IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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

CONSOLIDATED MOTIONS IN LIMINE

COMES NOW, Defendant Kenneth Chesebro, by and through undersigned counsel, and files these consolidated motions in limine in the above-styled matter.

I. ALLOW MR. CHESEBRO TO PUT ON HIS DEFENSE

Mr. Chesebro's defense is, and has always been, that he never advised his clients to break the law, at least not intentionally; rather, he believed—based on his experience, research, and historical precedent—that the Electoral Count Act ("ECA") permitted circumstances where an unascertained contingent slate of electors could meet, vote, and send its votes to Congress. Mr. Chesebro has been clear and candid about his defense since the beginning, stating it in court filings and public news coverage. In its first consolidated motions in limine, the State claims that because there is no mistake-of-law defense in Georgia, Mr. Chesebro therefore cannot argue that he interpreted the ECA a certain way and that said interpretation, even if wrong, should preclude him from criminal liability. In essence, the State is claiming that Mr. Chesebro cannot put on his sole defense to the charges against him. But the State misunderstands multiple things about Mr. Chesebro's defense and a mistake-of-law defense.

First, the State's, as well as its *amici*'s, argument is premised on ***its own***

interpretation of the ECA. The State interprets the antiquated, and at times ambiguous, language of the ECA to mean that the ECA prohibits contingent elector slates under any circumstances. That interpretation is wrong. The ECA does allow contingent elector slates under specific circumstances like the one at issue in this case.[1] And the State cannot hold Mr. Chesebro liable for *its* incorrect interpretation of the law. *See Heien v. North Carolina*, 574 U.S. 54, 67 (2014) (stating that "the government cannot impose criminal liability based on a mistaken understanding of the law").

Second, as discussed repeatedly herein, Mr. Chesebro's interpretation of the ECA is relevant and directly probative of his intent to enter into any conspiracies to violate Georgia criminal law.

Third, Mr. Chesebro's defense is not a mistake-of-law defense in the nature of those that Georgia prohibits.[2] The basic premise of a mistake-of-law defense is either that a defendant is not consciously aware of a criminal statute or what it said or that he misunderstood a clearly defined criminal statute. Georgia courts reject this defense because clearly defined, published law puts all individuals on notice of what the law says and means. Mr. Chesebro agrees that he was on notice of Georgia law, but he is not arguing that he was ignorant of or misunderstood Georgia criminal statutes. Rather, he is arguing that he had a good faith reasonable belief that his legal advice was consistent

[1] At worst, the ECA is unclear on whether contingent elector slates are allowed.

[2] It is also worth noting that the Georgia statute prohibiting a mistake-of-law defense, O.C.G.A. § 1-3-6, applies when defendants are claiming a mistake or misapprehension of "the laws of *this state*," i.e., *Georgia* law. But Mr. Chesebro's defense is centered on his understanding of *federal* law, the ECA.

with the ECA, that he attempted to comport his reasonable interpretation of the ECA,[3] and, if his conduct was in violation of the ECA, that he was not on **notice** of his violation.

The critical difference between Mr. Chesebro's defense and the type of defense prohibited by Georgia courts is notice. Due process requires notice. Mr. Chesebro could not have been on notice that he was breaking the law if he was acting on a good faith reasonable interpretation of an ambiguous law. It is clear that the ECA had real ambiguities. This is illustrated by Congress's swift action to amend the ECA in 2022; it is illustrated by the polarizing divide among legal scholars, commentators, and attorneys weighing in on this case and the ECA in general; and it is illustrated by the sheer fact that the parties have had to argue about it in nearly every pleading and court appearance.

Fourth, Mr. Chesebro has a constitutional right to put on his defense.[4] The State and its *amici* seek to deprive him of that right by making weak policy arguments to this Court that allowing Mr. Chesebro to put on his defense would somehow open the flood gates to provide attorneys-turned-criminal-defendants with the ability to commit as many crimes as they please without fear of punishment so long as they claim that they

[3] The State may try to argue that whether Mr. Chesebro believed he was complying with the ECA holds no bearing on whether he complied with Georgia criminal statutes. But as defense has argued repeatedly to this Court, if the ECA authorized contingent elector slates, then the Supremacy Clause prohibits the State from bringing criminal charges against those complying with the ECA because the State would be interfering with the compliance of federal law. Both the State and its *amici* argue that this is a legal question to be answered by the Court despite the fact that this Court has made clear through its recent orders that this is a question for the jury.

[4] The U.S. Supreme Court holds that "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi, supra*, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotations and citations omitted).

misinterpreted the law. Such a policy argument forewarns of a phenomenon that is incredibly rare and ignores the obvious conditions that can be imposed upon a mistake-of-law defense.[5] Moreover, rejecting such a defense would allow the State free reign to prosecute attorneys who argue novel, controversial, or divisive interpretations of the law that their opponents do not like.

II. ADMIT EVIDENCE OR TESTIMONY CONCERNING THE ELECTORAL COUNT ACT AND OTHER RELATED LAW

In its first consolidated motions in limine, the State asks this Court to exclude any evidence or testimony about the ECA. The State incredulously asserts that evidence about the ECA is irrelevant and poses a risk of confusing the jury by diverting the jury's attention from the central issues and leaving the jury with various interpretations of law to follow. First and foremost, the history, operation, interpretation, and applicability of the ECA is clearly relevant because it is probative of whether Mr. Chesebro intended to violate any law.[6] Second, the probative value of the ECA evidence is not substantially

[5] It should also be noted that forty-three states and the federal government allow criminal defendants to assert mistake-of-law defenses under some circumstances. In the interest of brevity, undersigned counsel can provide supporting citations at the Court's request. One state, Tennessee, is seemingly silent on whether a mistake-of-law defense is permissible. And although Georgia is one of six remaining states that have not yet explicitly recognized exceptions to the mistake-of-law defense, Georgia *does* utilize the mistake-of-law concept in the context of criminal law. For instance, Georgia courts apply the concept of mistake of law to determine whether a law enforcement officer had reasonable suspicion to justify a traffic stop or probable cause to conduct a search. *See Harris v. State*, 344 Ga. App. 572, 575 (2018) (finding that the officer's interpretation of the statute was not reasonable and thus his mistake of law could not justify the traffic stop of the defendant); *Abercrombie v. State*, 343 Ga. App. 774, 785 (2017) (citing *Heien v. North Carolina*, 574 U.S. 54 (2014)).

[6] Perhaps a hypothetical would help aid the prosecution's understanding here. Suppose, for example, that there was no question or debate over whether the ECA allowed unascertained contingent elector slates to meet, vote, and send their vote certifications to Congress. Mr. Chesebro advises his clients that the ECA authorizes contingent electors. The contingent electors meet, vote, and send their votes to Congress. Everyone's actions are consistent and lawful under

outweighed by the danger of confusion of the issues. Contrary to the State's assertion, evidence about the ECA is central to the core questions in this case.

With respect to Mr. Chesebro, the central questions in this case are whether he unlawfully conspired with others to violate the Georgia RICO Act and whether he unlawfully conspired to commit crimes related to the December 14, 2020 meeting of the Republican electors. The ***sole*** basis for these conspiracy charges is Mr. Chesebro's conduct in advising his clients to have the Republican electors meet and vote on December 14, 2020. If Mr. Chesebro believed that what he was advising—and what his clients were doing—was lawful under the ECA, then he could not have believed that the exact same conduct which was lawful under federal law would simultaneously be unlawful under Georgia law. In other words, Mr. Chesebro could not have intended to violate Georgia law if he believed his conduct was lawful and consistent with the ECA.

It is the State's burden to prove intent. To do that, it will have to point to Mr. Chesebro's emails and memos advising his clients that the ECA allows them to meet and vote on December 14, 2020. But without Mr. Chesebro being able to offer evidence about the ECA, the jury will be left with the question, "Why? Why did Mr. Chesebro say it was lawful under the ECA? Was he lying? Was he telling the truth?" The jury will be left with nothing to help them answer this question.

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the ECA. The State then could charge Mr. Chesebro and others with conspiracies to commit crimes related to the December 14, 2020 meeting of the Republican electors because there would be *no* crimes related to that meeting. Suppose instead that the ECA explicitly in plain, layman's terms stated that under no circumstances would contingent elector slates be allowed. Then Mr. Chesebro telling his clients to meet and vote on December 14, 2020 would clearly be in violation of the ECA, and the State could charge him with related crimes.

Lastly, the State claims that the admission of evidence or testimony about the ECA would result in the jury receiving three instructions about the ECA—one from the defense, one from the prosecution, and one from the Court. But juries *only* ever receive jury instructions from the Court. Thus, this argument is without merit.

