent of the problem, or how it might have affected the results.

Shawn Alan Smith

257. Shawn Alan Smith retired as a Colonel in the United States Air Force after over 25-1/2 years of active duty and is now one of the officers of Cause of

America, which is a non-partisan, non-profit organization that supports grassroots efforts in the 50 states to pursue election integrity. Tr. 1087-88 (Smith). Colonel Smith received a bachelor's degree in political science from California State Polytechnic University at Pomona, and master's degrees in national security affairs from Embry Riddle Aeronautical University and in aeronautical science from the Naval Postgraduate School of Monterey. Tr. 1088 (Smith).

258. During his military career, Colonel Smith worked number of roles in cyber-defense analyzing threats to software systems used for, among other things, space weapons systems and Defense Department weather satellites. Tr. 1089-98 (Smith). Prior to November 2020, he had never done any work on United States election systems or procuring voting machines. Tr. 1103-09 (Smith). But he became interested in the field after the election and worked to analyze the Dominion Voting Systems Election system, based on his previous defense-related experience. Tr. 1109-14 (Smith).

259. Colonel Smith was accepted as an expert in cybersecurity broadly, the supply chain threat, assessment and mitigations in the context of the election systems used in Georgia in November 2020, the adequacy of the certification programs, and subsequent claims that this election was free of any threat. Tr. 1122-23.

260. Colonel Smith opined that in Georgia and across the nation our electronic and computerized and voting systems are effectively defenseless. Tr. 1123. People who defend weapons and other securities systems from attack act on the assumption that if a system is vulnerable to attack, it has been compromised

and cannot be used. Tr. 1124-27 (Young). In his experience in the military, he learned of threats from foreign governments, in particular China, to computerized systems, not only through hacking into completed systems, but by imbedding devices in the supply chain of component parts of computerized systems that could later be used to obtain access. Tr. 1124, 1128-30, 1135-36 (Young).

261. It is Colonel Smith's opinion that election systems in Georgia and across the country have not been protected from these types of supply chain vulnerabilities, and that the way in which they are designed do not provide that protection. Tr. 1131-35. He also believes that election infrastructure is an attractive target for foreign governments, and therefore must be assumed to be compromised. Tr. 1144-47. He therefore disagrees with any certifications that purport to say that cybersecurity of an electronic voting system, in general, or Georgia's in particular was safe from cyberattack. Tr. 1147-60. Accordingly, he believes that the possibility of a cyberattack in 2020 should be further investigated. Tr. 1166-71. He also stresses that key fobs, thermostats, or other devices could be used as a means for allowing a foreign power to alter election results without an apparent way to determine that it was done. Tr. 1171-91. He also opines that government standards are inadequate to prevent this. Tr. 1192-1207.

262. Colonel Smith has described himself on Twitter as not an "election denier," but an "election abolitionist." Tr. 1733-34 (Young). He does not assert that the 2020 Presidential election was determined by foreign interference, but rather that voting machines cannot be trusted – that we have no ability to protect our electronic

voting machines across the country from foreign interference and that, accordingly, we should stop using electronic voting machines entirely and instead rely on in-person paper ballots. Tr. 1734-38 (Young).

263. There is no evidence that Colonel Smith has ever spoken to Mr. Clark, or that Mr. Clark was aware of Colonel Smith's work during the time period before January 3, 2021.

Garland Favorito

264. Garland Favorito retired in 2017 after a 40-year career involving computer programming, systems analysis and design, data administration and identity management systems. Tr. 1211-13, 1240 (Favorito); RX 333, 334. Since 2002, he has been interested in Georgia's voting system and wrote papers and presented at conferences on how Georgia could better secure its elections. Tr. 1214-15 (Favorito). In 2006, he cofounded VOTERGA, which stands for Voters Organized for Trusted Election Results in Georgia. Tr. 1215 (Favorito). While Mr. Favorito was employed, he worked approximately ten to twenty percent of his time for VOTERGA; and he has been full time there since 2017. Tr. 1216-17 (Favorito).

265. VOTERGA pursues initiatives with legislators and government officials, among other things, to support a verifiable voting system that does not turn on QR codes voters cannot read; that makes ballots public records to assist detecting counterfeit ballots; that uses visible watermarks and chain of custody procedures; and that improves voter rolls. Tr. 1217-18 (Favorito). VOTERGA recently obtained legislative changes on a number of these issues for future elections in Georgia.

Tr. 1219-20 (Favorito). Mr. Favorito has frequently testified before the Georgia legislature about election security issues, presented a paper to the National Voting Rights Task Force, and authored recommendations to the Secure, Accessible & Fair Elections (SAFE) Commission recommending changes to Georgia's election security system. Tr. 1221-27 (Young); RX 336, 338.

266. Mr. Favorito has gained familiarity with Georgia's election system through his involvement in lawsuits challenging the system's security, and has spoken and reviewed documentation on that subject generally and the 2020 election in particular. Tr. 1227-36 (Favorito). He was also an audit monitor in Fulton County for the 2020 election. Tr. 1237 (Favorito).

267. Mr. Favorito's report was inaccurate in that he indicated that he testified as an expert in the *Eastman* case; he actually was not permitted to testify as an expert and cited the fact that he had not been "qualified" as an expert as a reason not to respond to some of the questions he was asked on cross-examination. Tr. 1253-61 (Favorito). Disciplinary Counsel also challenged the extent of his training or education. Tr. 1247-49, 1261-62 (Favorito). We have taken these points into account in evaluating his testimony, however, we concluded that he had sufficient experience to testify as an expert on the election systems used in Georgia and the conduct of the 2020 elections, including securities issues and the system used in Georgia. Tr. 1237-38, 1262, 1264-65.

268. Mr. Favorito opined that election integrity requires the ability to verify the votes, to audit them, to form a complete recount, and the ability to ensure that

the ballots are secure and not subject to hacking. Tr. 1265-66. In 2019, Mr. Favorito recommended that Georgia limit the use of ballot marking devices. Tr. 1269-71 (Favorito); RX 336. Mr. Favorito urged that, although these devices are necessary to provide disabled people access, they have created risks of rigging when used for general voters because they are not all designed to produce complete records of ballots that can be verified by the voter (as opposed to QR codes) and are, in some instances, designed as all-in-one units (containing a scanner and ballot marking device in one physical unit) that could make them susceptible to hacking. RX 336 at 3, 9, 11-13.

269. These issues were a topic of discussion before the election in other places, including in a ruling entered in *Curling v. Raffensperger*, 493 F. Supp. 3d 1264 (N.D. Ga. 2020), that had granted in part and denied in part motions for preliminary injunction concerning the systems Georgia was using and, in part, ordered changes to be made for the next election cycle. Tr. 1271-78 (Favorito); RX 57.[11]

270. Mr. Favorito testified that the centralized electronic system used throughout Georgia was not adequate to protect against cybersecurity threats and was vulnerable to malware that could be downloaded at a single point of attack.

[11] We admitted a copy of the decision, RX 57, as evidence of what the court decided. Tr. 1279-80. It has not been admitted for the truth of the factual findings in that case, which involved different parties, circumstances and a record that is not before us.

Tr. 1281-82. In his experience, the state Center for Elections Systems has been unresponsive to these concerns and risk-limiting audits as implemented by Georgia after the election do not suffice to protect against the weaknesses in the system and were themselves subject to a 60% error rate in the count with discrepancies in every county. Tr. 1282-90.

271. There are different security issues involving mail-in ballots, including the concern that uncreased mail in ballots were counted, and there could have been trafficking in ballots at drop box locations. Tr. 1295-1301 (Favorito). There was also evidence of voting system malfunctioning in Ware County (involving 37 votes shifted from Trump to Biden – an error that was caught in the audit) and Coffee County where in audits the system first overcounted 39 votes and then undercounted 146 votes. Tr. 1301-04 (Favorito).

272. Mr. Favorito also testified that Floyd County had 2,700 ballots that were stuck in adjudication and added that the technicians were not able to resolve why that happened, instead they were able to rerun the entire set and get the correct results. Tr. 1376-77. There was also an initial discrepancy of 17,000 in the batched loaded in the recount of Fulton County; the 17,000 votes were later located but, according to Mr. Favorito no one knows from where. Tr. 1380-83.

273. On cross-examination, however, Mr. Favorito agreed that, apart from Fulton County, each of these counties voted substantially for Mr. Trump, Tr. 1439-41, and Mr. Favorito was unsure whether the error in Floyd County initially benefitted Mr. Trump. Tr. 1441. When pressed on whether someone would be

manipulating machines to favor Mr. Trump in one place and Mr. Biden in another, Mr. Favorito explained that he was not saying that any one person manipulated the machines, just that there was an actual problem with the machines that warranted investigation. Tr. 1441-43. He also agreed that even a potentially serious vulnerability (like a failure to maintain a chain of custody) means that there was an *opportunity* to commit fraud, not that there *was* fraud. Tr. 1443-44.

274. Although we agree with Mr. Favorito that election errors are a concern, especially if they can be avoided, we also disagree with his testimony on the significance of these particular errors. Mr. Favorito asserted that, although these numbers look small, the vote in the counties were also small, if you assume that the same percentage of errors occurred in every other county (which he is not saying happened), it "would have changed the outcome of the race." Tr. 1304-05. We cannot, however, accept this assertion. It requires not only assuming (as does not appear to be true) that the same percentage of errors occurred in every other county, but that in *every county the error benefitted Biden and none benefitted Trump*. The odds that a random error would not only occur to the same extent in each of 159 Georgia counties, but occur in the same direction, is infinitesimally small.

275. Mr. Favorito also testified that on average statewide, 3.5 percent of absentee ballots have "some type of a serious signature verification problem," while the rejection rate in Fulton County was 0.34 percent (an order of magnitude lower). Tr. 1305-07. However, as he explained, a signature verification problem does not require that the ballot be rejected, it requires the ballot to be "cured." Tr. 1306.

There is a "process" for getting the voters to identify and make sure that it was, in fact, their ballot, and if they confirm it, the ballot "still can be accepted." *Id.*

276. Mr. Favorito also testified that Secretary of State Raffensperger suggested in public statements on November 4 that Georgia was going to be finished counting that day, with about 4.7 million votes, while in fact the counting continued for another two or three days at least and Georgia ended up with 4.998 million votes and it is not clear to this day where the extra votes came from. Tr. 1308-09, 1362-63, 1372-73.

277. Mr. Favorito summarized evidence that he said suggested irregularity or fraud in the Georgia election prior to January 3, 2021. *See also* RX 340. Before the election, Georgia had received approximately $45 million from the Center for Technology and Civil Life, which was distributed 94% to counties that Mr. Biden carried. Tr. 1361-62 (Favorito). Mr. Favorito testified that the organization was funded by Mark Zuckerberg and former Barack Obama campaign manager, David Plouffe (who had written a book entitled "A Citizen's Guide to Beating Donald Trump"). Tr. 1364-65.

278. Mr. Favorito also referenced (as supporting concerns about the election) affidavits Ms. Voyles and Barbara Hartman submitted in one of the lawsuits concerning the absentee ballots without folds they observed during the November 15, 2020 audit, Tr. 1363, and one he had submitted in litigation concerning the Ware and Coffee County voting, Tr. 1364, as well as the December 3, 2020 hearing that led to Chairman Ligon's Report. Tr. 1365-69; RX 42.

279. Mr. Favorito also testified that the State Farm Arena video shows improper handling of the recount, for example, skirted tables that blocked views, ballots under a table, and scanning ballots without monitors after an announcement that counting would be discontinued. Tr. 1369-71. However, when told on cross-examination that the United States Attorney's Office investigated and found no fraud, he responded, "of course you may not find evidence of fraud," and stressed that you can certainly find "evidence of illegalities," in that procedures were "not in compliance with Georgia law." Tr. 1470.

280. Mr. Favorito also had many disagreements with statements Georgia Secretary of State Raffensperger made concerning the handing and security of the 2020 election. He testified that Secretary Raffensperger said audits were conducted, when they were not, or when they were not done in a way that would have detected illegitimate ballots. Tr. 1395-98, 1426-32, 1488-1500; RX 337. He asserts that there were significant tensions between the election board in Coffee County and the Secretary of State's office over whether to certify the hand count (as the election board had voted to do) or the machine count (as the Secretary of State's office wanted). Tr. 1402-03, 1464-49.

281. Mr. Favorito was interviewed by an investigator at the Secretary of State's office, but eventually cut off the interview because he concluded the investigator was trying to entrap him. Tr. 1403-05. He was not interviewed by the Georgia or Federal Bureaus of Investigation, the United States Attorney's Office or others at the United States Department of Justice. Tr. 1405-06 (Favorito).

282. Mr. Favorito did not contact the FBI with his allegations and has no reason to think that anyone at VOTERGA spoke with Mr. Clark at the time. Tr. 1501-03 (Favorito).

283. Mr. Favorito concluded that there was sufficient evidence in November/December 2020 to warrant further investigation, Tr. 1399-1402, and he believes that the election should not have been certified. Tr. 1375, 1377-79. VOTERGA has devoted the years afterwards to investigating the election and has amassed evidence that has led to changes in the election process in Georgia. Tr. 1406-09 (Favorito).

284. We find Mr. Favorito's testimony credible in some respects. We do believe that he has pointed out or focused on legitimate concerns about whether Georgia election complied with Georgia law. And we believe that his concerns about how Georgia conducts its elections (which date back long before 2020), and his desire to improve the election process, are genuine.

285. However, the suggestion in Mr. Favorito's VOTERGA publications that there was fraud sufficient to change the outcome or to justify not certifying the election stretched significantly beyond what the evidence actually shows and was ultimately contradicted by Mr. Favorito himself. In cross-examination, Mr. Favorito acknowledged that he cannot demonstrate the ***fraud*** that these documents charge, Tr. 1441-44, 1469-70, or, where he believes there was fraud, demonstrate actual (as opposed to potential) fraud on the scale that these documents suggest. Tr. 1444-55. He testified that there was "low or no evidence of an election being rigged,"

Tr. 1482, and while statements of other specialists preceded some of the evidence coming to light, he has "never even claimed that the election was rigged," *id.,* and the evidence of particular instances of what might be fraud in Georgia was not "fully developed" by January 3, 2021. Tr. 1486-87. *See generally* Tr. 1474-87 (Favorito).

286. There is no evidence that Mr. Clark knew of the allegations raised by Mr. Favorito, apart from those reflected in Chairman Ligon's Report. But even if Mr. Clark knew of all of the allegations made by Mr. Favorito before January 3, 2021 what he would have known is that there was reason to believe that Georgia did not follow proper election procedures under state law, not that the election result was altered and certainly not that there was fraud.

Edwin Meese III

287. Edwin Meese III has been a lawyer since 1959. Tr. 1517 (Meese). He practiced as a Deputy District Attorney, Legal Advisor to the Governor of California, Counselor to the President, and Attorney General under President Reagan from February 1985 to August 1988. Tr. 1518 (Meese). He has taught classes in constitutional law or the functioning of the Justice Department at the University of San Diego and as an adjunct at the University of California at Berkeley. Tr. 1518-19 (Meese). He has also given speeches and turned them into articles pertaining to the Justice Department and to legal matters, including constitutional law. Tr. 1519 (Meese).

288. Attorney General Meese was accepted as an expert on constitutional law and the functioning of the United States Department of Justice. Tr. 1519.

289. Attorney General Meese testified that, with two exceptions not relevant here, Assistant Attorneys General in the Justice Department are legally fungible in the sense that someone approved as Assistant Attorney General for one Division could lawfully be assigned to supervise another Division. Tr. 1522-23.

290. Attorney General Meese opined that the Opinions Clause in Article II, Section 1 of the Constitution (which states that that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices"), applies not just to the Attorney General but to other officers within the Department of Justice who are confirmed by the Senate. Tr. 1523-24.

291. In his view, while the President normally receives information via the Attorney General, that can be modified from time to time. Tr. 1524-25. The President could request technical information, and it would be better to have someone, usually, accompanying the Attorney General provide the information. Tr. 1525-26 (Meese). Although it would be unusual, it would not be "legally wrong" for the President to speak directly with one of the inferior officers, including Acting Assistant Attorneys General, in the department. Tr. 1527-28, 1530-31 (Meese).

292. Attorney General Meese also opined that a communication from a principal officer of the United States to the President would normally be covered by executive privilege and would be subject to other limitations such as the deliberative process, attorney-client or law enforcement privilege. Tr. 1525.

293. Attorney General Meese testified that, under the Constitution, Presidential electors are selected by the various states and appointed by the governor of those states. Tr. 1528. But there is no reason legally why the Justice Department could not offer advice to them. *Id.* He does not see any legal prohibition on Mr. Clark sending the Proof of Concept letter. Tr. 1529.

Harry R. Haury III

294. Mr. Haury has an undergraduate degree in chemical engineering and an M.B.A. with a specialty in finance and operations research from Washington University in St. Louis. Tr. 1566-67 (Haury). He is self-employed as a consultant, is acting CEO of Cain & Associates, a cyber-forensics firm based in West Virginia, and is chairman of the board of United Sovereign American, a corporation formed last year and doing work on election validity. Tr. 1567, 1591-92 (Meese).

295. He started work in the energy industry, working his way up to president of operations and chief engineer of an integrated natural gas and oil utility. Tr. 1567-68 (Haury). After that, he became a consultant on defense contracts for 33 years until 2019, and worked on a number of classified projects for federal agencies the Treasury, Defense and Justice Departments, and intelligence organizations, including the Central Intelligence Agency, National Security Agency, and National Reconnaissance Organization. Tr. 1568-69 (Haury). He was also the primary designer with another at Sandia National Laboratories of the architecture for the integrated public alert system for the Federal Emergency Management Agency. Tr. 1569-71 (Haury). He also holds a certified security systems professional

certification and helped to write some of the early National Institute of Standards and Technology standards that were incorporated into the tests for that certification. Tr. 1571-72 (Haury).

296. He is familiar with the Help America Vote Act (HAVA). Tr. 1572. Early in his career (approximately 2001) he did some work on scanning systems and ended up during the 2001-03 period giving advice based on his experience in the banking industry on how to design a secure and manageable high-speed processing system. Tr. 1572-75, 1580, 1582 (Haury). Between 2003 and 2020, his work was on other systems (defense, banking) and how to protect them. Tr. 1583-84 (Haury). The day after the November 3, 2020 election, he was invited by Wilson Powell (the son of attorney Sidney Powell), Andrew Giuliani (the son of Rudolph Giuliani), and Steve Bannon to investigate cybersecurity in the 2020 election, Tr. 1584-87 (Haury), and since then has focused on this subject with the Amistad Project, its manager former Kansas Attorney General Phill Kline and principal litigator Eric Kaardal. Tr. 1581, 1587 (Haury).

297. States that accept grants under HAVA agree to become HAVA-compliant; however, there are a number of states who are not HAVA states. Tr. 1575 (Haury). Other statutes in the area include the Cybersecurity and Infrastructure Security Act (which is administered by the Department of Homeland Security), and both a 2002 Federal Information Security Management Act and a 2014 update called the Federal Information Security Modernization Act. Tr. 1576-78 (Haury).

298. Mr. Haury was permitted to testify as an expert on HAVA standards as applied to election equipment and the further application of these other statutes to election equipment. Tr. 1578, 1592.

299. Mr. Haury explained that operational security systems are systems designed to make sure that servers are not accessible for tampering, and is different from cybersecurity of the systems to which they connect. Tr. 1593-95.

300. The statutory framework under HAVA and the two FISMA statutes involve the voter, the creation of the ballot (vote) and its tabulation, and include both the design of the system itself and designing a system in which the votes can be validated. Tr. 1595-97 (Haury). If systems are not auditable in accordance with the standards, that violates the law, and the system has a higher risk than what the statute approved and is no longer trustworthy. Tr. 1598-1603 (Haury).

301. Chain of custody is a "trust anchor" and if chain of custody documentation is lost for over 100,000 absentee ballots, it is invalid under the law – although it could be cured. Tr. 1605-06 (Haury). If the violations of process rules are sufficient to potentially affect the outcome, it would require some process of curing them and there would have to be an investigation. Tr. 1607-08 (Haury).

302. Similarly, a violation of a signature verification requirement is a violation of the trustworthiness of the system and needs to be investigated to see if it would possibly affect the outcome. Tr. 1610-13 (Haury).

303. The primary role of the Cybersecurity and Infrastructure Security Agency is to set and work with standards, to take over maintenance of the National

Institute of Standards and Technology protection profiles and advise other agencies. Tr. 1667-68 (Haury). Computerized voting systems have been formally declared to be part of the critical national infrastructure, which brings them under some level of heightened security requirements. Tr. 1668-69 (Haury).

304. The management structure involves identifying risks; selecting possible mechanisms for mitigating risks; then building a program to implement risk containment; then conducting ongoing assessment on how it works; then making an "authorization" step – a decision whether to go ahead with the design or not and if authorized, to monitor the system. Tr. 1669-71 (Haury). There are also operational controls, like whether the system can be accessed from the Internet or is it locked up at night. Tr. 1671-72 (Haury). Albert sensors are a mechanism by which the Department of Homeland Security and the Cybersecurity and Infrastructure Security Agency can monitor election equipment. Tr. 1671, 1674-75 (Haury).

