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STATE BAR COURT

HEARING DEPARTMENT - LOS ANGELES

In the Matter of: JOHN CHARLES EASTMAN, State Bar No. 193726, An Attorney of the State Bar	Case No. SBC-23-O-30029 **STATE BAR'S MOTION IN LIMINE NO. 5 TO LIMIT EXPERT TESTIMONY OF JOHN YOO; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DUNCAN CARLING**

The Office of Chief Trial Counsel of the State Bar of California (hereinafter "State Bar" or "OCTC") hereby moves this court for an order *in limine* limiting the testimony from respondent's designated expert witness John Yoo. The State Bar seeks to ensure that Yoo's testimony does not stray into two areas in which he should not be allowed to opine:

First, at his deposition, Yoo expressly disclaimed any intent to offer an opinion regarding whether it would be frivolous to assert that Vice President Pence had the authority to unilaterally adjourn the Joint Session of Congress, explaining that he had not researched the

topic. Yoo should not be permitted to opine on the merits of respondent's view on adjournment because Yoo doesn't have an adequate basis to reach that conclusion. (*See Korsak v. Atlas Hotels, Inc.*, 2 Cal. App. 4th 1516, 1523 (1992) ("[C]ourts have the obligation to contain expert testimony within the area of the professed expertise, and to require adequate foundation for the opinion.").) Moreover, experts cannot testify at trial about opinions when they previously stated at deposition they would not be offering opinions on that subject. (*See, e.g, Amtower v. Photon Dynamics, Inc.*, 158 Cal. App. 4th 1582, 1599 (2008) (testimony on topic properly excluded where expert "testified at his deposition that he had formed no opinions" on topic). The Court should prohibit respondent from eliciting any opinion from Yoo on this topic.

Second, although Yoo advised Vice President Pence's office in November 2020 that there was "no dispute" about the electoral vote, Yoo apparently intends to testify at trial that respondent's argument that Pence could refuse to count certain electoral votes was non-frivolous. But at his deposition, Yoo repeatedly explained that the question of whether respondent's position was legally tenable "depends on the facts," and that he did not know what facts respondent was relying upon, or whether those facts could justify respondent's position. The court should preclude Yoo from offering opinions and testimony about this topic that he was unprepared to discuss at his deposition. (*See id.*)

This motion is based on all pleadings and records in this case, the attached memorandum of points and authorities, and upon any additional documentary or oral evidence which may be presented at a hearing on the motion.

Respectfully submitted,

THE STATE BAR OF CALIFORNIA
OFFICE OF CHIEF TRIAL COUNSEL

DATED: June 5, 2023

By: _____
Duncan Carling
Supervising Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

Respondent assisted his client former President Trump with two potential strategies to overturn the 2020 election. First, respondent asserted that Vice President Pence could unilaterally decide not to count certain electoral votes. *(See* Notice of Charges at 4-8 ¶¶ 8-10, 12-17.) Second, he argued that Pence could unilaterally adjourn the Joint Session of Congress purportedly to allow state legislatures to decide whether to certify Trump's "alternative" slate of electors. (*See id.*)

In a recent article, John Yoo discussed historical practices and legal scholarship concerning the 12th Amendment, the Electoral Count Act, and the Vice President's authority to resolve disputes over the legitimacy of presidential electoral votes. (*See* Robert J. Delahunty & John Yoo, Who Counts?: The Twelfth Amendment, the Vice President, and the Electoral Count, 73 Case W. Res. L. Rev. 27 (2022).)[1] In his Case Western article, Yoo concluded that:

> On the facts of the 2020 election, no dispute over the electoral votes justified Vice President Pence's intervention. States had certified their electoral counts, and no courts had halted the meeting of the electors or the reporting of their votes. Because the Twelfth Amendment requires that "the votes *shall* then be counted," Pence was obliged to count the votes as submitted by the states.
>
> (*See* 73 Case W. Res. L. Rev. at 33-34. *See also id.* at 134 ("Pence was on unassailable grounds when he said he had 'no right to overturn the election.'")

Yoo's article is consistent with the advice that he gave to Vice President Pence's office in mid-November 2020: that it was "obvious" that "there was no dispute" over the electoral slates that would permit Pence to do anything but count those slates and declare Biden the winner. (*See* Banter: An AEI Podcast, *John Yoo on SCOTUS, Justice Thomas,*

[1] Available at: https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=4991&context=caselrev.

and Old Parkland, American Enterprise Institute, at 20:43-45 (May 31, 2022).)[2] As Yoo explained: "The most important thing – and I said this to the Vice President's office – is whether there's a real dispute over an electoral vote. Once there's a real dispute, then there's a system. *But you can't let people just make up that there's a dispute*." (*See id.* at 20:02-16 (emphasis added); *see also id.* at 20:38-21:01 ("This is what a real dispute is. And if President Trump's supporters just say, oh we're going to appoint electors and we think it's a dispute, I'm going to say, that's not enough. There has to be an institution, a court, a governor, a legislature that says there was fraud or there was a problem. . . . You can't just claim it because by your reelection committee.").

At his deposition, Yoo testified that he stood by the views he expressed in the Case Western article, and that any ambiguities in his testimony should be resolved by reference to it. (May 26, 2023 Deposition of John Yoo ("Yoo Dep.") at 32:10-15.) Yoo also testified about his research into the history and legal scholarship concerning the 12th Amendment as reflected in the article and historical disagreements about the electoral vote, as well as his views concerning the independent state legislature theory and his friendship with respondent and conversations that they had during the relevant 2020 time period.

As Yoo's article and advice to Pence suggest, Yoo disagrees with respondent, although Yoo apparently intends to opine that respondent's position was tenable or non-frivolous. Yoo testified at his deposition that he was basing that opinion on the ground that there "could be" disagreement about what "minimum facts" supported respondent's views and course of action that respondent proposed in his January 3, 2020 six-page memo. (*See* Yoo Dep. at 42:14-23; 56:14-57:10.) As discussed below, Yoo admitted, however, that he does not know what facts respondent was relying upon and doesn't have an opinion on whether in this case, there were the minimum facts to support respondent's views. (*See, e.g. id.* at 42:24-43:9; 43:22-25.)