III. ADMIT EVIDENCE OR TESTIMONY CONCERNING THE HAWAII ELECTORAL VOTES IN THE 1960 PRESIDENTIAL ELECTION

The State and its *amici* also seek to exclude evidence or testimony concerning the 1960 Hawaii electoral votes, claiming that it is irrelevant and arguing that there is no binding authority establishing that the events of Hawaii in 1960 were lawful. They argue that it is irrelevant because not every single fact is the same as the facts in the instant case. But that does not mean that Hawaii is irrelevant. In fact, *amici* even admit that Hawaii is relevant to determining the law around presidential electors. To be clear, the importance of the 1960 Hawaii presidential electors is to provide context and the reasoning for how Mr. Chesebro reached his interpretation of the ECA. Hawaii is also important because it illustrates how individuals have, for decades, interpreted the ECA to operate in scenarios on which the statute is silent.

IV. ADMIT EXPERT TESTIMONY AND OPINION FROM LAWRENCE LESSIG

On October 16, 2023, the State filed its first consolidated motions in limine asking this Court to exclude evidence or testimony from Mr. Chesebro's expert witness, Lawrence Lessig. Indeed, both the State and *amici* indirectly ask this Court to exclude Mr. Lessig. But this Court can, and should, admit Mr. Lessig to testify as a qualified expert witness as his testimony is both reliable and necessary to assist the trier of fact.

As the State points out, Mr. Lessig is a constitutional legal scholar and professor whose area of expertise involves the operation of the Electoral Count Act. O.C.G.A. § 24-7-702(b) discusses witnesses who are qualified as experts by knowledge, skill, experience, training, or education. "To qualify as an expert generally all that is required is that a person must have been educated in a particular skill or profession; his or her special knowledge may be derived from experience was well as study." *Kruel v. State*, 344 Ga. App. 256, 260 (2018) (alterations adopted). Mr. Lessig is perhaps the most qualified person on this subject. He is the Roy L. Furman Professor of Law and Leadership at Harvard Law School. He has lectured, published on, and litigated issues involving presidential election law and the Electoral Count Act. His credentials and scholarship are numerous. It is no question that he is qualified to testify in this case.

Georgia courts hold that "[t]here are many different kinds of experts and many different kinds of expertise, and it follows that the test of reliability is a flexible one, the specific factors neither necessarily nor exclusively applying to all experts in every case." *Smith v. Braswell*, 342 Ga. App. 700, 702 (2017). Here, Mr. Lessig's opinion relies on extensive legal scholarship which he uses to illustrate how Mr. Chesebro could have reasonably interpreted the ECA in the way that he did.

The State boldly alludes that the jury is capable of understanding the complexities of the ECA without needing the benefit of expert opinion. But understanding the verbiage, operation, nuances, and ambiguities of the ECA certainly require some specialized knowledge. Mr. Lessig's unique and specialized knowledge regarding the

Twelfth Amendment's and the ECA's history, operation, and ambiguities may help the jury contextualize and make sense of complicated information.

Thus, the Court should admit Mr. Lessig's expert testimony as he is a qualified, reliable, and helpful to the trier of fact. However, the State alleges that testimony from Mr. Lessig should be excluded because it would constitute legal conclusions on ultimate issues. While the State is correct that experts cannot testify as to legal conclusions, it fails to address what a legal conclusion is. For example, an expert who testifies on whether a defendant is guilty (or in the civil context, whether a defendant is negligent, at fault, or otherwise liable) would constitute a legal conclusion. *See United States v. Brenson*, 104 F.2d 1267, 1286 (11th Cir. 1997) ("The determination of whether an individual is an accessory after the fact 'is a legal conclusion subject to de novo review.'").[7]

The purpose of Mr. Lessig's testimony is not to state a legal conclusion that Mr. Chesebro is not guilty nor is it to opine on Mr. Chesebro's state of mind. Mr. Lessig is not judging the facts. Instead, the purpose of Mr. Lessig's testimony is to offer a framework for how to think about whether Mr. Chesebro can be guilty.[8]

The State's *amici* attempts to aid the State's argument by pointing out that expert witnesses also may not instruct the jury on the law. But, like the State, *amici* missings the nuance of Mr. Lessig's testimony. Mr. Lessig's testimony would not tell the jury how *it*

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[7] *See, e.g.*, *Rios v. Norsworthy*, 266 Ga. App. 469, 472 (2004) (expert opinion that driver was negligent was an inadmissible legal conclusion in a civil case); *McMichen v. Moattar*, 221 Ga. App. 230 (1996) (civil case); *Clayton Cnty. v. Segrest*, 333 Ga. App. 85 (2015) (civil case).

[8] In his report, Mr. Lessig states that "[t]hese considerations lead me to believe that Mr. Chesebro should have been privileged to advise Republican electors in Georgia to cast their ballots on Elector Day, ***if he believed in good faith***" that at least one of three scenarios existed. *See* Exhibit A, ¶ 16 (emphasis added).

must interpret the law.[9] Rather, Mr. Lessig's opinion would help the jury understand how *an attorney could* **reasonably** interpret the ECA.

Mr. Chesebro's defense is, and has always been, that he was not knowingly or intentionally advising his clients to break the law; he believed—based on his experience, research, and historical precedent—that an unascertained contingent slate of electors does not violate the ambiguous provisions of the Electoral Count Act. Mr. Chesebro has been clear and candid about his defense since the very beginning, stating it in pretrial motions. In contrast, the State, by prosecuting Mr. Chesebro, alleges that (1) the ECA was not ambiguous or open to different interpretations, (2) Mr. Chesebro knew his legal advice violated the ECA, and (3) Mr. Chesebro intended, by giving unlawful advice, to join a racketeering conspiracy and other charged criminal conspiracies.

Mr. Lessig seeks to testify that it would be reasonable for Mr. Chesebro to interpret the ECA to allow a contingent slate and how closely Mr. Chesebro's writings (e.g., his emails and memos) conform to this reasonable interpretation. Such testimony seeks to resolve a factual dispute—in fact, many factual disputes[10]—but does not go as far as to say that Mr. Chesebro did not violate the ECA or other charged crimes. But the State is attempting to exclude any expert testimony by a constitutional legal scholar who could aid the jury in understanding the nuances and ambiguities in federal election law and, most importantly, illustrate the split of opinion among legal scholars and practitioners

[9] Mr. Lessig, in fact, does not agree with Mr. Chesebro's interpretation, but he recognizes that Mr. Chesebro's interpretation is a reasonable one in light of the relevant scholarship on and ambiguity, history, and operation of the ECA.

[10] For instance, the dispute over whether the ECA, prior to its amendment in 2022, was subject to more than one reasonable interpretation.

over what the ECA meant. At the same time the State is attempting to exclude such expert testimony provided by the defense, it also purportedly intends to call its own witness to testify to *its* proffered interpretation of the ECA.[11] But despite the general rule prohibiting expert testimony amounting to a legal conclusion, experts are nonetheless permitted to explain often complex and technical regulations and ordinances when such an explanation would assist the jury to understand the issues in the case.[12]

Accordingly, this Court should admit Mr. Lessig's expert testimony.

V. TAKE JUDICIAL NOTICE OF AND ADMIT THE WISCONSIN ATTORNEY GENERAL'S MEMORANDUM

Georgia law allows this Court to take judicial notice of a fact not subject to reasonable dispute because it is "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." O.C.G.A. § 24-2-201.

In the aftermath of the 2020 presidential election, Mr. Chesebro assisted in various legal challenges to the election results in several states. Mr. Chesebro was also involved in creating a contingent or alternate slate of electors in some of those states. Of course,

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[11] The State has listed Matthew Seligman as a prosecution witness. Both the State and *amici* repeatedly cite an online article by Mr. Seligman which argues that Mr. Chesebro's analysis of the ECA was unlawful. Mr. Seligman and Mr. Lessig are both legal scholars who cowrote a book, *How to Steal a Presidential Election*, that will be published next year. Despite co-authoring a book on this topic, Mr. Lessig and Mr. Seligman appear to disagree over whether Mr. Chesebro's interpretation was reasonable.

[12] *See, e.g.*, *Georgia Dep't of Transportation v. Miller*, 300 Ga. App. 857, 861 (2009) (expert's testimony on DOT regulations and policies would assist the trier-of-fact); *Hopkins v. Hudgins & Co.*, 218 Ga. App. 508 (1995) (permitting safety engineer to testify that defendant's loading procedure violated OSHA safety regulations); *Ultima–Trimble, Ltd. v. Department of Transportation*, 214 Ga. App. 607 (1994) (in helping the jury to understand property value in condemnation proceeding, expert permitted to testify that setback requirement of ordinance would permit the plaintiff to build easement taken by the government).

Georgia was one of those states, so was Wisconsin. The conduct that took place in Wisconsin is nearly identical to the conduct that took place in Georgia.

