

Northern Justice Project, LLC
A Private Civil Rights Firm
406 G Street, Suite 207
Anchorage, AK 99501
Phone: (907) 308-3395; Fax: (866) 813-8645

1 Savannah Fletcher, AK Bar No. 1811127
2 James J. Davis, Jr., AK Bar No. 9412140
3 Goriune Dudukgian, AK Bar No. 0506051
4 **NORTHERN JUSTICE PROJECT, LLC**
5 406 G Street, Suite 207
6 Anchorage, AK 99501
7 (907) 308-3395 (telephone)
8 (866) 813-8645 (fax)
9 Email: sfletcher@njp-law.com
10 Email: jdavis@njp-law.com
11 Email: gdudukgian@njp-law.com

FILED in the TRIAL COURTS
State of Alaska Third District
NOV 22 2022

12 Attorneys for Plaintiff Randall Kowalke

13 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

14 THIRD JUDICIAL DISTRICT AT ANCHORAGE

15 RANDALL KOWALKE,)
16)
17 Plaintiff,)
18)
19 vs.)
20)
21 DAVID EASTMAN, STATE OF)
22 ALASKA, DIVISION OF ELECTIONS,)
23 and GAIL FENUMIAI in her official)
24 capacity as Director of Elections)
25)
26 Defendant.)
27)
28)

Case No. 3AN-22-07404 CI

19

**PLAINTIFF'S MOTION IN LIMINE TO PRECLUDE OPINION
TESTIMONY BY JOHN C. EASTMAN**

I. PRELIMINARY STATEMENT

Defendant David Eastman's preliminary witness list identified John Eastman as a purported expert on "Constitutional Law, First Amendment, Election Law," and stated that Dr. Eastman was "expected to testify regarding constitutionally protected speech as it relates to statements of the Oath Keepers, the organization of the Oath Keepers, and aspects of election law as it relates to the events

PLAINTIFF'S MOTION IN LIMINE TO PRECLUDE
OPINION TESTIMONY BY JOHN C. EASTMAN
Randall Kowalke v. David Eastman, et al.
Case No. 3AN-22-07404 CI
Page 1 of 8

D/S

1 of 1/6/21 in Washington D.C.”¹ In his expert disclosures (styled in the form of an affidavit),² Dr.
2 Eastman offers legal opinions on four issues: (1) disqualifying Rep. Eastman from public office
3 under Article XII, Section 4 of the Alaska Constitution “would violate Rep. Eastman’s freedom of
4 speech and association as protected by both the First Amendment to the U.S. Constitution (as
5 incorporated and made applicable to the states by the Fourteenth Amendment) and by Article I,
6 Section 5 of the Alaska Constitution”;³ (2) disqualifying Rep. Eastman would also violate “the
7 legislative immunity provision of the Alaska Constitution, Article II, Section 6”;⁴ (3) the federal
8 seditious conspiracy statute, 18 U.S.C. § 2384, “covers conduct broader than that covered by Article
9 XII, Section 4 of the Alaska Constitution”;⁵ and (4) the bylaws of the Oath Keepers “disavows” any
10 purpose to overthrow the government by force or violence.⁶

13 As discussed below, expert opinion testimony on such pure questions of law is not allowed.
14 Therefore, this Court should preclude Dr. Eastman’s testimony at trial.

15 II. RELEVANT BACKGROUND

16 Dr. Eastman is widely regarded as the architect of the various efforts by President Trump to
17 overturn the results of the November 2020 presidential election, which culminated in the January 6
18

19
20 ¹ Defendant David Eastman’s Preliminary Witness List (Oct. 12, 2022) at 5-6. To avoid
21 confusion, defendant David Eastman will be referred to as “Rep. Eastman” in this brief, and John
22 Eastman will be referred to as “Dr. Eastman.”

23 ² A copy of these disclosures, titled “Affidavit of John C. Eastman” and dated November 14,
24 2022, was previously filed with this Court as an attachment to Representative Eastman’s summary
25 judgment motion.

26 ³ Affidavit of John C. Eastman at ¶¶ 16, 29-33.

27 ⁴ *Id.* at ¶¶ 16, 33.