[2] Available at: https://www.aei.org/podcast/john-yoo-on-scotus-justice-thomas-and-old-parkland/

Yoo's article does not discuss any power that the Vice President may have to adjourn or delay proceedings. Yoo testified in his deposition that he would not offer an opinion on that theory because he had not researched or considered it. *See* Yoo Dep. at 74:21-75:18; 61:25-62:16.

A. Yoo Cannot Testify Regarding Respondent's Plan to have the Vice President Adjourn the Joint Session

As noted above, respondent asserted on behalf of his client Trump that Vice President Pence could adjourn the Joint Session purportedly to allow state legislatures to decide whether to certify Trump's "alternative" slate of electors. Yoo's article does not discuss this theory, and his expert disclosure does not mention it.[3] Most importantly, Yoo testified that he would not offer an opinion about whether this plan was frivolous because he had not researched the matter. When first asked about the theory, he explained that he "hadn't really thought about it." (Yoo Dep. at 61:22-62:2.) Later, when specifically asked whether he was "going to offer an opinion on the frivolousness or the tenability of an argument that the Vice President has authority to unilaterally adjourn the joint session," he replied, "I don't think so. I hadn't — I haven't done the research for it." (Yoo Dep. at 75:11-18; *see also id*. at 74:21-75:1 (Yoo's opinions are "just about counting the votes").)

Respondent should not be permitted to ask Yoo to offer any opinion about respondent's plan to have Pence adjourn the Joint Session and delay the proceedings. First, Yoo admitted that he has not studied this question, and thus, any opinion from him on this issue would lack an adequate basis. (*See Korsak v. Atlas Hotels, Inc.*, 2 Cal. App. 4th 1516, 1523 (1992) ("[C]ourts have the obligation to contain expert testimony within the area of the professed expertise, and to require adequate foundation for the opinion.").)

[3] The expert disclosure states that "Mr. Yoo is expected to testify regarding the Twelfth Amendment to the Constitution of the United States of America and his legal interpretation of same as a constitutional law scholar. Mr. Yoo is also expected to testify regarding the good faith legal arguments a lawyer can advocate regarding the constitutional interpretation of the Twelfth Amendment." (Respondent's March 22, 20223 Designation of Expert Witness Information, p. 6.)

Yoo cannot fix this problem by studying the issue at this late stage of the proceedings. The Civil Discovery Act's provisions governing expert discovery apply to these proceedings. (State Bar Rule of Procedure 5.65.1.) The purpose of these provisions is "to give fair notice of what an expert will say at trial." (*See Bonds v. Roy*, 20 Cal. 4th 140, 146 (1999).) They thus require that experts be prepared at their deposition to discuss "the specific testimony, including an opinion and its basis, that the expert is expected to give at trial." (Cal. Civ. Pro. Code § 2034.260(c)(4).) An expert who is not able to discuss a particular area at his deposition cannot testify to that opinion at trial. (*See Jones v. Moore*, 80 Cal. App. 4th 557, 565 (2000).) Moreover, "[w]hen an expert deponent testifies as to specific opinions and affirmatively states those are the only opinions he intends to offer at trial, it would be grossly unfair and prejudicial to permit the expert to offer additional opinions at trial." (*Id.*) Those new opinions must therefore be excluded. (*See id.*; *see also, e.g., Amtower v. Photon Dynamics, Inc.*, 158 Cal. App. 4th 1582, 1599 (2008) (because an expert "testified at his deposition that he had formed no opinions on" a certain matter, the trial court properly prohibits him from testifying about that matter).) This rule applies even where the written expert disclosure is broad enough to encompass the testimony. (*See Jones*, 80 Cal. App. 4th at 565-66.)

Here, Yoo testified at his deposition that he did not have an opinion to offer on the merits of respondent's plan to have the Vice President delay the proceedings, because he had not even thought about the issue, much less done the necessary research. The State Bar has had no opportunity to question him about any opinion he may have developed since then. Yoo should be prohibited from offering any such opinion at trial.

B. Yoo Cannot Opine About Whether Respondent's Plan to Have Pence Reject Certain Electoral Votes Was Frivolous

Yoo was also unprepared to discuss the basis for his opinion that respondent's other strategy for overturning the election — that Vice President Pence could unilaterally decide not to count certain electoral votes — was not frivolous; he eventually conceded that he did not have an opinion as to whether respondent's plan was in fact legally tenable. (Yoo Dep. at 56:14-57:10.)

Yoo repeatedly acknowledged that he did not believe that Pence could lawfully have refused to count any ballots. (*See, e.g.*, Yoo Dep. at 18:11-15 ("I did not see, in December 2020, that there was what, in my view, would be a sufficient dispute in order to require Vice President Pence to have to choose between any kind of conflicting electoral counts.").) Similarly, he "did not see any evidence that there had been dual slates of competing electors selected by any legitimate institutions of the state government." (*Id*. at 18:22-24; *see also, e.g., id*. at 42:8-14; 51:19-52:8 (Respondent's proposed course of action "is not permissible under the 12th Amendment.")."

Yoo then explained that respondent apparently takes a more-flexible "totality of the circumstances approach" to the question. (*See id*. at 43:22-25.) When asked whether respondent's position was legally tenable, Yoo declined to answer, explaining that the answer depends on facts — or perhaps what facts respondent believed to be true — and Yoo does not know what those facts are:

> I consider that a factual question, not a legal question. I think that it depends on, right, what actually happened. And I just want to emphasize, I don't think that I could contradict, you know, Dr. Eastman in what he thinks he saw in terms of facts. Like I said, I can only say what I saw, but to me that's a factual question, not a question of legal interpretation.

(*Id*. at 18:25-19:10.)

When asked specifically whether there was a reasonable basis for respondent's claim that seven states had transmitted dual slates of electors, thus rendering respondent's position legally tenable, Yoo similarly declined to express any opinion. (*Id.* at 19:24-21:2 ("I don't think I can comprehensively answer your question about what other people thought or what's legally tenable because I don't know all the facts beyond … just observing what's in the public domain."); *id*. at 25:4-9 (agreeing that "at some point there are so few facts that the [lawyer's] position becomes legally untenable"); *id*. at 38:6-13 ("there's got to be some line between what's sufficient to create a legitimate dispute and what's not."); *id*. at 54:20-55:9.)

