DISTRICT OF COLUMBIA COURT OF APPEALS

In the Matter of: JEFFREY B. CLARK, Respondent. A Member of the Bar of the District of Columbia Court of Appeals (Bar Registration No. 455315)	Case No. 25-BG-0731 Disciplinary Docket No. 2021-D193

BRIEF OF AMERICA FIRST LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTRODUCTION

In recent years, our political culture has taken a dark turn away from persuasion and into compulsion. The political left has adopted tactics designed to intimidate opponents into silence or acquiescence. Most relevant here, organizations like the 65 Project and the Legal Accountability Center have built a cottage industry out of, as they put it, "creating a system of deterrence" against lawyers willing to represent conservative causes, politicians, or organizations by filing frivolous ethics complaints without firsthand knowledge of the events complained of.

These efforts endanger honest attorneys' reputations and careers, while subjecting them to a difficult and painful legal process that unfairly drains their time, money, and energy. Ethics complaints motivated by partisan animosity are unethical, un-American, and detrimental to the profession of law and the pursuit of justice to which our profession is committed. Yet Jeffrey Clark, a current and former high-level federal official through three presidential administrations, now faces such a partisan persecution. This court should refuse to take part in it, decline to impose interim sanctions of any kind, and dismiss the matter.

Following the 2020 election, the nation was divided by allegations that election irregularities or fraud may have influenced the outcome. In his role as the Department of Justice's Acting Assistant Attorney General for the Civil Division, Jeffrey Clark took the position that irregularities or fraud merited further investigation and, potentially, the appointment or provisional appointment of a slate of pro-Trump electors for the State of Georgia. Now, Mr. Clark, an attorney with three decades of honest, distinguished, and respected legal experience, for performing his duty to advise the President of the United States, faces the possibility of being disbarred over a confidential draft that was unethically leaked for political purposes.

Mr. Clark has been ordered to show cause why he should not be suspended

pending final action on the Board on Professional Responsibility's (the "Board") recommendation. Amicus AFL writes in support of Mr. Clark and urges this Court **not** to suspend Mr. Clark during the pendency of this action. AFL further urges this court to reject the Board's recommendation and dismiss the complaint against Mr. Clark. As a senior Executive Branch officer and direct advisor to the President, Mr. Clark is entitled to absolute immunity against this process. Further, even if absolute immunity did not extend to Mr. Clark, he would at least be entitled to qualified immunity. Finally, even if Mr. Clark were not entitled to immunity, the Board is substantively incorrect to treat Mr. Clark's conduct as sanctionable dishonesty.

INTEREST OF *AMICUS CURIAE*

America First Legal Foundation ("AFL") is a 501(c)(3) nonprofit organization dedicated to promoting the rule of law in the United States by defending the Constitution, ensuring due process and equal protection for every American citizen, and encouraging understanding of the individual rights guaranteed under the Constitution and laws of the United States.

As a District-based public-interest legal organization, AFL has a substantial interest in this case. Many of its lawyers routinely practice in the District of Columbia and are members of the D.C. Bar, which means they share the profession's profound interest in the ethical conduct of attorneys and ethical regulation of the Bar.

Further, AFL's core mission includes advancing the rule of law, which, in this matter, means defending the constitutional separation of powers.

Finally, as a public interest law firm, AFL's attorneys routinely litigate politically sensitive cases. This proceeding inappropriately targets Mr. Clark for his political beliefs, partisan affiliation, and professional connection to President Donald Trump. Such abuse of Bar oversight chills zealous advocacy in politically sensitive matters and should never be permitted.

America First Legal is a non-profit corporation with no parent corporation.

No publicly held corporation owns 10% or more of its stock. No counsel for any party authored any part of this brief. No one other than the *amicus curiae*, its members, or its counsel financed the preparation or submission of this brief.

ARGUMENT

This proceeding should be dismissed immediately, with no penalties assessed against Mr. Clark, because it violates constitutional separation of powers principles. As a senior Executive Branch official and close advisor to the President, Mr. Clark is entitled to immunity from penalties or punitive proceedings (quasi-criminal or otherwise) for his work at the Department of Justice ("DOJ"). Further, even if Mr. Clark were not immune, the Board was simply and plainly wrong as a matter of law and fact in finding that Mr. Clark had violated D.C. ethics rules.