305. Risk limited audits operate after the fact and focus on the operational security boundaries that are supposed to be done before the fact – like training, procedures and policy; and look at whether the voter count, registration precinct tickets, and ballots appear to be accurate. Tr. 1675-76 (Haury). They do not look at everything required to determine if a system is secure and rely on having auditable items maintained and not destroyed. Tr. 1676-77 (Haury).

306. Mr. Haury said that, although it is possible that Dominion's voting system was subject to a sealed risk management framework analysis, he has been unable to determine whether it was ever done. Tr. 1677-78. He has not seen the

curing process for an operational breach done. Tr. 1678-84. There are also agreements that protect source code from disclosure and a normal FISMA review requires a review of the code. Tr. 1685-87 (Haury).

307. However, on cross-examination he acknowledged that the Dominion system that was put in place in Georgia was certified by the United States Election Assistance Commission, that the system was chosen by a commission, then approved by the Georgia legislature, and a court declined to enjoin the use of the system. Tr. 1707-10. He also acknowledged, although he disagrees with the conclusions, that both the Cybersecurity and Infrastructure Security Agency, DCX 36, and a group of scientists, DCX 78, issued statements that the November 3 election was secure. Tr. 1712-16.

308. As Mr. Haury explained, his testimony is not about challenging the outcome itself. It is about whether the process is intact. Tr. 1613. As he put it, "[o]bviously, I'm not saying that a valid election or nonvalid election determines that Joe Biden won or Donald Trump won the election. What it means is that the election wasn't conducted according to the law." Tr. 1678; *see also* Tr. 1683 ("So what happens when you see that election count going at night, it doesn't mean that those were Joe Biden votes.[12] That's not what it means. It means that there was an operational security breach that introduced an unknown number of ballots into the

[12] The reference to counting going on at night is a reference to the State Farm Arena recount. Mr. Haury did not know what investigation had been conducted into that recount. Tr. 1722-26.

system. It could have been Donald Trump votes. You don't know. But that doesn't make the election invalid or valid according to who the votes were for."); Tr. 1717 ("I'm not saying anything I have shows that Joe Biden didn't win or that Trump did win."); Tr. 1723 (to similar effect); Tr. 1727 ("can they prove [breaches on the State Farm Arena video] altered the result of the election? Absolutely not."); Tr. 1728-29 (to similar effect).

309. Mr. Haury concluded that the right way operationally, although not necessarily legally, to address the breaches would be to redo the election. Tr. 1730.

310. Mr. Haury also testified as a fact witness. He said that Jesse Morgan's story is that he was hauling a trailer from Bethpage, New York to Pennsylvania and became aware that it was carrying Pennsylvania ballots. Tr. 1693. Mr. Haury has no independent corroboration about this, but the Amistad project had received some affidavits about it. *Id.* He listened in to a conversation in which Attorney General Barr was speaking with an Amistad private investigator and told the investigator that he should stand down on what he was doing. Tr. 1693-97. On cross-examination, he acknowledged that he later learned that Mr. Morgan had a criminal record, and knew that the United States Postal Service, and perhaps others, had investigated and could not determine what was in the truck. Tr. 1697-1702.

311. There is no evidence that Mr. Haury spoke with Mr. Clark prior to January 3, 2020, or that Mr. Clark knew of any of his analysis.

G. Mr. Clark's Character Witnesses

In the sanction's phase of the hearing, Mr. Clark offered and we accepted Mr. Clark's resume, RX 568, into evidence, and Mr. Clark called two character witnesses.

Paul Emmanuel Salamanca

312. Mr. Salamanca graduated from Dartmouth College in 1983 and from Boston College Law School in 1986. Tr. 2012-13 (Salamanca). He has spent most of his career as an academic, almost exclusively at the University of Kentucky, but he has also practiced law and took a leave of absence for one-and-a-half years beginning in 2019 to work at the Environmental and Natural Resources Division of the Justice Department. Tr. 2013-14 (Salamanca). Mr. Salamanca began there as a senior counsel, in a reporting relationship to the Deputy Assistant Attorneys General and became an Acting Deputy Assistant Attorney General in October 2020. Tr. 2014-15 (Salamanca). Before that, Mr. Salamanca's academic specialty was constitutional law. Tr. 2015-16 (Salamanca).

313. Mr. Clark was the person who first reached out to Mr. Salamanca about joining the Department and he worked constantly with Mr. Clark after he was hired. Tr. 2016 (Salamanca).

314. Mr. Salamanca described Mr. Clark as "the most intense lawyer with whom I've ever worked." Tr. 2016. Mr. Salamanca found that a "profoundly rewarding experience." Tr. 2017. He admires Mr. Clark and says that Mr. Clark

taught him "in a way that [he] didn't even know was imaginable, how many rocks there are to turn over, in pursuit of your client." *Id.*

315. In Mr. Salamanca's opinion, Mr. Clark is an honest, upright attorney, who is conscientious, works hard on behalf of his clients, and is careful about the law. Tr. 2017-18. He considers Mr. Clark to be a "terrific lawyer," who was "absolutely devoted to his duties as an attorney." Tr. 2018.

316. Mr. Salamanca also noted that "there were times when Jeff and I disagreed, and I'm sure he can tell you that too. I learned a lot from him, and I hope he learned a lot from me." Tr. 2018. He added "[w]e went 15 rounds on a few things, and I don't think he always won. But I think the product was better for it, I really do." *Id.*

Andrew Charles Emrich

317. Mr. Emrich is an attorney with Holland & Hart LLP in Denver, Colorado. Tr. 2021 (Emrich). He graduated from Thomas Aquinas College in California and the University of Wyoming College of Law. *Id.* From 1997-2001, he was a legislative counsel to United States Senator Mike Enzi. Tr. 2021-22 (Emrich). From 2001 to 2005, he worked in the Environmental and Natural Resources Division of the Justice Department as counsel to the Assistant Attorney General, before going into private practice at Holland & Hart. Tr. 2022 (Emrich).

318. Mr. Emrich worked with Mr. Clark for almost the full four years when they were both in the Justice Department in the early 2000s, but has not worked directly with him since. Tr. 2022-24 (Emrich). At the time the two worked together,

Mr. Clark was one of two principal Deputy Assistant Attorneys General and Mr. Emrich was one of two or three (depending upon the time) counsels in the Division. Tr. 2024 (Emrich). Mr. Emrich worked directly for the Assistant Attorney General Thomas Sansonetti and collaborated, worked, and attended weekly meetings with, Mr. Clark and other Deputy Assistant Attorneys General. Tr. 2024-25 (Emrich).

319. At the time, Mr. Clark had supervisory authority over the appellate practice and the Indian Affairs Group. Tr. 2025 (Emrich). The appellate work was very challenging. *Id.* The Division was involved in several dozen appeals at any one time and occasionally a matter before a State Supreme Court and coordinated with the Solicitor General's Office on matters from the Division that reached the United States Supreme Court. Tr. 2025-26 (Emrich). The work was complex and involved a wide range of statutes and causes of action and both affirmative litigation and also defending federal government actions, such as rulemaking and permitting decisions. Tr. 2025-26 (Emrich).

320. Mr. Emrich testified that in his involvement with Mr. Clark, Mr. Clark was always upright and honest. Tr. 2026. He was, in Mr. Emrich's opinion, "a very fine lawyer . . . [and] was extremely well-prepared, thoughtful, always wanted to get both sides of a legal view." Tr. 2027. Mr. Clark also had "a very . . . great deal of intellectual curiosity, so he was always interested sort of going deeper and understanding the reasons behind positions we were taking in court, what impact those decisions might have on subsequent cases." *Id.* He was "very prepared in the work [Mr. Emrich] saw him do." *Id.*

321. Mr. Emrich also had a favorable opinion of Mr. Clark's devotion to his professional responsibilities. During the four years they worked together on "almost on a day-to-day basis," Mr. Clark was "always careful, conscientious, respectful of others and took his obligations as a lawyer very seriously." Tr. 2027-28.

III. CONCLUSIONS OF LAW

Disciplinary Counsel asserts that Mr. Clark violated Rules 8.4(a) and (c), attempting to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, by attempting to send the Proof of Concept letter containing misrepresentations; and Rules 8.4(a) and (d), by attempting to engage in conduct that would seriously interfere with the administration of justice. Specification ¶ 31. Mr. Clark argues that none of the statements Disciplinary Counsel relies on are misrepresentations under Rule 8.4(c) and that Rule 8.4(d) does not apply to the conduct Disciplinary Counsel has proved.

As explained below, although we do not agree that all of the statements Disciplinary Counsel has identified from the Proof of Concept letter were misrepresentations, we agreed that some of them were, and conclude that Mr. Clark violated Rule 8.4(a) as it applies to Rule 8.4(c) by attempting to send a letter that contained these misrepresentations. We conclude that Mr. Clark did not attempt significantly to interfere with the administration of justice, and therefore did not violate Rule 8.4(a) as it applies to Rule 8.4(d).

Before we address these points, however, we address several legal challenges Mr. Clark has raised to the conduct of this proceeding.

A. Mr. Clark's Legal Objections to Being Subject to this Disciplinary Proceeding Are Not Well Taken.

During the preparation for the hearing, on the night before the hearing began, during the hearing itself, and afterwards in briefing, Mr. Clark objected to having this matter proceed at all, or having this matter proceed without additional delays, on numerous grounds. Mr. Clark asserts he cannot be subject to any disciplinary hearing or any disciplinary hearing under the system that the District of Columbia uses for all of its disciplinary hearings. He asserts that he was "denied a fair hearing," because the Justice Department did not approve his requests to have some witnesses testify; because he was not able to delay the hearing pending his criminal trial in Georgia and had to make his assertion of a Fifth Amendment privilege not to testify on a question-by-question basis and because he was not permitted to rely on evidence that did not exist at the time he acted to show the basis for his action. He claims that he received insufficient notice of the charges against him, and (in a Supplemental Brief filed after argument closed) asserts that he is entitled to Presidential immunity from his bar obligations, and that bar discipline requires a trial by jury. We have reviewed all of the arguments Mr. Clark asserted and do not believe any are well taken.

1. This Hearing Committee Has Jurisdiction to Evaluate the Conduct Alleged In this Proceeding

During the prehearing period or since, Mr. Clark has asserted four different jurisdictional challenges. He first argues that subjecting him to the Court of Appeals disciplinary jurisdiction for conduct relating to his advice to President Trump would

violate the Supremacy Clause (if the District of Columbia is treated as a State) or the Separation of Powers (if the District of Columbia is treated as a creature of Congress).

Second, he seeks to preserve an argument that the District of Columbia Court of Appeals and the United States District Court for the District of Columbia have already rejected, in which he urges that the District of Columbia cannot discipline Justice Department lawyers at all for violating the Rules of Professional Conduct.

Third, he asserts a modified version of the second argument that the District of Columbia cannot discipline Justice Department lawyers unless the particular conduct involved in the case has arisen previously and led to disciplinary proceeding against other District of Columbia lawyers.

Finally, he argues that the process the District of Columbia uses to hear evidence and issue a report and recommendation that is then considered by a Board and the District of Columbia Court of Appeals is an improper delegation of agency authority. We address each, in turn.

a. Mr. Clark's Argument that 28 U.S.C. § 530B(a) Does Not Give the Board on Professional Responsibility Jurisdiction that Would Interfere with the Take Care Clause, U.S. CONST., ART. II, § 3, and the Opinion Clause, U.S. CONST., ART. II, § 2, CL. 1.

Mr. Clark relies on the opinion of the Department of Justice Office of Legal Counsel that "[r]ules promulgated by state courts or bar associations that are inconsistent with the requirements or exigencies of federal service may violate the

Supremacy Clause." State Bar Disciplinary Rules, 9 Op. O.L.C. 71 (1985). The Supremacy Clause, found at Article VI, clause 2 of the Constitution, states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

"The fundamental principle underlying the Supremacy Clause is that conflicts between federal and state power are to be resolved in favor of the federal government." *United States v. Ferrara*, 847 F. Supp. 964, 968 (D.D.C. 1993) (Supremacy Clause does not preclude state disciplinary prosecution of federal government attorney), *aff'd*, 54 F.3d 825 (D.C. Cir. 1995), amended (July 28, 1995). Under the "doctrine of intergovernmental immunities," "federal officers are immune from state interference with acts 'necessary and proper' to the accomplishment of their federal duties." *Id.*

The fact that the Supremacy Clause *might* prohibit the disciplinary prosecution of a federal government lawyer does not mean that it prohibits this prosecution of Mr. Clark. Indeed, he does not explain why the relevant disciplinary rules, which prohibit dishonesty and serious interference with the administration of justice, are inconsistent the "requirements or exigencies of [his] federal service," or "necessary and proper" to his accomplishment of his federal duties.

Rather than present a conflict between his obligations as a federal government lawyer, and those imposed by the Rules of Professional Conduct, Mr. Clark rests his argument on the faulty premise that

> [t]his case entails an organ of the D.C. government second-guessing confidential internal deliberations at the highest level of the Executive Branch, including directly with the President himself in the Oval Office, regarding how to carry out the President's core authorities under Article II.

Mr. Clark's Br. at 71. This Hearing Committee has not been asked to "second guess" confidential deliberations within the Executive Branch or to substantively critique the deliberations between the President and his advisors. Instead, our task is much more limited: we must determine whether Disciplinary Counsel proved by clear and convincing evidence that Mr. Clark attempted to engage in dishonesty and attempted to seriously interfere with the administration of justice. On the facts of this case, the Supremacy Clause does not remove Mr. Clark from the Court's disciplinary jurisdiction.

b. The Court of Appeals has already rejected Mr. Clark's argument that 28 U.S.C. § 530B prevents the District of Columbia from holding D.C. Bar members who work for the Justice Department to the requirements of the D.C. Rules of Professional Conduct.

Mr. Clark has repeatedly asserted that 28 U.S.C. § 530B excepts Department of Justice lawyers in the District of Columbia from the requirements of the District of Columbia Rules of Professional Conduct. Section 530B specifies that:

> (a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.
>
> (b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.

Mr. Clark recognizes that the District of Columbia Court of Appeals has rejected his argument that this provision exempts federal attorneys from District of Columbia Bar rules and denied his requests for both panel and en banc review, and included arguments in his post-hearing brief to preserve them for appellate review. Mr. Clark's Br. at 72 (referencing *In re Clark*, 311 A.3d 882 (D.C. 2024)).

Although we therefore do not need to address this argument, there are some portions of the Court's analysis that we believe are worth noting as they are relevant for other arguments Mr. Clark makes. Among the premises to Mr. Clark's argument are that (1) it is this statute that obliges Justice Department lawyers to be subject to the rules of the state bars to which they have been admitted; (2) the statute obliges Justice Department lawyers only to follow the rules of "state" bars; and (3) the District of Columbia is not a "state" for purposes of this statute, so (4) therefore, Justice Department lawyers are free to become members of the District of Columbia Bar by ostensibly taking an oath to follow its rules, but then to violate that oath without bar sanction.

In *In re Clark*, the Court joined the United States District Court for the District of Columbia in rejecting these contentions "as not only unpersuasive, but completely absurd." 311 A.3d at 888 (citing *In re Clark*, 678 F. Supp. 3d 112, 127 (D.D.C. 2023)).

Without repeating all parts of these courts' analyses, we underscore one particular point, which is relevant to Mr. Clark's next argument. Contrary to Mr. Clark's assertion, Mr. Clark's Br. at 72, 28 U.S.C. § 530B is not the source of the Court of Appeals' disciplinary authority over members of the District of Columbia Bar. D.C. Bar R. XI, § 1(a), prescribes that:

> Persons subject to disciplinary jurisdiction. ***All members of the District of Columbia Bar***, all persons appearing or participating pro hac vice in any proceeding in accordance with Rule 49(c)(1) of the General Rules of this Court, all persons licensed by this Court Special Legal Consultants under Rule 46(c)(4), all new and visiting clinical professors providing services pursuant to Rule 48(c)(4), and all persons who have been suspended or disbarred by this Court ***are subject to the disciplinary jurisdiction of this Court and its Board on Professional Responsibility (hereinafter referred to as "the Board").*** [emphasis added].

D.C. Bar Rule XI, § 2(b) provides that:

> Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the attorney's oath of office or the rules or code of professional conduct currently in effect in the District of Columbia shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. . . .

As the District of Columbia Court of Appeals noted, a District of Columbia law license is not just a requirement for a lawyer, it is a representation by the Court of Appeals to the public about the lawyer's service:

> The license to practice law in the District of Columbia is a continuing proclamation by this Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and an officer of the Court. It is the duty of every recipient of that privilege at all times and in all conduct, both

> professional and personal, to conform to the standards imposed upon members of the Bar as conditions for the privilege to practice law.

In re Clark, 311 A.3d at 887 (quoting D.C. Bar Rule XI. § 2(a)).

Title 28 U.S.C. § 530B does not purport to ***exempt*** a District of Columbia lawyer from any obligation to the District of Columbia Court of Appeals. It extends that lawyer's obligation so that even if the lawyer appears before a state or federal court of ***another*** state in which the lawyer is not barred, that lawyer is "subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in ***that*** State." § 530B (emphasis added).

Indeed, Mr. Clark's argument stands on its head as the way legal licensing works. Federal law does not require ***the District of Columbia Court of Appeals*** to meet special standards ***in order to*** enforce bar requirements on lawyers who work for the Justice Department. It requires ***lawyers*** to meet the requirements of their own bar, ***in order to practice in the Justice Department.*** *See* 28 U.S.C. § 530C(c)(1); Justice Manual § 1-4.110 (2018). It makes no sense for the Justice Department to require lawyers to meet the qualifications of their bar only to immunize them from having to meet those requirements.

> c. The law does not require that the facts that give rise to discipline in this case be the same as those that have given rise to discipline in other proceedings.

As an alternative, Mr. Clark urges that even if 28 U.S.C. § 530B is understood to subject him to the disciplinary jurisdiction of the District of Columbia Court of

Appeals, it only permits that to happen "to the ***same extent*** and in the ***same manner*** as other attorneys in that State." Mr. Clark's Br. at 75 (citing § 530B(a) (emphasis Mr. Clark's). Mr. Clark also argues that the accompanying Justice Department regulations, which he characterizes as "subjecting lawyer working for the federal government to local bar disciplinary processes," does not apply if the local jurisdiction "would not ***ordinarily*** apply its rules of ethical conduct ***to particular conduct or activity by the attorney***." *Id.* at 75-76 (citing 28 C.F.R. § 77.2(j)(2)) (emphasis Mr. Clark's).

Based on this premise, Mr. Clark argues that, assuming the Court of Appeals could have jurisdiction over his conduct as a federal government attorney, there is no jurisdiction here because Rule 8.4 has never been applied to (1) a "pre-decisional discussion among a team of lawyers concerning a draft statement" that was never sent, or (2) a Senate-confirmed DOJ official engaged in deliberations at the highest levels of the DOJ and with the President himself. Mr. Clark's Br. at 76. In other words, Mr. Clark argues that the Rules cannot be applied to him because no previous disciplinary action has involved the circumstances of proposing to send a dishonest letter.

This argument fails for some of the same reasons as the first variant. It is not Section 530B or Justice Department regulations that "subject[s]" Mr. Clark to the requirement that he follow the oath he took in order to obtain his District of Columbia bar license. It is Bar Rule XI, which he does not cite. Section 530B and

the Justice Department regulations do not suggest that any lawyer is exempted from any of the requirements of any bar, much less ***his/her own*** bar license.

In any event, the words Mr. Clark emphasizes do not justify the reading he attaches to them. Mr. Clark is reading these provisions to afford a type of qualified immunity: a right to violate the applicable professional rules so long as no one else has previously faced discipline for doing so on the same facts. But the statutes do not purport to create a qualified immunity. They purport to address treating people differently because they are Justice Department lawyers.

Just because Mr. Clark's particular facts have not arisen before, however, does not mean Mr. Clark has been treated differently. Non-government lawyers face disciplinary charges alleging violations of Rules 8.4(a), (c) and (d) for attempt, dishonesty and substantial interference with the administration of justice. The same set of rules apply to their cases, as do the same elements of proof and does the same "clear and convincing" evidence standard. If the charges are proven, they face discipline to be determined under the same standards that we apply here. And if the charges are not proven (as we conclude some of Disciplinary Counsel's charges have not been here), they are not sanctioned under those Rules. So too with Mr. Clark.

Mr. Clark has a right to argue that he did not violate the rules and if he is correct, he should face no sanction. But he has no right to be exempt from sanction for violations that Disciplinary Counsel has proved just because his facts are unusual. Some facts are always unusual and "each case must be decided on its particular facts." *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc)

(quoting *In re Haupt*, 422 A.2d 768, 771 (D.C. 1980)). It is not unfair to Mr. Clark that we do so here.

d. The non-delegation doctrine does not prevent the District of Columbia Court of Appeals from having this Committee take evidence and issue a Report and Recommendation for a Board Determination.