Indeed, Yoo admitted that he had not even considered what facts would be sufficient to support Respondent's position. When asked what facts would have to exist for him to opine that

Respondent's position was legally tenable, he demurred because he "never really thought about it -- not thought about it." (*Id*. at 43:22-25; *see also id.* at 42:24-43:9 ("I didn't even really consider it.").) Similarly, though Yoo contended that law review articles supported respondent's position, (*id*. at 129:7-132:5), he disclaimed any knowledge of how the theories espoused in those articles would apply to the actual facts in this matter. (*See, e.g., id.* at 139:9-23.)

Finally, Yoo was asked whether he would "in this trial, be offering the opinion that [respondent's] proposal" was "nonfrivolous." (*Id*. at 56:14-17.) Yoo replied, "[I]t depends on the facts present. I can't testify about the facts present." (*Id*. at 56:19-20.) When asked whether this meant that he was "saying that hypothetically, there could be minimum facts to support [respondent's position], but you don't have an opinion as to whether in this case there were minimum facts to support that view?" he answered "Yeah. How could I?" (*Id*. at 57:5-10.)

Experts must be prepared at their deposition to discuss "the specific testimony, including *an opinion and its basis*, that the expert is expected to give at trial." (*See* Cal. Civ. Pro. Code § 2034.260(c)(4) (emphasis added); *see also Wicks v. Antelope Valley Healthcare Dist.*, 49 Cal. App. 5th 866, 881, (2020) (excluding expert opinion that lacked a reasoned explanation as to why the underlying facts led to the ultimate conclusion).) The requirement that experts provide the basis for their opinions is critical because an expert opinion is worth no more than the reasons and facts on which it is based. (*See id.*) The deposing party must therefore be able to probe not just the opinion, but how the expert reached it and the facts on which it depends. (*See* Cal. Civ. Pro. Code § 2034.260(c)(4).) Yoo repeatedly testified that his opinion about whether respondent's position was legally tenable "depends on the facts," but that he did not know what "minimum facts" respondent was relying upon or whether those "minimum facts" could justify respondent's position. (Yoo Dep. at 56-57.) Thus, he did not have an actual opinion as to whether respondent's claim about Pence's authority to disregard electoral votes was legally tenable. (*See id.* at 57 ("How could I?").) To the extent he stated that he did have an opinion on this topic, he failed to provide the required basis and "reasoned explanation" for it. (*See Wicks,*

49 Cal. App. 5th at 881.[4]

Moreover, "a party's expert may not offer testimony at trial that exceeds the scope of his deposition testimony if the opposing party has no notice or expectation that the expert will offer the new testimony, or if notice of the new testimony comes at a time when deposing the expert is unreasonably difficult." (*See Harris v. Thomas Dee Eng'g Co.*, 68 Cal. App. 5th 594, 601 (2021); *Easterby v. Clark*, 171 Cal. App. 4th 772, 778 (2009) (additionally "an expert may not offer an opinion on [a topic] at trial if he declines to offer one during his deposition."); *see Harris v. Thomas Dee Eng'g Co.*, 68 Cal. App. 5th 594, 601 (2021).) Respondent has not provided any notice that Yoo will expand his deposition testimony at trial. Because Yoo was unable to provide an opinion at his deposition about whether respondent's position was supported by the "minimum facts" needed to render Respondent's view legally tenable, he cannot do so at trial. (*See* Yoo Depo. at 56:14-57:10.)

[4] At his deposition, Yoo did point to some bases for his legal views. He suggested that respondent's position could be justified by a version of the independent state legislature theory. (*See, e.g.,* Yoo Dep. at 27:10-29:4.) He also indicated that any objection to an elector raised by a member of Congress is by definition non-frivolous, regardless of whether it has any factual or legal basis of any kind. (*See* Yoo Dep. at 90:22-91:22; *see also id.* at 91:9-14 ("I disagree with that, but the fact that there's a senator or member of the House who are willing to do that, I guess to me -- not a guess -- to me, that seems to be their reflection that these are not frivolous. I don't agree with them. I don't agree."). He also contended that respondent's conduct was analogous to Thurgood Marshall and the NAACP's decades long, public, deeply reasoned, step by step court strategy to change the law concerning racial segregation and *Plessy v. Ferguson.* (*See id.* at 63:11-64:5; 131:14-31.)

CONCLUSION

For the above reasons, the court should grant the State Bar's motion to limit Professor Yoo's testimony at trial.

Respectfully submitted,

THE STATE BAR OF CALIFORNIA
OFFICE OF CHIEF TRIAL COUNSEL

DATED: June 5, 2023

By: _____
Duncan Carling
Supervising Attorney

DECLARATION OF DUNCAN CARLING

I, Duncan Carling, declare:

1. I am an attorney admitted to all courts of the State of California. I have been employed as a Trial Counsel in the Office of Chief Trial Counsel since June 5, 2017, and am currently a Supervising Attorney. I am assigned to the above-captioned matters. All statements made herein are based on my personal knowledge.

2. On May 26, 2023, I took the deposition of respondent's expert witness, John Yoo. Attached as Exhibit 1 to this declaration are true and correct copies of excerpts of the Yoo deposition from the certified transcript.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 5th day of June, 2023 at Alameda County, California.

Duncan Carling
Declarant

EXHIBIT 1

STATE BAR COURT
HEARING DEPARTMENT - SAN FRANCISCO

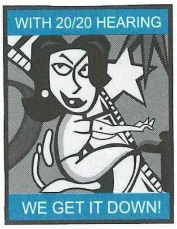
IN THE MATTER OF:	)
	)
JOHN CHARLES EASTMAN,	)
STATE BAR NO. 193726,	)
	) **CASE NO.** SBC-23-O-30029
	)
AN ATTORNEY OF THE STATE BAR.	)
_____	)

DEPOSITION OF
JOHN YOO

DATE: Friday, May 26, 2023

REPORTER: Stephanie Cherness, CSR No. 13775

VIA REMOTE VIDEO TECHNOLOGY



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STATE BAR COURT

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of: JOHN CHARLES EASTMAN, State Bar No. 193726, An Attorney of the State Bar	Case No. SBC-23-O-30029

VIDEOCONFERENCE DEPOSITION OF JOHN YOO

Friday, May 26, 2023

Via Zoom

Reported by:
STEPHANIE CHERNESS
CSR No. 13775

STATE BAR COURT

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of:	)	
	)	
JOHN CHARLES EASTMAN,	)	
	)	Case No.
State Bar No. 193726,	)	SBC-23-O-30029
	)	
An Attorney of the State Bar	)	
_____	)	

The videoconference deposition of JOHN YOO, taken on behalf of the State Bar, via Zoom videoconference, commencing at 9:21 a.m., Friday, May 26, 2023, before Stephanie Cherness, Certified Shorthand Reporter No. 13775.