Complainants in Wisconsin alleged that the December 14, 2020 meeting of contingent Wisconsin Republican electors was an "unlawful attempt to undermine the election." However, respondents argued that "the meeting was necessary to avoid missing a statutory deadline while legal challenges were pending." *See* Exhibit B. The Wisconsin Attorney General concluded in a February 9, 2022 memorandum to the Wisconsin Election Commission that "in light of the facts, historical precedent, and related federal authorities . . . the Complaint does not raise a reasonable suspicion that Respondents violated Wisconsin election law." *See id.*

To be clear, the judicially noticeable fact here is *not* that Mr. Chesebro did not violate Wisconsin law, but rather that the Wisconsin Attorney General—the State's top legal official—declined to pursue charges against Mr. Chesebro and his basis for declining to pursue charges. The Wisconsin Attorney General's memo reflects these facts. There is no dispute that his memo is an authentic or accurate source. Consequently, Mr. Chesebro is asking this Court to take judicial notice of the Wisconsin Attorney General's decision to not prosecute this conduct as a criminal case—or at all for that matter.

VI. TAKE JUDICIAL NOTICE OF AND ADMIT THE TRANSCRIPT AND VIDEO OF THE REPUBLICAN ELECTORS' MEETING ON DECEMBER 14, 2020

On December 14, 2020, Georgia's Republican nominees for the Electoral College met in the Georgia State Capitol Building. This meeting, which lasted just over 20 minutes, was both filmed and transcribed. The transcript, prepared by AHReporting

LLC, has been certified as complete and accurate. The very first thing the electors discuss is the timing of their meeting and why it is important to meet when they did. Chairman David Shafer states:

> The President has filed a contest to the certified returns. That contest has -- is pending. It's not been decided or even heard by any judge with the authority to hear it. And so in order to preserve his rights, it's important that the Republican nominees for Presidential Elector[s] meet here today and cast their votes.

Exhibit C.

There is no dispute that the Republican electors met at the Georgia State Capitol on December 14, 2020, and there is no dispute about the subject of their conversation or what they stated. There is no dispute that the transcript is an accurate or authentic source.[13] Consequently, Mr. Chesebro respectfully requests this Court take judicial notice of the transcript and corresponding video of the Republican electors' meeting.

VII. EXCLUDE EVIDENCE OR TESTIMONY CONCERNING UNRELATED PORTIONS OF THE ALLEGED RICO SCHEME

Georgia courts hold that to be convicted of a RICO conspiracy, a criminal defendant generally does not need to have knowledge of all co-conspirators, all acts done by co-conspirators, or even all parts of the conspiracy. *See Thompson v. State*, 211 Ga. App. 887, 890 (1994) ("None of the provisions of the RICO Act, however, requires that each defendant in an enterprise have full knowledge of all facets and elements of the enterprise and all its members or actors."); *see also McLeod v. State*, 297 Ga. 99, 102 (2015) (discussing

[13] While there may be a dispute over the truthfulness or belief of the statements made in the transcript and on the video, the judicially noticeable fact is the fact that this is what the electors *said*.

conspiracy generally). But if a defendant can be convicted of a RICO conspiracy despite lacking knowledge about a particular facet of the conspiracy, then it follows that proof of said facet is not relevant to the defendant's involvement in the RICO conspiracy.

Here, the RICO conspiracy involves nearly 50 individuals[14] in 8 different schemes, including the breach of election equipment in Coffee County, solicitation of high-ranking federal and Georgia government officials, false statements to the Georgia General Assembly, and false statements about and harassment of Fulton County election worker Ruby Freeman. The only facet of the RICO conspiracy in which Mr. Chesebro is alleged to have taken part is the plan for the contingent Republican presidential electors for Georgia to meet and vote on December 14, 2020. Mr. Chesebro is not alleged to have been part of any of the other facets of the RICO conspiracy in Count 1.

On October 19, 2023, co-defendant Sidney Powell entered into a plea deal. Ms. Powell was set to go to trial with Mr. Chesebro this week. Ms. Powell was charged in the indictment for her alleged involvement in the Coffee County election equipment breach. As discussed herein, her actions—and the actions of several co-defendants and co-conspirators in this case—were not known to Mr. Chesebro. They did not overlap. Moreover, they were not incidental to each other's charges scheme. In fact, the Coffee County election equipment breach was not a reasonably foreseeable act that was a necessary or natural consequence of the plan to have a contingent slate of electors meet and cast their votes. *See McLeod*, 297 Ga. at 102. Indeed, the indictment alleges that the

[14] The case involves 19 defendants and 30 unindicted co-conspirators.

Coffee County election breach occurred on January 7, 2021—long after the contingent electors met and voted and after the date that Mr. Chesebro had advised was the final deadline for challenging the election (January 6, 2021). Accordingly, any evidence of the Coffee County breach of election equipment is not relevant to the State's case against Mr. Chesebro as it does not make any fact of consequence more or less likely. Further, any evidence regarding solicitation of government officials, the harassment of election workers, false statements to the Georgia legislature, and other portions of the RICO conspiracy are not relevant to the State's case against Mr. Chesebro as the State does not need to prove that Mr. Chesebro had knowledge of those facets, co-conspirators, or conduct in order to sustain a RICO conspiracy conviction against him.

VIII. EXCLUDE EVIDENCE OR TESTIMONY FROM MATTHEW SELIGMAN

Mr. Seligman's article, attached as Exhibit A to the State's consolidated motions in limine, asserts how the presidential elector process operates according to U.S. constitutional and statutory law operates and opines that Mr. Chesebro's proposal failed to comport with federal election law. *This* is textbook legal conclusion; Mr. Seligman's article both makes a conclusion as to whether Mr. Chesebro is guilty as well as asserts how the ECA *must* be interpreted. By comparison, Mr. Lessig's testimony will explain *how* attorneys could use some of the existing scholarship and historical precedent to support an argument for interpreting the ECA in a way similar to Mr. Chesebro's interpretation.

IX. CONCLUSION

WHEREFORE, Mr. Chesebro respectfully requests this Honorable Court grant his motions in limine.

Respectfully submitted, this 20th day of October, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing *Consolidated Motions in Limine* upon counsel for the State of Georgia via the e-filing system.

ON THIS, the 20th day of October, 2023.

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Exhibit A

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1. My name is Lawrence Lessig. I am the Roy L. Furman Professor of Law and Leadership at Harvard Law School. I have been subpoenaed to testify in the matter of *Georgia v. Kenneth Chesebro.* I provide this statement to outline the basis of any testimony I would give, and the substance of the evidence I would offer.

2. I have been teaching and writing in the field of constitutional law for more than 30 years. My work has especially focused on constitutional structure and the executive.

3. In the fall of 2020, I taught a seminar with Matthew Seligman titled "Wargaming 2020," which explored the law surrounding presidential elections and the strategies that candidates might deploy in the context of the Electoral Count Act of 1887 and the Constitution.

4. In 2024, Yale Press will publish a book I have co-written with Seligman, *How to Steal a Presidential Election.*

5. In addition to my academic work, I have litigated questions involving the selection of the president. I was lead counsel in *Chiafalo v. Washington* (2021), which addressed the freedom of presidential electors to cast a ballot according to their own conscience. In my role at EqualCitizens.US, I helped support a series of cases that challenged the winner-take-all system for allocating presidential electors.

6. Shortly before Election Day in 2020, I published an essay with Van Jones on the CNN website that addressed the question of how electors should act in the context of a contested election. At the time we published that piece, it seemed likely that the results

in Pennsylvania would be extremely close. Our objective was to make clear that the Constitution does not require states to resolve contested elections either before the "safe harbor" date in the Electoral Count Act ("ECA"), or even before "Elector Day," the day when electors are to cast their ballot. As we argued, for electors' votes to be counted on January 6, the Constitution requires electors to cast their ballots on Elector Day.

7. The implication of this constitutional requirement is that in any election in which there is a good faith contest about which slate of electors has been chosen in the state — at the very least through the lawful procedures established for the resolution of disputes about the appointment of electors, and, as described below, possibly for other reasons as well — electors are privileged to cast their ballots on Elector Day, and a lawyer is privileged to advise electors about their actions.

8. This prudent practice has been the practice of electors whenever there have been competing slates presented to the Joint Meeting of Congress—including most recently Hawaii in 1960, as well as Florida, Louisiana, Oregon, and South Carolina in 1876.

9. The Electoral Count Act of 1887 presumed such competing slates could be presented to the Joint Meeting. That Act expressly directed the President of the Senate to open "all the certificates and papers purporting to be certificates of the electoral votes," 3 U.S.C. §15, and it also provided an extensive (if complicated, and at times, seemingly contradictory) method for working through competing slates.

10. If called to testify, I could address both the constitutional and federal statutory requirements for electors and the history of electors casting ballots in contested elections, including the rules under the ECA for selecting the slate of electors whose votes Congress will count.

11. I could also testify about how closely Mr. Chesebro's writings—including his memos and the emails I have seen—conform to my understanding of those constitutional requirements.