At the outset, it is undisputed that Disciplinary Counsel and the Board are not seeking to have Mr. Clark disbarred over any alleged dishonesty in a court filing—*nothing* was filed anywhere or sent to anyone outside the Executive Branch. *See, e.g.*, Report and Recommendation of the Board on Professional Responsibility, Board Docket No. 22-BD-039 (July 31, 2025) at 28 (hereinafter, "R&R"). Indeed, the proposed letter at the heart of this matter was never signed nor sent to anyone; it was, at most, a *draft* letter proposing a position to DOJ leadership that only became public *at all* because some other DOJ employee violated their ethical duties far more severely—violating client confidentiality—than anything Mr. Clark is accused of doing. *See* Respondent's Post-Hearing Brief at 32, *In re Clark*, No. 2021-D193 (May 23, 2024) ("Once the President made his decision not to send the draft letter, that was the end of the matter. And, once the President decided, there is nothing in the record that would show that Mr. Clark did anything other than abide by the final decision of the President.") (internal citation omitted); *see also* Disciplinary Counsel's Reply Brief at 14, *In re Clark*, No. 2021-D193 (June 7, 2024) ("The first two sentences are admitted.") (referring to the quoted portions of Respondent's Post-

Hearing Brief).

This proceeding is about a senior Executive Branch official proposing a departmental position to his leadership and an opinion to the President. Such actions are not subject to review by the Judiciary. Even if they were, what Mr. Clark did is not sanctionable dishonesty.

I. Mr. Clark Is Entitled To Absolute Immunity Under *Trump V. United States.*

A. As a close presidential advisor, Mr. Clark is entitled to absolute immunity.

The Supreme Court's recent decision in *Trump v. United States* definitively established that the President is entitled to broad immunity from criminal prosecution for official acts. *See* 603 U.S. 593 (2024).[1] The Court held unequivocally "that the President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority." *Id*. at 609. Further, the President is entitled to "at least a *presumptive* immunity from criminal prosecution" for acts "within the outer perimeter of his official responsibility." *Id*. at 614 (declining ultimately to decide whether immunity within the outer perimeter of authority is absolute or presumptive).

This case not only touches on, but threatens direct interference with core, constitutionally explicit duties of the President. In carrying out his duties, 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." U.S. Const. art. II § 2, cl. 2. This Constitutional prerogative to run the executive departments and solicit opinions necessarily requires that senior

[1] It had long been clear that the president had immunity from civil suit for "official acts extending to the 'outer perimeter of his authority.'" *Clinton v. Jones*, 520 U.S. 681, 694 (1997) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 757 (1982).

executive officers be empowered to offer opinions and carry out their duties without fear of later retribution, much like the President himself.

Here, Disciplinary Counsel *explicitly* seeks to punish the President's official exercise of core powers—which the Supreme Court has unequivocally held to be an unconstitutional infringement on the powers of the Executive Branch—by going after a senior official who drafted a letter and offered an opinion. Disciplinary Counsel does not, at any point, imply that Mr. Clark struck out on his own; to the contrary, he is alleged to have acted at the President's behest. *See, e.g.*, Disciplinary Counsel's Proposed Findings of Fact and Conclusions of Law, *In re Clark*, No. 2021-D193 at 26 (Apr. 29, 2024) (alleging Mr. Clark was "do[ing] the President's corrupt bidding"); *id*. at 36 ("Mr. Clark was following the direction of President Trump that Mr. Rosen and Mr. Donaghue refused . . . .").

Beyond the President's constitutional right and responsibility to solicit opinions from senior executive officials, there is also no question that running the Department of Justice and ensuring "that the Laws be faithfully executed," U.S. Const. art. 2 § 3 cl. 4, is a core Presidential duty entitled to absolute immunity. As noted above, the Constitution explicitly empowers the President to seek the counsel of his executive officers, treating "the principal Officer in each of the executive Departments" as a privileged source of counsel. Such empowerment must, logically, include the power to seek the counsel of other senior officials in the Executive Branch—with whom the President often engages throughout any administration. "In justifying absolute immunity for certain officials, both at common law and under 42 U.S.C. § 1983, courts have invariably rested their decisions on the proposition that such immunity is necessary to protect the decision-making process in which the official is engaged." *Imbler v. Pachtman*, 429 U.S. 409 (1976) (White, J. *concurring*).

To be clear: Impeding the President's ability to exercise core constitutional

powers is the *purpose* of this proceeding. Disciplinary Counsel makes no secret of his dislike for President Trump nor of his highly negative opinions of those, like Mr. Clark, who helped President Trump carry out the core constitutional duties of his office. But political (and policy) disagreement is no excuse for discarding the separation of powers that allows the Executive Branch of our government to function. Mr. Clark exercised no power that did not derive directly from the President's core role as Chief Executive, and his actions were performed at the President's request. The President and his senior advisors are entitled to absolute immunity—both civil and criminal—in exercising core constitutional Executive powers.