28 ⁵ *Id.* at ¶21.

⁶ *Id.* at ¶18.

1 insurrection when Vice President Pence refused to go along with Dr. Eastman's frivolous claims and
2 conspiracy theories. In *Eastman v. Thompson*,⁷ a federal judge recently held that Dr. Eastman had
3 more likely than not engaged in a criminal conspiracy with President Trump to obstruct the joint
4 session of Congress on January 6, 2021.⁸

6 The federal court detailed Dr. Eastman's involvement in the conspiracy as follows:

7 While he was a professor at Chapman, Dr. Eastman worked with
8 President Trump and his campaign on legal and political strategy regarding
9 the results of the November 3, 2020 election.

10 * * * *

11 **2. Plan to disrupt electoral count**

12 In response to alleged fraud, Dr. Eastman researched and planned a strategy
13 for President Trump to win the election. Just after Christmas, Dr. Eastman
14 wrote a now-public two-page memo proposing that Vice President Pence
15 refuse to count certified electoral votes from states contested by
16 the Trump campaign: Arizona, Georgia, Michigan, Nevada, New Mexico,
17 Pennsylvania, and Wisconsin. The memo outlines the two ways in which
18 Dr. Eastman's plan ensures "President Trump is re-elected." If Vice
19 President Pence refused to count electoral votes from all seven contested
20 states, President Trump would win 232 votes to 222. Alternatively, if
21 Congress claimed that a candidate could not win without reaching 270 votes,
22 Vice President Pence could send the election to the Republican-majority
23 House of Representatives, which would then elect President Trump. The
24 memo emphasizes that "[t]he main thing here is that Pence should do this
25 without asking for permission — either from a vote of the joint session or
26 from the Court."

27 On January 3, 2021, Dr. Eastman drafted a six-page memo expanding on his
28 plan and analysis, which he later disclosed to the media. This memo "war
gam[ed]" four potential scenarios for January 6, only some of which would
lead to President Trump winning re-election. Claiming that "[t]he stakes
could not be higher," Dr. Eastman concludes his memo stating that his plan

25 ⁷ No. 8:22-cv-00099-DOC-DFM, 2022 U.S. Dist. LEXIS 59283 (C.D. Cal. Mar. 28, 2022).

26 ⁸ *See id.* at *44-61. The court thus held that certain communications between Dr. Eastman and
27 Trump were not privileged under the crime-fraud exception and would have to be disclosed to the
28 Congressional committee investigating the January 6 insurrection. *See id.*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

is "BOLD, Certainly. But this Election was Stolen by a strategic Democrat plan to systematically flout existing election laws for partisan advantage; we're no longer playing by Qucensbury Rules."

On January 4, President Trump and Dr. Eastman invited Vice President Pence, the Vice President's counsel Greg Jacob, and the Vice President's Chief of Staff Marc Short to the Oval Office to discuss Dr. Eastman's memo. Dr. Eastman presented only two courses of action for the Vice President on January 6: to reject electors or delay the count. During that meeting, Vice President Pence consistently held that he did not possess the authority to carry out Dr. Eastman's proposal.

The Vice President's counsel and chief of staff were then directed to meet separately with Dr. Eastman the next day to review materials in support of his plan. Dr. Eastman opened the meeting on January 5 bluntly: "I'm here asking you to reject the electors." Vice President's counsel Greg Jacob and Dr. Eastman spent the majority of the meeting in a Socratic debate on the merits of the memo's legal arguments. Over the course of their discussion, Dr. Eastman's focus pivoted from requesting Vice President Pence reject the electors to asking him to delay the count, which he presented as more "palatable." Ultimately, Dr. Eastman conceded that his argument was contrary to consistent historical practice, would likely be unanimously rejected by the Supreme Court, and violated the Electoral Count Act on four separate grounds.

Despite receiving pushback, President Trump and Dr. Eastman continued to urge Vice President Pence to carry out the plan. At 1:00 am on January 6, President Trump tweeted, "If Vice President @Mike_Pence comes through for us, we will win the Presidency . . . Mike can send it back!" At 8:17 a.m., the President tweeted again, "States want to correct their votes . . . All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!"