Mr. Clark argues that the D.C. attorney discipline system violates the private nondelegation doctrine, which prohibits federal lawmakers from "delegat[ing] regulatory authority to a private entity." *Sandvig v. Sessions*, 315 F. Supp. 3d 1, 33 (D.D.C. 2018) (quoting *Ass'n of Am. R.R.s v. U.S. Dep't of Transp.*, 721 F.3d 666 (D.D.C. 2013)). This argument assumes that the Court of Appeals should be treated like a federal agency because both are created by Congress. However, the Court is not a federal agency.

The Court of Appeals was created by Congress as part of the Court Reauthorization Act of 1970. "One of the primary purposes of the Court Reform Act was to restructure the District's court system so that 'the District will have a court system comparable to those of the states and other large municipalities.'" *Pernell v. Southall Realty*, 416 U.S. 363, 367 (1974) (quoting H.R. Rep. No. 91-907, at 23 (1970)); *see also Palmore v. United States*, 411 U.S. 389, 409 (1973) (a purpose of the Court Reform Act "was to establish an entirely new court system with functions essentially similar to those of the local courts found in the 50 States of the Union with responsibility for trying and deciding those distinctively local controversies that arise under local law").

Congress has plenary power to legislate for the District of Columbia under the "District Clause" of the United States Constitution. U.S. Const., art. I, § 8, cl. 17; *Apartment & Off. Bldg. Ass'n of Metro. Washington v. Pub. Serv. Comm'n of D.C.*, 203 A.3d 772, 778 (D.C. 2019). Congress was acting pursuant to that power when it conferred judicial power on the Court of Appeals and the Superior Court. *Palmore v. United States*, 290 A.2d 573, 577 (D.C. 1972), *aff'd*, 411 U.S. 389 (1973). Congress was not creating an agency.

Congress created the Court of Appeals as "the highest court of the District of Columbia." D.C. Code § 11-102; *see also* D.C. Code § 1-204.31 (the Home Rule Act) ("The judicial power of the District is vested in the District of Columbia Court of Appeals and the Superior Court of the District of Columbia."). The Court has relied on its status as the "highest court" in concluding that it "has the inherent authority to regulate the practice of law, including the admission and discipline of attorneys." *Bergman v. District of Columbia*, 986 A.2d 1208, 1225 (D.C. 2010).

Relevant to Mr. Clark's argument, Congress gave the Court the authority to "make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion." D.C. Code § 11-2501(a). In *Bergman,* the Court characterized § 11-2501's grant of authority over the practice of law as "confirm[ing] the existence of this court's inherent authority over admission and discipline of attorneys." 986 A.2d

at 1226. The Court has recognized that its authority to regulate the practice of law derives from a combination of statutory and inherent authority:

> [T]his court possesses broad authority to regulate the practice of law, deriving much of this power from the District of Columbia Court Reorganization Act of 1970. A portion of that Act, passed by Congress, provides that "[t]he District of Columbia Court of Appeals shall make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion." D.C.Code § 11–2501(a) (2012 Repl.). Beyond this broad statutory grant of authority, the court possesses significant inherent authority as well. In *Sitcov v. District of Columbia Bar*, we relied upon the "almost universally accepted" proposition "that the highest court in the jurisdiction is imbued with the inherent authority to define, regulate, and control the practice of law in that jurisdiction." 885 A.2d 289, 297 (D.C.2005) (quoting *Brookens v. Comm. on Unauthorized Practice of Law,* 538 A.2d 1120, 1125 (D.C.1988)).

BiotechPharma, LLC v. Ludwig & Robinson, PLLC, 98 A.3d 986, 994 (D.C. 2014).

Mr. Clark also argues that the Court itself must hold the disciplinary hearing, relying on D.C. Code § 11-2503(b), which provides that:

> a member of the bar may not be censured, suspended, or expelled under this chapter until written charges, under oath, against that member have been presented to the court, stating distinctly the grounds of complaint. The court may order the charges to be filed in the office of the clerk of the court and shall fix a time for hearing thereon. . . .

However, the Court has already determined that the "hearing" required by § 11-2503(b) means "an opportunity to be heard" in a hearing "established by the rules of this court, consistent with constitutional requirements." *In re Richardson*, 692 A.2d 427, 430 (D.C. 1997).

Even if the private nondelegation doctrine applied, and the Hearing Committee were considered a private entity, Mr. Clark's motion should be denied because the Court has not delegated any regulatory authority to the Hearing Committee. The Court has promulgated the Rules of Professional Conduct, under which the Hearing Committee finds only facts, and is entitled to no deference on its conclusions of law or recommendation as to sanction. Mr. Clark cites no cases that prohibit a private entity from performing this function.

Indeed, Mr. Clark does not attempt to reconcile his argument with other obvious examples in which others besides judicial employees have roles in government decision-making. Both the Sixth and Seventh Amendments to the Constitution, for example, protect the right to trial by jury – a procedure in which citizens, who are non-professional, and need not be lawyers – are the final arbiters of the fact, whose determinations are reversible only for legal error. Both Federal Rule of Civil Procedure 53 and District of Columbia Superior Court Rule 53 provide for the appointment of "masters," who are not government employees and need not be lawyers, and depending on the circumstances, can conduct hearings on non-dispositive matters, and issue reports and recommendations. Fed R. Civ. P. 53; D.C. Super. Ct. R. Civ. P. 53. This is not an unconstitutional delegation. It has been part of courts' inherent authority since "the commencement of our government." *In re Peterson*, 253 U.S. 300, 312 (1920).

Mr. Clark also argues that he should have been provided with information about how the Hearing Committee members were selected for Hearing Committee

service and selected for participation on this Hearing Committee. However, a respondent is not entitled to *voir dire* Hearing Committee members. *In re Fay*, 111 A.3d 1025, 1031 (D.C. 2015).

A respondent with evidence of bias can file a motion to recuse under Board Rule 7.22. That Rule states, in relevant part:

> Any challenges to the members of the Hearing Committee must be made by affidavit alleging a personal bias or prejudice on the part of the Hearing Committee member against the party submitting the affidavit. The affidavit must be accompanied by a motion for disqualification made to the Board, which will be decided by the Board Chair. The affidavit must state facts and reasons upon which the allegations of bias or prejudice are based and must be accompanied by a certificate executed by the party submitting the affidavit, or counsel for such party, stating that the challenge is made in good faith. The affidavit must be submitted to the Office of the Executive Attorney at least seven days prior to the date set for the hearing or the challenge shall be deemed waived. A Hearing Committee member appointed pro hac vice within seven days of the hearing to replace a previously named member may be challenged without regard to the seven-day notice ordinarily required. Emergency motions filed less than seven days before the beginning of the hearing will be considered only if the factual basis for the motion could not have reasonably been known before the deadline.

Mr. Clark, however, did not comply with this Rule. Mr. Clark did not submit the affidavit or certificate this Rule requires. He did not provide the seven-day notice the Rule requires. He filed the motion on the night before the hearing. He did not submit an emergency motion or offer a basis as to why he could not have provided the notice the Rule requires.

For all these reasons, we reject Mr. Clark's challenges to the use of the panel in this case.

2. Mr. Clark's "*Touhy*" Requests to the Justice Department

Government agencies may promulgate regulations governing how the agency will respond to third party subpoenas and document requests. These regulations are often known as *Touhy* regulations, after the Supreme Court's decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467-68 (1951); the Court ruled that "agency employees could not be held in contempt of court for refusing to respond to a subpoena, if instructed not to respond by a superior." *Agility Pub. Warehousing Co. K.S.C.P. v. U.S. Dep't of Def.*, 246 F. Supp. 3d 34, 41 (D.D.C. 2017).

Mr. Clark sought documents and witness testimony from the Office of the Director of National Intelligence and the Department of Justice, which both denied his requests. Mr. Clark asserts that the ODNI and DOJ decisions denied him a fair hearing in this case because the testimony he sought to present would have aided his defense by providing evidence that he "was constrained from supplying himself by the necessity of asserting his Fifth Amendment right against self-incrimination." Mr. Clark's Br. at 57.[13]

Disciplinary Counsel argues that the Board Rules do not provide a remedy where a third-party refuses to voluntarily provide information, and that Mr. Clark should have challenged the decisions of the ODNI and the DOJ in federal court. ODC Reply Br. at 24-25.

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[13] As noted below, we do not agree that Mr. Clark was "compelled" to assert the Fifth Amendment. However, we assume for purpose of our discussion that Mr. Clark's arguments here do not depend on our agreeing with him on this point.

We agree with Disciplinary Counsel. Mr. Clark complains that he was denied a fair trial because he could not compel witnesses to testify on his behalf. But that is not unusual in the D.C. attorney discipline system, where the parties do not have nationwide subpoena power, and thus, there are instances in which third-parties cannot be compelled to appear. *See, e.g.*, *In re Koeck*, Board Docket No. 14-BD-061, at 6-8 (H.C. Rpt. Jan. 11, 2017) (neither Disciplinary Counsel nor the respondent were successful in compelling a remote witness to testify). Absent evidence that Disciplinary Counsel prevented Mr. Clark's access to the documents and testimony he sought, we have no basis to conclude that the decisions of the ODNI and the DOJ denied him a fair trial.

Moreover, if Mr. Clark disagreed with the decisions of the ODNI and the DOJ, he could have filed an action in federal court under the Administrative Procedure Act. *Houston Bus. J., Inc. v. Off. of Comptroller of Currency*, 86 F.3d 1208, 1212 (D.C. Cir. 1996). Mr. Clark did not seek that review here and accordingly, we do not know whether these witnesses and documents would have been available to Mr. Clark had he challenged those decisions. But, in any event, the fact that someone is unable to present evidence they did not seek to compel does not deny them a fair hearing.

3. Mr. Clark's Fifth Amendment Objections

Mr. Clark also asserts that he was denied a fair hearing because he was, in his words, "forced" to invoke the Fifth Amendment in this proceeding. Mr. Clark's Br. at 58-60. What Mr. Clark appears to be arguing is not actually that he was forced to

invoke the Fifth Amendment, but rather that (1) Mr. Clark had to decide whether to invoke the Fifth Amendment, rather than having the hearing delayed; and (2) Mr. Clark was required to invoke the Fifth Amendment on a question-by-question basis. We have addressed Mr. Clark's arguments about how the Fifth Amendment affects the conduct of this proceeding on two previous occasions and as these prior rulings and the subsequent ruling of the Court of Appeals in *Clark* reflect, Mr. Clark's arguments are contrary to law.

On October 25, 2023, the Hearing Committee Chair issued a Report and Recommendation on Mr. Clark's Second Request to Defer this Proceeding that was based primarily on the assertion that the Constitution required this proceeding be delayed primarily "to await the outcome of *State of Georgia v. Donald J. Trump et al.,* in which Mr. Clark is named as a co-defendant." Report and Recommendation, at 6 (H.C. Oct. 25, 2023) (quoting Mr. Clark's Request at 1). The Hearing Committee Chair recommended rejecting Mr. Clark's request, and, on November 3, 2023, the Board Chair ruled that Mr. Clark's motion to defer would be denied "[s]ubstantially for the reasons set forth in the recommendation," and "adopted and incorporated" that Report and Recommendation in her order. Order, at 3 (BPR Nov. 3, 2023).

After concluding that Mr. Clark's motion did not meet the standards provided in the Board rules for deferring a hearing, the Report and Recommendation the Board adopted and incorporated explained that "Case law has also rejected Mr. Clark's contention that the Constitution affords a respondent in a disciplinary case

[a right] to avoid having to choose between testifying in the disciplinary case and asserting his Fifth Amendment rights." Report and Recommendation, at 10-11 (H.C. Oct. 25, 2023) (citing *De Vita v. Sills*, 422 F.2d 1172, 1178 (3d Cir. 1970); *Bachman v. Statewide Grievance Comm.*, No. CV126028403S, 2012 WL 4040367, at *8 (Conn. Super. Ct. Aug. 22, 2012); *People v. Jobi*, 953 N.Y.S.2d 471, 476 (Sup. Ct. 2012); *Arthurs v. Stern*, 560 F.2d 477, 478-79 (1st Cir. 1977); *Sternberg v. State Bar of Mich.*, 185 N.W.2d 395, 397 (1971)).

As the Report and Recommendation explained, these cases rejected not only Mr. Clark's argument that the pendency of a criminal matter required the delay of other, disciplinary, matters, but Mr. Clark's premise – that it denies individuals a fair hearing if they have to decide whether to testify or to assert their Fifth Amendment right not to testify. "A respondent does not have a constitutional right to be relieved of the burden of choosing whether to exercise his right to remain silent." Report and Recommendation, at 12 (H.C. Oct. 25, 2023) (quoting *Attorney Grievance Comm'n of Maryland v. Unnamed Attorney*, 467 A.2d 517, 522 (Md. 1983)).

For the same reasons the case law explained, Mr. Clark was not "forced" to claim a Fifth Amendment privilege from testifying. Rather, he had to make the same choice he (like *every* defendant would need to make at a criminal trial), whether it is better to testify and face cross-examination or remain silent.

> Manifestly, difficult choices confront an individual who is the subject of simultaneous criminal and civil or administrative proceedings. It is well accepted that such an individual has no constitutional right to be

> relieved of the choice whether or not to testify, and civil proceedings will not be enjoined pending the disposition of the criminal charges.

Attorney Grievance Comm'n of Maryland, 467 A.2d at 522 (citations omitted).

Mr. Clark then went on to file a Motion in Limine asking that the Committee not draw a negative inference from his assertion of the Fifth Amendment at trial. The Committee conducted oral argument on this motion on December 18, 2023, and at the hearing, counsel for Mr. Clark and Disciplinary Counsel agreed on some basic propositions of Fifth Amendment law that the Hearing Committee Chair described:

> [Mr. Hirsh:] It's clear and I don't [think] there is any dispute that Mr. Clark has the right to invoke his Fifth Amendment privilege if it applies. I think it's also clear ***that the way the process would work of his invoking it, is that he take the stand and invoke it on a question-by-question basis***.
>
> I think it's clear that in a -- that the fact that he invokes the Fifth Amendment privilege is not itself a basis for sanction. I don't think anyone asserts that that's true. He's not sanctioned for invoking his constitutional rights.

* * * *

> ***I think it's clear that if the effect of invoking the Fifth Amendment is that testimony that would be favorable to Mr. Clark doesn't get in the record, that's a risk of invoking the Fifth Amendment and he doesn't have a constitutional right to an inference that if he were to testify the evidence would be favorable to him***.[14]

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[14] For this reason, we agree with Disciplinary Counsel that Mr. Clark cannot create a dispute of fact by suggesting in his post-hearing brief that the testimony he did not give when he invoked the Fifth Amendment might have differed from the evidence of record. *See* Mr. Clark's Br. at 32-34, Responses to PFOFs ¶¶ 46, 48-53. Whatever statements Mr. Clark might have made are not part of the record.

> I think it's clear that in a civil proceeding an opposing attorney can comment on the failure to testify and seek to draw an inference that if he had given -- the reason he didn't testify was the testimony would be unfavorable. And in a criminal proceeding a prosecutor cannot do that.
>
> And I think it's clear that, that our proceeding is, whatever it's called, quasi-criminal, and it's unclear exactly to what extent you can draw arguments that this is more like a criminal proceeding or more like a civil proceeding in whether you can comment on the failure to testify under oath.
>
> First of all, does someone, ***does anyone have difficulty with what I have laid out as far as where the law goes on this***? Now I know each of you would argue as to whether it's closer to one or the other, but the basic outlines of the issue.
>
> MR. BURNHAM: ***I agree with Your Honor's framing of the issue***.
>
> * * * *
>
> MR. FOX: I have no problem with . . . what you said.

December 18, 2023 Tr. at 209-12 (emphasis added).

On January 11, 2024, the Hearing Committee Chair ruled on Mr. Clark's Motion. This January 11, 2024 Order memorialized the parties' agreement on these principles, including the principle that the "decision to invoke the Fifth Amendment can (and frequently does) involve a difficult choice. Whether in a criminal proceeding, a civil proceeding, or this disciplinary proceeding, a party who decides not to testify runs the risk that there, therefore, be no evidence to rebut adverse allegations," and that accordingly, "[a] party is not entitled to a favorable inference from silence: that, if only they had testified, that testimony would have demonstrated innocence or a lack of liability." *See* Order, at 4-5 (H.C. Jan. 11, 2024).

The January 11, 2024 Order then went on to rule on the issue of whether Mr. Clark's invocation of the Fifth Amendment could or would be construed against him. The Committee Chair ruled that, while we were unaware of any authority "that would prohibit this Hearing Committee from drawing an adverse inference should Mr. Clark invoke the Fifth Amendment during the hearing," given "counsel's representation as to the anticipated breadth of Respondent's invocation, we find that this Hearing Committee would be unable to draw an adverse inference regarding any particular material fact from the anticipated blanket assertion of the Fifth Amendment." Order, at 5 (H.C. Jan. 11, 2024). Accordingly, the Order granted Mr. Clark's Motion Opposing Adverse Inference in Response to Valid Invocation of the Constitutional Right to Remain Silent, "without prejudice to reconsideration in the event that Mr. Clark's actual invocation of the Fifth Amendment varies from counsel's prediction." *Id.*

After we issued the January 11, 2024 Order, the District of Columbia Court issued its decision in *Clark*. After rejecting Mr. Clark's argument that there was no jurisdiction to conduct a disciplinary proceeding, the Court went on to rule that Mr. Clark *could* invoke the Fifth Amendment to refuse to provide documents in response to Disciplinary Counsel's subpoena. *Clark*, 311 A.3d at 887-91.

The Court of Appeals, however, did ***not*** hold, as Mr. Clark asserts, "that Mr. Clark is entitled to the protections of the Fifth Amendment . . . ***because it is a quasi-criminal case***." Mr. Clark's Br. at 59 (emphasis added). Instead, the Court held that he had an "act-of-production" privilege because Disciplinary Counsel's "subpoena

requests Mr. Clark to produce documents in his possession that relate directly to the central charges against him in the two pending indictments. Given how the requests are phrased, Mr. Clark's compelled production of responsive documents to the questions clearly would have a potentially incriminating 'testimonial aspect.'" *In re Clark*, 311 A.3d at 890. The Court's decision to deny enforcement did not turn on this proceeding itself being quasi-criminal.

Indeed, the *Clark* decision specifically ***rejected*** the idea that quasi-criminal nature of disciplinary proceedings meant that the Fifth Amendment imposes the same limitations in this proceeding that it imposes in a criminal proceeding. The opinion went on to emphasize that (unlike in a criminal procedure, where the decision not to testify cannot be the basis for an adverse inference), it remains an open question whether Mr. Clark's invocation of the Fifth Amendment could be used against him. It wrote:

> [W]e express no view as to whether Mr. Clark's successful assertion of his Fifth Amendment privilege with respect to the document subpoena could form the basis for an adverse inference against him by the Hearing Committee. The parties before us have not addressed this question in this appeal. Although, unlike in a criminal case, an adverse inference generally is permissible in a civil case, *see In re D.B.*, 947 A.2d 443, 451 n.15 (D.C. 2008), we do not appear to have squarely decided this question in the context of a disciplinary proceeding. *See In re Fay*, 111 A.3d 1025, 1032 (D.C. 2015) (per curiam) ("Because disciplinary proceedings are quasi-criminal, attorneys subject to discipline are entitled to due process of law. ... However, disciplinary proceedings are ***not*** criminal proceedings, and attorneys are not afforded all of the protections which are extended to criminal defendants." (internal quotation marks omitted; emphasis original)); *In re Burton*, 472 A.2d 831, 845-46 (D.C. 1984) (rejecting Burton's burden-shifting argument on the ground that the hearing committee had "made it clear that it was

> drawing no adverse inference based on [his] failure to testify... [or his] invoking his Fifth Amendment privilege against self-incrimination when [he] was called as a witness by Bar Counsel" (internal quotation marks omitted)).

Clark, 311 A.3d at 893 n.29 (emphasis added); *see also In re Barber*, 128 A.3d 637, 640 (D.C. 2015), ("Unlike in a criminal trial, however, Mr. Barber did not have a Fifth Amendment right to decline to take the witness stand. ***He instead was free to invoke his Fifth Amendment right on a question-by-question basis if, in responding to a question,*** Mr. Barber would be providing evidence that could be used to convict him of a crime" (emphasis added)).

Taken together, Mr. Clark's argument that he was "denied a fair hearing" because he had to decide whether to invoke his Fifth Amendment privilege and required to do so on a question-by-question basis is contrary to numerous decisions, previous rulings by the Committee, and the holding of *In re Barber* – none of which he cites or distinguishes – and cannot be reconciled with the decision in *In re Clark*. In fact, the law is that in a disciplinary proceeding respondents may not only be required to decide whether to invoke the Fifth Amendment, that invocation might actually be used against them.[15]

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[15] Indeed, the examples Mr. Clark cites for how he is supposed to have been "denied a fair hearing" by having to invoke the Fifth Amendment on a question-by-question basis illustrate the weakness of this assertion. Mr. Clark claims that the question-by-question basis produced "zero probative value," Mr. Clark's Br. at 59, and, in particular criticizes a Hearing Committee member, *id.* at 59-60, for asking him a question that he not only ***decided to answer*** but ***relies upon*** as one of his most prominent points at the outset of his brief. *See* Mr. Clark's Br. at 2 (citing Mr. Clark's testimony, Tr. 527, for the proposition that Mr. Clark's client was President

We have declined to draw that inference against Mr. Clark, not because we believe such an inference necessarily to be impermissible, but because we do not believe the circumstances warranted the inference. Mr. Clark asserted the Fifth Amendment in the context of anticipating at some point that he may need to defend a criminal trial. This is a reason why he might choose to be silent. Accordingly, we do not believe that we can appropriately infer that his testimony would be inculpatory.