Separation of powers caselaw, across a multitude of contexts, has consistently stood for the proposition that executive branch deliberations should not occur in a "fishbowl." The President *needs* the ability to speak freely with his advisors. This maxim applies most clearly when those who provide candid advice to the President are punished for doing so. The D.C. Bar would have close presidential advisors temper their advice out of fear that they, too, could face the sort of political persecution that Jeffrey Clark has been subjected to. Because assisting—really, *advising*—the President in exercising his core constitutional powers is all that Disciplinary Counsel alleges Mr. Clark did, Mr. Clark is entitled to immunity.

B. The R&R was wrong to ignore Mr. Clark's immunity.

The Board counters that the immunity discussed in *Trump* applies narrowly to the President himself, and "[n]othing in *Trump* extends that immunity to other Executive Branch employees." R&R at 30. This unduly narrow reading of *Trump* is unsupportable and seeks to end-run the separation of power principles at the heart of the *Trump* holding. First, the R&R argument ignores how Article III courts function. President Trump was the party before the court, so the Court respected the constitutional boundaries of their authority by declining to offer an advisory opinion

about how the same principles apply to other Executive Branch officers. Appropriate judicial restraint on the part of the Supreme Court is no excuse for other adjudicative bodies to ignore the constitutional principles at the core of the Court's precedent.

Further, although the Supreme Court specifically addressed *presidential* immunity, the implications for senior executive officials are clear. The privilege of immunity is justified by the President's "unique position in the constitutional scheme." *Trump*, 603 U.S. at 610. The President must be "fearless[ ]," able to ensure "the steady administration of the laws, the protection of property, and the security of liberty." *Id*. (internal quotations omitted). But no President can carry out the duties of the entire Executive Branch alone, and the Court's explanation of *why* presidential immunity is a logically necessary result of our constitutional system of separation of powers applies with equal force to senior presidential advisors like Mr. Clark.

For example, the Supreme Court explained that the danger it sought to avoid in recognizing presidential criminal immunity was "akin to, indeed greater than, what led [the Court] to recognize absolute Presidential immunity from civil damages liability—that the President would be chilled from taking the 'bold and unhesitating action' required of an independent Executive." *Id*. at 613 (quoting *Fitzgerald*, 457 U.S. at 751). But the independent Executive could hardly be expected to *actually carry out* any "bold and unhesitating action" if senior Executive offers are subject to prosecution for directly advising the President. The *Trump* Court explained that the precise harm it sought to avoid was the "prospect of an Executive Branch that cannibalizes itself, with each successive President free to prosecute his predecessors, yet unable to boldly and fearlessly carry out his duties for fear that he may be next." Neither the R&R nor any party to this case can explain how the President could "boldly and fearlessly carry out its duties," or even how the Executive Branch could be considered fully independent, if the Executive Branch were free to cannibalize itself by way of prosecuting every *other* officer of the Branch *except* the President,

and if the judiciary had the power to second-guess and judge every executive action undertaken save the final decision and order from the lips of the President himself.

Indeed, the R&R's narrow characterization of the *Trump* holding ignores the Court's own characterization of that decision: "[W]hat the Court actually does today [is] conclude that immunity extends to official discussions between the President and his Attorney General." 603 U.S. at 637. That is literally the exact context of this disciplinary proceeding: an official discussion between the President and his (acting) Attorney General (and acting Deputy Attorney General, prospective acting Attorney General, and White House counsel). Mr. Clark is not facing disciplinary charges because he drafted the letter at issue, *see* R&R at 75 ("Importantly, neither Disciplinary Counsel nor the Hearing Committee concluded that Respondent's December 28 email violated any Rule."), but because he pursued the letter until the January 3, 2021, meeting in the White House. Nothing in the *Trump* Court's decision, its underlying logic, or separation of powers principles generally indicates that immunity is limited to the President himself; to the contrary, the constitutional separation of powers principles that ensure a vigorous and fearless Executive necessarily require that *all* participants in the conversation enjoy the "immunity [that] extends to official discussions between the President and his Attorney General." *Trump*, 603 U.S. at 637.

To be sure, this is not to say that all Executive Branch officials at any level and acting in any context are entitled to absolute immunity from criminal or quasi-criminal proceedings. However, at a minimum, the *Trump* opinion must logically apply to those senior Executive Branch officers who interact directly with the President *in their direct interactions with the President*. To conclude otherwise is just as paralyzing to the Presidency and the Executive Branch as imposing direct criminal and civil liability for official acts on the President himself and opens the door to the sort of partisan persecution represented by this very proceeding. "The

enfeebling of the Presidency and our Government that would result from such a cycle of factional strife is exactly what the Framers intended to avoid." *Id*. at 640.