APPEARANCES OF COUNSEL (via Zoom):

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ALSO PRESENT:

JOHN EASTMAN
MATTHEW SELIGMAN

fair?

BY MR. CARLING:

Q Well, I'll try to pose a question that avoids this issue.

A Yeah.

Q Putting aside what advice you may or may not have given Vice President Pence, in December 2020, did you consider whether there was sufficient evidence of a real dispute over the electoral votes to give the Vice President authority to reject votes?

A Yes, that's fair to say. I did not see, in December 2020, that there was what, in my view, would be a sufficient dispute in order to require Vice President Pence to have to choose between any kind of conflicting electoral counts.

Q And did you consider in December of 2020 whether any state had submitted dual slates of electors to the Vice President?

A Yes, I looked at the time; I didn't see any.

Q You didn't see any evidence that any state had submitted dual electors, correct?

A Yeah. I did not see any evidence that there had been dual slates of competing electors selected by any legitimate institutions of the state government.

Q Will you be opining in this case that

Dr. Eastman's position in December 2020 that there were dual slates of electors was a tenable legal argument?

A I consider that a factual question, not a legal question. I think that it depends on, right, what actually happened. And I just want to emphasize, I don't think that I could contradict, you know, Dr. Eastman in what he thinks he saw in terms of facts. Like I said, I can only say what I saw, but to me that's a factual question, not a question of legal interpretation.

Q The first sentence in the two-page memo -- and, you know, when I say "two-page memo," I'm referring to the December 23rd, 2020 -- do you know what I mean by --

A Yeah, do you want me to pull it up in front of me?

Q I was debating. I'll go ahead and put it on the screen.

A Okay. Because I certainly have it here somewhere.

Q All right. Can you see the screen?

A Yep.

MR. CARLING: I don't think, Madam Court Reporter, that we need to mark this as an exhibit.

Q The very first sentence says, "Seven states have transmitted dual slates of electors to the

President of the Senate." Do you see that?

A Yeah.

Q Is that a factually correct statement?

A I don't think factually that it is correct.

Q Is there a tenable legal argument that it's a factually correct statement?

A How could you have a legally -- right, that's my point I think you're getting at, is I don't think that's, to me, a legal question. To me that's just a reporting of fact. I didn't see the facts that way at that time.

Q In your opinion in December 2020 or on December 23rd of 2020, was there a reasonable basis for making this factual assertion?

A That I don't know. I don't -- I just couldn't -- I'm not a fact witness. I don't know what information there was available to other people. I did not see -- or what I would do if I were following, you know, through the -- based on the theory I had was to look and see what did the state legislatures certify at that time under the laws of the state or what did state or federal courts find in reported decisions.

But I can't -- I don't think I can comprehensively answer your question about what other people thought or what's legally tenable because I don't

know all the facts beyond just what actually you and I would know just observing what's in the public domain.

Q If you assumed that the leaders of the legislatures of those seven states had publicly stated that they had no intention of challenging the governor's certificate of ascertainment or reconsidering their state's electoral votes, would that change your view as to whether there's a reasonable basis for making that statement?

MR. MILLER: Objection. It lacks foundation, it's vague, also calls for speculation.

Go ahead, Professor Yoo. You can respond to that question.

THE WITNESS: I was going to say, do you -- you're just preserving this for some future? I can go ahead and answer?

MR. MILLER: Yeah, you may hear me from time to time object to a question or make comment or even colloquy between counsel. For the most part, you can ignore that; it is just for the record. And you can feel free to respond to the question as best you can after that. So you might give me a second or two after the question is posed to assert an objection, but I'll make sure that it's known if I have an objection, but you can proceed to respond after that.

article, I tried to say that's why we rely on courts to -- when I say "we," I mean my co-author and I -- that's why we rely on courts to make that decision.

Q You said lawyers could disagree as to what the minimum facts could be on those points to give the Vice President this power. Do you agree that at some point there are so few facts that the position becomes legally untenable?

A Of course.

MR. MILLER: Objection. Vague, lacks foundation.

THE WITNESS: Yes, I mean, just to compare it to --

MR. MILLER: I'm sorry, Professor Yoo, I do have one more objection before you start your response --

THE WITNESS: Yeah.

MR. MILLER: -- and that is that it's an incomplete hypothetical. Thank you.

THE WITNESS: Yeah, I was actually, unfortunately, going to answer your question, Mr. Carling, with a hypothetical, which is to say -- or you could say in first-year criminal law, you could say someone had to use force to defend themselves, right? So you could say what is the -- what facts need to be

screen. Mr. Yoo, can you see the document on the screen?

A Yep.

Q And for the record, this is the January 3rd, 2021 six-page memo. I don't believe we need to use it as an exhibit in the deposition. In this memo, Dr. Eastman makes assertions about illegal conduct by election officials in various states. Do you see that?

A Yes.

Q In offering an opinion that Dr. Eastman's view that there were minimum facts to support Pence's authority to choose which votes to count, are you assuming that any of these factual assertions in the six-page memo were true?

A No, I don't need to. I did watch -- I mean, I did watch several of these cases move through the lower courts, so I don't need to -- particularly, I wrote about, I think, the Pennsylvania case, the Boockvar case, because I'm a native and I grew up Pennsylvania, so I was particularly interested in what was going on in my old home state. So I felt aware of that case in particular.