4. Mr. Clark's Argument that the Hearing Committee Erred in Excluding Post-January 3, 2021 Evidence.

Prior to the hearing, Mr. Clark filed a motion *in limine*, arguing that he should be allowed to introduce evidence

> regarding the results of investigations into the 2020 election conducted after January 3, 2021 to support the reasonableness of the positions he took in the draft letter of December 28, 2020 based on the belief, expressed in the draft letter of that date and in discussions with others, that there were "significant concerns that may have impacted the

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Trump, in his official capacity, "who, pursuant to U.S. Const. Article II §1 ***is*** the Executive Branch was therefore "the highest authority [in the Executive Branch] that [could] act on behalf of the [United States] as determined by applicable law.") (emphasis Mr. Clark's brief). Mr. Clark also claims that Disciplinary Counsel played a card "from the bottom of the deck," by "consum[ing] 27 pages" of a 2,106-page transcript asking specific questions (some of which Mr. Clark's answered). Mr. Clark's Br. at 59. This characterization is not accurate. The questions were all relevant to the case and none involved a personal attack. Nor was Mr. Clark prejudiced. Where Mr. Clark chose to answer, he produced evidence he now relies on. Where he declined to answer, we have determined neither to use his invocation of the Fifth Amendment, nor the manner in which he invoked it, as the basis for a negative inference.

> outcome of the election in multiple States, including in the State of Georgia."

Motion in Limine, at 1 (Nov. 22, 2023).

By Order dated January 11, 2024, we denied that motion because Mr. Clark failed to show that the post-January 3 evidence relates to Disciplinary Counsel's charges or his defenses to them. *See* Order (H.C. Jan. 11, 2024); *see also* Order (H.C. Feb. 16, 2024) (resolving a dispute between the parties concerning the effect of the Order).

In his post-hearing brief, Mr. Clark argues that the Hearing Committee erred in excluding this evidence. He argues that (1) "it inherently validates Mr. Clark's recommendation that further investigations be conducted"; (2) "the value of additional investigations was proven by what was later discovered, which was sufficient to cast the outcome of the election into serious doubt"; and (3) "what was later discovered proved the gross inadequacy of the investigations carried out by DOJ and the factual predicate upon which Rosen and Donoghue based their rejection of Mr. Clark's proposal." Mr. Clark's Br. at 63.

As discussed further below, one flaw in this argument is that the Proof of Concept letter does not recommend the months and years of further investigation that Mr. Clark sought to offer in evidence. One sentence in the letter suggests that "the Georgia General Assembly should convene in special session so that its legislators are in a position to take additional testimony, receive new evidence, and deliberate on the matter consistent with its duties under the U.S. Constitution,"

DCX 8 at 3. But the next sentence explains that the work needed to be completed by January 6, 2021, in time to change the election results:

> Time is of the essence, as the U.S. Constitution tasks Congress with convening in joint session to count Electoral College certificates, *see* U.S. Const., art. II, § 1, cl. 3, consider objections to any of those certificates, and decide between any competing slates of elector certificates, and 3 U.S.C. § 15 provides that this session shall begin on January 6, 2021, with the Vice President presiding over the session as President of the Senate.

Id.

Thus, as we explain in greater detail below, the letter did not ask the Georgia legislature on January 3, 2021, to overcome constitutional objections by convening a special session, assemble, develop protocols for taking testimony, conduct an investigation sufficient to uncover evidence it would take months and years to produce, evaluate all the evidence, and come to a thoughtful conclusion by January 6, 2021. It asked the Georgia legislature to declare a second set of electors regardless of the evidence that might be generated in the future.[16]

But in any event, Mr. Clark could not be said to have relied on evidence that did not exist at the time he sent the letter to justify sending it. If anything, the fact that Mr. Clark seeks to rely on evidence that did not exist at the time of his decision

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[16] *See also* DCX 8 at 1 (cover email explaining "The concept is to send it to the Governor, Speaker, and President pro temp of each relevant state to indicate that in light of time urgency and sworn evidence of election irregularities presented to courts and to legislative committees, the legislatures thereof should each assemble and make a decision about elector appointment in light of their deliberations").

to suggest that the decision was reasonable when he made it, reinforces the conclusion that he lacked a basis at the time.

Mr. Clark's second argument – that the results of subsequent investigations "was sufficient to cast the outcome of the election into serious doubt" – is uncompelling for similar reasons. The Proof of Concept letter did not say that "we think the evidence you might find may create significant concerns." It said that the Justice Department had already "identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia." DCX 8 at 2. If the evidence that existed as of January 3, 2021 did not make that statement true, evidence that did not exist until later could not make it true.

Finally, Mr. Clark argues that the later investigations show that the DOJ investigations had been grossly inadequate. But this case is not about the adequacy of the Justice Department's investigation. It is about the truth of the Proof of Concept letter. Indeed, as explained below, if the Justice Department did not conduct the investigation the letter describes sufficient to identify "significant concerns" that makes the letter *false* – because it stated otherwise.

Accordingly, we do not see a reason to revisit the ruling on the motion *in limine* regarding evidence that came to light after January 3, 2021.

5. Mr. Clark's November 13, 2023 Motion to Dismiss on Grounds of Inconsistent Theories or, Alternatively, to Require the Office of Disciplinary Counsel to Pick One Theory of Violation and Stick to It.

In an earlier motion, Mr. Clark argued that the charges should be dismissed because Disciplinary Counsel had changed its theory of the case. Mr. Clark argued that the July 19, 2022 Specification of Charges

> contended that Mr. Clark committed "attempted dishonesty" in violation of Rule of Professional Conduct 8.4(a) and (c) by drafting a letter that proposed, subject to the approval of his superiors, up to and including the President, that DOJ take a different position on the 2020 election in Georgia than DOJ had taken up to that point.

Motion to Dismiss, at 2 (Nov. 13, 2023). He contends that Disciplinary Counsel changed its theory in its September 6, 2022, response to a motion to dismiss, and argued that Mr. Clark violated Rule 8.4

> not because of anything in the four corners of the suggested letter itself, but because Respondent persisted in his suggestion until the President decided not to send the letter, even after Mr. Clark was told by his immediate superiors that, in their view, there was no evidence to support the claims proposed in the draft letter.

Motion to Dismiss, at 5 (Nov. 13, 2023). Finally, Mr. Clark argued that Disciplinary Counsel again changed its theory in an October 21, 2022 filing in removal-related litigation, where Disciplinary Counsel asserted that it "has never accused Respondent of lying to his superiors." Motion to Dismiss, at 8 (Nov. 13, 2023). Mr. Clark argued that Disciplinary Counsel's changing theories of the case violated his right to Due Process because he did not know the actual charge against him. Motion to Dismiss, at 9 (Nov. 13, 2023).

The Hearing Committee recommends that the Board deny the motion. The Specification of Charges alleged that Mr. Clark violated Rules 8.4(a) and 8.4(c) in that he "attempted to engage in conduct involving dishonesty, by sending the Proof of Concept letter containing false statements." Specification of Charges ¶ 31(a). The Specification of Charges also alleged that the Proof of Concept letter contained numerous false or misleading statements on behalf of the Department of Justice. *See id.* ¶¶ 15-19. The Specification also alleged that Mr. Clark's superiors (Messrs. Rosen and Donoghue) told him that they would not authorize or sign the letter because it contained false statements. *Id.* ¶ 21. The Specification next alleges Mr. Clark persisted in his efforts to send the Proof of Concept letter. *Id.* ¶ 23 (Mr. Clark told Messrs. Rosen and Donoghue that he was considering the President's offer to appoint him as Acting Attorney General if they were unwilling to send the letter); ¶ 26 (Mr. Clark told Mr. Rosen that he intended to accept the appointment as Acting Attorney General and send the Proof of Concept letter); ¶¶ 28-29 (in the January 3, 2021 Oval Office meeting, all of the lawyers present opposed sending the letter, except Mr. Clark). The Specification of Charges does not allege that Mr. Clark misled any of his superiors and it did not change the allegations when the Disciplinary Counsel noted as much in a later filing.

Thus, the Specification of Charges put Mr. Clark on notice of the charges against him, and the facts that Disciplinary Counsel intended to present to prove those charges. This is sufficient to satisfy Due Process. *See In re Francis*, 137 A.3d 187, 190-91 (D.C. 2016) (per curiam) (Due Process is satisfied when the

Specification of Charges provides notice of the charged Rule violations and the factual basis for the charged Rule violations).

Moreover, even if Mr. Clark initially believed that Disciplinary Counsel would not offer evidence of his alleged persistence, and would offer evidence that he misled his superiors at the DOJ, he has been informed of Disciplinary Counsel's theory really since Disciplinary Counsel's Omnibus September 6, 2022 Response to Respondent's Sept. 1, 2022 Pleadings, at 2-3 (quoted at p. 89, above), and certainly since November 2023 (five months before the hearing began) when Mr. Clark briefed this Motion to Dismiss. Due Process is satisfied when a respondent is on notice of the charges against him. *In re Slattery*, 767 A.2d 203, 212 (D.C. 2001); *cf. In re Morten*, Board Docket No. 18-BD-027, at 1-2 (BPR May 7, 2021), appended Hearing Committee Report at 97-103 (dismissing a misappropriation charge that Disciplinary Counsel had not articulated until closing argument).

6. Mr. Clark's Argument that the Supreme Court's Decision in *Trump v. United States* Affords Him Presidential Immunity from Bar Discipline

In a supplemental brief filed after the hearing concluded, Mr. Clark argues that all charges against him must be dismissed because the Supreme Court ruled that a President "is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority" and that this immunity specifically applies to President Trump's "alleged conduct involving his discussions with Justice

Department officials." Mr. Clark's Supplemental Br. at 2-3 (quoting *Trump v. United States*, 603 U.S. ___, 144 S. Ct. 2312, 2328, 2335 (2024)).[17]

Disciplinary Counsel argues that *Trump's* discussion of immunity is limited to the immunity of the President of the United States from criminal prosecution, and that *Trump* does not discuss immunity of Executive Branch employees for criminal liability, much less immunity from disciplinary sanction.

We agree with Disciplinary Counsel. Mr. Clark's argument overlooks the very limited scope of the *Trump* opinion. The Supreme Court granted *certiorari* to determine "[w]hether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve

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[17] Mr. Clark argues that he was denied Due Process because he was allowed only 2,000 words to brief the import of *Trump* and *Jarkesy* (discussed below), and was not permitted a reply brief. On July 10, 2024, the Board Chair rejected his appeal of the order setting these requirements and we disagree with Mr. Clark's arguments for several reasons. First, Due Process requires notice and the opportunity to be heard. Mr. Clark had both. Mr. Clark cites no authority for the proposition that word limits or prohibitions on reply briefs (both of which are common, especially for requests to submit supplemental authority) violate Due Process. We know of none. *Cf.* Fed. R. App. P. 28(j) (limiting letters notifying appeals courts of supplemental authority to 350 words). Second, what process is due depends upon the effect a determination has on a protected right. This Committee does not finally determine legal issues. It is tasked with making a recommendation on legal issues that will be reviewed *de novo* first by the Board and then by the District of Columbia Court of Appeals, in both instances after briefing. In any event, the 2,000 word limit afforded to each side was sufficient to allow each side to present their arguments on two relatively brief Supreme Court cases. The *Trump* opinion is approximately twenty-three pages (*see* 144 S. Ct. 2312, 2324-2347). The *Jarkesy* opinion is approximately fifteen pages in length (*see* 144 S. Ct. 2117, 2124-2139). Additional briefing from the parties was unnecessary to the Hearing Committee's understanding of the legal arguments based on these cases.

official acts during his tenure in office." *Trump*, 144 S. Ct. at 2326. The first two sentences of the *Trump* opinion reiterate the narrow issue:

> This case concerns the federal indictment of a former President of the United States for conduct alleged to involve official acts during his tenure in office. We consider the scope of a President's immunity from criminal prosecution.

Id. at 2324; *see also id.* at 2326 ("We are called upon to consider whether and under what circumstances such a prosecution [(of a former President)] may proceed."). The Supreme Court concluded that

> under our constitutional structure of separated powers, the nature of Presidential power requires that ***a former President*** have some immunity from criminal prosecution for official acts during ***his*** tenure in office. At least with respect to ***the President's*** *exercise* of ***his*** core constitutional powers, this immunity must be absolute. As for ***his*** remaining official actions, he is also entitled to immunity.

Id. at 2327 (emphases added).

Thus, whereas Mr. Clark argues that a President's immunity extends to Mr. Clark because "the immunity is for the President's official acts—which are carried out through his subordinates like Mr. Clark," Mr. Clark's Supplemental Br. at 4, *Trump* repeatedly and carefully limits its analysis to the President's conduct:

> Congress cannot act on, and courts cannot examine, ***the President's actions*** on subjects within ***his*** "conclusive and preclusive" constitutional authority. It follows that an Act of Congress—either a specific one targeted at the President or a generally applicable one—may not criminalize ***the President's actions*** within ***his*** exclusive constitutional power. Neither may the courts adjudicate a criminal prosecution that examines such ***Presidential actions***.

Trump, 144 S. Ct. at 2328 (emphases added).

We cannot assume that the Supreme Court repeatedly stressed the unique role the Constitution affords to the President, if it really meant to rule that the lower level officials, have immunity as well, even though their positions are not mentioned in (or required by) the Constitution. As Disciplinary Counsel notes, "[i]t is well established that Presidential aides who engage in criminal conduct, even at the President's direction, are subject to criminal prosecution." ODC Response to Respondent's Supplemental Post-Hearing Br. at 2 (citing *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977)).

However, even if Mr. Clark were entitled to Presidential immunity from criminal prosecution, he has not shown that this immunity also affords him a special privilege to practice law in the District of Columbia without complying with its Rules of Professional Conduct. Despite their immunity from criminal or civil prosecution, Presidents have been subject to bar discipline for conduct they engaged in while in office. On October 1, 2001, for example, the Supreme Court, *itself*, suspended former President Clinton from the Supreme Court bar, and ordered him to show cause why he should not be disbarred *In re Discipline of Clinton*, 534 U.S. 806 (2001).[18] The New York bar disbarred former President Nixon, *see, e.g.*, *In re Nixon*, 385 N.Y.S.2d 305 (N.Y. 1976), as well as former Attorney General John Mitchell. *In re Mitchell*, 351 N.E.2d 743 (N.Y. 1976).

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[18] President Clinton discharged the order to show cause by resigning from the Supreme Court bar. *In the Matter of Bill Clinton*, D-2270, at 344 (U.S. Nov. 13, 2001), https://www.supremecourt.gov/orders/journal/jnl01.pdf.

If Presidents and Attorneys General can be subject to bar discipline, lower level officials can be. Although federal prosecutors, for example, are generally immune from at least civil liability for prosecutorial decisions, that "[p]rosecutorial immunity is premised on the belief that disciplinary proceedings, rather than civil proceedings are the appropriate means of addressing the unethical conduct." *In re* Doe, 801 F. Supp. 478, 487 (D. N.M. 1992). Indeed, the Supreme Court decision that established civil prosecutorial immunity, *Imbler v. Pachtman*, 424 U.S. 409 (1976), noted that "a prosecutor stands perhaps unique among officials whose acts could deprive persons of constitutional rights in his [or her] amenability to professional discipline by an association of his [or her] peers." 424 U.S. at 429.

Thus, although prosecutors are absolutely immune, for example, from civil lawsuits for failing to make disclosures of potentially exculpatory information required by *Brady v. Maryland*, 373 U.S. 83 (1963), *see Jones v. Yanta*, 610 F. Supp. 2d 34, 42 (D.D.C. 2009); *see generally, e.g.*, *Kassa v. Fulton Cty.*, 40 F.4th 1289, 1292-93 (11th Cir. 2022), they remain subject to disciplinary sanction for that conduct. *See, e.g.*, Rule 3.8(e); *In re Dobbie*, 305 A.3d 780, 787 (D.C. 2023) (imposing sanctions); *In re Kline*, 113 A.3d 202 (D.C. 2015) (discussing numerous cases involving this issue).

Accordingly, we recommend that the Board deny Mr. Clark's claim to absolute immunity from meeting the professional standards required of lawyers in the District of Columbia.

7. Mr. Clark's Argument that He is Entitled to a Jury Trial in this Attorney Discipline Matter

Mr. Clark argues that *Secs. & Exch. Comm'n v. Jarkesy*, 144 S. Ct. 2117 (2024), requires that Disciplinary Counsel's charges be considered by a jury because he faces punishment here and "*Jarkesy* specifically holds that the presence of punishment triggers jury-trial rights." Mr. Clark's Supplemental Br. at 7 (citing *Jarkesy*, 144 S. Ct. at 2129). Mr. Clark's citation does not support his argument. *Jarkesy* does not sweep nearly as broadly as he would have us believe.

The question in *Jarkesy* was whether "the Seventh Amendment entitles a defendant to a jury trial when the [Securities and Exchange Commission ("SEC")] seeks civil penalties against him for securities fraud." *Jarkesy*, 144 S. Ct. at 2127. The Supreme Court concluded that "[t]he SEC's antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury." *Id.* It did not rule that any proceeding of any kind that might involve punishment is a remedy available at common law – or for that matter that disciplinary proceedings are a form of punishment, which they are not. *See In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc); *see also In re Goffe*, 641 A.2d 458, 464 (D.C. 1994) (per curiam). Nor did it suggest that the SEC's own process for disciplining professionals authorized to practice in SEC proceedings, [19] is in any way infirm.

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[19] *See* SEC Rules of Practice, Rule 102(e) (April 2024) available at https://www.sec.gov/enforcement-litigation/rules-practice/rulesprac042004htm.

As Disciplinary Counsel argues, this is not a civil suit, Disciplinary Counsel does not seek civil penalties. Mr. Clark cites no authority to support the proposition that attorney discipline matters have ever been decided by a jury at common law.

Accordingly, we recommend that the Board reject Mr. Clark's argument that the D.C. attorney discipline system violates *Jarkesy*.

B. Disciplinary Counsel Proved that Mr. Clark Violated Rule 8.4(a) By Attempting to Assist or Induce Others to Engage in Dishonesty and Misrepresentation in Violation of Rule 8.4(c), or By Attempting to Engage in Dishonesty or Misrepresentation Himself.

Disciplinary Counsel charges Mr. Clark with violating Rule 8.4(a), by attempting to violate Rule 8.4(c), which prohibits "conduct involving dishonesty, fraud, deceit, or misrepresentation." Here, Disciplinary Counsel argues that Mr. Clark attempted to assist or induce others to engage in dishonesty or misrepresentation, and attempted to engage in dishonesty himself.

Rule 8.4(c) – Dishonesty is the most general of the four categories of prohibited conduct. It includes "not only fraudulent, deceitful or misrepresentative conduct, but also 'conduct evincing a lack of honesty, probity or integrity in principle; a lack of fairness and straightforwardness.'" *In re Samad*, 51 A.3d 486, 496 (D.C. 2012) (quoting *In re Shorter*, 570 A.2d 760, 767-68 (D.C. 1990)). The Court holds lawyers to a "high standard of honesty, no matter what role the lawyer is filling," *In re Jackson*, 650 A.2d 675, 677 (D.C. 1994) (per curiam) (appended Board Report), because "[l]awyers have a greater duty than ordinary citizens to be scrupulously honest at all times, for honesty is 'basic' to the practice of law." *Hutchinson*, 534 A.2d at 924.

If the dishonest conduct is "obviously wrongful and intentionally done, the performing of the act itself is sufficient to show the requisite intent for a violation." *In re Romansky*, 825 A.2d 311, 315 (D.C. 2003). Conversely, "when the act itself is not of a kind that is clearly wrongful, or not intentional, [Disciplinary] Counsel has the additional burden of showing the requisite dishonest intent." *Id.*; *see also In re Uchendu*, 812 A.2d 933, 939 (D.C. 2002) ("[S]ome evidence of a dishonest state of mind is necessary to prove an 8.4(c) violation.").