C. Disciplinary Counsel's arguments below are also unavailing.

Disciplinary Counsel argued below that Mr. Clark is not entitled to official immunity because the McDade Amendment allegedly precludes such immunity. *See* Disciplinary Counsel's Reply Brief at 32–33 (citing 28 U.S.C. § 503(B)). The R&R does not address this argument, but *amici* will. The McDade Amendment, as an act of Congress, cannot restrict the core constitutional functions of the Executive Branch, nor can it subject Executive Branch officials to judicial oversight or penalties that they are constitutionally entitled to immunity from.

As the Supreme Court recently explained, "Congress cannot act on, and courts cannot examine, the President's actions on subjects within his 'conclusive and preclusive' constitutional authority." *Trump*, 603 U.S. 609. Further, "an Act of Congress . . . may not criminalize the President's actions within his exclusive constitutional power." *Id*. In other words, Congress *has no constitutional power* to impair the President's oversight of the Department of Justice or his explicit constitutional mandate to seek advice from senior officers.

The Department of Justice's regulations implementing the McDade Amendment make clear that—despite subjecting DOJ attorneys to the same generally applicable rules as other attorneys—they do "not, however, purport to eliminate or otherwise alter . . . rules and federal court rules that expressly exclude some or all government attorneys from particular limitations or prohibitions." 22 C.F.R. § 77.2(k). Such exclusions *must* encompass constitutionally recognized privileges, duties, and powers, such as providing advice and counsel to the President.

Disciplinary Counsel may seek to evade constitutional limitations on his power to punish political opponents by trying to thread this proceeding somewhere between civil liability, for which longstanding law confers immunity on Mr. Clark,

and criminal liability, which the Supreme Court recently clarified is subject to immunity as well. But that does not work.

The District of Columbia Court of Appeals has long recognized the quasi-criminal nature of disciplinary proceedings. *In re Williams*, 464 A.2d 115, 118–19 (D.C. 1983) (*Williams I*) ("It is well settled that disciplinary proceedings are quasi-criminal in nature and that an attorney who is the subject of such proceedings is entitled to procedural due process safeguards."). To be sure, an attorney is not entitled to *every* protection that might be afforded to a criminal defendant. But disciplinary proceedings undoubtedly subject a respondent-attorney to the sort of potentially grave personal and professional consequences, including loss of career and public infamy, that require immunity to ensure the efficient functioning of the Executive Branch. *See In re Williams*, 513 A.2d 793, 796 (D.C. 1986) (*Williams II*) ("The accusatorial quality of attorney discipline proceedings, coupled with their grave consequences, demand the provision of due process safeguards.").

Like a criminal prosecution, a quasi-criminal proceeding that subjects a respondent to scrutiny and potentially "grave consequences," *id.*, is likely to "significantly undermine[ ]" "the independence of the Executive Branch," *Trump*, 603 U.S. at 614. Regardless of how this proceeding is characterized, it violates the constitutional separation of powers and must be dismissed because Mr. Clark enjoys immunity for his advice and counsel to the President of the United States.

Because Mr. Clark is entitled to absolute immunity, this proceeding was improper from the outset. It should never have been brought, Mr. Clark should never have been made to suffer years of persecution, and Mr. Clark should certainly not be suspended from the practice of law now, pending further adjudication of his case. Instead, this Court should immediately dismiss the proceeding against Mr. Clark.

II. Alternatively, Mr. Clark Is Entitled To Qualified Immunity.

Even if this Court were to conclude that only the President is entitled to

absolute immunity and that lesser Executive Branch officials are adequately protected by qualified immunity, Mr. Clark would still be entitled to qualified immunity, and this case should be dismissed.

A. Senior Presidential advisors may invoke qualified immunity in professional discipline matters.

Although the Board acknowledged that the Court of Appeals has not addressed the application of qualified immunity to professional discipline matters, the R&R hints (without deciding) that it might not be available. R&R at 33. This suggestion is based on a misunderstanding of the principles behind the constitutional immunity to which Mr. Clark is entitled.