I guess my point of view was there's an argument that the courts had, in response to the Covid emergency, changed the electoral votes -- I'm sorry --

changed the process of taking -- of the voting for the 2020 election, and that that would be itself a grounds for questioning legitimacy of the electoral votes chosen in that election because the Constitution says it's the state legislatures that sets the rules for how you pick the electors.

So if the state courts and federal courts in those states had changed them in the variety of ways that the memo discusses, which is also extensively discussed in these opinions that the court's issued, that would itself be sufficient grounds to question the electoral vote. In my Case Western article, I don't agree with that, but it's certainly, to me, a permissible legal view to have.

Q So you had mentioned before --

A Can I say one more thing?

Q Go ahead.

A In fact, the Supreme Court, as you know, granted certain and heard oral arguments in this case called Moore versus Harper about state legislatures and their right to set the congressional districts in their states, and so it's still pending. The Court might still issue a decision. Some people think the Court might reject it. But if the Court issues a decision on that question, it would have a lot of implication for

whether that theory there is in the range of what I think -- within the range of permissible legal argument.

Q Would you agree, Mr. Yoo, that timely resolution of any challenges to a state's electoral vote are important for the fair and orderly transition of power?

A Of course.

Q All right. So you had acknowledged earlier that at some point, there are insufficient minimum facts to make a tenable argument that the Vice President has the authority to choose which vote to count, correct?

A Yeah. If you accept my view of what -- my legal view of what a sufficient minimum for a dispute has to be.

Q So I'm going to ask you to accept some hypothetical facts as true, and I'm not playing hide-the-ball here. I'm going to ask you, as we go, whether you still have minimum facts to support that tenable view that the Vice President has the authority.

A Uh-huh.

Q So one thing I would ask you to just assume is true is that all of the Trump campaign lawsuits challenging the states' votes had either been rejected or any cases still pending had no reasonable prospect of being resolved in the campaign's favor. So assume

Q Okay. And assume that all of the challenges brought by the Trump campaign had actually been rejected at that point. This is a hypothetical.

A Yeah.

Q On those facts, would you still say there's a tenable argument for enough minimum facts to give the Vice President authority to count the votes?

MR. MILLER: Objection. It's vague, lacks foundation, and also it's an incomplete hypothetical.

THE WITNESS: Maybe I could answer it this way: I would say I looked at it in the article. And, again, you know, I refer any ambiguity and clarity of my responses to the article. I think that's my best representation of what I think. Looking in from the Vice President's perspective, what do you see emanating from the states in your mind sufficient to create a dispute?

So my view is that -- my view in the article is this is my best view of what the Vice President -- or just what the Constitution means and then a Vice President would say, "I want to see, you know, what you're saying is lacking, conflict between the legislature and the governor or judicial findings of some kind of fraud or something or abuse."

But I think that it's reasonable to have a

Amendment. So to me those could be legitimate questions about the taking of the electoral votes in those states. I think we mentioned that at the end of the Case Western article.

BY MR. CARLING:

Q You agree that at some point there are an insufficient number of minimum facts to make a tenable legal argument that the Vice President --

A Of course, at some point you just can't -- you just can't claim facts exist, which there's no facts, yeah, but there's got to be some line between what's sufficient to create a legitimate dispute and what's not.

Q So if, hypothetically, Biden's win in these seven states had been confirmed multiple times through recounts and investigations and the responsible state officials in those states had said multiple times that there's no evidence of fraud or illegality to have affected the outcome, and as I mentioned, the same fact that the legislative leaders said they have no intention of changing the state's electoral vote, and there's no viable case still pending challenging those votes, on those facts, do you still think there's a tenable argument that there's enough facts for the Vice President to reject -- to choose which votes to count?

Q Is your opinion that Dr. Eastman's position that there were sufficient minimum facts to give the Vice President the authority to choose which votes to count, is that dependent at all on an opinion you have of the viability of any remaining legal claims that were pending challenging state election results at the time?

MR. MILLER: Objection. Vague.

THE WITNESS: I would say my view -- this is the part where I disagree with -- Dr. Eastman's view is on the facts, as I understood them at the time, which is I didn't see any -- any claims to me which would, you know, give rise to a finding of a dispute under the 12th Amendment that would cause a Vice President's role to come into effect.

BY MR. CARLING:

Q Well, you've explained that your opinion is that there was not a real dispute at the time.

A Yes.

Q But you've also explained that you think Dr. Eastman had a tenable position that there was because you might disagree as to what the minimum facts could be to support that, correct?

A Yeah.

Q Can you identify any facts that are outside of where you would draw the line but which you think

Dr. Eastman was reasonable in relying on?

MR. MILLER: Objection. Vague.

THE WITNESS: I think I understand your question. I would say I don't -- in a way, you're saying if I were applying John Eastman's theory, what facts would I have seen at that time which would have triggered John Eastman's argument; in a way, I guess that's what you're asking. To me, I didn't even really consider it. That's what I was trying to do in the article was come up with a bright-line rule of what would be a dispute or not.

So I can't really -- and that's I think to me the virtue of the claim made in the argument is that it does set out this. This is what triggers a dispute. This is what doesn't. It's very easy to administer. You know, it's like what we call in the legal scholarship a rule. John is pursuing the other kind of interpretation, which is a legal standard, which is you look at the totality of the circumstances.

To me, I just excluded everything from consideration that wasn't formally found by one of the institutions of state government. His approach is willing to bring in everything -- it's a totality of the circumstances approach. So I have to say I never really thought about it -- not thought about it.

harder one to make in terms of the original understanding of the 12th Amendment and the constitutional order. My argument more relies on sort of a -- this is just a modern practice nowadays, people raise these challenges to the legitimacy of the appointment of officers all the time, and they seem to get more headway than they used to. But the argument in favor of the political question doctrine would be a strong one, too.

BY MR. CARLING:

Q Regarding the remedy that's being proposed here, which would be for Pence to reject the votes of those seven states, in your opinion, you know, had Vice President Pence taken that course of action and rejected the votes of those seven states, in your view, would that have disenfranchised those states' voters?

MR. MILLER: Objection. It's vague, it's an incomplete hypothetical, and it lacks foundation.