12. I summarize the substance of my views in the following paragraphs:

Context of 2020 Election

(1) It is my view that there is no doubt about whether President Biden was properly elected President. As I believe the Constitution should be interpreted, I do not believe that on January 6, there could have been any basis or legal mechanism for selecting a slate of electors in any state other than the slate that was ultimately selected.

(2) I do not believe that there could have been any basis for reversing the decision of Congress on January 6 after January 6. Specifically, no court could have had jurisdiction to force Congress to reconsider its count on January 6. Neither could Congress have legitimately revisited any determination on January 6 once made.

(3) I accept that many believed there had been substantial fraud in certain states in the 2020 election and believed that such fraud drew the selection of electors in those states into doubt. I have not seen any evidence to support those beliefs.

Views about the Authority to Count Electoral Votes

(4) Though I do not believe this is a correct interpretation of the Constitution, I do recognize that there has long been a view among some scholars that the Constitution vests in the President of the Senate an exclusive power to count the electoral votes cast, and therefore, of necessity, when multiple slates are presented, to determine which slate of electoral votes should be counted. Scholars suggest this view was more common early in the history of the Republic than today. All agree that a longstanding and contrary practice in Congress has rendered this claimed original view no longer tenable. But I recognize that this scholarship may well suggest that an "originalist" interpretation of the Constitution and of the

power it vests in the President of the Senate could support the belief that the President of the Senate has a constitutional authority to determine which slate of electoral votes from a state presenting multiple slates shall be counted.

(5) I acknowledge that in the writings I have reviewed in this matter, Mr. Chesebro cited three sources to support the view that the Constitution vested in the President of the Senate a constitutional authority to determine electoral votes. Vasan Kesavan, *Is the Electoral Count Act Unconstitutional*, 80 N.C. L. Rev. 1653 (2002); John C. Nagle, *How Not to Count Votes*, 104 Colum. L. Rev. 1732 (2004); and Edward B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 Loy. U. Chi. L. J. 309 (2020). None of these sources asserts that this is in fact the correct view of the Constitution. But each suggests that indeed this view has been held by jurists and some members of Congress. See, e.g., Foley, 51 Loy. U. Chi. L. J., at 321 ("Some Republicans take the especially aggressive position that Mike Pence, as President of the Senate, has the unilateral authority under the Twelfth Amendment to decide which certificate of electoral votes … is the authoritative one entitled to be counted in Congress"); at 321-22 ("These Republicans point to the historical pedigree of this position, observing that Republicans made the same argument during the disputed election of 1876 and that at least some recent law journal scholarship has supported this position."); at 324 ("Here, thus, is the first frustrating ambiguity. It could be the "President of the Senate" who does the counting; or, after the President of the Senate has finished the role of "open[ing] the certificates" then the whole Congress, in this special joint session, collectively counts the electoral votes"); at 325 ("Despite its ambiguity, or perhaps because of it, the peculiar passive-voice phrasing of this crucial sentence opens up the

possibility of interpreting it to provide that the "President of the Senate" has the exclusive constitutional authority to determine which "certificates" to "open" and thus which electoral votes "to be counted." This interpretation can derive support from the observation that the President of the Senate is the only officer, or instrumentality, of government given an active role in the process of opening the certificates and counting the electoral votes from the states. The Senate and House of Representatives, on this view, have an observational role only. The opening and counting are conducted in their "presence"—for the sake of transparency—but these two legislative bodies do not actually take any actions of their own in this opening and counting process. How could they? Under the Constitution, the Senate and the House of Representatives only act separately, as entirely distinct legislative chambers. They have no constitutional way to act together as one amalgamated corpus. Thus, they can only watch as the President of the Senate opens the certificates of electoral votes from the states and announces the count of the electoral votes contained therein."); at 325-26 ("Thus, according to this argument, the inevitable implication of the Twelfth Amendment's text is that it vests this ultimate singular authority, for better or worse, in the President of the Senate."); Kesavan, 80 N.C. L. Rev., at 1701 ("If the counting function belongs to the President of the Senate, the Electoral Count Act is unconstitutional because it vests the counting function in the two Houses of Congress, and under the Constitution, Congress may not strip the President of the Senate of her constitutional duty."); at 1706 ("The Framers clearly thought that the counting function was vested in the President of the Senate alone."); at 1707-08 ("early commentators on the Constitution, such as Chancellor James Kent and Professor William Duer, writing in the wake of the Twelfth Amendment, thought that the counting function still belonged to the President of the Senate"); at

1708 ("Representative Caldwell recalled the President of the Senate's unsuccessful attempt to assume the counting function in the Wisconsin Incident of 1857 and the Hayes-Tilden Incident of and described the primary purpose of the Electoral Count Act as 'decid[ing], first, that the power to count the vote is not in the President of the Senate.'"); Nagel, 104 Colum. L. Rev., at 1737, (quoting William Rehnquist writing "the counting of votes in presidential elections suffers from the fact that "[t]he Constitution was silent as to *who* would do the counting."); at 1738 ("Republicans claimed that the President of the Senate possessed the responsibility for choosing among the competing certificates that were presented from Florida, Louisiana, Oregon, and South Carolina."). As Professor Foley summarizes this scholarship,

> "Whatever each of us personally thinks of this interpretative argument, it is necessary to acknowledge that it has a significant historical pedigree. It routinely had its advocates in the years leading up to the disputed election of 1876. During that intense dispute, it was conveniently invoked by Republicans, since the President of the Senate was one of their own at the time. After the resolution of that ugly dispute, the argument was resurrected by some during the congressional debates that led to passage of the Electoral Count Act of 1887, including the claim that this Act is unconstitutional because it interferes with the exclusive authority vested in the President of the Senate to determine which electoral votes from the states to count. That claim was repeated after passage of this Act. Indeed, it has been repeated recently—and forcefully—in a law review article written

after *Bush v. Gore* in contemplation of what might transpire if and when another disputed presidential election ever reaches Congress." 51 Loy. U. Chi. L. J., at 326.

(6) Beyond the sources cited by Mr. Chesebro, there are other prominent scholars and lawyers who have also described an early view that the President of the Senate has a constitutional authority to determine electoral votes. In 2004, Yale Professor Bruce Ackerman, and David Fontana, currently a professor at George Washington Law School, described the argument that the President of the Senate had a constitutional authority to determine electoral votes, and suggested that Thomas Jefferson acted in light of that presumption. See David Fontana & Bruce Ackerman, *Thomas Jefferson Counts Himself into the Presidency*, 90 Va. L. Rev. 551 (2004). Professor Ackerman repeated his view in an essay with Congressman Ro Khanna in the L.A. Times leading up to the 2020 election. Bruce Ackerman & Ro Khanna, *Claims of a rigged election? Here's how Congress could save our democracy from vote-count chaos*, L.A. Times, September 13, 2020 ("Precedents established by Thomas Jefferson in 1800 would permit Pence to invalidate a particular state's electoral returns on the grounds that the underlying vote-count was generated in an illegitimate fashion — that it was rigged."). Likewise, Professors Ned Foley and Nathan Colvin have extensively reviewed the same early view in an article not referenced by Mr. Chesebro. Nathan L. Colvin and Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. Miami L. Rev. 475 (2010), at 480 ("Early scholars generally divided the patterns into three general periods. During the first period, from 1789 to 1821, the power was generally thought vested in the states or in the President of the Senate."); at 481 ("the text 'in the Presence of the Senate and House of Representatives' suggests the Framers might have intended for these

bodies to serve as mere witnesses to the President of the Senate's act of counting."); at 483 ("This record might support a strong role for the President of the Senate in opening *and counting the votes,* while the members at the clerk's table play the role of mere witnesses to his actions-keeping record of the votes."); at 500 ("The dividing lines were drawn between those who did not believe the Constitution gave Congress a "right to say whether votes shall be counted or not be counted" and those who did."); at 506 (referring to the election of 1876, "The Republicans seemingly had the upper hand, if the potentially crucial President of the Senate could exercise his judgment in Hayes's favor."). Finally, this view was referenced on the floor of Congress in 1886 by Representative Herbert. 18 Cong. Rec. 75 (1886) ("The gentleman from New York … contends that the President of the Senate has that power [to count votes independently of Congress].").

(7) These sources together might well be read to support the view that it was reasonable for electors in contested states to meet and vote on Elector Day. As the Supreme Court has not yet addressed the question, and as that Court increasingly deploys "originalist" arguments to interpret the Constitution, see, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008) (through originalist argument, finding an individual constitutional right to bear arms), but see *Chiafalo v. Washington*, 591 U.S. ___ (2020) (rejecting originalist argument favoring electoral discretion), this scholarship might well support the view that an originalist court could conclude that the President of the Senate originally did indeed have a constitutional power to determine electoral votes.