First, the cases cited in the R&R are inapposite. All but one address qualified immunity solely in dicta, while addressing immunity for civil damages. *See Silberg v. Anderson*, 786 P.2d 365, 373-74 (Cal. 1990) (defendants allegedly unethical communications are privileged, but other remedies *might* be available); *Wright v. Yurko*, 446 So. 2d 1162, 1164 (Fla. Dist. Ct. App. 1984) (same); *Hawkins v. Harris*, 661 A.2d 284, 288 (N.J. 1995) (same). The sole exception relied entirely on a state-level official claiming immunity under a state statute, and the determination that the statute was not intended to treat disciplinary cases as "actions" for purposes of that specific statute. *In re Discipline of Arabia*, 495 P.3d 1103 (Nev. 2021).

Further, these cases don't even reference the same type of privilege—each involves the common law doctrine of litigation immunity, which is a form of absolute immunity in a discrete context where an exception to permit disciplining lawyers for unethical conduct in court makes obvious sense. As relevant here, Mr. Clark's case deals with the qualified immunity due to a respondent federal official in the Executive Branch. Mr. Clark's immunity is based on constitutional separation of powers principles, "the need to protect officials who are required to exercise their

discretion[,] and the related public interest in encouraging the vigorous exercise of official authority." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (explaining the history of official immunity, including the policy balance courts have struck in adopting qualified immunity as "the norm" for executive officials) (internal quotation omitted).

The President's need for immunity is, if anything, even greater in the criminal context than in the civil. *Trump*, 603 U.S. at 613 ("The danger is akin to, indeed greater than, what led us to recognize absolute Presidential immunity from civil damages liability—that the President would be chilled from taking the bold and unhesitating action required of an independent Executive."). Similarly, subjecting the President's advisors to "the peculiar public opprobrium that attaches to criminal proceedings," or quasi-criminal disciplinary proceedings that seek to publicly label them as so dishonest as to be unfit for the legal profession, without recourse to *any* form of immunity, is likely to chill them from providing candid advice or energetically advocating for their positions. *Id*.

B. Qualified Immunity is appropriate in this case.

After essentially skipping the question of whether qualified immunity applies to Mr. Clark's situation (it does), the R&R "assum[es] for the sake of completeness that qualified immunity might apply in a disciplinary case," but then wholly fails to apply the standards demanded by the extensive history of qualified immunity precedent. *See* R&R at 34–35. "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818. Although the Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality," *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011), the Board goes no further than treating the letter of the Rules as self-explanatory and defending its

level of generality, *see* R&R at 33–36.

Citing *Gordon v. District of Columbia*, 309 A.3d 543 (D.C. 2024), the Board asserts that "a case directly on point" is not necessary for the law to be clearly established. True, "but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft*, 563 U.S. at 741. Neither the contours of Rule 8.4 nor Mr. Clark's specific conduct are beyond debate.

First, the Board makes no attempt to outline the contours of Rule 8.4, asserting only that: "At the time of the events at issue, the requirements of Rules 8.4(a), 8.4(c) and 8.4(d) were 'clearly established,' and a reasonable member of the D.C. Bar would have known that attempting to tell a lie or attempting to interfere with the administration of justice violated Rules 8.4(a)[;] . . . 8.4(c)[;] . . . and 8.4(d) . . . ." R&R at 35; *see also id.* at 36 (reiterating the broad proposition that "[a]s discussed above, Rules 8.4(a), 8.4(c), and 8.4(d) apply with obvious clarity to an attempt to make a false statement or an attempt to seriously interfere with the administration of justice").

But even the D.C. Bar itself doesn't believe Rule 8.4 to be so clear-cut, as evidenced by Ethics Opinions seeking to explain its contours (incidentally, none of which, to amici's knowledge, touch on an attorney's duty with respect to a proposed, but unsent, letter seeking to persuade an Executive Department to adopt a particular view of controversial evidence). For example, Ethics Opinion 323 explains that "Lawyers employed by government agencies who act in a non-representational official capacity in a manner they reasonably believe to be authorized by law do not violate Rule 8.4 if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct of their official duties." D.C. Bar Ethics Opinion 323, Inquiry No.: 01-11-25 (2004) (presenting the issue in the context of an attorney working as an intelligence officer).

Since Mr. Clark appears to have been a lawyer employed by a government

agency who acted in a leadership and policymaking, rather than representational, official capacity in a manner authorized by law, he might reasonably have believed that he did not violate Rule 8.4 if he, in the course of his employment, made misrepresentations that were reasonably intended to further the conduct of his official duties (specifically, if he believed that further investigation of election irregularities was necessary, that he was the man to ensure such investigation took place, and that the letter would instigate such further investigation). Whether this belief is correct is immaterial, as it illustrates how the contours of Rule 8.4 are less clear than the Board believes. *See* Ethics Opinion 323 (explaining that, although the language Rule 8.4 admits no exceptions, "clearly, it does not encompass all acts of deceit—for example, a lawyer is not to be disciplined professionally for committing adultery, or lying about the lawyer's availability for a social engagement").