THE WITNESS: In my view, if in that situation Vice President Pence had rejected those seven states' electoral votes, I mean, I think he would be rejecting what to me, in my opinion, were the valid outcomes in those states because there was no -- in the way you describe it, there's not even a choice he has to make between two competing slates that could be of equal

legitimacy. He's just blocking one set, which I think is not permissible under the 12th Amendment. That's my view.

BY MR. CARLING:

Q So while that's your view, would you agree that that was one of the courses of action that Dr. Eastman was proposing in the six-page memo?

A Yes.

Q Okay. So what is the -- is there a nonfrivolous argument that that remedy of excluding the votes of those seven states is the appropriate response in that situation?

MR. MILLER: Objection. It's vague, lacks foundation, it's an incomplete hypothetical.

THE WITNESS: So are you asking me what the argument would be in favor of being able to do that?

BY MR. CARLING:

Q Is there -- yes, I'm asking, while I know it's not your opinion --

A Yeah.

Q -- is there a nonfrivolous argument that that is -- excluding the votes of those seven states is the correct response in that situation?

MR. MILLER: Same objections.

THE WITNESS: If the Vice President really

So your hypothetical is if there were no actual factual grounds for any fraud to have occurred, in other words, the electoral vote there actually does represent the results of the properly taken election under the rules set out by the state legislature as required by the Constitution, I don't think there are other grounds.

It's hard for me to -- I mean, I'm trying to think of what the other grounds -- it's hard for me to exclude all other grounds. I'm just trying to think of the ones I can think of.

BY MR. CARLING:

Q Well --

A Like I was saying, racial discrimination. I could go through the ones I can think of and say -- so I'm having trouble excluding all -- do you see my point? I'm having trouble just saying all -- these are all the ones included, so therefore everything remaining is out, I can't -- I don't know if I can do that because I can't think of everything that would possibly be out.

Q Would you agree -- you know, we talked earlier about whether at some point there aren't minimum facts to make a tenable argument that the Vice President would have the authority to choose which votes to count. Would you also agree at some point there are not minimum facts to make a tenable argument that excluding the

votes of those seven states and thereby disenfranchising those voters is a reasonable response to this situation?

MR. MILLER: Objection. Vague, lacks foundation, it's an incomplete hypothetical, and misstates testimony.

THE WITNESS: So I would say that there could be a set of facts which don't satisfy minimum tests for -- that any reasonable person would hold for not counting the electoral votes of the state.

BY MR. CARLING:

Q And we ran through a number of hypothetical facts before. I'm just going to quickly summarize them again.

A Yeah.

Q Let's assume Biden's votes in those seven states had been confirmed by multiple recounts and investigations. Let's assume that the state officials in those states had uniformly taken the position that there was no fraud or enough illegal conduct to have affected the outcome; that there was no viable challenge pending in any state court that was likely to change the outcome; and that the legislative leaders had all stated that they did not intend to challenge the governor's certificate of ascertainment.

On those set of facts, are we now below the

minimum set that would allow for a tenable argument that excluding those seven states and disenfranchising those voters was a reasonable response in that situation?

MR. MILLER: Objection. It's vague, lacks foundation, it's an incomplete hypothetical.

THE WITNESS: I can't exclude other possibilities, but all I can say is to me, I didn't see any facts, but I don't know. Again, I'm not -- I don't consider myself a fact witness, so I don't really know what happened or not. To me, I don't see those minimum facts present, but I have to claim that I don't know all the facts that occurred.

BY MR. CARLING:

Q Well, will you, in this trial, be offering the opinion that Dr. Eastman's proposal of that course of action in the six-page memo was a nonfrivolous proposed response to the situation?

MR. MILLER: Objection. Vague.

THE WITNESS: I would say it depends on the facts present. I can't testify about the facts present. I can testify what I saw were the facts, but I can't say -- does that make it clear, what I think I can testify to, which is, right, there's certain minimum facts that are present where I think Dr. Eastman's views are certainly within the spectrum of what's a reasonable

legal argument and legal view to hold. I can't be definitive on what those facts were actually in the 2020 election.

BY MR. CARLING:

Q So if I understand you correctly, you're saying that hypothetically, there could be minimum facts to support it, but you don't have an opinion as to whether in this case there were minimum facts to support that view?

A Yeah. How could I?

Q Before I move on to the postponement, would you agree, Mr. Yoo -- and when I say "postponement," I mean the other course of action proposed to Pence. Would you agree that no Vice President in history has ever done what Dr. Eastman was proposing Pence do regarding choosing which votes to accept or reject?

A Again, this requires -- it depends on what you think Ackerman and Fontana argued and what some of these other legal scholars argued, which is whether Adams or Jefferson actually did resolve the disputes, they just happened to resolve them in their favor. I think the better way to say it is no Vice President has rejected the electoral votes that came from the state, but that doesn't mean that Adams and Jefferson may not have resolved the dispute.

Madam Reporter, would you like a break?

THE REPORTER: Yes, please. That would be great.

MR. CARLING: Why don't we take a 10-minute break. Is that all right, Counsel?

THE WITNESS: Actually, I -- is it at all reasonable to take a break until 11:15? Would that be possible?

MR. CARLING: I'm open to the idea. You know, the only -- the only reason I'm hesitating -- should we go off the record?

MR. MILLER: It's your record. Sure, go ahead.

MR. CARLING: Let's go off the record.

(Discussion held off the record.)

BY MR. CARLING:

Q So, Mr. Yoo, another theory set forth in the six-page memo is the position that Vice President Pence had the authority to postpone the count for days or longer to give the states a chance to investigate claims of voter fraud irregularity, correct?

A Uh-huh. I saw it in the memo, yes.

Q All right. So do you believe that the Vice President has legal authority to postpone the count as set forth in that memo?

A I think -- I don't think we extensively

discussed it in that Case Western article. I hadn't really thought about it. To me, my legal -- my view is that the Vice President just counts or not counts what -- the votes that come to him or her. In a way, you could see my view as being harsher or more draconian, may be the word, than that idea which would be sort of not having the Vice President reject a vote at all but more pause, I guess, to see what the facts are to have some kind of investigation, whereas I don't -- my legal view is just the Vice President gets these -- he opens a ballot, she opens the ballot, looks at it, and either counts it or doesn't count it.