Dishonest intent can be established by proof of recklessness. *See Romansky*, 825 A.2d at 316-17. Recklessness as a "conscious choice of a course of action" with either "knowledge of the danger to others" or "knowledge of facts that would disclose this danger to any reasonable person." *In re Ponds*, 279 A.3d 357, 362 (D.C. 2022) (per curiam) (quoting *In re Gray*, 224 A.3d 1222, 1232 (D.C. 2020)). To prove recklessness, Disciplinary Counsel must establish by clear and convincing evidence that the respondent "consciously disregarded the risk" created by his actions. *Romansky*, 825 A.2d at 316-17; *see, e.g.*, *In re Boykins*, 999 A.2d 166, 171-72 (D.C. 2010) (finding reckless dishonesty where the respondent falsely represented to Disciplinary Counsel that medical provider bills had been paid, without attempting to verify his memory of events from more than four years prior, and despite the fact that he had recently received notice of non-payment from one of the providers). The entire context of the respondent's actions, including their credibility at the hearing, is relevant to a determination of intent. *See In re Ekekwe-Kauffman*, 210 A.3d 775, 796-97 (D.C. 2019) (per curiam).

Misrepresentation is a "statement . . . that a thing is in fact a particular way, when it is not so." *Shorter*, 570 A.2d at 767 n.12 (citation omitted); *see also In re Schneider*, 553 A.2d 206, 209 n.8 (D.C. 1989) (misrepresentation is element of deceit). Misrepresentation requires active deception or a positive falsehood. *See Shorter*, 570 A.2d at 768. The failure to disclose a material fact also constitutes a misrepresentation. *In re Outlaw*, 917 A.2d 684, 688 (D.C. 2007) (per curiam) ("Concealment or suppression of a material fact is as fraudulent as a positive direct misrepresentation." (citations omitted)); *see, e.g.*, *In re Lattimer*, 223 A.3d 437, 451 (D.C. 2020) (per curiam) (respondent stated as fact a proposition that was contradicted by the only relevant evidence in the record); *In re Scanio*, 919 A.2d 1137, 1139-44 (D.C. 2007) (respondent failed to disclose that he was salaried employee when he made a claim for lost income to insurance company measured by lost hours multiplied by billing rate); *Reback*, 513 A.2d at 228-29 (respondents neglected a claim, failed to inform client of dismissal of the case, forged a client's signature onto second complaint, and had the complaint falsely notarized).

As with dishonesty, Disciplinary Counsel does not need to establish that a misrepresentation was deliberate, only that it was made with "reckless disregard for the truth." *In re Brown*, 112 A.3d 913, 916, 918 (D.C. 2015) (per curiam); *see, e.g.*, *In re Jones-Terrell*, 712 A.2d 496, 499 (D.C. 1998) ("Even if they were, at least in part, attributable to Respondent's haste in preparing the petition, the false statement and omissions were of such significance to the issues before the court that we believe

her conduct was at least reckless and sufficient to sustain a violation of the rule." (quoting Board Report)).

Rule 8.4(a) – As noted above, Mr. Clark is not charged with engaging in dishonesty or misrepresentation, but rather, is charged with violating Rule 8.4(a), which prohibits "attempt[ing] to violate the Rules of Professional Conduct, knowingly assist[ing] or induc[ing] another to do so, or do[ing] so through the acts of another." "'Knowingly,' . . . denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Rule 1.0(f). Disciplinary Counsel argues that "Mr. Clark first attempted to assist or induce Mr. Rosen and Mr. Donoghue to engage in conduct involving dishonesty or misrepresentation, prohibited by Rule 8.4(c). When that effort failed, he attempted to do so himself." ODC Opening Br. at 31.

Disciplinary Counsel recognizes that the "attempt" prong of Rule 8.4(a) does not have an explicit state of mind requirement. It posits that the state of mind required to constitute a prohibited "attempt" should be the same as the state of mind required to prove an attempt to violate a criminal statute: the "intent to commit the offense allegedly attempted." *Smith v. United States*, 813 A.2d 216, 219 (D.C. 2002) (collecting cases). Thus, Disciplinary Counsel concludes that it "must establish that Mr. Clark intended to engage in conduct involving dishonesty." ODC Opening Br. at 25. But the elements of a criminal attempt include more than just the intent to commit the underlying crime. "To prove attempt, the government must show the intent to commit a crime and the doing of some act toward its commission that goes

beyond mere preparation. *Stroman v. United States*, 878 A.2d 1241, 1245 (D.C. 2005); *see also Wormsley v. United States*, 526 A.2d 1373, 1375 (D.C. 1987) ("To show attempt, the government needed only to prove an overt act done with the intent to commit a crime, and which, except for some interference, would have resulted in the commission of the crime.").[20]

Thus, we must determine whether Disciplinary Counsel proved by clear and convincing evidence that Mr. Clark intended and sought to have a letter sent that would violate Rule 8.4(c). We need to determine whether the letter contained misrepresentations; whether Mr. Clark attempted to have the letter sent; and whether Mr. Clark acted knowingly or recklessly.

Did the Proof of Concept letter Contain Misrepresentations?

Disciplinary Counsel asserts that the Proof of Concept letter contained five factual misrepresentations, ODC Opening Br. PFOFs ¶¶ 33(a)-(e); and two representations that exceeded the scope of the Justice Department's authority. *Id.* PFOFs ¶¶ 34(a)-(b). We address each, in turn:

(1) First Alleged Misrepresentation: Significant Concerns May Have Impacted the Election. Disciplinary Counsel asserts "The letter stated, '***we have identified significant concerns that may have impacted the outcome of the election***

[20] Cases in other jurisdictions have relied on the elements of "attempt" in the substantive criminal law when applying disciplinary rules similar to Rule 8.4(a). *N. Carolina State Bar v. Merritt*, 2022-NCCOA-633, ¶ 21, 285 N.C. App. 534, 542, 877 S.E.2d 892, 899, *appeal dismissed, review denied*, 894 S.E.2d 768 (N.C. 2023); *In re Bryan*, 275 Kan. 202, 214–15, 61 P.3d 641, 651 (2003).

in multiple States, including the State of Georgia.' DCX 8 at 2. In fact, the Department of Justice had not identified any such 'significant concerns,' and the former Attorney General had publicly said so on two occasions." ODC Opening Br., PFOF ¶ 33(a) (emphasis added to the allegedly false statement) (citing Tr. 131-32 (Donoghue)).

In response, Mr. Clark does not dispute that, at the time the letter was drafted, the Justice Department had not "identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia." Rather, he asserts several arguments for why, in the context of a *draft* letter, this statement was not false. Mr. Clark's Br. at 7-8 (Response to PFOF 33(a)). We group these arguments into five categories:

a. Mr. Clark's argument that the letter was just a proposal that Mr. Rosen and Mr. Donoghue would have to approve. Mr. Clark urges that "[t]his was a proposed statement, contingent upon the approval of Mr. Clark's superiors, including the President." Mr. Clark's Br. at 7. We accept that this was true *when Mr. Clark first drafted the letter on December 28*.[21] But it does not

[21] Different possibilities are consistent with the evidence. One possibility is that Mr. Clark made up his mind on December 28 to try to get Mr. Rosen and Mr. Donoghue's agreement, but to send the letter regardless if they refused. This is supported by his subsequent failure to follow his superiors' direction to speak with the United States Attorney in Atlanta, failure to attempt seriously to learn what the actual investigations had shown, and continued violation of the White House Contacts Policy. We consider these facts below as some of the reasons why we conclude that he was ultimately willing to send the letter regardless of whether it was true. However, we do not believe that clear and convincing evidence proved

respond either to Disciplinary Counsel's contention or remain true afterwards. As noted above, Mr. Clark is not facing discipline because he sent the letter for Mr. Rosen and Mr. Donoghue's approval; he is facing discipline because of what he did afterwards. *See* ODC's Omnibus Response to Respondent's Sept. 1, 2022 Pleadings, Sept. 6, 2022 at 2-3; *see also* Tr. 716. Afterwards, Mr. Clark continued to insist on sending the letter after Mr. Rosen and Mr. Donoghue told him it was false. He decided to accept the post of Acting Attorney General so that he could send the letter *regardless* of the fact that Mr. Rosen and Mr. Donoghue did not approve it. By January 3, 2021, Mr. Clark was not even willing to meet with the President unless Mr. Donoghue was excluded. And at that meeting, he tried to get the letter sent even after President Trump said "no." The fact that Mr. Clark *initially* proposed the letter for Mr. Rosen's and Mr. Donoghue's approval is no defense to Mr. Clark's later conduct when the letter ceased to be just a proposal and became an inevitability unless President Trump stopped Mr. Clark.

b. Mr. Clark's argument that the letter was a discussion draft. Next, Mr. Clark urges that the letter "was proposed as a discussion draft subject to multiple privileges and never should have been made public." Mr. Clark's Br. at 7. Although we would question whether every privilege Mr. Clark asserts actually applies to the

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that this was Mr. Clark's plan from the outset. The testimony afterwards suggests that Mr. Clark's course of action was evolving, at least until January 2, when he told Mr. Rosen and Mr. Donoghue that if they sent the letter that they could keep their jobs.

draft, we accept for the purposes of argument that document was subject to at least some privilege. But the fact that a document may have been subject to a privilege and was not intended to be publicly disclosed does not prevent the Hearing Committee from considering the content of the document.

The Hearing Committee has already rejected Mr. Clark's argument that witnesses should not be allowed to testify to information that may once have been subject to the executive privilege, law enforcement privilege, deliberative process privilege, and/or attorney-client privilege. *See* Order (H.C. Feb. 27, 2024).

We do not understand Mr. Clark to repeat these evidentiary arguments, but rather, to argue that confidential communications deciding whether to issue the Proof of Concept letter should not be the basis of discipline because they should not have been disclosed. We are aware of no authority that would prevent the Hearing Committee from considering Mr. Clark's communications with others at the DOJ and the White House because the communications were confidential when made. To conclude otherwise would effectively immunize misconduct that was intended to be secret.

We have not located a Court opinion addressing this precise issue. However, in *In re Confidential*, the Court rejected a respondent's argument that the attorney-client privilege excused him from complying with a subpoena for documents relating to his handling of client funds, even though no client had complained of his conduct. 703 A.2d 1237 (D.C. 1997). The Court concluded that the privilege was not intended

to be used as a shield by an attorney to prevent scrutiny of his conduct. *Id.* at 1238. We reach the same conclusion here.

c. Mr. Clark's argument that there was merely a difference of opinion. Mr. Clark next asserts four related points that argue that this is just a difference of opinion and if Mr. Rosen and Mr. Donoghue agreed with him (or disagreed and were fired in favor of Mr. Clark assuming the position of Acting Attorney General), the opinion of the Justice Department would change. *See* Mr. Clark's Br. at 7-8 (the letter is "a statement of . . . disputed opinions arising from disputed questions of fact. As such, it is distinct from a statement of empirical fact"; that "[p]roposing DOJ take a different position on disputed opinions is not false or misleading"; and that "[s]uch a statement could not be misleading to Rosen or Donoghue. Mr. Clark was not proposing to lie about information as to what had been discovered under Rosen['s] and Donoghue['s] supervision" and that "[t]he statements of the former Attorney General were his opinions on disputed questions of fact. Mr. Clark was free to form different opinions and to propose them in confidential internal discussions.").

We do not agree with Mr. Clark, however, that this was simply a difference of opinion. The Department in fact did not have evidence from its investigations raising "significant concerns that may have impacted the outcome of the election." DCX 8 at 2. As Mr. Donoghue put it, and the evidence reflects, Mr. Clark's statement was not dishonest "merely because it's different. . . . [M]aking factual assertions that are incorrect or false, [is] obviously a standalone issue." Tr. 205; *see also* Tr. 209-10 (Donoghue) (Mr. Clark "had a different opinion. Yes. But he was

also proposing different facts. That was the problem. . . . It was just we were almost like living in two different worlds"); Tr. 210 (Donoghue) (Mr. Clark's view of irregularities "relayed that he didn't understand the department's role then. And that's why we explained it to him repeatedly."); Tr. 211 (Donoghue) ("[B]ased on what he perceived to be frauds, plus what he perceived to be irregularities, [he] was pushing for the department to do something that the department does not have any role or responsibility in. . . . I think that's constitutionally based. It's the states that run the elections. . . . [I]t's not for the federal government to dictate to the states the procedures for doing that."); Tr. 214 (Donoghue) (testifying it was not true that all the differences were a combination of fact, opinion, law, policy, and judgment, but "[s]ome of them [were] just factual disputes"); Tr. 424-25 (Rosen) ("[U]nfortunately, [Mr. Clark's view] wasn't based on the facts and the law."); Tr. 461-62, 474-78 (Rosen).

d. Mr. Clark's arguments that there was a difference of focus and the letter was benign. Mr. Clark then argues in several points that this was a difference of focus – that the Justice Department was investigating only fraud and Mr. Clark was talking about investigating irregularities. *See* Mr. Clark's Br. at 8 (arguing that Mr. Barr's "statements were limited to fraud because DOJ only investigated fraud, despite having publicly announced that it would also investigate 'irregularities'"; "[b]y only investigating fraud, DOJ overlooked irregularities sufficient to put the outcome of the election in doubt, such as the failure of Fulton County to carry out absentee ballot signature verification"; "DOJ also refused to investigate several other

issues that were reported to DOJ"; "Mr. Clark's draft letter did not refer to fraud at all but only to 'irregularities' and thus there is no irreconcilable contradiction between Mr. Clark's draft letter and Mr. Barr's statements" (citations omitted)).

During his opening statement, Mr. Clark's counsel made a different, but somewhat related, argument that the letter was not definitive. Counsel emphasized that the letter was couched in terms like "***may***," and, proposed "***recommending*** to the Georgia legislature that they carry out additional investigations of the elections ***if they chose in their discretion to do so***," and that "there ***was something worth investigating*** in Georgia." Tr. at 34-35, 41-42 (emphasis added).

As noted above, we have found that the facts do not support the brightline distinction Mr. Clark seeks to draw between "irregularities" and "fraud." "Irregularities" and "fraud" are not two different categories. "Irregularities" include a wide range of potential deviations from procedure, including fraud, and it may require investigation to determine if a deviation rose to the level of fraud. *See* Tr. 224, 231-36 (Donoghue), 439-41 (Rosen). Nor did the Justice Department refuse to "investigate" (in the sense of examine) allegations of "irregularities" – it examined them to determine if they potentially gave rise to sufficient fraud. *See, e.g.*, Tr. 88-94, 158-60 (Donoghue) (discussing several investigations into election allegations that did not find anything substantial); Tr. 397 (Rosen) ("Department had [done] fairly extensive reviews and assessments of [those allegations]."); Tr. 461-64 (Rosen) (testifying the Department of Justice would "act on" sufficient widespread

fraud). Thus, the question of whether irregularity involved fraud was an issue for what the Justice Department would enforce, rather than what it would examine.

Indeed, as discussed further below, Mr. Clark's letter, itself, is at tension with Mr. Clark's assertion the Justice Department did not investigate irregularities. It said, "[t]he Department of Justice ***is investigating various irregularities in the 2020 election for President of the United States***," and "we ***have*** identified significant concerns." DCX 8 at 2 (emphasis added). This statement would at least be materially misleading if it were meant to convey that the Justice Department had ***not*** even looked at irregularities in the hundreds of interviews it had conducted and it was only at the moment that Mr. Clark became Acting Attorney General that it "identified significant concerns" with no investigation beyond whatever Mr. Clark conducted personally.

Moreover, both the "irregularity" vs. "fraud" distinction and the suggestion that the letter was not definitive, do not account for what the letter said in context. As of December 28, 2020 and certainly January 3, 2021, Georgia had already certified a slate of electors for Joseph Biden and the electoral college had already voted. The letter says that the Justice Department had "identified significant concerns" that "may" have impacted the outcome ***sufficient*** to suggest taking the vote of all of the citizens of Georgia out of the electoral process to a different forum where the outcome could be decided based on political leanings (and without a popular election revote). *See* DCX 8 at 2-6. In that context, "***may***" does not mean "***might or might not, it is anyone's guess***." It means "***we have identified sufficient***

information to justify taking an extraordinary step that rarely, if at all, has occurred in American history."[22]

The letter also said that this extraordinary step should be taken essentially immediately. The next line of the letter says, "Time is of the essence." DCX 8 at 3. As of December 28, 2020, and certainly January 3, 2021, there was no legitimate basis for believing that a legislature (much less several legislatures) would be able, before January 6, 2021, to "take additional testimony, receive new evidence, and deliberate" to make an informed conclusion about whether alleged "irregularities"

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[22] The letter cited as precedent one example of how the Hawaii ballots were treated in the 1960 election. DCX 8 at 3 (citing Jack C. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 Yale L. J. 1407, 1421 n.55 (2001)). These two situations were different. In 1960, Hawaii did certify two sets of electors on the appointed day (December 19, 1960) because litigation was pending over whether to accept the initial count (which went for Richard Nixon) or the recount (which went for John Kennedy). Later that month, a Court decision affirmed the validity of the recount, but two different Governors (a Republican, in office at the end of December and a Democrat who took over in January) sent each of the two certifications to Congress. In the Senate, Nixon himself, as Vice President and therefore President of the Senate, expressed the view that the vote for Kennedy was the correct one and that is the one they counted. *See* Balkin, 110 Yale L. J. at 1421 n.55. Mr. Clark actually had no basis in the letter for saying that Georgia had certified two sets of electors and there was no court decision about who was correct. He was also not asking the Governor to send a different certification, he was asking the legislature to go into special session to change the certification already sent; *see also* Tr. 761 (Mr. Elliott) (noting that from his understanding, the Hawaii situation "was probably distinguishable from the situation here"). But even if the circumstances provided clearer support for legislative action, the fact that this one example comes from 60 years before illustrates that convening a special session of the legislature in order to change the certified Presidential election results from a state was no ordinary "suggestion."

in fact "impacted the outcome." DCX 8 at 2-3. Even witnesses who had very strong opinions that election procedures were not followed, or vote tabulation could have been compromised, were not in a position to testify – even today – that there was fraud or that irregularities changed the outcome of the election in any state (again much less several). *See, e.g.*, FF 246, 253, 273, 285, 308.

Thus, in context, Mr. Clark's letter was not saying "do a careful informed analysis to see if there is proof that the election was affected by irregularities." It was saying "make an immediate decision that could not possibly be an informed analysis to see if you can declare that the election was affected by irregularities, regardless of whether the facts would ever prove that."

Moreover, the letter did not say merely that President Trump had concluded that the Georgia legislature should meet to consider sending electors. It said that the United States Department of Justice had endorsed that with its imprimatur. But, Mr. Clark's assertion that the Justice Department had facts to justify that request was false. As Mr. Philbin put it, there were not "sufficient facts that had been developed to tell the legislature in Georgia that they should have a session or create and alternative slate of electors. I don't think that there was any evidence of fraud that had actually affected the outcome of the election. And so trying to do something to change the electoral vote count would in itself be corrupting the outcome of the election because we didn't have actual evidence to show the fraud that would justify taking that action." Tr. 287.

e. Mr. Clark's claim that he had information Mr. Rosen and Mr. Donoghue did not consider. Finally, Mr. Clark argues that his "letter relied upon information, not available to Barr at the time of his statements, and that were not considered by Rosen and Donoghue." Mr. Clark's Br. at 8 (citing Tr. 189-90 (Donoghue)). We have found, however, Mr. Rosen and Mr. Donoghue's testimony credible that Mr. Clark had no significant information to offer in any of the conversations that they had not already considered. Nor did Mr. Clark provide any evidence in the record of what additional information there might have been. Mr. Clark did not, for example, call the bail bondsman with whom he spoke as a witness. Instead, he called numerous witnesses who never suggested that they had spoken to Mr. Clark before January 3, 2021, or denied having done so. *See*, *e.g.*, FF 175-76, 181, 185, 200, 211, 217, 256, 263.

It is hard to imagine some unidentified evidence so significant as to potentially change the outcome of the election that Mr. Clark alone knew and never disclosed. Mr. Rosen and Mr. Donoghue received and the Justice Department examined numerous communications from the White House and others about possible evidence of irregularities and fraud. It is implausible to begin with that the White House and others (who were fervently seeking to have the Justice Department conduct more investigations) either did not have or withheld from the Department some significantly persuasive evidence that Mr. Clark alone knew. And it is not credible that Mr. Clark having known of what would have been critical evidence did not (i) reference it in any draft of the Proof of Concept letter; or, (ii) identify the

critical evidence in any of the meetings with Mr. Rosen, Mr. Donoghue, or with people at the White House, including at the January 3, 2021 Oval Office meeting. Whatever evidence Mr. Clark had, did not persuade the room full of people in the Oval Office on January 3, including President Trump, himself. Tr. 287-88 (Philbin).[23]

Accordingly, we agree with Disciplinary Counsel that this first statement was false.

(2) Second Alleged Misrepresentation: Justice Department's Review of Chairman Ligon's Report.

Disciplinary Counsel asserts that, in support of the first statement (about the Department having significant concerns about irregularities that may have affected the election outcome in Georgia and other states), "the letter cited a publication, referred to in these proceedings as the 'Ligon Report' (and a news article about that report) that was not in fact an official legislative report, but rather a summary of testimony." ODC Opening Br. PFOF ¶ 33(b) (citing RX 42 at 2). According to Disciplinary Counsel, this was misleading because the "letter did not reveal that the Department had looked at the 'report' and concluded that it concerned election process issues that had nothing to do with election fraud or matters the Department might investigate." *Id.* (citing Tr. 132-33 (Donoghue)).