(8) It is my view, however, that however reasonable it would have been to interpret this scholarship to show that an originalist view of the power of the President of the Senate gives the President a constitutional discretion to determine electoral votes, that view is mistaken.

Subsequent work by Matthew Seligman has demonstrated that there is no clear original source, contemporaneous with the founding, that supports the suggestion that the President of the Senate has any constitutional authority to determine electoral votes. Matthew Seligman, *Analysis of the Lawfulness of Kenneth Chesebro's Elector Plan Under Federal Election Law,* Just Security, October 9, 2023, available at https://perma.cc/6LKZ-M7S9. Likewise, my book with Seligman is quite clear in its rejection of the argument that the early examples of Adams and Jefferson in the electoral count establish that there was an understanding that the President of the Senate had a constitutional power to determine electoral votes. Lessig & Seligman, *How to Steal a Presidential Election* ch. 3 (forthcoming 2024). Obviously, this scholarship comes after the events leading up to January 2021. And thus, in my view, though it would have been reasonable to read this work to support the claim that during the founding period, "from 1789 to 1821, the power was generally thought vested in the states or in the President of the Senate," Colvin & Foley, *supra*, at 480, that reasonable view is ultimately incorrect. I do not believe that even an originalist Supreme Court would find that the Constitution vested in the President of the Senate an unchecked power to determine electoral votes.

(9) Beyond the argument that the Constitution vests in the President of the Senate a constitutional power to determine electoral votes, there was also a prominent argument advanced by Members of the United States Senate in 2020 to support the idea that Congress might legitimately exercise its power to select the slate of electors among competing slates, when, in its view, state judiciaries had not done an adequate job policing claims of fraud. As Senator Josh Hawley (R-MO) stated on the floor of the House on January 6, 2021, when the courts have not addressed claims of fraud completely, "this

[house] is the forum" for resolving those claims. 167 Cong. Rec. 55–56 (2021).

(10) This view, in my view, has no basis in law, and, because not plausibly grounded in any constitutional text, is a clear violation of the principles of federalism. In my view, the Constitution vests in the states the exclusive power to "appoint, in such Manner as the Legislature thereof may direct" electors. Article II, sec. 1, cl. 2. In every state today, that "Manner" includes a judicial process for adjudicating claims of fraud. Congress has no power to second-guess that judicial process because the Constitution gives Congress no power to second-guess the "Manner" by which states "appoint" electors.

(11) Nonetheless, if such a view were being advanced by prominent (and presumptively well-educated) Members of Congress (its most prominent proponent was a graduate of the Yale Law School, and a former professor of constitutional law), it might well be appropriate to privilege electors from states with plausibly competing slates to cast their ballots on Elector Day, and privilege any lawyers advising such electors: if it was plausible to believe that Congress would exercise, however improperly, the power to relitigate claims of fraud, it might well be justified to assure that Congress would have legitimate electoral votes to select among.

Privileged Behavior of Presidential Electors

(12) It is my view that so long as there is a good faith reason why the selection of a slate of electors in a state is not finally determined on Elector Day, electors should be privileged to meet on Elector Day and cast their ballots, and lawyers should be privileged to advise electors about their activities. Such acts are within the scope of the federal function of electors. *Ray v. Blair*, 343 U.S. 214, 224 (1952) ("electors exercise a federal function"). By the

Supremacy Clause, no state law can interfere with those federal functions.

(13) Thus, if there is a judicial contest prosecuted in good faith about the results of an election but unresolved by Elector Day, electors should be privileged to meet and cast their ballots, and lawyers should be privileged to advise them about their actions.

(14) Likewise, if there is a good faith reason to believe that the President of the Senate could be held to have the power to determine to select one slate of electors from among competing slates, electors in such contested states should be privileged to meet and cast their ballots, and lawyers should be privileged to advise them about their activities.

(15) Likewise, if there is a good faith reason to believe that Congress, as the "forum" of last resort to evaluate claims of fraud, will exercise its judgment to select one slate of electors from among competing slates, electors should be privileged to meet and cast their ballots, and lawyers should be privileged to advise them about their activities.

(16) These considerations lead me to believe that Mr. Chesebro should have been privileged to advise Republican electors in Georgia to cast their ballots on Elector Day, if he believed in good faith:

(a) that there was ongoing good-faith litigation that could have resolved in favor of the Republican ticket, *or*

(b) that there was a reasonable chance that the Supreme Court would hold that the President of the Senate has a constitutional authority to determine a contest among slates of electors and that power could reasonably be expected to be deployed in favor of the Republican ticket, *or*

(c) that Congress, as the final "forum" to resolve claims of fraud, could exercise its judgment to select the Republican slate of electors in Georgia if fraud was indeed demonstrated.

(17) My conclusions are bolstered by considering what would have been the appropriate action of Biden electors, had Governor Kemp followed President Trump's command that he certify the slate of Republican electors, contrary to Georgia law. Had that happened, the Biden electors should have been privileged to meet and cast their ballots on Elector Day, either because (a) there would certainly be litigation pending on Elector Day that could reasonably resolve in their favor, or (b) because the President of the Senate might be upheld in his or her power to count the Biden slate, the governor's certification notwithstanding, or (c) because Congress would be free, each House voting separately, to vote to count the Biden slate, the governor's certification notwithstanding. Any lawyer advising the Biden electors to so vote should likewise be privileged in giving such advice to those electors.

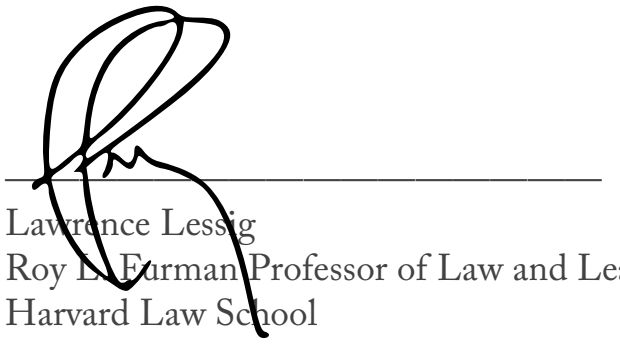
Legal Relevance of Failed Electors Voting

(18) Though legally harmless, it is my view that there is no need for electors from a failed ticket to cast their ballots on Elector Day when there could be no legitimate basis for counting their votes on January 6.

(19) Nonetheless, if electors from a failed ticket do meet to cast their ballots on Elector Day, their votes are legally ineffective. Though such ballots may recite facts that are not, at the time, true, those statements should be understood as part of a contingent document, the validity of which should be measured only if the condition that renders them contingent obtains.

(20) For example, in 1960, both the Republican and Democratic slates of electors signed certificates asserting that they were the properly elected slate of electors in the 1960 Hawaii election. Of necessity, at the time those electors signed those documents, that statement was not true for one of the two slates. Nonetheless, the truth within those documents should only be measured if the contingency applying to each obtains. For example, if a person asserted falsely that they were a Democratic elector (because they had not been selected by the party to be such an elector), and the Democratic slate were determined to be the properly selected slate for that state, then that false statement should be actionable. If the slate is not determined to be the properly selected slate, it should not. Put differently, if contingency obtains, and that slate is thus selected as the slate representing the state, then the facts asserted within those certificates could be measured legally. If they are false and material to the document, those false statements should be actionable.

Signed this 15 October 2023,



Lawrence Lessig
Roy L. Furman Professor of Law and Leadership
Harvard Law School

Exhibit B

ATTORNEY CLIENT PRIVILEGED
CONFIDENTIAL

EXHIBIT C

Date: February 9, 2022

To: Wisconsin Elections Commission

Subject: 2021 EL 21-13: *Sickel v. Hitt, et al.*
Memorandum on Complaint under Wis. Stat. § 7.75 and 5.10

This matter involves an allegation that ten presidential elector nominees violated certain Wisconsin election laws when they met on December 14, 2020, to vote as presidential electors for Donald Trump and Michael Pence. That vote occurred after a statement of canvas certified election results in favor of Joseph Biden and Kamala Harris, after a recount was completed, but while court challenges to the election result were pending. Complainants argue that the December 14, 2020, meeting was an unlawful attempt to undermine the election, and the Respondents argue that the meeting was necessary to avoid missing a statutory deadline while legal challenges were pending. Based upon the text of the relevant statutes, and in light of the facts, historical precedent, and related federal authorities, this memorandum concludes that the Complaint does not raise a reasonable suspicion that Respondents violated Wisconsin election law.

Complainants also argue that eight of the Respondents forfeited any defenses by not filing separate responses to the Complaint. Under the Commission's procedures for deciding complaints of this nature, a respondent does not default by declining to individually respond.

I. Nature of the proceeding.

This action is commenced under Wis. Stat. § 5.05. In a section 5.05 complaint, the Commission makes one of three initial findings. It may (1) find by a preponderance of the evidence that a complaint is frivolous, (2) fail to find that there is reasonable suspicion of a violation and dismiss the complaint, or

(3) find that there is reasonable suspicion of a violation. Wis. Stat. §§ 5.05(2m)(c)2.am, 5.05(2m)(c)(4).