In *Anderson v. Creighton*, the Supreme Court criticized the Court of Appeals for a "brief discussion of qualified immunity" that "consisted of little more than an assertion that a general right . . . the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances[ ] was clearly established." 483 U.S. 635, 640 (1987). Instead, the Court of Appeals should have considered the specific circumstances the government official claiming immunity was facing at the time of his action. *Id*. at 640–41. Further, there must be allowance for what the Court described as "reasonably unreasonable" conduct—conduct that might exceed the scope of the rule at issue but could reasonably have been believed to be within the scope of the rule. As explained below in Section III, Mr. Clark's conduct was not even dishonest, and therefore did not exceed the scope of the rule, but, even if it had been attempted dishonesty, it was not unreasonable to believe that the letter did not exceed the contours of Rule 8.4. "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft*, 563 U.S. at 744. Mr.

Clark is entitled to the "breathing room" of qualified immunity, but the Board refused to evaluate his claimed immunity at anything but the very highest level of generality.

Second, Mr. Clark's specific case meets the prevailing standard for qualified immunity. To overcome qualified immunity, "existing precedent must have placed the statutory or constitutional question beyond debate." *Id*. at 741. "When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id*. at 743 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Whether Mr. Clark violated Rule 8.4(a), (c), or (d) is, at most, debatable.

The Board treats Mr. Clark's conduct as self-evidently unethical and violative of Rules 8.4(a), 8.4(c), and 8.4(d). Yet, Rule 8.3(a) requires any "lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects" to "inform the appropriate professional authority." The culmination of Mr. Clark's allegedly unethical conduct was the January 3, 2021, meeting at the White House, which was attended by several prominent and widely respected attorneys, including Acting Attorney General Rosen, Principal Associate Deputy Attorney General Donoghue, White House Counsel Patrick Cipollone, Deputy White House Counsel Patrick Philbin, and Assistant Attorney General for the Office of Legal Counsel Steven Engel. There is no reason to doubt the intelligence, professional ethics, or integrity of any of those men—to the contrary, they are all held in the highest esteem. Yet, following that meeting, Mr. Rosen did not believe anything Mr. Clark had done was so unethical as to merit "inform[ing] the appropriate professional authority." Mr. Donoghue apparently felt no obligation to "inform the appropriate professional authority." Likewise, Messrs. Cipollone, Philbin, Engel, and everyone else in the room.

Even in the months between the unethical leak of the draft letter and Senator

Durbin's partisan ethics complaint against Mr. Clark, when the letter was no longer confidential and had, instead, been published by countless news outlets worldwide, these esteemed lawyers declined to report any ethics concerns. These were not colleagues hesitant to report their friend over a polite discussion; these folks were not on good terms. Mr. Clark agreed to accept the position of Acting Attorney General, even at the cost of Messrs. Rosen and Donoghue resigning or being fired, along with nearly everyone else in the room resigning in protest. "It was an intense discussion. People raised their voices and used impolite language." R&R at 28. There is every reason to believe that, if the attorneys in that room saw *any* plain violation of Rule 8.4, they would have upheld their ethical obligation and reported it—probably happily so. But not one felt compelled to do so.

There was (and remains) sufficient room to debate Mr. Clark's conduct in drafting and advocating for his letter that he cannot be said to have clearly violated Rules 8.4(a), 8.4(c), or 8.4(d). That the Board cannot identify any prior case that is anywhere close, factually, to this case, or even analogous, and must rely instead on the very highest level of generality only supports the conclusion that Mr. Clark did not have notice that his actions could be held to violate Rule 8.4.

Therefore, even if this Court holds that absolute immunity is unavailable to Executive Officers below the president, Mr. Clark is entitled to qualified immunity. This court should neither suspend him nor impose any other sanction during the pendency of this proceeding and should, instead, immediately dismiss the proceeding.

III. Mr. Clark did not attempt to make a false statement; the Board's contrary conclusion is based on unsupportable assumptions.

The R&R identifies three allegedly dishonest statements that Mr. Clark supposedly attempted to make: "(1) indicating that the Justice Department had

identified significant concerns about potential outcome-determinative irregularities; (2) suggesting that the Justice Department was investigating the information in the report prepared by George State Senator Ligon ("Ligon report"); and, (3) stating that the Justice Department believed that competing slates of Presidential electors had been sent to Washington, D.C." R&R at 68–69. The Board rejected the third of these (because it was true), adopting only the first two. But the only way those could reasonably be treated as dishonest is in the context of the letter never being sent; had the letter been sent, the statements would have been true.

