FULTON COUNTY SUPERIOR COURT
STATE OF GEORGIA

STATE OF GEORGIA,	
V.	CASE NO. 23SC188947
KENNETH CHESEBRO *ET AL.*,	JUDGE MCAFEE
DEFENDANTS.	

GENERAL DEMURRER TO COUNT 1 (RICO) FOR FAILURE TO ALLEGE THE CONTINUITY REQUIREMENT

COMES NOW, Kenneth Chesebro, by and through undersigned counsel, and asks this Honorable Court to dismiss Count 1 of the indictment due to a violation of the requirement for "continuity" in the RICO allegation. In support thereof, Mr. Chesebro shows as follows:

I. PROPOSED FINDINGS OF FACT

Beginning on or about November 18,2020, Mr. Chesebro was asked by his former colleague, Judge James R. Troupis, to provide research regarding the Electoral Count Act and the Twelfth Amendment. Mr. Chesebro, as a distinguished attorney with substantial experience in appellate and constitutional law, including extensive knowledge of the law governing presidential elections (based on his having assisted Al Gore's legal team in litigation over the 2000 presidential election), accepted the task. Mr. Chesebro, as a lawyer for the Trump Campaign, then supplied legal advice until early January 2021. Based on his legal advice, Mr. Chesebro has been charged in a Georgia RICO conspiracy. The entirety of Mr. Chesebro's involvement as a lawyer for the Trump Campaign spans a time frame of less than two months.

II. CITATION TO AUTHORITY AND ARGUMENT

A. Length of the RICO Conspiracy

Count 1 of the indictment alleges that the predicate acts began on or about November 4, 2020, and ended on or about September 15, 2022, thereby alleging a span of nearly two years. However, the indictment also states that the RICO conspiracy had one discrete goal: "to unlawfully change the outcome of the election in favor of Trump." *See* Indictment at 14. Count 1 lists 161 overt acts in furtherance of that purpose, alleging offenses of solicitation, false statements, forgery, harassment, and others. Notably, the indictment does ***not*** enumerate any acts of attempted insurrection or coup to keep Donald Trump in power.[1] Instead, Count 1 concerns acts related to sending a contingent slate of electors for Trump to Congress for its consideration in certifying the votes of the election of U.S. President and Vice President pursuant to the Electoral Count Act, the Twelfth Amendment, and other relevant law.

The Electoral Count Act of 1887 as it stood in 2020 (it was amended earlier this year) required that Congress meet, read, certify, and count the Electoral College votes on January 6. 3 U.S.C. § 15.[2] In other words, the congressional certification proceeding on January 6, 2021, was the final stage of the presidential election process, and the event which by statute was to lead to the official declaration of the winner of the presidential election. There is no legal, statutory, or constitutional authority or other mechanism—

[1] The indictment mentions the storming of the U.S. Capitol only twice, in both instances in reference to testimony provided before the U.S. House Select Committee to Investigate the January 6th Attack on the U.S. Capitol.

[2] This code section stems from Section 2 of the ECA.

whether lawful or unlawful—for changing the outcome of the presidential election once Congress finalizes the result of the election on January 6.[3] In short, January 6 is the deadline for the resolution of controversies concerning the electoral votes casted by a State.

Here, the conspiracy alleged in Count 1 concerns actions to change the outcome of the election in favor of Trump ***through contingent electoral slates***. The timeframe within which to accomplish this purpose only lasted until the conclusion of the congressional certification proceeding. Therefore, as a matter of law, the conspiracy alleged in Count 1 legally and factually ended on January 6, 2021.

B. <u>Continuity of the RICO Pattern</u>

Georgia's RICO law states that "[i]t shall be unlawful for any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity." O.C.G.A. § 16-14-4(b). Georgia law defines "enterprise" as

> any person, sole proprietorship, corporation, business trust, union chartered under the laws of this state, or other legal entity; or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental as well as other entities.

O.C.G.A § 16-14-3(3). As alleged in the indictment, the objective of the sprawling enterprise was to re-elect former President Trump.

[3] For example, if massive voter irregularities showing Trump won the election had been found on January 8, 2021, it could not have changed the result once Congress had declared Biden the winner on January 6, 2021.

Similarly, Georgia law defines "pattern" as "[e]ngaging in at least two acts of racketeering activity in furtherance of one or more incidents, schemes, or transactions that have the same or similar intents, results, accomplices, victims, or methods of commission to otherwise are interrelated by distinguishing characteristics and are not isolated incidents . . . ." O.C.G.A § 16-14-3(4)(A).

However, the U.S. Supreme Court has held that "pattern" is "***more than*** just a multiplicity of racketeering predicate[]" acts, but is instead "an arrangement or order of things or activity." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 238 (1989) (emphasis added) (internal citation and quotations omitted). In *Northwestern Bell*, the Court held that a RICO pattern requires not just multiple predicate acts, but also a relationship between those acts, and the "threat of continuing activity." *Id.* at 238–39. Thus, the Court held that a racketeering "pattern" requires proof of "***continuity plus relationship***." *Id.* at 239 (emphasis in original). In other words, "to prove a pattern of racketeering activity . . . [a] prosecutor must show that the racketeering predicates are related, ***and*** that they amount to or pose a threat of ***continued*** criminal activity." *Id.* (first emphasis in original) (second emphasis added).