If the Commission finds that there is reasonable suspicion of a violation, it then has two options for how to proceed. First, it may authorize the commencement of an investigation. Wis. Stat. § 5.05(2m)(c)(4) ("if the commission believes that there is reasonable suspicion . . . the commission may by resolution authorize the commencement of an investigation.") At the end of such investigation, the Commission would determine whether probable cause exists to believe that a violation has occurred, whether to conduct further investigation, or whether to terminate the investigation due to lack of sufficient evidence to indicate a violation has occurred. Wis. Stat. § 5.05(2m)(c)(5). Additionally, "[a]t the conclusion of its investigation, the commission shall, in preliminary written findings of fact and conclusions based thereon, make a determination of whether or not probable cause exists to believe that a violation. . . has occurred or is occurring. Wis. Stat. § 5.05(2m)(c)(9).

Second, the Commission may make a finding of probable cause without an investigation. Wis. Stat. § 5.05(2m)(c)(6). The Commission could then authorize the administrator to file a civil complaint against the alleged violator or refer the matter to a district attorney. Wis. Stat. §§ 5.05(2m)(c)(6), (11).

No court decision has interpreted "reasonable suspicion" in the context of section 5.05. In other contexts, courts have indicated that reasonable suspicion exists when there is a particularized and objective basis to suspect there has been a violation of the law. This can be drawn using common sense inferences from everyday life, as well as the person's experiences. Reasonable suspicion is more than a hunch, but less than probable cause. *Kansas v. Glover*, 140 S.Ct. 1183 (2020); *see also State v. Newer*, 2007 WI App 236; *State v. Post*, 2007 WI 60, ¶ 18, 301 Wis. 2d 1, 11, 733 N.W.2d 634 ("this court has consistently maintained that the determination of reasonable suspicion is based upon the totality of the circumstances"); *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84, 88 (Wis. Ct. App. 1997) ("[t]he question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present. . ."); *State v. Patton*, 2006 WI App 235, ¶ 9, 297 Wis. 2d 415, 297 Wis.2d 415 (in the traffic stop context reasonable suspicion is a particularized and objective basis for suspecting the person stopped of criminal activity.")

Probable cause is a higher standard than reasonable suspicion. *State v. Houghton*, 2015 WI 79, ¶ 21, 364 Wis. 2d 234; *Patton*, 297 Wis.2d 415 ¶ 9. Probable cause is defined in Wis. Admin. Code § EL 20.02(4) to mean "the facts and reasonable inferences that together are sufficient to justify a reasonable, prudent person, acting with caution, to believe that the matter asserted is probably true."

II. Scope of the Complaint.

The Complaint alleges that the respondents violated Wisconsin Statutes sections 7.75 and 5.10 and "[b]y this sworn Complaint [requests] that the Wisconsin Elections Commission investigate the apparent violations of Wis. Stats. §§ 5.10 and 7.75." (Compl. ¶ 32.) It further requests that the Commission "initiate an investigation pursuant to Wis. Stat. § 5.05(2m)(c)4. of the apparent violations of Wis. Stats. §§ 5.10 and 7.75." (Compl.[1] ¶ 33; Compl. Form[2] p. 1)

The complaint documents state that the Complainants have separately requested that the District Attorney for Milwaukee County investigate apparent criminal violations including crimes affecting the administration of government and forgery. (Compl. ¶ 35.) Complainants note that such investigation is "distinct from the civil actions [Complainants] request the Wisconsin Elections Commission to undertake." (Compl. ¶ 36.)

Consistent with the Complaint, this memorandum addresses the facts and arguments that the parties have raised regarding Wis. Stats. §§ 5.10 and 7.75. This memorandum does not address other potential violations of law, such as election fraud under Wis. Stat. § 12.13 or matters that the Complainants have raised to other authorities or discussed in the media, such as forgery under Wis. Stat. § 943.38, false swearing under Wis. Stat. § 946.32, falsely assuming to act as a public officer under Wis. Stat. § 946.69, simulating legal process under Wis. Stat. § 946.68, misconduct in public office under Wis. Stat. § 946.12, conspiracy, aiding, or attempt to commit such acts, or any other matter outside the scope of the complaint.

III. Nature of the Complaint.

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[1] "Compl." refers to the document titled "Sworn Complaint against fraudulent electors under Wis. Stat. § 5.05."

[2] "Compl. Form" refers to the document titled "State of Wisconsin Elections Commission Complaint Form."

On February 15, 2021, Complainant Paul Sickel filed a Complaint against Andrew Hitt, Robert Spindell, Kathy Kiernan, Bill Feehan, Carol Brunner, Scott Grabins, Darryl Carlson, Pam Travis, Kelly Ruh, and Mary Buestrin (the "Respondents"). The Complaint and supporting briefs allege that the Respondents violated Wis. Stat. §§ 5.05 and 7.75.

The Complaint involves events following the November 3, 2020, presidential election. On November 19, 2020, the Commission issued an order for recount.[3] On November 30, 2020, the Chairperson of the Commission executed a statement of canvass certifying that electors for candidates Biden and Harris received the greatest number of votes. (Compl. Ex. D.) On the same day, Governor Evers executed a certificate of ascertainment, certifying that result. (Compl. Ex. E.)

Simultaneously with the canvassing, recount, and certification, several election-related lawsuits were pending in both state and federal court, including legal challenges to the results. *E.g.*, *Donald J. Trump, et al. v. Joseph R. Biden, et al.*, Milwaukee Cty. Case No. 20-CV-7092; *Donald J. Trump, et al. v. The Wisconsin Elections Commission, et al.*, E.D. Wis. 2:20-CV-01785-BHL. These lawsuits were not finally concluded until February and March 2021, when the U.S. Supreme Court denied certiorari review in both cases. As of December 14, 2020, the recount results had been upheld but appeals, or appeal opportunities, remained. (*See* timeline in Sur-Reply, p. 2–3.) In the state court case, on December 14, 2020, the Wisconsin Supreme Court rejected a Trump campaign challenge. The campaign then filed a petition for writ of certiorari with the United States Supreme Court on December 29, 2020, which was denied on February 22, 2021. In the federal case, the district court dismissed the Trump complaint on December 12, 2020, an appeal was filed on December 14, 2020, and the court of appeals affirmed the dismissal on December 24, 2020. The campaign then filed a petition for writ of certiorari with the United States Supreme Court on December 30, 2020, which was denied on March 8, 2021.

On December 11, 2020, the Trump plaintiffs in the state-court recount case filed a petition with the Wisconsin Supreme Court that addressed the meeting and electoral college votes in a footnote:

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[3] Available at *Order for Recount,* Wisocnsin Elections Commission, https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/WEC%20-%20Final%20Recount%20Order_0.pdf (last accessed November 3, 2021.)

> Following the recommended approach to situations involving court challenges in Presidential elections which are not resolved by the time the Presidential electors must cast their votes pursuant to Art. II, § 1, cl. 4, and 3 U.S.C. § 7 (this year, December 14), the Trump-Pence Campaign has requested its electors to sign and send to Washington on that date their votes, to ensure that their votes will count on January 6 if there is a later determination that they are the duly appointed electors for Wisconsin.

(Goehre Aff. Ex. A: 8 n.3.)

On December 14, 2021, the Respondents met in the state Capitol building as electors for candidates Trump and Pence. (Compl. Ex. G.) Each executed a "Certificate of the Votes of the 2020 Electors From Wisconsin" indicating presidential votes for Trump and Pence. (Compl. Ex. G.) Respondents Hitt and Ruh sent the document to the President of the United States Senate, the Wisconsin Secretary of State, the Archivist of the United States, and the Chief Judge for the Western District of Wisconsin. (Compl. Ex. G.) The transmittal letter has only one signature, which appears to be of Andrew Hitt. (Compl. Ex. G.)

In a social media post, Respondent Feehan indicated that the Trump and Pence electoral college votes were "[j]ust keeping our legal options open." (Compl. Ex. H.) The Republican Party of Wisconsin, via Respondent Hitt, stated: "While President Trump's campaign continues to pursue legal options for Wisconsin, Republican electors met today in accordance with statutory guidelines to preserve our role in the electoral process with the final outcome still pending in the courts." (Compl. Ex. I.)

The Complaint alleges that "[t]he only reasonable inference that can be drawn from these documents [indicating electoral votes for Trump and Pence] is that the fraudulent electors created and delivered these documents for the purpose, and with the intent, that they be received as valid documentation for the purpose of inducing the United States Congress to credit the wrong candidates with having earned Wisconsin's ten electoral votes." (Compl. ¶ 24.) This, the Complainants contend, constituted fraud and an intent to undermine the presidential election. (Compl. ¶ 26.)