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[23] As Mr. Philbin put it, it was "not as if there was a big smoking gun problem there and everyone was trying to turn a blind eye to it so the only way to solve that situation was to have someone else come in." Tr. 270-71.

Mr. Clark makes several responses to Disciplinary Counsel's assertion. He argues that Chairman Ligon's report was an accurate account of the testimony his committee took, or there is no evidence Mr. Clark did not know otherwise, or that the significance of Chairman Ligon's report was a matter of opinion on which Mr. Clark could differ. Mr. Clark's Br. at 9. He argues that the "Ligon Report referred to irregularities of a nature DOJ refused to investigate, and so DOJ's position that there was no fraud does not contradict any evidence of irregularities reported in or conclusion in the Ligon Report." *Id.* He also argues that because some of the arguments against Georgia's procedures could be framed as an equal protection violation, these issues were within the purview of the Civil Rights Division of the Justice Department to investigate. *Id.* at 9-10. Mr. Clark also cites Mr. Meese's testimony that there "was no legal reason why DOJ could not offer advice or suggestions to States on the conduct of their elections." *Id.* at 10 (citing Tr. 1528 (Meese)).

We do not accept all of Disciplinary Counsel's arguments on this point. We agree that Mr. Clark did not miscite what the Report said or did. Nor was citing Chairman Ligon's Report made "misleading" because it was not an official legislative report, but merely a summary of testimony. The letter also referred to the Report as "The Chairman's Report," DCX 8 at 2, and cites the report as support, in part, for the statement that "[n]o doubt, many of Georgia's state legislators are aware of irregularities sworn to by a variety of witnesses." *Id.* And that is a fair statement.

We do, however, conclude that the citation to Chairman Ligon's report in context is materially misleading in two respects. First, the letter does not merely reference the Report, it suggests that the information in the Chairman Ligon's Report is among the matters ***the Department of Justice*** is investigating. It says that the Justice Department is, ***itself***, "investigating various irregularities in the 2020 election for President of the United States," that ***it*** will update the Governor and legislature of Georgia "as we are able on investigatory progress," "but at this time" the Justice Department had ***already*** "identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia," and that many of Georgia legislators are aware of at least some of what the Justice Department is examining because of Chairman Ligon's Report on what sworn witnesses said, and that the Justice Department has "taken notice of their complaints." DCX 8 at 2.

It was materially misleading to suggest that the Justice Department was investigating something it was not. Although as noted above, we do not agree that the DOJ refused to investigate matters brought to its attention, the Department was not at the time investigating the substance of the Chairman Ligon's Report to the point of reaching even a preliminary conclusion about their validity. Tr. 183-84 (Donoghue).[24]

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[24] Indeed, Mr. Clark's current argument that the "Ligon Report referred to irregularities of a nature ***DOJ refused to investigate*** ..." Mr. Clark's Br. at 9 (emphasis added), contradicts his statement in the letter that the Justice Department was investigating these matters.

Second, the letter is misleading because it suggests a role for the Justice Department it did not have. Mr. Clark argues as that under *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), some aspects of the objections raised to Georgia election procedures could be understood to be an equal protection violation. Assuming this is correct (and we are uncertain it is, or to what arguments it might apply) Mr. Clark does not show that the Justice Department has roving authority to enforce private parties' rights in any matter in which there is a potential equal protection clause argument.

The only proposition for which the letter cites *Bush v. Gore* is to declare that "[t]he State Legislature's authority to appoint Electors is 'plenary,'" DCX at 8 at 6, which implies that the Federal Government does not have a role. Mr. Clark's brief references the Justice Manual for the proposition that the Civil Rights Division has authority to enforce the civil rights laws. Mr. Clark's Br. at 9-10. However, that Manual identifies the voting laws that the Division enforces and Mr. Clark does not suggest (and we cannot see) how any of these laws makes it the Civil Rights Division's purview to investigate the equal protection argument he posits. *See* Justice Manual § 8-2.270.[25]

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[25] This Section states:

> The Voting Section of the Civil Rights Division has enforcement responsibility for certain civil provisions of federal laws that protect the right to vote. This includes provisions of the Voting Rights Act of 1965, 52 U.S.C. §§ 10301 to 10702; Voting Accessibility for the Elderly and Handicapped Act of 1984, 52 U.S.C. §§ 20101 to 20107; Uniformed and Overseas Citizens Absentee Voting Act of 1986, 52 U.S.C.

We agree that the law does not bar the Justice Department from offering advice, but that does not make the letter any less misleading. The letter does not just offer advice, it supports that advice with an imprimatur that the Justice Department's investigations had confirmed the allegations sufficiently to conclude that they raised significant concerns that may have affected the outcome of the election.

(3) Third Alleged Misrepresentation: Keeping State Officials Informed.

Disciplinary Counsel asserts that the letter was false or misleading also because it "promised to update the Georgia officials on the Department's investigation as progress was made." ODC Opening Br. PFOF ¶ 33(c) (citing DCX 8 at 2). Disciplinary Counsel claims this is false or misleading because "it was not the Department's practice to update state officials on federal investigations." *Id.* (citing Mr. Donoghue's testimony, Tr. 130-31).

We do not find this statement to be false or misleading. Mr. Donoghue testified that "if we're conducting an investigation, ***typically*** we don't want any outside authorities involved until we're done. There are times when it's appropriate to coordinate with state authorities, but we don't ***normally*** just update elected officials in states about ongoing federal investigations." Tr. 131 (emphasis added). At most, this supports the conclusion that Mr. Clark was unfamiliar with how the

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§§ 20301 to 20311; National Voter Registration Act of 1993, 52 U.S.C. §§ 20501 to 20511; Help America Vote Act of 2002, 52 U.S.C. §§ 21081 to 21085, 21111; and the Civil Rights Acts of 1957 and 1960, 52 U.S.C. §§ 10101, 20701 to 20706.

Justice Department normally conducted investigations. It is not "false" or "misleading" to volunteer to provide more information about a particular investigation than the Justice Department normally does.

(4) Fourth Alleged Misrepresentation: Alternate Slate of Electors.

Disciplinary Counsel says that the letter "stated that the Department believed that in Georgia and other states, two slates of electors had been chosen on December 14, 2020, and that both sets of ballots—one supporting Biden and one supporting Trump—had been transmitted to Washington, D.C." ODC Opening Br. PFOF ¶ 33(d) (citing DCX 8 at 3). Disciplinary Counsel states this was false because "Mr. Clark's cover email acknowledged that a second set of electors had not actually been sent to Washington by expressing the view that 'the legislatures [of each relevant state] should assemble and make a decision about elector appointment in light of their deliberations.'" *Id.* (quoting DCX 8 at 1). Disciplinary Counsel also argued that "[i]n fact, two slates of electors had not been chosen on December 14, 2020." *Id.* (citing Tr. 134-35 (Donoghue)).

The clear and convincing evidence showed that it was not true that two sets of electors had been chosen in Georgia. Mr. Donoghue testified credibly that the Justice Department was "not aware of any state having legitimately selected two slates of electors. That has happened in American history, but it did not happen in the 2020 election." Tr. 134-35 (Donoghue). Georgia's Governor had certified the Georgia electors on December 7, 2020. DCX 35.

Nor does Mr. Clark counter this evidence. Mr. Clark asserts that "[i]t is factually correct that an alternate slate of electors did meet and vote and their votes were transmitted to Washington, D.C." Mr. Clark's Br. at 10. But Mr. Clark does not cite anything in the record to support that statement and we can find none.

Mr. Clark's remaining responses argue that Mr. Clark did not suggest or imply that the Biden electors were not certified. Instead, Mr. Clark urges he was asserting in various ways that the legislature should and (based on the *McPherson* case and the Hawaii example) had the authority ***to decide*** either to decertify these electors or ***to send*** a different set of electors. *See* Mr. Clark's Br. at 10-11.

As noted above, *see supra* notes 3, 22, neither the *McPherson* case nor the Hawaii example appear to support Mr. Clark's claims about a legislature's authority to change elections procedures after the fact. But even if we were to assume they did, the statement in the letter is still false. The problem is not that the letter ***denied*** that a slate had been certified for Mr. Biden. The problem is that letter ***said*** that ***two*** slates of electors ***had been*** chosen, gathered, and cast their ballots on December 14, 2020, and that "***both*** sets of those ballots" – one supporting Biden and one supporting Trump – "***ha***[***d***] ***been*** transmitted to Washington, D.C." DCX 8 at 3 (emphasis added). That was untrue. There was only one slate.

(5) Fifth Alleged Misrepresentation: Being Troubled By the Pace of the Trump Campaign's Litigation.

Disciplinary Counsel argues that the "letter stated that the Department found 'troubling' the current posture of a lawsuit in Fulton County, Georgia because no hearing had been scheduled and it was unlikely to be resolved before January 6,

2021, the date for the Congress to finally certify the election results." ODC Opening Br. PFOF ¶ 33(e) (citing DCX 8 at 3). Disciplinary Counsel argues that this "was misleading because the Department was not a party to this lawsuit. There had been seven or eight other lawsuits filed by the Trump campaign or its supporters challenging the results of the Georgia election, and all the others had been dismissed." *Id.* (citing Tr. 1454-61 (Favorito)).

In response, Mr. Clark argues that the letter did not indicate that the Justice Department was a party to the litigation, and it is not misleading to be troubled by the pace of a case in which the Justice Department is not involved, or to express it, regardless of whether the Justice Department is a party. Mr. Clark's Br. at 11-12.

For reasons we explain more below, we find very troubling Mr. Clark's expressed concern – on behalf of the Justice Department – for how quickly a court was acting in the Trump campaign's lawsuit. One of the factors that makes Mr. Clark's conduct reckless, and one of the major risks Mr. Clark created by his conduct was his failure to distinguish between the role of the Justice Department as a nonpartisan law enforcement organization and the interest of President Trump as a candidate for reelection. From the standpoint of a nonpartisan law enforcement organization, it is difficult to imagine why the pace of the Trump campaign's lawsuit would be such a concern. Laws can always be enforced after the election – indeed, before the November 9, 2020, memorandum by which Attorney General Barr changed the policy, the Justice Department was not even examining election allegations until after elections were certified. An obvious reason for being

concerned about the pace of the civil case is a desire to change the result of the election. And regardless, this expression of concern suggests that the Justice Department is on the side of the current President's desire to be reelected.

However, although this is evidence that Mr. Clark acted recklessly, our concerns about the statement do not make the statement itself false or misleading. We agree that Mr. Clark did not say that the Justice Department was a party in the litigation and what he did say is not "false." There are circumstances in which it could be appropriate for the Department to express concern about the pace of litigation as it relates to the Department's broad interests. Though this is not likely the case here, we do not find clear and convincing evidence that the stated expression of concern is false or misleading.[26]

(6) & (7) Assertions that the Letter Exceeded the Role of the Justice Department.

Disciplinary Counsel also argues that, in two respects, the Proof of Concept letter proposed a course of conduct that exceeded the Department's role in a federal system.

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[26] As discussed below, although there is reason to find that Mr. Clark's conduct moved from suggesting an idea to attempted dishonesty when he arguably threatened Mr. Rosen and Mr. Donoghue with losing their jobs if they did not send a letter they knew was false, we have concluded that this theory was not proven by clear and convincing evidence. If we had ruled otherwise, it would make this statement false, as the evidence is undisputed that Mr. Rosen and Mr. Donoghue would be lying if they sent a letter expressing a concern the Justice Department did not have about the pace of the Trump campaign's civil litigation.

First, Disciplinary Counsel notes that the letter "recommended that the Georgia legislature convene in special session to act as a sort of tribunal—taking testimony, receiving evidence, and deliberating, with the possibility of reversing the results of the already certified election." ODC Opening Br. PFOF ¶34(a) (citing DCX 8 at 3-4). Disciplinary Counsel argues that this was false or misleading because the "Governor and Lieutenant Governor of Georgia had already declared that a special session was not an option under state or federal law and that any attempt to do so would be "unconstitutional and immediately enjoined by the courts, resulting in a long legal dispute and no short-term resolution." *Id.* (first citing DCX 40 at 1; then Tr. 133-34 (Donoghue); and then Tr. 476-77 (Rosen)).

Second, Disciplinary Counsel asserts that the letter "proposed a novel legal theory as to the Georgia legislature's plenary power under the federal constitution to call itself into session even if the Governor refused to do so." ODC Opening Br., PFOF ¶ 34(b) (citing DCX 8 at 4-6). Disciplinary Counsel asserts that theory "was unvetted and unapproved by the Office of Legal Counsel and the Solicitor General." *Id.* (first citing Tr. 134-36 (Donoghue); and then Tr. 475-77 (Rosen)).

In response to these assertions, Mr. Clark argues a number of points. He urges that "[t]he draft letter did not address Georgia law," only federal law; the "legal analysis was clearly stated and not frivolous or dishonest"; Georgia's Governor and Lieutenant Governor were not responding to the letter, because they never received it; it is not dishonest to have disagreements between federal and state officials; there is no evidence that the positions were frivolous; the arguments were not imposed for

delay; there is no requirement that arguments be vetted by the Office of Legal Counsel and the Solicitor General; nor is it unethical to take novel legal positions. Mr. Clark's Br. at 13-14.

Again we have concerns about Mr. Clark's discussion in the letter. We question the validity of Mr. Clark's analysis. We also believe that his failure to analyze all aspects of the issue (including whether what he was suggesting the Governor and Legislature do was legal) and to announce these as positions of the Justice Department without even discussing them with the Office of Legal Counsel or the Solicitor General is an indication of his mindset. It is also notable that Mr. Clark's letter relied ***both*** on misstating the evidence the Justice Department had, and asserting questionable legal theories without appropriate analysis and vetting.

However, we do not believe that Disciplinary Counsel has shown these statements to be false or misleading. They may be incomplete and unpersuasive arguments. But they are not dishonest ones.

Does Mr. Clark's Evidence Make the Letter True or Not Misleading?

In reviewing whether the letter contained false or misleading statements, we have also considered the evidence Mr. Clark offered. For the most part, Disciplinary Counsel and Mr. Clark spoke about different things. Disciplinary Counsel's case in chief focused, almost exclusively, on the events in the Justice Department and the White House leading up to the January 3, 2021 Oval Office meeting. Mr. Clark's case focused, almost exclusively, on what allegations were out there concerning problems in the election.

As we noted at the outset, this case is not about who won the 2020 election. It is about whether Mr. Clark attempted dishonesty or substantial interference with the administration of justice. The bulk of Mr. Clark's evidence does not bear on these issues for several reasons.

First, of the 14 fact or expert witnesses whose evidence Mr. Clark presented on potential violation, the only one who attested to speaking with Mr. Clark during the November 3, 2020 to January 3, 2021 period was Representative Perry. Representative Perry's testimony was offered solely by declaration, RX 3000, and did not address what information was discussed with Mr. Clark in conversations to which Representative Perry was a party. The only other witness Mr. Clark called who suggested information Mr. Clark may have had at the time was Dr. Lott. Dr. Lott did not discuss his analysis or absentee votes in precincts bordering Fulton County with Mr. Clark at the time, but had the impression from talking with Mr. Clark recently that Mr. Clark had read it in December 2020. Tr. 825, 847-48.

Second, while Mr. Clark generally offered testimony from witnesses with whom he did not speak, he did not offer testimony from the ones with whom he did speak, such as the bail bondsman. We cannot assume that this testimony would be favorable – if anything, the failure to call these witnesses while calling others with whom Mr. Clark did not speak suggests the testimony would be unfavorable to him.

Third, the evidence Mr. Clark offered does not significantly bear on whether the letter was true and not misleading. We do not doubt the sincerity of the witnesses Mr. Clark called. We recognize that there are arguments and counterarguments

about, for example, whether Georgia properly followed its election procedures. *Compare*, *e.g.*, DCX 43 at 1, 4-13 (Georgia Secretary of State Raffensperger's January 6, 2021 letter to Vice President Pence discussing what he believes the evidence shows concerning the conduct of the Georgia elections), *with* RX 337 (Mr. Favorito's point-by-point response).

We are not called upon to, and do not, decide who is right in these disagreements. Nor do we find (or need to) that the 2020 election was free of error or even fraud. Indeed, Attorney General Barr said at the time and Mr. Donoghue also testified that there was some evidence of fraud, but not fraud on the scale to affect an individual state or the election as a whole. Tr. 93-94.

However, even if we were to assume that Mr. Clark was aware of all of the information he presented in evidence, and it is clear that he was not, the letter would still have been false or materially misleading in the respects we have discussed. As Disciplinary Counsel urges, at best, the evidence would support a claim that, "if the Department of Justice had continued to investigate allegations raised by these witnesses after December 28, 2020, it *might* have uncovered some evidence of election fraud that *might* have affected the results." ODC Opening Br. at 43-44. But the letter claimed that the Department already had, "significant concerns" that might have affected the election results, and urged that the election be taken away from the vote count and the legal system and instead decided by politics of legislative bodies who could not possibly analyze the actual facts. DCX 8. We have found that was false and some of the statements made to support it were misrepresentations.

Did Mr. Clark "attempt" to have the letter sent with the statements we have found false or misleading within the meaning of Rule 8.4(a)?

As discussed above, Mr. Clark did not merely propose the letter for Mr. Rosen's and Mr. Donoghue's approval. He argued vociferously with Mr. Rosen and Mr. Donoghue when they told him the letter was untrue. On January 2, 2021, Mr. Clark told Mr. Rosen and Mr. Donoghue that he was seriously considering taking over as Acting Attorney General if they did not sign the letter. Then on January 3, 2021, he continued to push for sending the letter even after President Trump said "no." There is no question that Mr. Clark did everything he could to have the letter sent regardless of what warnings he had received about it.

Although it is clear that Mr. Clark therefore attempted to send the letter, as noted above, *see supra* n. 26, the point at which we conclude that Mr. Clark's efforts became an attempt is relevant for one of our conclusions about falsity. There is no question that, on January 2, 2021, Mr. Clark said that he had promised to give the President an answer by Monday (January 4), but that Mr. Rosen and Mr. Donoghue could avoid all that if they would agree to sign onto the letter. Tr. 160-61, 471. This could be construed as an effort to threaten Mr. Rosen and Mr. Donoghue with the loss of their jobs unless they signed a letter they knew was false and misleading.

However, although we believe that clear and convincing evidence proves that Mr. Clark said what he said, we do not believe that clear and convincing evidence proves that Mr. Clark intended what he said to be a threat. There is not sufficient evidence, for example, to conclude that Mr. Clark expected that Mr. Rosen or Mr. Donoghue would sign *a letter they thought was false* in order to keep their positions

at the Justice Department, or to rule out the alternative possibility that Mr. Clark instead hoped to *convince* Mr. Rosen and Mr. Donoghue to sign the letter *so that he did not have to become* Acting Attorney General in order to send the letter. Because the evidence is not clear or convincing on this point, we are not relying on this event as the trigger for his violation.[27]

Accordingly, we conclude that Mr. Clark's conduct became an attempt to commit dishonesty on January 3, 2021 when only President Trump's rejection (and not any decision of his own) prevented him from sending the letter, and when Mr. Clark continued to press for sending the letter even afterwards.

Were the false statements dishonest, in that they were either intentionally or recklessly false?

During his opening statement, Disciplinary Counsel urged that "[t]his was an attempt to use the authority of the Department of Justice to overturn the results of the election based on no factual support, based on a lie." Tr. 31. Disciplinary Counsel continued that "[t]here were no concerns that the Department had . . . that there [was] evidence of fraud that would have affected the results of the election. ***And Mr. Clark didn't have any either***." *Id.* (emphasis added).

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[27] During closing argument, Disciplinary Counsel answered a question (albeit tentatively and reserving the right to think more about it) that we would "probably not" have a case if Mr. Clark had the next day dropped the effort to have the letter sent at the January 3, 2021 meeting, before President Trump said "no." Tr. 1864-65. This too suggests that Mr. Clark did not cross over to a violation on January 2, 2021.

This statement *might* explain what happened. It is possible that President Trump made the same statement to Mr. Clark that he made to Mr. Donoghue and Mr. Rosen – "Just say the election was corrupt and leave the rest to me and the Republican Congressmen," Tr. 109-10; *see also* DCX 6 at 5 – and that Mr. Clark intentionally set out to do that in spite of the facts.

However, the evidence did not prove clearly or convincingly that this is what occurred. It is possible that Mr. Clark felt called by his personal concerns and those expressed by President Trump; lost perspective and objectivity; and saw a specter of fraud in what he read on the Internet, in public speeches and in citizen concerns such as those in Chairman Ligon's Report. Mr. Donoghue testified that, while he believed Mr. Clark had no basis for his claims, it was "***clear that he believed these things. He seemed to accept what he was being told***," and appeared to be "sincere" in the views he articulated. Tr. 186. Mr. Philbin called Mr. Clark "100 percent sincere in his views." Tr. 293.