So I did not myself see any -- I didn't think the 12th Amendment has that. That's to me more -- I think more an issue of practical politics, I guess. But I don't -- that's not the view I came to in my article.

Q Well, aside from your article, in this trial, will you be offering an opinion that Dr. Eastman's position that Vice President Pence could do that was a legally tenable argument?

A Oh, I think someone could legally -- I mean, I think someone could make that argument. It wouldn't be -- the standard you've been asking me before is tenable or nonfrivolous. I think you could make that argument. I don't happen to agree with it, but I don't

think it's frivolous.

Q And by the way, what is your understanding of the definition of a tenable legal argument?

A So I know this is a difficult standard to express subjectively, and this might be more where law gets into an art than a science, but different ways I think of it is any judicial opinions or concurrences or dissents that adopt that view or consider that view to be reasonable, I think would be evidence that something is, right, not -- not frivolous.

Of course, the weight of history and legal opinion over time, so, you know, one that sticks with me and that we study in school is the arguments made by the NAACP and Thurgood Marshall against racial segregation even though Plessy versus Ferguson was a governing precedent, and they lost over and over again in the lower courts until they made progress.

But when they first made those arguments, even though all the weight of authority at that time was against them, certainly I think it was not frivolous for them to make those arguments, and the weight of precedent history afterwards proved them right. And I think -- I'm not trying to indulge in a self-benefitting proposition, but I think if you have a lot of legal scholars discussing things, especially on issues that

could never get to court or have never gotten to court before, I think it would be valid to see what scholars say and see what their arguments are and their judgments about whether arguments are to be taken -- can be taken seriously or not.

Q In your "Who Counts" article, you discuss several other Law Review articles that you considered the Vice President's authority to choose which votes, correct?

A Yeah.

Q Did any of these legal scholars consider the Vice President's authority to adjourn the session and postpone the counting over the objection of both houses of Congress?

A I can't say definitively because I'd have to go back and check the footnotes of people's articles, but I don't recall any of them thinking of that, yeah.

Q Can you think of any legal scholar who has ever proposed that the Vice President has that authority to postpone the count?

MR. MILLER: Objection. Vague, lacks foundation.

THE WITNESS: Can you --

BY MR. CARLING:

Q Well, let's start with the Law Review

that there is historical evidence that it's Congress, not the Vice President, that decides when to adjourn and for how long?

A Oh, yeah. There's some -- yeah, historical evidence, sure.

Q Okay. And would you agree that never in history has the Vice President exercised unilateral authority to adjourn the electoral count?

A You mean adjourn the session where the electoral count is taken.

Q I probably used the wrong terminology. Never in history has the Vice President exercised unilateral authority to adjourn the joint session related to the electoral count?

A I did not personally look at every record of every election, but I don't question scholars who say that.

Q Can you think of any time that a Vice President has unilaterally adjourned a joint session of Congress?

A I can't think of any, no.

Q So what, then, is the nonfrivolous legal argument for the theory that the Vice President has the authority to unilaterally adjourn the joint session?

A I don't think I made the claim that he could. My claim is just about counting the votes, the ballots,

yeah.

Q But are you, in this trial, going to offer an opinion that Dr. Eastman's legal theory that the Vice President could do that was a nonfrivolous legal theory?

A Where is that in the -- to me that's not important, actually, whether -- who actually formally adjourns the session. To me what was important in my view is who counts the votes, who resolves a dispute. I didn't address this question about the ending of the session itself.

Q Well, I know you didn't address it in your article. So is it fair to say, Mr. Yoo, that in this case, you're not going to offer an opinion on the frivolousness or the tenability of an argument that the Vice President has authority to unilaterally adjourn the joint session?

A I don't think so. I hadn't -- I haven't done the research for it.

Q I want to ask you about the articles that we had talked about before. You referenced in your "Who Counts" article several Law Review articles related to Vice Presidential authority and electoral counts, correct?

A Yes.

Q All right. None of those articles that you

December of 2020, those alternative slates constituted dual slates of electors?

A So if you had a different legal view than mine, then you could -- so here's -- let me explain that. Let me answer that better. Under the Electoral Count Act, you could think of those as nonfrivolous because all you would need is one member of the House and one member of the Senate to agree and then to raise the objections in the proper way under the Electoral Count Act. And then that is the dispute, and the Electoral Count Act then calls on the House and Senate to resolve it.

I actually have maybe a tighter test than what the Electoral Count Act does. I mean, the Electoral Count Act, interestingly, it's almost like it's a process more than a set of substantive standards that the Congress should apply because it would let Congress reject electoral count votes -- electoral votes without even really having to give a reason why.

Q I just want to make sure I understand that answer because I think you referred to nonfrivolous --

A Yeah.

Q -- slates of electors. In your view, is there a nonfrivolous legal argument that those alternate proposed slates submitted in December 2020 actually constituted dual slates of electors?

A So I don't think -- I don't think that those were valid slates of electors. You're asking me what would be a -- things that I don't happen to agree with but still be within the range. And so my point is that you had members of the House and Senate who had seemed to have thought so because they did vote to raise objections to some of the electoral votes in some of these states.

I disagree with that, but the fact that there's a senator or member of the House who are willing to do that, I guess to me -- not a guess -- to me, that seems to be their reflection that these are not frivolous. I don't agree with them. I don't agree. I would not have considered those legitimate electoral votes.

Q The factual circumstance but it's not a legal argument, are you going to take the position at trial that Dr. Eastman had a nonfrivolous legal theory as to why those constituted valid dual slates of electors?

A He could make that argument, and it wouldn't be frivolous because members of the House and the Senate seem to have agreed with him, not all the House, not all the Senate, but some members did.

Q While some people may have agreed with it, what is the legal argument that's not frivolous?

A So this is why -- so what is the legal argument

you reviewed that Mr. Seligman came to the opinion or offered the opinion that no reasonable lawyer exercising appropriate diligence would have adopted Dr. Eastman's legal conclusions, fair to say that you disagree with that opinion?

A Yes, that's fair to say that. Yes.