The Respondents deny this allegation, and state that they "acted with the sole intent of preserving standing and ensuring that if any of the pending legal

cases were successful, the courts did not claim it was too late for the appropriate remedy to be awarded." (Resp. 2–3.)

IV. Issue 1: Whether the Respondents' December 14, 2020, meeting or execution of documents including a "Certificate of Nomination Presidential Electors Meeting: October 6, 2020" violated Wis. Stat. §§ 5.10 or 7.75.

The Complainants request that the Commission "initiate an investigation pursuant to Wis. Stat. § 5.05(2m)(c)4. of the apparent violations of Wis. Stats. §§ 5.10 and 7.75." (Compl. ¶ 33.)

a. Laws at issue:

Sections 5.10 and 7.75 state:

> 5.10 Presidential electors
>
> Although the names of the electors do not appear on the ballot and no reference is made to them, a vote for the president and vice president named on the ballot is a vote for the electors of the candidates for whom an elector's vote is cast. Under chs. 5 to 12, all references to the presidential election, the casting of votes and the canvassing of votes for president, or for president and vice president, mean votes for them through their pledged presidential electors.
>
> 7.75 Presidential electors meeting
>
> (1) The electors for president and vice president shall meet at the state capitol following the presidential election at 12:00 noon the first Monday after the 2nd Wednesday in December. If there is a vacancy in the office of an elector due to death, refusal to act, failure to attend or other cause, the electors present shall immediately proceed to fill by ballot, by a plurality of votes, the electoral college vacancy. When all electors are present, or the vacancies filled, they shall perform their required duties under the constitution and laws of the United States.
>
> (2) The presidential electors, when convened, shall vote by ballot for that person for president and that person for vice president who are, respectively, the candidates of the political party which nominated them

> under s. 8.18, the candidates whose names appeared on the nomination papers filed under s. 8.20, or the candidate or candidates who filed their names under s. 8.185(2), except that at least one of the persons for whom the electors vote may not be an inhabitant of this state. A presidential elector is not required to vote for a candidate who is deceased at the time of the meeting.

Wis. Stat. §§ 5.10, 7.75. These statutes describe that Wisconsin voters select presidential electors by voting for the presidential candidates, and that electors shall meet on a certain date and cast electoral college votes for their candidates. In 2020, December 14 was the deadline for presidential electors to meet. After that date, the Section 7.75 deadline would have been missed.

b. Analysis:

The issue in this complaint is whether the Trump and Pence electors violated these statutes when they met, voted, and documented their votes, after the canvassing, recount, and certification were complete, but before court challenges to the recount outcome were complete.

Applying sections 5.10 and 7.75 begins with the plain language of the statutes. *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Nothing in either statute prohibits or otherwise limits a party from meeting to cast electoral votes during a challenge to an election tabulation. Instead, section 5.10 merely says that while 'the presidential candidates' names appear on the ballot, votes for those candidates are votes for their electors. And section 7.75 merely lays out the procedure for presidential electors to cast their votes. They say nothing about an alternative set of electors casting votes and do not expressly prohibit a slate of electors form casting votes to preserve their votes in case pending legal challenges prove successful.

Petitioners contend that "Because the Republican candidates for the offices of President and Vice President of the United States did not win Wisconsin's statewide November 2020 election, the Republican Party's designees were not elected as Wisconsin's Presidential Electors. Accordingly, they had no legal duty to meet on December 14, 2020." (Compl. ¶ 17.) The argument, in essence, is that the Respondents were not "electors" to begin with, so they had no duty to meet and vote.

As an initial matter, even assuming the Complainants were right that the Respondents had no *duty* to meet, it does not necessarily follow that meeting violated the law. The remainder of this argument has some facial appeal because the U.S. Constitution describes presidential electors as a product of the state election process. U.S. Const. art. II, § 1, cl. 2 ("Presidential Electors Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.") In other words, individuals nominated by a party to be electors are not actually electors until the state process decides who won the election. However, the Complainant's argument—that the Respondents were not electors—presumes the outcome of the state procedures. And as noted above, Wisconsin law does not prohibit an alternative set of electors from meeting.

Respondents point out that the election outcome was still under judicial review, so their votes were a necessary protection against missing the deadline should the challenges to the November 30 canvassing have succeeded. Court pleadings, a news release, and social media indicate that the Respondents' intent was to avoid missing the December 14, 2020, deadline while court challenges were pending. Respondents point out that if they did not meet that day, they risked having no electoral votes that could possibly be counted if their legal challenges were successful and Trump were declared the successful candidate by legal process. Respondents' concern is reasonable; courts have found that candidates' delays can bar legal rights. *See Trump v. Biden*, 2020 WI 91, ¶¶ 13–22, 394 Wis. 2d 629, 951 N.W.2d 568 (barring claims where "[t]he Campaign offers no justification for this delay; it is patently unreasonable"); *Hawkins v. Wisconsin Elections Comm'n*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877 ("petitioners delayed in seeking relief in a situation with very short deadlines and that under the circumstances, including the fact that the 2020 fall general election has essentially begun, it is too late to grant petitioners any form of relief"); *Joseph R. Santeler Complaint against Kanye West,* Case No. EL 20-30[4] (nomination papers rejected when submitted shortly after 5:00 p.m. deadline)

Complainants reply that if the intent was to preserve the deadline, the letter transmitting the record of Trump electoral votes could have stated expressly that the votes were contingent on the outcome of pending litigation,

[4] Meeting minutes available at *Notice of open and Closed Meeting,* Wisconsin Elections Commission, https://elections.wi.gov/sites/elections.wi.gov/files/2020-08/August%2020%20Open%20Session%20Packet.pdf (last accessed November 3, 2021.)

which is what occurred in other states such as Pennsylvania and New Mexico. (Compl. Reply p. 2–3.) That is a valid criticism of the transmittal letter signed by Respondent Hitt. (Compl. Ex. G.) The letter would have been more accurate, and may have prevented confusion or concern, if it had expressly stated that the votes were being transmitted only to meet the statutory deadline in case they became operative after the lawsuits were resolved. That would have been better practice, and may have prevented this proceeding, but it likely not a violation of election statutes.

In addition to Pennsylvania and New Mexico in 2020, there is additional historical precedent for protective presidential elector votes. In the 1960 presidential election between Nixon and Kennedy, Hawaii's canvassing showed Nixon a winner by 141 votes and the governor issued a certificate of election to the Republican slate. The results were challenged in a lawsuit brought by Democratic voters, and a recount was commenced. The recount was not completed by the date that presential electors voted, December 19, and both the Democrats and Republicans met and cast their votes for their respective candidates. The recount concluded on December 28, and two days later the court declared that Kennedy had won the election by 115 votes. Ultimately, three certificates of electoral college votes and the court's judgment was submitted to Congress, and the votes were counted for Kennedy in light of the December 30 court ruling. (Goehre Aff. Ex. C–F.)

The Respondents actions here were similar to those of the Democratic presidential electors in Hawaii. They cast their votes, even though the canvass did not reflect a Trump victory, in order to preserve the opportunity for the votes to be counted if a court challenge found that Trump received the majority of votes. Petitioners point out a difference that the recount was still underway in Hawaii when the Democratic electors met, but in Hawaii it was the court decision that ultimately ended the dispute. As a federal court recognized in the 2020 election litigation, an election canvassing is not necessarily final while legal challenges are pending:

> The final determination of the next President and Vice President of the United States has not been made, however, and the issuance of a Certificate of Ascertainment is not necessarily dispositive on a state's electoral votes. . . . Under the federal statute governing the counting of electoral votes, a state governor may issue a certificate of ascertainment based on the canvassing and then a subsequent certificate of "determination" upon the conclusion of all election challenges. 3 U.S.C.

> § 6. The certificate of "determination" notifies the U.S. Congress of the state decision when Congress convenes . . . to count the electoral votes.

Trump v. Wisconsin Elections Comm'n, No. 20-CV-1785-BHL, 2020 WL 7318940, at *9 (E.D. Wis. Dec. 12, 2020). In the Wisconsin 2020 election, there was no final court decision by December 14.

Although the Commission's decision is confined to a state law inquiry, it is notable that federal law and Supreme Court commentary contemplate the possibility of multiple slates of electors. Federal statutes include procedures for Congress to follow "in such case of more than one return or paper purporting to be a return from a State" (3 U.S.C. § 15), and deadlines for state courts to resolve election-related disputes. 3 U.S.C. § 5. In a case involving the 2000 presidential election, the Supreme Court noted, in a dissent, that these rules "do not prohibit a State from counting what the majority concedes to be legal votes until a bona fide winner is determined. Indeed, in 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines." *Bush v. Gore*, 531 U.S. 98, 127, 121 S. Ct. 525 (2000) (J. Stevens, dissenting). These authorities acknowledge the possibility that state procedures may result in multiple electoral votes being transmitted to the federal legislature.