The Court explained that the ***continuity*** of RICO predicate acts and "the ***relationship*** these predicates must bear to one another are distinct requirements." *Id.* at 242 (emphasis in original). The Court further explained that—because RICO is concerned with long-term criminal conduct—"[p]redicate acts extending over a few

weeks or months and threatening ***no future*** criminal activity do ***not*** satisfy this [continuity] requirement." *Id.* (emphases added).[4]

The Eleventh Circuit Court of Appeals, interpreting this idea, stated that "closed-ended continuity cannot be met with allegations of schemes lasting less than a year." *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1266 (11th Cir. 2004) (stating that numerous other circuits agree with this proposition).

In *Dover v. State*, the Georgia Court of Appeals also addressed similar arguments about the requirements for proof of a racketeering pattern under Georgia's RICO statute. 192 Ga. App. 429 (1989). At the time of the parties' arguments in *Dover*, several federal circuit courts had held that proof of a RICO pattern required multiple schemes. *Id.* at 431. Accordingly, Mr. Dover appealed his RICO conviction on the basis that there was insufficient proof of a racketeering pattern because his actions were part of a *single* fraudulent scheme, urging the Court of Appeals to adopt the federal circuits' multi-scheme requirement for a RICO pattern.[5] The Court of Appeals acknowledged the

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[4] The "continuity" required for a RICO pattern may be either "close-ended continuity," which refers to a "closed period of repeated conduct," or "open-ended continuity," which concerns "past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. Thus, continuity may be demonstrated over a closed period of time by proving a series of related predicate acts extending over a substantial period of time. *Id.* at 241–42. Continuity may also be demonstrated over an open period of time by proving either that the predicate acts themselves include a specific threat of repetition extending indefinitely into the future, or that the predicate acts are part of an ongoing entity's regular way of doing business. *Id.* at 242.

[5] The idea that proof of multiple schemes was necessary to show a RICO pattern was rejected by the U.S. Supreme Court in *Northwestern Bell* in favor of the more cooperative and cogent "continuity" requirement.

instructiveness of the federal court RICO opinions on Georgia's statute. *Id.* However, it ultimately declined to adopt the multi-scheme requirement for a RICO pattern, stating that

> our legislature intended to and did . . . subject to the coverage of [Georgia's] RICO statute two crimes, included in the statute as designated predicate acts, which are part of the same scheme, without the added burden of showing that defendant would continue the conduct or had been guilty of like conduct before the incidents charged as a RICO violation.

Id. at 432. In other words, the Court of Appeals found that a RICO pattern did not require predicate acts that were part of different schemes, but instead could be established by acts that were part of a single scheme.

From a plain reading of the *Dover* opinion, it is impossible to determine whether the Court even considered a continuity or length-of-time requirement for proof of a RICO "pattern," or if the Court simply rejected Mr. Dover's contention that there was insufficient proof of a pattern on the basis of his singular-scheme argument.[6] Further, as astutely pointed out by Mr. Randall Eliason, a legal scholar who has contemplated this point, "*Northwestern Bell* was decided by the U.S. Supreme Court just about a week before *Dover*, and probably after the *Dover* opinion was already written. *Dover* doesn't address the *Northwestern Bell* arguments about RICO's focus on long-term conduct and how that affects the definition of 'pattern.'"[7] Indeed, the only time that the *Dover* opinion mentions

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[6] The Court of Appeals ultimately reversed Mr. Dover's RICO conviction based on the State's failure to prove venue. *Id.* at 433.

[7] Randall Eliason, *Problems with the Georgia RICO Charge*, SIDEBARS BLOG (Sept. 7, 2023), https://www.sidebarsblog.com/p/the-problems-with-the-georgia-rico. Mr. Eliason

Northwestern Bell is in reference to the latter's rejection of the federal circuits' multi-scheme requirement for which Mr. Dover was advocating Georgia adopt. *See* 192 Ga. App. at 431–32.

Even if the *Dover* opinion could be construed as rejecting the Supreme Court's continuity requirement for proof of a RICO pattern under Georgia law, the only basis for such an interpretation that is provided by the Court of Appeals' opinion would be that Georgia's definition of "pattern" already required a relationship amongst the predicate acts. But as our nation's highest Court so clearly explained in *Northwestern Bell*, the continuity factor and the relationship factor are ***separate*** requirements, and it is "continuity ***plus*** relationship which combines to produce a pattern." 492 U.S. at 239–42. Notably, there is no Georgia Supreme Court decision interpreting the *Dover* decision.