Following his tweets, President Trump placed two calls to Vice President Pence directly. After not being able to connect with the Vice President around 9:00 am, they spoke at approximately 11:20 am. Vice President Pence's National Security Advisor, General Keith Kellogg, Jr., was present and described President Trump as berating the Vice President for "not [being] tough enough to make the call" to delay or reject electoral votes.

3. Attack on the Capitol

On January 6, 2021, tens of thousands of people gathered outside the White House to protest the lawful transition of power from President Trump to President Joseph Biden. Both Dr. Eastman and President Trump gave

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

speeches to relay the plan not just to the thousands gathered at the Ellipse but also to those watching at home.

President Trump's personal attorney, Rudy Giuliani, introduced Dr. Eastman before he spoke as the "professor" who would "explain . . . what happened last night, how they cheated, and how it was exactly the same as what they did on November 3." Dr. Eastman declared to the crowd:

And all we are demanding of Vice President Pence is this afternoon at 1:00 he let the legislators of the state look into this so we get to the bottom of it, and the American people know whether we have control of the direction of our government, or not. We no longer live in a self-governing republic if we can't get the answer to this question. This is bigger than President Trump. It is a very essence of our republican form of government, and it has to be done. And anybody that is not willing to stand up to do it, does not deserve to be in the office. It is that simple.

President Trump then took the podium. He began with praise for Dr. Eastman and his plan to have Vice President Pence disrupt the count:

Thank you very much, John. . . . John is one of the most brilliant lawyers in the country, and he looked at this and he said, "What an absolute disgrace that this can be happening to our Constitution." . . . Because if Mike Pence does the right thing, we win the election. All he has to do, all this is, this is from the number one, or certainly one of the top, Constitutional lawyers in our country. He has the absolute right to do it.

Before the Joint Session of Congress began, Vice President Pence publicly rejected President Trump and Dr. Eastman's plan: "It is my considered judgment that my oath to support and defend the Constitution constrains me from claiming unilateral authority to determine which electoral votes should be counted and which should not."

At 1:00 pm, members of Congress began the Joint Session as required by the Twelfth Amendment and the Electoral Count Act.

Soon after, President Trump finished his speech by urging his supporters to walk with him to the Capitol:

Now, it is up to Congress to confront this egregious assault on our democracy. And after this, we're going to walk down, and I'll be there with you, we're going to walk down, we're going to walk down. . . . [W]e're going to try and give our Republicans, the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

weak ones because the strong ones don't need any of our help. We're going to try and give them the kind of pride and boldness that they need to take back our country. So let's walk down Pennsylvania Avenue.

After President Trump's speech, several hundred protesters left the rally and stormed the Capitol building. As the D.C. Circuit described it:

Shortly after the speech, a large crowd of President Trump's supporters—including some armed with weapons and wearing full tactical gear—marched to the Capitol and violently broke into the building to try and prevent Congress's certification of the election results. The mob quickly overwhelmed law enforcement and scaled walls, smashed through barricades, and shattered windows to gain access to the interior of the Capitol. Police officers were attacked with chemical agents, beaten with flag poles and frozen water bottles, and crushed between doors and throngs of rioters.

President Trump returned to the White House after his speech. At 2:02 pm, Mark Meadows, the White House Chief of Staff, was informed about the violence unfolding at the Capitol. Mr. Meadows immediately went to relay that message to President Trump. Even as the rioters continued to break into the Capitol, President Trump tweeted at 2:24 pm: "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!"

During the riot, Vice President Pence, Members of Congress, and workers across the Capitol were forced to flee for safety. Seeking shelter during the attack, Vice President Pence's counsel Greg Jacob emailed Dr. Eastman that the rioters "believed with all their hearts the theory they were sold about the powers that could legitimately be exercised at the Capitol on this day." Mr. Jacob continued, "[a]nd thanks to your bullshit, we are now under siege."