Q All right. Now, you mentioned some of the other scholarly material that was reported in the "Who Counts" article. Tell me a little bit more about that. Tell me about the process of trying to collect those other materials and include them within the "Who Counts" article so that you could, you know, sort of assess where they came out with respect to the issues that you were considering?

A So the one thing that struck me about the discussions over this issue is that I don't think anyone had actually systematically sat down and said, "Here are all the people who have written about the 12th Amendment," so -- and then tried to describe their views and tried to figure out the differences between them.

And so when I did that, I actually thought there was more support in the scholarly literature for the Vice President's role than people commonly assumed in the academic -- I mean not in the academic, in the popular press or in politics. So I tried to be fairly

systematic in trying to find all the published articles or mentions in books about this question.

And there's some fairly prominent scholars there, like John Harrison at the University of Virginia or Gary Lawson. These are not, you know, people who hold frivolous views. These are some of the most serious, careful scholars, particularly about the structure of the Constitution and its original meaning. I take their views very seriously.

They're the kind of scholars that when I have an intuition about something and then I go look up what they say and their view is different than what my intuition was, I go back and, say, well, I'd better reconsider what I thought because they're such good, careful scholars.

So when I see people like a Gary Lawson or a John Harrison raising these issues, discussing these questions and suggesting that, you know, there's a lot of serious arguments in favor of the Vice President, that reinforces my view that -- John's view, which may not have had the luxury of time and resources that I had to try to review everything, that there was serious support for John's conclusion.

Q Now, you've been responding, Professor Yoo, with respect to sort of scholars in this area, some of

whom were included -- or many of whom were included in the "Who Counts" article. Would you consider Dr. Eastman to be an authoritative constitutional scholar at the same level of those that you collected and wrote about in the "Who Counts" article?

A Yes. I mean, and I -- yes. And just because I disagree with him doesn't mean I think he's holding frivolous views. I mean, it's not uncommon for constitutional law scholars to disagree. That's very different than I think whether someone could reasonably have the view, as you said something exercising diligence -- there are a lot of people whose views I disagree with. I don't think they take frivolous views.

And there are a lot of advocates who have taken views which -- and, again, I refer to the -- Thurgood Marshall and NAACP where everything in -- that you would consider legal authority at that time was against them. And, you know, if the state bars back then were allowed to consider them frivolous, God knows what the State Bar of Alabama would have thought about Thurgood Marshall in the 1940s and 1950s.

Just because even, you know, the cases might say something different doesn't mean you can't hold a view and that it's not -- it's not frivolous. So I -- so that's my way of, you know, saying I think that

actually -- the way I would put this: Actually, if I thought about the scholars who wrote about this question, a large number of them come out on the side of Vice Presidential role here like I've described, and they're surprised by it.

And they often say, "I can't believe this" or "I don't think it's a great idea." And I think John reaching that same view cannot be frivolous if all these other scholars hold this view. And like I said earlier, I have had disagreements with John about birthright citizenship, but that doesn't mean I've thought John's views on that question were outside the range, even though maybe his views on that one are more the minority than it was on the Vice Presidential question.

I think that many scholars in the field of constitutional law find John to be a very provocative and deep-thinking scholar. You know, he -- he -- it's not a fault, but if he has sort of this instinct, it's to actually go towards the most controversial questions, and it's in those controversial questions you're going to have the least uniformity of opinion because that's what he likes to do.

There's other kinds of constitutional law scholars who would like to write endlessly about the Dormant Commerce Clause. That's not John. That, you

view, I don't see how we could say it was unreasonable or frivolous, either.

MR. MILLER: Okay. That's all I have, Professor Yoo. Thanks for your time.

MR. CARLING: Just a little bit of follow-up if I could.

FURTHER EXAMINATION

BY MR. CARLING:

Q Mr. Yoo, when you were talking about whether Dr. Eastman's arguments were in a reasonable range -- I believe that's the phrase you used --

A Uh-huh.

Q -- would you agree that the reasonableness of the positions being taken in the memos depend in part on the factual basis for those positions?

A Yes, I think I tried to make that clear, yeah.

Q Okay. And so it's not purely a legal question, correct?

A Yeah. No, all -- I think the legal position is within the reasonable range. I don't know anything about the facts beyond what's in the public, the public realm. And it is a mixed question there where they intersect about what facts trigger a legal question.

Q And while we talked earlier that people may draw the line in different places as to a minimum set of

C E R T I F I C A T E

I, STEPHANIE M. CHERNESS, CSR, do certify:

That I am a disinterested person herein;

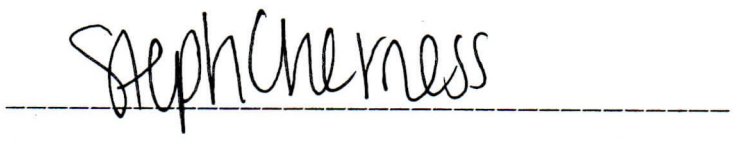
That the witness named in the foregoing deposition was by me duly sworn to tell the truth, the whole truth, and nothing but the truth;

That thereafter the deposition was taken down by me in shorthand at the time and place therein named and thereafter transcribed under my direction and supervision;

That the foregoing deposition is a true and correct transcription of my shorthand notes so taken.

I further certify that I am neither counsel for nor related to any party to said action, nor in anywise interested in the outcome thereof.

IN WITNESS WHEREOF, I have hereunto subscribed my hand on May 31, 2023.



STEPHANIE CHERNESS, CSR No. 13775

DECLARATION OF SERVICE

CASE NUMBER(s): SBC-23-O-30029

I, the undersigned, am over the age of eighteen (18) years and not a party to the within action, whose business address and place of employment is the State Bar of California, 845 South Figueroa Street, Los Angeles, California 90017, Alicia.Bubion@calbar.ca.gov, declare that:

- on the date shown below, I caused to be served a true copy of the within document described as follows:

STATE BAR'S MOTION IN LIMINE NO. 5 TO LIMIT EXPERT TESTIMONY OF JOHN YOO; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DUNCAN CARLING

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Based on agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed herein below. No error was reported by the fax machine that I used. The original record of the fax transmission is retained on file and available upon request.

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I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

DATED: June 5, 2023

SIGNED: Alicia Bubion

ALICIA BUBION
Declarant