The evidence did, however, overwhelmingly support the conclusion that Mr. Clark was reckless and that his sincere belief was not objectively reasonable. First, that Mr. Clark would be involved in this (or any) criminal investigation was extraordinary. Mr. Clark stresses that Assistant Attorneys General upon receiving Senate confirmation are legally fungible – so that someone approved as Assistant Attorney General to lead one Justice Department Division (in this case the Environmental and Natural Resources Division) can be appointed as acting Assistant Attorney General for another, such as the Civil Division, or, in principle, the

Criminal Division. Tr. 1522-23. But the fact that someone legally could be asked to lead a different Division of the Justice Department does not invest them with the skills or experience to lead every Division of the Justice Department – or turn a civil and environmental litigator into a criminal prosecutor with knowledge of investigations that had been taking place for many weeks. As Mr. Donoghue put it, "[h]aving Mr. Clark look into any criminal investigations is not the way the [D]epartment was going to operate because he was the AAG of the civil division." Tr. 227; *see also* Tr. 424-27 (Rosen).

There was no reason to believe that Mr. Clark had ever been involved in a criminal matter – whether as a prosecutor or defense attorney. And the evidence is clear that he had no involvement in the actual investigations conducted. As Mr. Donoghue noted, Mr. Clark did not even appear to be familiar with normal practices used in criminal investigation – for example, suggesting in the Proof of Concept letter that the Justice Department would volunteer to update state officials on the progress of its criminal investigation. Tr. 130-31.

Mr. Clark violated well-established procedures designed to afford confidence that criminal investigations would be insulated from political pressures. Mr. Clark repeatedly violated the White House Contacts Policy – that the Justice Department maintain a line between nonpartisan law enforcement and politics. Mr. Clark showed no concern for the "imperative that the Department's investigatory and prosecutorial powers be exercised free from partisan consideration." Justice Manual § 1-8.100 (2019). Mr. Clark did not merely take a call directly from the President;

he took it without asking Acting Attorney General Rosen or Acting Deputy Attorney General Donoghue to join the conversation. He did not even contact them immediately after it occurred to report it. He appeared apologetic and promised to inform them of any subsequent contacts but then broke that promise and continued to have direct unauthorized contacts with the President afterwards.

The evidence showed that Mr. Clark's interest in finding out what investigations had shown was limited at best. In his cover email, Mr. Clark asked for authority ***to obtain*** a briefing from the Director of National Intelligence – but even before that briefing, or any apparent direct information any of the criminal investigative files, Mr. Clark was ready to declare that "we should get [the Proof of Concept letter] out as soon as possible," and that, while he would like to cite check the letter, he did not think "should let unnecessary moss grow on this." DCX 8 at 1.

His cover email also states that Mr. Clark could not even "see" that there were "valid downsides" to sending out the letter "as soon as possible." *Id*. He was oblivious to the risk of overturning an electoral college vote that had already taken place and plowed ahead despite numerous warning signs in the days that followed.

Mr. Rosen and Mr. Donoghue told him that the letter was false in describing the investigations. Not only did this fail to move Mr. Clark, he made no serious effort even to inform himself of what the investigations showed. For example, he did not ask to see any of the dozens of files the Department had opened or a single one of the hundreds of interviews the FBI conducted.

Mr. Clark was told by his superior to contact United States Attorney Pak about the main investigation that concerned him – Fulton County. But he did not call to ask Mr. Pak about it. Tr. 228-31.[28]

We have no reason to believe that Mr. Clark took into account the Justice Department's role in elections, not only as a matter of policy but as a matter of law. For example, although Mr. Donoghue in his email sent 70 minutes after Mr. Clark sent his original draft of the Proof of Concept letter (*compare* DCX 8, *with* DCX 9), noted that it would be entirely inappropriate to consider sending such a letter without discussing the role of the Justice Department with its Office of Legal Counsel, DCX 9, there is no evidence that Mr. Clark ever asked the Office of Legal Counsel for its opinion. To the contrary, he continued to press for sending the letter even after the Assistant Attorney General for the Office of Legal Counsel, Steven Engel, one of President Trump's original appointees, told President Trump, in Mr. Clark's presence, that he would resign rather than be part of having such a letter sent. *See* Tr. 176; FF 162, 170.

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[28] As noted above, what evidence there is of Mr. Clark's review shows it to be far more limited. The only evidence of any direct contact Mr. Clark had about the election was that he received a briefing from the Director of National Intelligence (which led Mr. Clark to agree that there was no reason to believe that thermostats had been used by a foreign power to alter the election results) and reports that he had a phone call with someone who was identified as the largest bail bondsman in Georgia. Mr. Clark did not call this person as a witness to discuss whatever information he provided. There was also evidence that he reviewed the files in at least some civil case(s), which were not identified in the evidence, but presumably included the *Trump v. Raffensperger* case referenced in the draft Proof of Concept letter, read Chairman Ligon's Report and saw allegations on the Internet.

Mr. Clark not only dismissed what Mr. Donoghue told him about the investigations, Mr. Clark even conditioned his appearance at the January 3, 2021 White House meeting on Mr. Donoghue, the person most knowledgeable about the actual investigations, ***not*** being there. Tr. 167.[29]

Mr. Philbin in advance and others at the January 3 meeting told Mr. Clark that there was going to be a mass resignation from the Justice Department. But this did not move him. He dismissed it as if it were a routine cost – with the words "so be it." Tr. 177 (Donoghue); *see also* Tr. 175-76 (Donoghue); FF 148-49.

Mr. Philbin told Mr. Clark that there would be riots in the streets. This too Mr. Clark dismissed. He said that the "Insurrection Act" exists to so enable the deployment of United States troops to quell its own citizens.

Ultimately, Mr. Clark persisted in a plan so extreme that a room full of President Trump's closest appointed advisors all considered it to be catastrophic. This group, was not, as Mr. Clark urges, a "Potemkin Village," Mr. Clark's Br. at 63, who, secretly, conspired to ensure that no evidence would be used to question the results of the election that would otherwise end the administration in which they

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[29] The idea that Mr. Clark thought he could impose such a condition (of excluding Mr. Donoghue) is remarkable in several ways. First, it suggests that it was so important to Mr. Clark that Mr. Donoghue not attend this meeting that Mr. Clark would have refused to attend ***the President's meeting*** if Mr. Donoghue were there. Second, the person Mr. Clark insisted on excluding was not just anyone; as of that morning, Mr. Donoghue had been Mr. Clark's immediate boss. Third, the person he was excluding was also the person most knowledgeable about the criminal investigations. This undercuts the notion that all Mr. Clark was attempting to do was to foster a free and open discussion of the appropriateness of the letter.

worked. The participants were Mr. Rosen (President Trump's appointed (and Senate approved) Deputy Attorney General, who he later made Acting Attorney General); Mr. Donoghue (who he not only appointed to be an Associate Deputy Attorney General but asked to be Acting Attorney General); his White House Counsel, Mr. Cipollone; his Deputy White House Counsel, Mr. Philbin; his Senior Advisor Mr. Hershmann; and the Assistant Attorney General for the Office of Legal Counsel, Steven Engel – one of President Trump's original Senate-approved appointees. They all not only disagreed with sending the letter, they said they would ***resign*** if the letter were sent; President Trump and Mr. Clark were told that the Assistant Attorneys General and many of the United States Attorneys (also appointed by the President) would resign also. Ultimately President Trump, *himself*, rejected sending the letter, *twice*. FF 172-73.[30]

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[30] Mr. Clark argues that the fact that the Civil Division successfully defended against a suit filed by Representative Louie Gohmert suggesting that Vice President Pence had some authority to ignore the electoral vote, *see* Tr. 454-56, shows that Mr. Clark had a balanced approach to considering the merits of arguments involving the election. Mr. Clark offered no details about the lawsuit, and although his counsel implied in cross-examining Mr. Rosen that Mr. Clark operated with "his team" to defend it, there is no evidence that he had any personal role in briefing or arguing the case. The opinions in the case do not identify him as having any personal involvement. Although his resume identifies cases in which Mr. Clark prevailed while at the Justice Department, the *Gohmert* case is not one of them. RX 568 at 1-2. But even if he had personal involvement, it would not make reasonable what he did in connection with the Proof of Concept letter. All the decision in the case concluded was that the plaintiffs lacked standing to argue that Vice President Pence had authority (he did not claim to have) to reject Arizona's electoral votes. The case law on standing was so well established that the Fifth Circuit affirmed the District Court's dismissal within one day without reaching the merits. *See Gohmert v. Pence*,

The evidence established that Mr. Clark made a "conscious choice of a course of action" with both "knowledge of the danger to others," and "knowledge of facts that would disclose this danger to any reasonable person." *Ponds*, 279 A.3d at 362 (cleaned up) (citations omitted). In ignoring the overwhelming warning signs he received, he also "consciously disregarded the risk" created by his actions. *Romansky*, 825 A.2d at 316-17.

Accordingly, we conclude that Mr. Clark violated Rule 8.4(a) by attempting to violate Rule 8.4(c).

C. Disciplinary Counsel Did Not Prove that Mr. Clark Violated Rule 8.4(a) By Attempting to Seriously Interfere with the Administration of Justice in Violation of Rule 8.4(d).

Rule 8.4(d) provides that it is professional misconduct for a lawyer to "[e]ngage in conduct that seriously interferes with the administration of justice." To establish a violation of Rule 8.4(d) in connection with a judicial proceeding, Disciplinary Counsel must demonstrate by clear and convincing evidence that: (i) the respondent's conduct was improper, *i.e.*, that the respondent either acted or failed to act when he should have; (ii) the respondent's conduct bore directly upon the judicial process with respect to an identifiable case or tribunal; and (iii) the respondent's conduct tainted the judicial process in more than a *de minimis* way, *i.e.*, it must have at least potentially had an impact upon the process to a serious and

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510 F. Supp. 3d 435 (E.D. Tex. Jan. 1, 2021), *aff'd* 842 Fed. Appx. 349, 350 (5th Cir. Jan. 2, 2021) (per curiam), *request for interim relief denied*, 141 S. Ct. 972 (2021).

adverse degree. *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. 1996). Violations of Rule 8.4(d) can occur outside the judicial context, such as the failure to respond to Disciplinary Counsel's investigative inquiries and orders of the Board and the Court (*see* Rule 8.4, cmt. [2]; *see, e.g.*, *In re Doman*, 314 A.3d 1219, 1231 (D.C. 2024) (per curiam) (board decision)), or agreeing with a client to withdraw a disciplinary complaint. *See In re Martin*, 67 A.3d 1032, 1052 (D.C. 2013).

Disciplinary Counsel argues that Mr. Clark's conduct constitutes an attempt to violate Rule 8.4(d) because, had the Proof of Concept letter been sent, and the Georgia legislature acted upon any of the recommendations, there would have been an "explosion of litigation" regarding the legislature's action, the legislature itself would have convened in an adjudicatory capacity, the Congressional certification of the Presidential election could have been disrupted, and the results of the election could possibly have been reversed. ODC Opening Br. at 36.

Mr. Clark argues that these circumstances do not meet any of the *Hopkins* standards. He urges that it was not improper to attempt to send a letter that relies on action by a state legislature; that there is no identifiable case or tribunal; and that it is speculation whether there would be harm from sending the letter, as it was not sent. Mr. Clark's Br. at 53-55.

For the reasons explained above, we do believe that the letter was improper (*Hopkins* requirement 1). We also agree with Disciplinary Counsel that Rule 8.4(a) makes it a disciplinary violation to "attempt" to substantially interfere with the administration of justice, a violation under that provision cannot require that the

conduct actually has resulted in the interference with the administration of justice (requirement 3). Here, there was substantial reason to believe that sending this letter would have very bad effects – including mass resignations at the Justice Department and possibly riots in the streets.

However, we agree with Mr. Clark that, however deleterious these effects might have been, they were not a substantial inference with the administration of justice. The circumstances do not meet the second *Hopkins* requirement of bearing "directly upon the judicial process . . . with respect to an identifiable case or tribunal." *Hopkins*, 677 A.2d at 61. Applying Rule 8.4(d) whenever litigation is expected to occur (whether individual or an "explosion"), would read the "an identifiable case or tribunal" out of the standard and turn almost any conduct that causes significant harm into a substantial interference with the administration of justice. Our court system exists to remedy wrongs. Even when a lawyer engages in conduct that has led to litigation (for example, making a false financial statement for a large publicly-traded company or misappropriating client funds) that does not mean that the lawyer "interfered" with the administration of justice by necessitating the lawsuit.

Nor do we believe that Mr. Clark "interfered" with the administration of justice by drafting a letter directed to, among others, the Georgia legislature. Disciplinary Counsel cites *In re White*, 11A.3d 1226 (D.C. 2011) (per curiam) to support the application of Rule 8.4(d) in the legislative context. ODC Opening Br. at 34. In *White*, the Hearing Committee concluded that the respondent violated Rule

8.4(d) when she made perjurious statements and submitted false evidence to the D.C. City Council, but did not discuss the application of the *Hopkins* test to misconduct occurring before the D.C. Council. *See White* 11 A.3d at 1232-33; *see also id.* at 1257, 1276-77 (second appended Board Report and appended Hearing Committee Report). The Board and the Court agreed with the Hearing Committee, but without any meaningful analysis. *See id.* at 1232-33.

Although *White* is an example of the application of Rule 8.4(d) outside of the judicial context, it is of limited usefulness in guiding our analysis here. Not only does it lack explanation, the case did involve an "identifiable" proceeding (albeit legislative) in which the perjurious statements ***were*** made and submitted. This case involved the possibility of some legislative proceeding, not an identifiable proceeding.

More generally, the plain words – attempt to interfere substantially with the administration of justice – do not describe the wrong Disciplinary Counsel has charged and proven. We agree with Disciplinary Counsel, ODC Reply at 22-23, that the primary case Mr. Clark cites (Mr. Clark's Br. at 55-56), *United States v. Brock*, 94 F.4th 39 (D.C. Cir. 2024) (which interpreted the phrase "administration of justice" for purposes of the Sentencing Guidelines applicable in criminal cases), is of similarly limited value in interpreting the "administration of justice," in this disciplinary context. But the words "interfere with the administration of justice" still have a meaning beyond merely acting (or in this case attempting to act) dishonestly

– it requires an act that disrupts or unreasonably burdens some sort of process. That act is absent from the case Disciplinary Counsel has charged and proven.[31]

Accordingly, we find that Disciplinary Counsel has not proven a violation of Rule 8.4(a) to the extent that it involves an attempted violation of Rule 8.4(d).

IV. RECOMMENDED SANCTION

In this case, Disciplinary Counsel has asked the Hearing Committee to recommend that Mr. Clark be disbarred.[32] Mr. Clark urges that "[t]here should be no discipline imposed in this case. But if discipline is recommended by the Committee, it should be de minimis or minor considering all relevant circumstances." Mr. Clark's Br. at 83. For the reasons described below, we recommend the sanction of two years suspension with a requirement that Mr. Clark show fitness before returning to the practice of law.

A. Standard of Review

The sanction imposed in an attorney disciplinary matter is one that is necessary to protect the public and the courts, maintain the integrity of the legal profession, and deter Mr. Clark and other attorneys from engaging in similar misconduct. *See, e.g.*, *Hutchinson*, 534 A.2d at 924; *Martin*, 67 A.3d at 1053; *Cater*,

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[31] In reaching this conclusion, we address the theories Disciplinary Counsel asserts. We do not address whether there might be other theories of attempted substantial interference with the administration of justice that Disciplinary Counsel could have charged and might have proven under the circumstances.

[32] In the District of Columbia, an attorney who has been disbarred may apply for reinstatement five years after the effective date of the disbarment. *See* D.C. Bar Rule XI, § 16.

887 A.2d at 17. "In all cases, [the] purpose in imposing discipline is to serve the public and professional interests . . . rather than to visit punishment upon an attorney." *Reback*, 513 A.2d at 231 (citations omitted); *see also Goffe*, 641 A.2d at 464.

The sanction also must not "foster a tendency toward inconsistent dispositions for comparable conduct or . . . otherwise be unwarranted." D.C. Bar R. XI, § 9(h)(1); *see, e.g.*, *Hutchinson*, 534 A.2d at 923-24; *In re Berryman*, 764 A.2d 760, 766 (D.C. 2000). "Ultimately, however, '[w]ithin the limits of the mandate to achieve consistency, each case must be decided on its particular facts.'" *Hutchinson*, 534 A.2d at 924 (citations omitted).

In determining the appropriate sanction, the Court of Appeals considers a number of factors, including: (1) the seriousness of the conduct at issue; (2) the prejudice, if any, to the client which resulted from the conduct; (3) whether the conduct involved dishonesty; (4) the presence or absence of violations of other provisions of the disciplinary rules; (5) whether the attorney has a previous disciplinary history; (6) whether the attorney has acknowledged his wrongful conduct; and (7) circumstances in mitigation or aggravation. *See, e.g.*, *Martin*, 67 A.3d at 1053 (citing *In re Elgin*, 918 A.2d 362, 376 (D.C. 2007)). The Court also considers "'the moral fitness of the attorney' and 'the need to protect the public, the courts, and the legal profession . . . .'" *In re Rodriguez-Quesada*, 122 A.3d 913, 921 (D.C. 2015) (per curiam) (quoting *In re Howes*, 52 A.3d 1, 15 (D.C. 2012)).

B. Application of the Sanction Factors

1. The Seriousness of the Misconduct

Although we do not accept Disciplinary Counsel's argument that Mr. Clark should be sanctioned as if Disciplinary Counsel had proven that he intentionally violated his oath to upholding the Constitution, Mr. Clark's misconduct was nonetheless extremely serious. His recklessness risked disabling the Justice Department, throwing the Presidential election into chaos, and even potentially causing riots in the streets.

2. Prejudice to the Client

Mr. Clark potentially prejudiced both the Justice Department and the Office of the President. Had the letter been sent, it might well have eliminated permanently, the separation between the interest of an individual who serves as President in a candidacy for reelection and the role of the Justice Department as a nonpartisan law enforcement organization.

3. Dishonesty

We have found that Mr. Clark attempted to engage in reckless dishonesty.

4. Violations of Other Disciplinary Rules

"The 'violation of other disciplinary rules' prong of the analysis considers how many rules were violated." *Dobbie*, 305 A.3d at 812. We have found that Mr. Clark essentially violated one Rule (Rule 8.4(a)) by attempting a violation of Rule 8.4(c). Accordingly, this is not an aggravating factor. *Id*.

5. Previous Disciplinary History

Mr. Clark has no other disciplinary history.

6. Acknowledgement of Wrongful Conduct

Mr. Clark has never acknowledged that he engaged in wrongful conduct. As explained above, the evidence of his conduct at the time leads us to conclude that he was unwilling to appreciate that there could be negative repercussions to sending the letter he insisted on sending. On December 28, 2000, when he sent the first draft of the letter, he could "see no valid downsides to sending out the letter," and that this was something they should not let "moss grow on" before getting out. DCX 8 at 1. During the time between December 28, 2020 and January 3, 2021, no one, not even President Trump, appears to have been able to convince him that sending the letter was inappropriate, and even the prospect of having the Justice Department decimated by resignations and the military called out to suppress riots was not enough to give him pause.

Nor do we have reason to believe that Mr. Clark now appreciates any of these concerns. The two character witnesses who Mr. Clark called during the sanction phase, Mr. Salamanca and Mr. Emrich, opine that Mr. Clark is very skilled, creative, intense, hard-working, responsible, honest and tenacious. *See* FF 312-321. But neither offers evidence on this point – that they believe he now, or has even been, willing to acknowledge the responsibilities he bears as a lawyer to use the independent judgment necessary to act not just based on allegations, but evidence, and, in this case, not just evidence of particular failures to follow state election laws

the Justice Department is not charged with enforcing, but of the evidence of fraud on a sufficient scale to change the outcome of the election.

We reach this conclusion based on the evidence, and it is important to underscore what we are not relying on. Disciplinary Counsel asks that we go beyond just the evidence offered in the proceeding to use various aspects of the way in which Mr. Clark defended Disciplinary Counsel's charges as evidence that he does not recognize his wrongdoing and that, therefore, a more severe sanction is appropriate.

Disciplinary Counsel argues that even though Mr. Clark had a right to invoke the Fifth Amendment and "[c]ertainly, [Mr. Clark] can defend himself here however he chooses," that "does not relieve him 'from recognizing the seriousness of the misconduct that led to' this proceeding.'" ODC Opening Br. at 42 (quoting *In re Yelverton*, 105 A.3d 413, 430 (D.C. 2014)). Disciplinary Counsel continues, "lawyers can both mount a vigorous defense while acknowledging mistakes and pledging to do things differently if given the opportunity." *Id.* (citing *Dobbie*, 305 A.3d at 812 as an example of crediting the respondent for doing so).