* * * *

As the attack progressed, Dr. Eastman continued to urge Vice President Pence to reconsider his decision not to delay the count. In an email to Vice President Pence's counsel Greg Jacob at 2:25 pm on January 6, Dr. Eastman wrote: "The 'siege' is because YOU and your boss did not do what was necessary to allow this to be aired in a public way so the American people can see for themselves what happened." At 6:09 pm, Dr. Eastman "remain[ed] of the view" that "adjourn[ing] to allow the state legislatures to

1 continue their work” was the “most prudent course.” At 11:44 pm, Dr.
2 Eastman sent one final email to persuade Jacob to change his mind: “I
3 implore you to consider one more relatively minor violation and adjourn for
4 10 days”

5 After the riot had subsided, the Joint Session of Congress reconvened. “It
6 was not until 3:42 a.m. on January 7 that Congress officially certified Joseph
7 Biden as the winner of the 2020 presidential election.”

8 The rampage on January 6 “left multiple people dead, injured more than 140
9 people, and inflicted millions of dollars in damage to the Capitol.” As the
10 House of Representatives later wrote, January 6, 2021 was “one of the
11 darkest days of our democracy.”⁹

12 III. ARGUMENT AND AUTHORITIES

13 Alaska Evidence Rule 702 governs testimony by experts. Rule 702(a) provides:

14 If scientific, technical, or other specialized knowledge will assist the trier of
15 fact to *understand the evidence or to determine a fact in issue*, a witness
16 qualified as an expert by knowledge, skill, experience, training, or
17 education, may testify thereto in the form of an opinion or otherwise.

18 The plain language of Rule 702(a) only allows expert opinion testimony on *factual* issues.
19 Thus, courts routinely exclude legal opinions couched as “expert” testimony.¹⁰ “There being only
20 one applicable legal rule for each dispute or issue, it requires only one spokesman of the law, who

21 ⁹ *Id.* at * 2-16.

22 ¹⁰ *See, e.g., Goodman v. Harris Cty.*, 571 F.3d 388, 399 (5th Cir. 2009) (“[A]n expert may
23 never render conclusions of law.”); *Nationwide Transp. Fin. v. Cass Info. Sys.*, 523 F.3d 1051, 1059-
24 60 (9th Cir. 2008) (“[A]n expert witness cannot give an opinion as to her legal conclusion, i.e.,
25 an opinion on an ultimate issue of law.”); *Berkeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 217 (3d
26 Cir. 2006) (“[A]n expert witness is prohibited from rendering a legal opinion.”); *Densberger v.*
27 *United Techs. Corp.*, 297 F.3d 66, 74 (2d Cir. 2002) (“[E]xperts are not permitted to present
28 testimony in the form of legal conclusion.”) (2d Cir. 2002); *TC Systems Inc. v. Town of Colonie*, 213
F. Supp. 2d 171, 182-82 (N.D.N.Y. 2002) (excluding portions of expert report which “read more
like a legal brief than an expert opinion”).

Northern Justice Project, LLC
A Private Civil Rights Firm
406 G Street, Suite 207
Anchorage, AK 99501
Phone: (907) 308-3395; Fax: (866) 813-8645

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

of course is the judge.”¹¹

Here, the entirety of Dr. Eastman’s proffered opinions, as stated in his expert disclosures, are actually legal opinions on various questions of law that this Court will ultimately have to decide. Because such legal opinions are not allowed under Evidence Rule 702(a), this Court should not allow Dr. Eastman to provide any “expert” testimony about his legal opinions at trial.

DATED: November 21, 2022

NORTHERN JUSTICE PROJECT, LLC
Attorneys for Plaintiff

By: /s/ Goriune Dudukgian
Goriune Dudukgian, ABA No. 0506051
James J. Davis, Jr., ABA No. 9412140
Savannah Fletcher, AK Bar No. 1811127

CERTIFICATE OF SERVICE

I hereby certify that on 11/21/2022 a true and correct copy of the foregoing document was served via E-MAIL on:

Joseph Miller
Law Offices of Joseph Miller, LLC
Email: info@aklaw.us

Lael Harrison and Thomas Flynn
State of Alaska, Department of Law
lael.harrison@alaska.gov
thomas.flynn@alaska.gov

By: /s/ Goriune Dudukgian
Goriune Dudukgian

¹¹ *Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir.1988) (internal citations omitted); *see also Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997) (“Each courtroom comes equipped with a ‘legal expert,’ called a judge . . .”).