In short, under U.S. Supreme Court case law, to prove a "pattern of racketeering activity" requires more than a showing of multiple acts. What must be shown are multiple acts that have some relationship to one another and demonstrate criminal conduct of a continuing nature. The Georgia RICO statute already reflects two of these three requirements for a pattern: (1) that there must be at least two predicate acts, and (2) that the predicate acts must be interrelated, i.e., have some relationship with one another. The third requirement—the continuity factor—is not listed in Georgia's prolix

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definition, but it is embraced implicitly within it as explained by the *Northwestern Bell* decision[8] as well as by the legislative intent found in O.C.G.A. § 16-14-2(b).[9]

Here, the purpose of the RICO conspiracy in Count 1 could not be accomplished after January 6, 2021. Thus, the predicate acts alleged in Count 1 do not possess any threat of repetition in the future. As explained by a federal court in Florida, the fact that Trump "may run for office again in 2024 is not sufficient to suggest that Defendants will commit any predicate acts in the future." *Trump v. Clinton*, 626 F. Supp. 3d 1264, 1305 (S.D. Fla. 2022). Any "attempt to rely on [one's] 'history' to establish open-ended continuity falls short." *Id.* at 1306. Further, the alleged acts here were directly in response to the 2020 presidential election. In other words, the acts were "a unique, first-time occurrence." *See Jackson*, 372 F.3d at 1268. The enterprise alleged in the indictment is not a formal entity.[10] Thus, it cannot be said that the predicate acts were part of an ongoing entity's "regular

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[8] For comparison, the federal RICO statute's definition of "pattern" only lists the "at least two acts" requirement and does not list either a continuity requirement or a relationship requirement, but all three are held to be necessary components which must be established to prove a RICO pattern.

[9] O.C.G.A. § 16-14-2(b) states that the intent of the RICO statute is to prosecute criminal activity "motivated by or the effect of which is pecuniary gain or economic or physical threat or injury." The reason for including a monetary or physical threat motivation requirement is because the statute is targeting activity with a goal or effect that can be repeated or sustained indefinitely. Take, for example, the prosecution of a drug trafficking organization under RICO. The group's actions are motivated by a desire to obtain monetary gain. Its purpose does not end once one drug transaction is completed. The purpose of the group is to continue to traffic and sell narcotics over and over again until it is *forced* to stop.

[10] Some, but not all, of those charged in the indictment are formally associated with the Trump Campaign.

way of doing business." Therefore, there is no open-ended continuity alleged in the indictment.

Further, as discussed herein, Mr. Chesebro's total involvement in the matter lasted approximately six weeks. Moreover, the timeframe to accomplish the purpose of the RICO conspiracy in Count 1 was roughly nine weeks after the alleged conspiracy began. This falls well short of the substantial period of time required to establish close-ended continuity. *See Jackson*, 372 F.3d at 1266. But even if this Court finds that the conspiracy lasted until September 15, 2022, the indictment still fails to allege close-ended continuity. As the Eleventh Circuit has recognized in *Jackson*, 372 F.3d at 1266, federal courts find that conduct occurring over a period of less than two years is insufficient to establish close-ended continuity.[11]

Moreover, the Eleventh Circuit also holds that a "single scheme with a discrete goal" is insufficient to establish close-ended continuity "even when the scheme took place over a longer period of time." *Jackson*, 372 F.3d at 1267; *see also Ferrell v. Durbin*, 311 F. App'x 253, 257 (11th Cir. 2009) ("[S]ingle schemes with a specific objective and a natural ending point can almost never present a threat of continuing racketeering activity."). Here, there was one alleged scheme with a singular objective: "find the votes" to re-elect

[11] *See, e.g.*, *Efron v. Embassy Suites (P.R.), Inc.*, 223 F.3d 12 (1st Cir. 2000) (finding no close-ended continuity where predicate acts occurred over a ***21-month*** period); *Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 242 (2d Cir. 1999) (stating that the Second Circuit "has never held a period of ***less than two years*** to constitute a 'substantial period of time'" (emphasis added)); *Vemco, Inc. v. Camardella*, 23 F.3d 129, 134 (6th Cir. 1994) (finding ***17-month*** period insufficient to show continuity); *J.D. Marshall Int'l, Inc. v. Redstart, Inc.*, 935 F.2d 815, 821 (7th Cir. 1991) (concluding that ***13 months*** is not a substantial period of time).

Trump. Regardless of whether the conspiracy lasted seven weeks or twenty-two months, the predicate acts alleged in Count 1 do not possess anything like the form of continuity required to prove a RICO pattern.

While this Court might regard the continuity element as a jury question, the State has repeatedly argued its concerns about judicial economy. If the continuity element cannot be met on the face of the indictment, then the State's decision to charge RICO in Count 1 would be an abuse of prosecutorial discretion. Accordingly, the Court would have the power to dismiss Count 1.

III. CONCLUSION

For the foregoing reasons, Mr. Chesebro contends that the lack of continuity alleged in the indictment renders a showing of "pattern of racketeering activity" impossible. Continuity is an essential and required component of a "pattern." Without it, the State cannot establish proof of a RICO pattern. Accordingly, being fatally wounded by the loss of a required factor, the RICO charge in Count 1 must fall.

WHEREFORE, Mr. Chesebro requests that the Court dismiss Count 1 of the indictment.

Respectfully submitted, this the 26th day of September, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing ***General Demurrer to Count 1 (RICO) for Failure to Allege the Continuity Requirement*** on counsel for the State via the e-filing system.

This the 26th day of September, 2023.

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