Disciplinary Counsel also urges that various objections Mr. Clark made during the course of the proceeding are actually an additional reason for imposing sanction. Disciplinary Counsel argues that Mr. Clark adopted a "misdirection strategy," that sought to deflect, rather than respond to, the allegations in the case. ODC Opening Br. at 42-44. Disciplinary Counsel cites in particular unsuccessful motions Mr. Clark filed that substantially delayed the proceedings, and the failure to

offer evidence about the conduct that formed the basis of charge from other witnesses besides himself. *Id.*

Disciplinary Counsel also points to Mr. Clark's demeanor when asserting privileges, urging that "Mr. Clark became combative and self-righteous when asserting privileges on the stand, and he tried on several occasions to make legal arguments in lieu of his three attorneys." ODC Opening Br. at 44 (citing Tr. 503, 511-12 (Clark)). Disciplinary Counsel argues that "[t]he Hearing Committee can—and should—consider Mr. Clark's demeanor as additional evidence of his failure to acknowledge the wrongfulness of his misconduct." *Id.* (citing *Bates v. Lee*, 308 F.3d 411, 421-22 (4th Cir. 2002) (concluding that it did not violate the rights of a defendant who invoked the Fifth Amendment to comment during sentencing on his failure to react when witnesses cried on the stand)).

Disciplinary Counsel adds that Mr. Clark is responsible for how his defense was litigated, because, although he "was represented throughout these proceedings, Mr. Clark explicitly named himself as both lawyer and respondent, and identified himself as part of his defense team." ODC Opening Br. at 45 (citing Tr. 512 (Clark)). Accordingly, Disciplinary Counsel urges that "[t]he inescapable conclusion is that Mr. Clark believes he did nothing wrong." *Id.*

In one way, this conclusion is inescapable because Mr. Clark's brief does not address or (therefore) dispute it. Nor does Mr. Clark address Disciplinary Counsel's specific points. But we remain obliged ourselves to indicate what indicia we find persuasive.

We disagree with some aspects of Disciplinary Counsel's argument. Mr. Clark *does* have the right to "defend himself here however he chooses." ODC Opening Br. at 42. If he does not respond to particular points, that may well make his defense less persuasive. But he is not obliged to disagree with every or any fact Disciplinary Counsel alleged. In fact, although it is true that Mr. Clark did not respond paragraph by paragraph to the facts in Disciplinary Counsel's Specification, we do not draw an inference from this, as he responded by pleading the Fifth Amendment. And at the hearing, he could have put on no evidence at all and argued that the facts did not amount to a disciplinary violation.

The fact that he chose to defend in other ways, such as challenging the proceeding on other legal grounds, and offering other evidence that he urged put his conduct in a different light does not become sanctionable just because we found these unpersuasive. Indeed, in some of the cases that Disciplinary Counsel relies on, Disciplinary Counsel has successfully urged that respondents should be found not to have acknowledged wrongdoing *because* they chose to dispute assertions of fact that proved to be true. *See, e.g.*, *Lattimer*, 223 A.3d at 453.

Others of Disciplinary Counsel's arguments, however, raise more serious concerns. We do have concerns about the particular legal arguments Mr. Clark has asserted. First, many of the arguments are quite strained. The District of Columbia Court of Appeals and the Federal District Court did not merely call Mr. Clark's main jurisdiction argument "incorrect"; these courts found it "absurd." *See Clark*, 311 A.3d at 888; *Clark*, 678 F. Supp. 3d at 127. His claim to have been denied a "fair

hearing" because of his invocation of the Fifth Amendment failed to cite contrary controlling authority that had previously be brought to his attention and overlooked or misdescribed decisions in his own case. *See* Mr. Clark's Br. at 58-60. And his other legal arguments for avoiding the proceeding, or claiming that it was unfair, do not appear to us to be significantly stronger.

Second, what many of his legal arguments seek is especially troubling. Mr. Clark did not argue merely that *he* did nothing wrong. Taken together, he has argued, among other things, that thousands of Justice Department lawyers who took an oath to follow the District of Columbia Rules of Professional Conduct should not be held to that oath; that the longstanding system the District of Columbia uses for attorney discipline of having volunteer and public input into the disciplinary process could not be used to hold anyone to their disciplinary obligations; that no jurisdiction should be disciplining lawyers under their existing systems because they should be permitting trial by jury; that the District of Columbia Court of Appeals must keep lawyers who violate its rules in good standing; and that all of these lawyers should be able to continue to serve the public regardless. *See, e.g.*, Mr. Clark's Br. at 64-77. These arguments attack the very idea of holding lawyers to bar standards.

We also take Disciplinary Counsel's point about Mr. Clark's role as not only party, but lawyer, in this proceeding. One reason for not imposing additional sanctions on a respondent based on legal arguments asserted in the proceeding is that often, the respondent is a client, not the lawyer making the argument. Here, however, that would be less of a concern. Mr. Clark made clear that he was part of

the defense team, and pushed to be able both to plead the Fifth Amendment in his own testimony and while arguing issues as a legal counsel.

We were also concerned ourselves about Mr. Clark's demeanor during the hearing. Particularly because he assumed these dual roles, he was at times argumentative, even as he asserted privileges not to answer questions.

Disciplinary Counsel has also cited legal authority that suggests that we could take these types of factors into account. For example, *Yelverton* did rely on a respondent's litigation conduct in determining the appropriate sanction. *See* 105 A.3d at 430-31. And *Bates*, 308 F.3d at 421-22, did allow the assessment of courtroom demeanor of a criminal defendant who had exercised his Fifth Amendment right not to testify. It concluded that a prosecutor could invite the jury to consider a defendant's failure to react to the emotional testimony of others. 308 F.3d at 422-23.

However, even assuming that the law would permit us to draw conclusions from these sources, we do not do so for several reasons. To begin with, we approach with extreme caution a request that might have the effect of imposing a more severe sanction on a respondent for making unsuccessful arguments in defense of a charge, or for arguing points too vigorously. Respondents are entitled to defend themselves and every sanctions evaluation involves a situation where at least one defense was unsuccessful. If we readily impose additional sanctions for making unsuccessful arguments, we may chill the ability to defend – an especially unfair result when

Disciplinary Counsel is free to assert losing arguments without any fear of having to face a sanctions proceeding if the arguments fail.

Sanctioning losing arguments also risks creating inconsistency in our disciplinary rules. Although, as we noted, Mr. Elliott's testimony concerning Rule 3.1 (candor towards the tribunal) was not directly relevant to standards that apply for violation of Rule 8.4(c), he is correct that Rule 3.1 does require a significant standard before sanctioning counsel for pursuing unsuccessful arguments. *See* FF 228. In fact, while the District of Columbia Court of Appeals and the United States District Court for the District of Columbia called Mr. Clark's main jurisdictional argument "absurd," they did not impose a sanction for asserting it, much less (at least publicly) refer the matter for disciplinary proceedings. *See Clark*, 311 A.3d at 888; *Clark*, 678 F. Supp. 3d at 127. Thus, while it is true that arguments can be so unreasonable that they provide an additional basis for sanction, we do not reach that conclusion lightly.

Second, the type of arguments that Mr. Clark asserts here are fundamentally different than those involved in the cases Disciplinary Counsel cites. Mr. Yelverton did not merely assert strained arguments. Mr. Yelverton, among other things, filed six motions with the District of Columbia Court of Appeals, "some of which were largely verbatim copies of previously submitted filings," including a request that every judge of the court be recused from his case for bias "based upon prejudgment" with theories so outlandish that he was ordered to stop submitting motions and pleadings in this case without leave of the court, that he then disobeyed. 105 A.3d

at 419-20. Mr. Clark did not lie on the stand or seek falsely to transfer blame to a client. *See Lattimer*, 223 A.3d at 453-56 (finding an aggravating factor for failure to acknowledge wrongdoing when respondent blamed clients and rewrote facts). Although we do believe that Mr. Clark does not appreciate the wrong he committed, he did take responsibility for his actions in the sense of owning his decision at the time. Indeed, as Mr. Philbin notes, Mr. Clark sincerely owned his actions even as he remained unable to appreciate what people told him about how misguided they were.

Third, although we do not find compelling Mr. Clark's arguments about the effect of his role in the government on his obligations as a member of the bar, there are special principles that apply in some circumstances to the work of government lawyers. It is understandable that Mr. Clark would at least want to raise the possibility that these principles affect the treatment of this case. *See* Mr. Clark's Br. at 70-75. Indeed, Disciplinary Counsel's argument that this is a "highly unusual case," Opening Br. at 38-42, implies that it may have "highly unusual" defenses that have not been previously considered.

Finally, Mr. Clark's demeanor, while troubling, was different from Mr. Bates' demeanor. Mr. Clark did not listen to emotional testimony from victims and show no remorse about the underlying events. He was angry at questions to which he responded by asserting privilege. The anger he displayed did not do him credit. Advocates are more effective if they can control their emotions and we would wish to be more reflective than reflexive. But the fact that he was annoyed, or even angry,

when asked questions to which he was claiming privilege in a proceeding in which he is defending his right to practice law does not make him more worthy of sanction.

7. Other Circumstances in Aggravation and Mitigation

It is undeniable that the conduct took place in a highly-charged political environment. Mr. Clark was certainly not the only person who became convinced that election result was wrong, or the only person (regardless of political beliefs) to be subject to confirmation bias in connection with the 2020 election. We have found that his reaction to the circumstances entirely overtook his judgment. That is very serious, but it is not as serious as intentionally seeking to manipulate the results as Disciplinary Counsel has claimed.

As observed by Mr. Philbin and Mr. Donoghue, Mr. Clark, while misguided, was sincere in his beliefs. *See* FF 153; Tr. 186 (Donoghue), 293 (Philbin). This puts his conduct in a somewhat different category than someone who engaged in dishonesty for a venal motive. What Mr. Clark did was objectively reckless, but subjectively, the evidence indicated that he thought he had been chosen for a historic cause, to which he applied all of his energies.

However, we do consider as an aggravating factor the extreme nature of the warnings that Mr. Clark disregarded.

When his long-standing colleagues, Mr. Rosen and Mr. Donoghue, told him that the statements in the letter were false and that the approach was misguided, then

repeated their concern and refused to sign the letter, and again voiced their opposition in the January 2 meeting, he persisted.

When warned that there would be mass resignations at the Justice Department if he became Acting Attorney General under these circumstances, Mr. Clark said "so be it." Tr. 177 (Donoghue).

When Mr. Philbin warned that there would be riots in major American cities if President Trump stayed in office after January 20, Mr. Clark said "well, Pat, that's what the Insurrection Act is for." Tr. 281 (Philbin). We agree with Mr. Philbin's opinion that given the possible consequences of Mr. Clark's conduct, he should have been "really sure" about what he was doing:

> Well, I think for the obvious reason that if your planned course of action is one that you think will or has the high likelihood of triggering riots in every major city in America, you've got to be really sure about what you're doing, and have no alternatives. And that was just not -- and be justified, 100 percent, 1000 percent, know that, you know, you are rock solid in what you're doing. And that was not, in my estimation, that was not the sort of situation we were talking about.

Tr. 282-83 (Philbin).

B. Sanctions Imposed for Comparable Misconduct

In disciplinary cases involving dishonesty, the Court has imposed a wide range of sanctions, depending on the surrounding circumstances. *See, e.g.*, *In re Edwards*, 278 A.3d 1171, 1172-74 (D.C. 2022) (per curiam) (suspending respondent for two years with fitness where the respondent made a reckless false statement to a court on a *pro hac vice* application form, displayed a pervasive lack of record keeping, and had prior discipline for strikingly similar misconduct); *In re Tun*, 195

A.3d 65, 72, 79 (D.C. 2018) (one year suspension where the respondent filed a recusal motion with a court that contained a false statement and then offered false testimony to the hearing committee); *Rodriguez-Quesada*, 122 A.3d at 921 (two-year suspension where attorney "intentionally made a false statement to an immigration judge and then gave false testimony to the Hearing Committee about having done so," but also showed "a pattern of lack of competence, lack of diligence, neglect of his clients' cases, failure to communicate with his clients, and refusal to return case files and unearned payments"); *In re Guberman*, 978 A.2d 200, 204, 210 (D.C. 2009) (eighteen-month suspension for lying to a law firm supervisor about having filed an appeal and creating false court filing stamps on papers, thereby "falsely certifying that the papers had been filed in court" (internal quotation marks omitted)); *Hutchinson*, 534 A.2d at 919-920 (one-year suspension for untruthful testimony before the Securities and Exchange Commission); *In re Ukwu*, 926 A.2d 1106, 1109 (D.C. 2007) (suspending respondent for two years with fitness requirement in a matter involving five client matters where respondent engaged in dishonesty, intentionally neglected clients, and failed to communicate and act with reasonable promptness); *In re Johnson*, 158 A.3d 913, 915-16, 919-20 (D.C. 2017) (suspending respondent for ninety days, with sixty days suspended in favor of one year of probation with conditions, where respondent commingled funds, failed to act competently and diligently, and engaged in dishonest conduct).

The facts of this case do not fit neatly within these examples. Most of the cases involving lengthy suspensions have involved repeated independent acts of

dishonesty, rather than one effort. But the dishonesty did not have anywhere near the type of impact of the attempted dishonesty we have found here. As noted above, Disciplinary Counsel has identified no comparable cases involving violations of Rules 8.4(a) or 8.4(c) in this jurisdiction.

In support of its disbarment recommendation, Disciplinary Counsel points to two recent cases as the only instances of which it is aware in which an attorney has engaged in comparable misconduct – *Giuliani*, Board Docket No. 22-BD-027 and *In re Eastman,* Case No. SBC-23-O-30029-YDR (State Bar Court of California, Mar. 27, 2024). ODC Reply Br. at 34-35. These cases, however, are distinguishable from this one.

In *Giuliani*, the Board recommended that the Court disbar Mr. Giuliani for violating Rules 3.1 and 8.4(d) by propounding frivolous litigation in an effort to disenfranchise hundreds of thousands of Pennsylvania voters in the 2020 presidential election. *Giuliani*, Board Rpt. at 1-4. The Board found that Mr. Giuliani's litigation "launched a full-throated attack on the integrity of the Pennsylvania election." *Id.* at 56. It concluded that disbarment was necessary "[i]n order to maintain public confidence in the integrity of the profession, and to deter others who might be inclined to similar frivolous attempts to deprive their fellow citizens of the right to vote." *Id.* at 62-63. Similar to our conclusion here that Mr. Clark lacked an objectively reasonable basis for statements made in the Proof of Concept letter, the *Giuliani* Board found that the claims Mr. Giuliani made in pursuit of his election

challenges were based "only on speculation, mistrust, and suspicion" – not facts. *Id.* at 56.

But the two cases present critical differences as well. In the context of representing his client in court, Mr. Giuliani abused his license to practice law and breached his core ethical duties. In contrast, Mr. Clark's misconduct did not involve the courts, occurred in the context of high-level discussion and debate within the Executive Branch regarding the integrity of the 2020 election, and did not involve an attempt to mislead others within the Justice Department.

Similar in some respects to the *Giuliani* case, the *Eastman* matter also arose out of his representation of Mr. Trump and the Trump Campaign. But the *Eastman* case presented considerably broader charges and more egregious misconduct than that presented here. There, the California State Bar court found that, in connection with efforts to challenge the outcome of the 2020 presidential election, Dr. Eastman failed to support the Constitution and laws of the United States, and engaged in pervasive dishonesty, including knowingly false and misleading statements in court filings. The California court concluded that Dr. Eastman's misconduct involved "a shared plan to obstruct the lawful function of government," that he was aware that his plan was unlawful, and that his "demonstrated intent was to foment loss of public confidence in the integrity of the 2020 election." *Eastman*, Case No. SBC-23-O-30029-YDR, at 124. In view of the foregoing, the California State Bar court recommended Dr. Eastman's disbarment. *Id.* at 2. This case does not involve the degree of dishonesty present in *Eastman*. It does not involve dishonesty to courts.

And we have made no finding that Mr. Clark engaged in a conspiracy to obstruct the function of our government or that he otherwise had a venal motive.

Taking all these factors into account, we recommend that Mr. Clark be suspended for two years from the practice of law. The limitation in what was charged and proven warrants a less severe sanction than the Board found appropriate in *Giuliani.* But, as in *Giuliani*, the significant sanction of a two-year suspension is necessary "in order to maintain public confidence in the integrity of the profession, and to deter others." *Giuliani*, Board Rpt. at 62-63. This case is not like a lawyer making a misstatement in a brief. Mr. Clark engaged in a campaign that ignored warning signs so significant that he risked mass resignations in the Justice Department and riots in the street. The sanction needs to reflect the seriousness of the risks Mr. Clark dismissed.

In recommending this sanction, we also do not accept Mr. Clark's argument that it is "a dictatorial crushing of dissent," to expect lawyers who challenge elections not to attempt dishonesty in violation of Rules 8.4(a) and (c). Mr. Clark's Br. at 80-81. In *Giuliani*, the Board concluded that holding counsel to follow Rule 3.1 (involving candor towards a tribunal) does not destroy the ability to make valid or even novel election challenges:

> [T]here is nothing inherently improper in challenging election results, even in a Presidential election. Political candidates, like anyone else, are entitled to seek assistance from learned counsel to obtain relief from the judicial system. Counsel are entitled to make arguments to advance their client's interest, to include putting forth novel arguments in support of their position, without regard to how that interest might be perceived by others, provided that those arguments are supported by

> law and fact. Respondent violated Rule 3.1 not because he challenged the results of the Pennsylvania election, and not because he did so in federal court, but rather, because he did so without the requisite factual basis.

Giuliani Board Rpt. at 49.

Similarly, here, Mr. Clark faces sanctions for violating Rule 8.4(a) not because he disagreed with the election results, but because he took extraordinary efforts to try to send a letter that was untrue and misleading while ignoring and willfully blinding himself both to the real facts and to the consequences of sending that letter.

C. Fitness

The purpose of conditioning reinstatement on proof of fitness is "conceptually different" from the basis for imposing a suspension. *Cater*, 887 A.2d at 22. The Court has observed that while a suspension represents "a 'commensurate response to the attorney's past ethical misconduct,' the fitness requirement addresses the concern 'that the attorney's resumption of the practice of law will not be detrimental to the integrity and standing of the Bar, or to the administration of justice, or subversive to the public interest.'" *In re Brown*, No. 20-BG-0589, slip op. at 25-26 (D.C. Mar. 7, 2024) (quoting *Lattimer*, 223 A.3d at 452-53).

Thus, in *Cater*, the Court held that "to justify requiring a suspended attorney to prove fitness as a condition of reinstatement, the record in the disciplinary proceeding must contain clear and convincing evidence that casts a serious doubt upon the attorney's continuing fitness to practice law." 887 A.2d at 6. Proof of a "serious doubt" involves "more than 'no confidence that [the respondent] will not

engage in similar conduct in the future.'" *Guberman*, 978 A.2d at 213. It connotes "real skepticism, not just a lack of certainty." *Id.* (quoting *Cater*, 887 A.2d at 24).

As the Court explained:

> The fixed period of suspension is intended to serve as the commensurate response to the attorney's past ethical misconduct. In contrast, the open-ended fitness requirement is intended to be an appropriate response to serious concerns about whether the attorney will act ethically and competently in the future, after the period of suspension has run. . . . [P]roof of a violation of the Rules that merits even a substantial period of suspension is not necessarily sufficient to justify a fitness requirement . . . ."

Cater, 887 A.2d at 22.

In addition, the Court found that the five factors for reinstatement set forth in *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985), should be used in applying the *Cater* fitness standard. The factors are:

(a) the nature and circumstances of the misconduct for which the attorney was disciplined;

(b) whether the attorney recognizes the seriousness of the misconduct;

(c) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones;

(d) the attorney's present character; and

(e) the attorney's present qualifications and competence to practice law.

Cater, 887 A.2d at 21, 25.

As with this sanction itself, the analysis on proof of fitness in this case does not fit easily within prior precedents. As explained above, Mr. Clark's conduct

(factor a) was extremely serious, there is no reason to believe (factor b) that Mr. Clark recognizes the seriousness of his conduct, or (factor c) that has he taken any step to remedy past wrongs or to prevent future ones. We, however, have no reason (factor d) to question his present character or (factor e) his qualifications and competence to practice law. As his character witnesses attest, and his resume reflects, he is a highly-credentialed, hard-working lawyer who represents clients tenaciously.

Having considered all of the evidence in this case, we have no question that Mr. Clark has the talent and intelligence to serve as a lawyer. But his apparent inability to acknowledge any concern about the risks involved in his extraordinary conduct leave us with "real skepticism, not just a lack of certainty," *Guberman*, 978 A.2d at 213, that, were the situation to arise again, he would act carefully and thoughtfully. It is admirable, not wrong, to believe in a cause; but it is wrong and dangerous to the public and our legal system to let that belief operate to the exclusion of judgment.

Accordingly, we believe that before he can be readmitted, Mr. Clark should demonstrate that he has reflected on the conduct in which he engaged, appreciated its risks, and is ready to provide the independent judgment that service as a lawyer requires.

V. CONCLUSION

For the foregoing reasons, the Committee finds that Mr. Clark violated Rule 8.4(a) by attempting to violate Rule 8.4(c) and should receive the sanction of a two-

year suspension from the practice of law. We further recommend that before readmission he demonstrate fitness to practice as described above. *See* D.C. Bar R. XI, §§ 14, 16(c).

HEARING COMMITTEE NUMBER TWELVE

Merril Hirsh

Merril Hirsh, Chair

Patricia Mathews

Patricia Mathews, Public Member

Rebecca Smith

Rebecca C. Smith, Attorney Member