Starting with the second point (regarding the Ligon Report[2]), because it highlights the fallacious nature of the Board's assumptions, there is no reason to believe the Justice Department would ignore such a report after committing to investigate it. The letter explicitly cites to the Ligon Report which Mr. Clark was, himself, attempting to investigate; Mr. Pak, another DOJ attorney, was apparently also investigating certain elements of the Ligon Report, such as the events at State Farm Arena. *See* R&R at 21. Had the Acting Attorney General, his top deputy, and the acting head of the Civil Division all signed onto the letter, there is no reason to believe they would have then abandoned all investigation of the Report.

The fundamental dispute within DOJ was whether the Ligon Report was credible (Mr. Clark believed it was, Messrs. Rosen and Donoghue apparently did not). Had Mr. Clark persuaded the others to the contrary and convinced them that, as he believed, the report was credible, they *would have* investigated it further (and, in the persons of Mr. Clark and Mr. Pak, DOJ *already was* investigating it). It is unreasonable to assume that Messrs. Donoghue and Rosen would have signed a

[2] State of Ga. Senate Judiciary Comm., *The Chairman's Report of the Election Law Study Subcommittee of the Standing Senate Judiciary Committee Summary of Testimony from December 3, 2020 Hearing* (Dec. 17, 2020), https://perma.cc/E5CT-29R2 (hereinafter the "Ligon Report").

letter saying they were investigating without actually investigating, or that, had they resigned and been replaced by Mr. Clark, Mr. Clark would not have immediately tasked other DOJ personnel to investigate (or continued investigating it himself). There is no reasonable set of facts in which the letter is signed and sent without the DOJ investigating the information in the Ligon Report, precisely as the letter stated. Had the attempt to send the letter succeeded, the statement would have been true.

Similarly, every finding the R&R makes about the first alleged "dishonesty" (that DOJ had identified evidence of potentially outcome-determinative irregularities) relies on unrealistic assumptions and ignores the basic fact that, in an investigation, some evidence is credible, other evidence is not, and reasonable people can disagree about what is or is not credible. Mr. Clark's efforts to promote his letter necessarily included an effort to argue the credibility of the evidence that led him to draft the letter. But the Board imagines a world in which no one is persuaded, but the letter is sent regardless. That's ridiculous. If Mr. Clark had persuaded anyone (whether Messrs. Rosen and Donoghue or President Trump) to send the letter, the effort would necessarily have included persuading them of the credibility of evidence that had, up to that point (and, ultimately, through the January 3, 2021, meeting), not been viewed as sufficiently credible by others senior to Mr. Clark. There is no justification for presuming the letter would have been sent without the decision-maker being persuaded that Mr. Clark's evidence was credible and the letter was true.

Indeed, the Ligon Report cited in the disputed letter concluded that the results of the 2020 election "cannot be trusted," that potential fraud or irregularities at State Farm Arena alone were "sufficient to change the results of the presidential election and the senatorial contests," and that "the 2020 George General Election was so compromised by systemic irregularities and voter fraud that it should not be certified." Ligon Report at 12. Messrs. Rosen and Donaghue apparently did not find

the allegations in the letter credible; Mr. Clark did, and even the Board accepts that his credibility evaluation was sincere. R&R at 25.

Keep in mind that Mr. Clark is not accused of dishonesty; his letter was never sent to anyone. He is accused of *attempted* dishonesty. But to find him guilty of attempted dishonesty, he must have done something that, had he accomplished his apparent end, would have involved dishonesty. One cannot reasonably evaluate an attempt charge without considering the counterfactual scenario in which Mr. Clark's letter was sent. But, consistently, the Board ignores other facts that would have had to be true for the letter to be sent, declining even to consider that there were multiple possible scenarios for such a thing to occur. It is here, at the intersection between disputed credibility evaluations and any plausible scenario in which the letter would be sent, that the allegation of attempted dishonesty falls apart.

Despite presenting the facts to paint Mr. Clark as less informed about the evidence than Messrs. Rosen and Donoghue, the Board apparently acknowledges that reasonable people could disagree about the quality or credibility of the evidence when it distinguished between what Mr. Clark believed and what "the Justice Department" had concluded: "Respondent's subjective belief that there was something wrong that should be investigated further is of some relevance here; however, the question presented by Disciplinary Counsel's charges is whether it was false to represent that the *Justice Department* had already 'identified significant concerns that may have impacted the outcome of the election in multiple states.'" R&R at 25–26 (emphasis in original). Mr. Clark's position, that there was credible evidence of irregularities, was not entirely unjustified, and the Board accepts that he sincerely held that position.

Mr. Clark identified the Ligon Report, which contained extensive allegations of potentially outcome-determinative irregularities and fraud, many of which were supported by sworn affidavits and/or testimony. He proffered a witness who claimed

to have video of shredding trucks outside an election facility, although Mr. Donoghue scoffed at it as merely "two allegations of ballot shredding in Georgia." R&R at 22. Mr. Clark pointed to news reports and other allegations of foreign interference in the operation of voting machines, along with irregularities ranging from poll watchers sent home early so vote counters could evade oversight, to election workers tasked with verifying signatures who were unable to do so, to facially suspicious ballots being delivered in massive tranches in the night. *See, e.g.*, Ligon Report at 5–10.

The Board appears to accept the sincerity of Mr. Clark's belief that the evidence he had viewed was credible, but counters that the *Department* did not. But the Department of Justice is not a unitary individual; what "the Justice Department" believed or had concluded depends on the credibility evaluations of the individuals reviewing the evidence. It may be true that Messrs. Rosen and Donoghue had reached a different conclusion about the evidence, and even that the investigators they had tasked with looking into irregularities believed the same, but the entire purpose of Mr. Clark's efforts was to persuade the leadership at the Department of Justice that his view of the evidence was correct; his goal—what he was attempting to do—was persuade the Department that, based on what he believed to be credible evidence, the Department's position *should be* that there were significant concerns that may have impacted the outcome of the election.

Had he succeeded in persuading Messrs. Rosen and Donoghue at the outset—if the two most senior leaders of the DOJ, backed by the President and the head of the Civil Division had all signed the letter affirming their faith in the evidence Mr. Clark had presented—there could hardly be any argument that it was *not* the clear position of the Department of Justice that the DOJ found the Ligon Report credible and had identified significant concerns about potential outcome-determinative irregularities.

Indeed, where the R&R touches on counterfactuals, the Board shows its hand:

> If Respondent could speak for the Justice Department, there would have been no reason for him to prepare a letter for signature by him, Rosen, and Donoghue. There would have been no need for the Oval Office meeting to determine whether he should have been appointed Acting Attorney General in order to send the letter. Respondent's belief in the accuracy of the Ligon report did not mean that the *Justice Department* had adopted the Ligon report. Indeed, the evidence shows that the Justice Department did not support the allegations in the letter, as most of the Justice Department senior leadership would have resigned had the letter been sent.

R&R at 80–81. But Respondent's entire purpose—the very crux of his "attempt"—was to convince DOJ to adopt the Ligon Report by convincing Messrs. Rosen and Donoghue—those who clearly *did* have authority to speak for the Justice Department—of its credibility. Had he done so, the Justice Department *would have* adopted the Ligon Report, and it *would have* been the position of the DOJ that the allegations in the letter were justified. When that failed, Mr. Clark agreed to be put in charge of the DOJ and, presumably, would have filled any vacancies created by allegedly threatened resignations with others who shared his view of the evidence. In that case, the acting Attorney General and any DOJ personnel who remained in positions of authority would, presumably, credit the Ligon Report (as Mr. Clark did) and other evidence supporting Mr. Clark's position, and it would have been the new position of the DOJ that the allegations in the letter were justified. There is no plausible scenario in which the letter would have been sent without it being true; the only way for the letter to be "false" is if Mr. Clark's efforts to persuade his superiors failed.

Had Mr. Clark sent the letter regardless, there might be a credible argument

that it was false; in that case, he would have been asserting a position of the DOJ that had been rejected by the acting Attorney General without authority to do so. But it was not sent, because Mr. Clark was not able to persuade the acting Attorney General of his position, nor to persuade the President to make Mr. Clark the acting Attorney General. The law of attempt requires that something unlawful might have happened *had the attempt succeeded*. Had Mr. Clark succeeded, everything in the letter would have been true, and there would have been no violation of the rules.

CONCLUSION

For these reasons, *amicus curiae* America First Legal Foundation urges that this Court should not impose interim sanctions on Mr. Clark during the pendency of this proceeding. Rather, this Court should dismiss the case against Mr. Clark.

September 30, 2025

Respectfully submitted,

/s/ Ryan T. Giannetti

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day served counsel for all parties of record with a copy of this *Brief of America First Legal Foundation as* Amicus Curiae *in Support of Respondent* by email addressed to:

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This 30th day of September, 2025.

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