Finally, Complainants argue that the Respondents "met in a concerted effort to ensure that they would be mistaken, as a result of their deliberate forgery and fraud, for Wisconsin's legitimate Presidential Electors." (Compl. 25.) The record does not support this allegation. Before and after the December 14 meeting, the Respondents publicly stated, including in court pleadings, that they were meeting to preserve legal options while litigation was pending. (Compl. Ex. H–I; Goehre Aff. Ex. A: 8.)

Under the plain text of Wis. Stats. §§ 5.10 and 7.75, and in light of the facts, historical precedent, and related federal authorities, the Complaint does not raise a reasonable suspicion that Wis. Stats. §§ 5.10 or 7.75 were violated.

V. Issue 2: Whether Respondents Robert Spindell, Kathy Kiernan, Carol Brunner, Scott Grabins, Darryl Carlson, Pam Travis, Kelly Ruh, and Mary Buestrin defaulted this action.

The Commission received two responses to the Complaint; the Response to Complaint filed by counsel for Andrew Hitt and an email from Bill Feehan

stating that he joins the Hitt response. Complainants argue that all Respondents other than Hitt and Feehan have forfeited their opportunities to present facts and arguments or elected to not dispute the allegations. (Compl. Reply p. 1; Sur-Response p. 2.)

The statutes governing this complaint do not require a response and contain no provision for a default. The procedures in Wis. Stat. § 5.05 permit a respondent "to demonstrate to the commission . . that the commission should take no action against the person on the basis of the complaint," but there is no response requirement. Wis. Stat. § 5.05(2m)(c)2.a. There is no indication that a respondent defaults by not individually responding to a complaint. The Respondents other than Hitt and Feehan therefore did not default in this action by not submitting individual responses.

CONCLUSION

The allegations in the Complaint, and the supporting arguments and evidence, do not indicate that the Respondents violated Wis. Stats. §§ 5.10 or 7.75. Additionally, no Respondent is in default of those allegations.

Exhibit C

Exhibit A

UNITED STATES OF AMERICA

STATE OF GEORGIA

COUNTY OF FULTON

MEETING OF THE ELECTORAL COLLEGE OF GEORGIA

RE GEORGIA'S ELECTORAL VOTES

FOR

PRESIDENT and VICE PRESIDENT

OF THE

UNITED STATES

* * *

December 14, 2020

12:05 p.m.

Georgia State Capitol

206 Washington Street

Room 216

Atlanta, Georgia 30334

Anne Hansen, RPR, CCR #2711

Videographer, Ben Jones

A P P E A R A N C E S

Representing the 2020 Electors for the State of Georgia:

Chairman David Shafer
Joseph Brannan
James "Ken" Carroll
Vikki Townsend Consiglio
Carolyn Hall Fisher
Honorable Burt Jones
Gloria Kay Godwin
David G. Hanna
Mark W. Hennessy
Mark Amick
John Downey
Cathleen Alston Latham
Daryl Moody
Brad Carver

Representing President Donald J. Trump:

Ray S. Smith, III, ESQ.
Smith & Liss, LLC
Five Concourse Parkway, Suite 2600
Atlanta, Georgia 30328
(404)760-6000

PROCEEDINGS

CHAIRMAN SHAFER: My name is David Shafer. I'm the chairman of the Georgia Republican Party. And the hour of noon having arrived, it's my privilege to call to order this meeting of the Republican nominees for the Electoral College from the State of Georgia.

The President has filed a contest to the certified returns. That contest has -- is pending. It's not been decided or even heard by any judge with the authority to hear it. And so in order to preserve his rights, it's important that the Republican nominees for Presidential Elector meet here today and cast their votes.

From my observation, 13 of the 16 nominees are present. The first order of business is for the electors who are present to fill the three vacancies for those who are not present.

Is there a motion to elect Mark Amick, Brad Carver, and Burt Jones as Substitute Presidential Electors?

MS. FISHER: I so move.

JOSEPH BRANNAN: Second.

CHAIRMAN SHAFER: It's been moved and seconded that Mark Amick, Brad Carver, and Burt Jones be elected Substitute Presidential Electors.

Is there any discussion on that motion?

The Chair hears no discussion, and the motion will be put to a vote.

All those in favor signify so by saying "Aye."

Those opposed "No."

The "Ayes" have it. The motion carries. And we now have a full slate of 16 Presidential Electors.

I will pause for a moment and say that Pat Garland, one of our Presidential Electors, his wife died last week, and he is taking care of his family. And our hearts are -- obviously all go out to him.

We will suspend for a moment while the paperwork is prepared to reflect the new slate of Presidential Electors, and then we will conduct the balloting. So this meeting is suspended momentarily.

(Recess 12:07-12:11 p.m.)

CHAIRMAN SHAFER: All right. Is there any objection to Carolyn Fisher serving as the secretary of this meeting?

The Chair hears no objection, and Carolyn Fisher is now the secretary of this meeting.

Now, Secretary, if you would call the roll of the Presidential -- Presidential Electors.

MS. FISHER: Joseph Brannan.

MR. BRANNAN: Here.
MS. FISHER: Ken Carroll.
MR. CARROLL: Here.
MS. FISHER: Vikki Consiglio.
MS. CONSIGLIO: Here.
MS. FISHER: Carolyn Fisher.
Kay Godwin.
MS. GODWIN: Here.
MS. FISHER: David Hanna.
MR. HANNA: Here.
MS. FISHER: Mark Hennessy.
MR. HENNESSY: Here.
MS. FISHER: John Isakson.
CHAIRMAN SHAFER: No. I'm sorry. He was replaced. He was substituted.
MS. FISHER: Sorry.
Cathy Latham.
MS. LATHAM: Here.
MS. FISHER: Daryl Moody.
MR. MOODY: Here.
MS. FISHER: David Shafer.
MR. SHAFER: Here.
MS. FISHER: Shawn Still.
MR. STILL: Here.
MS. FISHER: Chandra Yadav.

MR. YADAV: Here.
MS. FISHER: Mark Amick.
MR. AMICK: Here.
MS. FISHER: Brad Carver.
MR. CARVER: Here.
MS. FISHER: Burt Jones.
MR. JONES: Here.
MS. FISHER: And Frank -- what's that?
CHAIRMAN SHAFER: I'm sorry.
Oh. Can I confer with you for just a moment, please?
MR. SMITH: Yes.
CHAIRMAN SHAFER: Okay. So there is -- we will need to elect one more.
Robert, do you need me to elect one more?
One of our -- one of our presidential electors has -- is no longer eligible because he registered to vote in another state to further his college studies.
Is there a motion to elect John Matt Downey as a substitute presidential elector?
MS. FISHER: I so move.
MS. LATHAM: Second.
CHAIRMAN SHAFER: It's been moved and seconded that John Downey be elected as a substitute

presidential elector. All those -- is there any discussion on that motion?

The Chair hears no discussion and will put the motion to a vote.

All those in favor signify so by saying "Aye."

Those opposed "No."

The "Ayes" have it. The motion carries, and John Downey is a -- now a Presidential -- Republican Candidate for Presidential Elector. And he is present.

MR. DOWNEY: Yes, sir.

CHAIRMAN SHAFER: And -- and so all 16 are present. And we will conduct the voting momentarily.

Ray Smith is a lawyer for President Trump. Do you wish to make any comments at this time?

MR. SMITH: Yes. We're -- we're conducting this as -- as Chairman Shafer said, we're conducting this because the contest of the election in Georgia is ongoing. And so we continue to contest the election of the electors in Georgia. And so we're going to conduct this in accordance with the Constitution of the United States, and we're going to conduct the electorate today similar to what happened in 1960 in Hawaii.

CHAIRMAN SHAFER: And if we did not hold this meeting, then our election contest would effectively be abandoned; is --

MR. SMITH: That's correct.

CHAIRMAN SHAFER: -- that not correct?

MR. SMITH: That's correct.

CHAIRMAN SHAFER: And so the only way for us to have any judge consider the merits of our complaint, the thousands of people who we allege voted unlawfully, is for us to have this meeting and permit the contest to continue; is that not correct?

MR. SMITH: That's correct. That's correct, Mr. Chairman.

MR. SINNERS: Chairman Shafer --

CHAIRMAN SHAFER: Yes, sir.

MR. SINNERS: -- I have John A. Isakson as an original elector being replaced by John Downey.

CHAIRMAN SHAFER: That's correct.

MR. SINNERS: Patrick Garland, Mark -- being replaced by Mark Amick.

CHAIRMAN SHAFER: That's correct.

MR. SINNERS: C.J. Pearson being replaced by Honorable Burt Jones, and Susan Holmes being replaced by Brad Carver.

CHAIRMAN SHAFER: That's -- that's fine.

Yes. And they all 16 are present. And you've got the paperwork ready?

MR. SINNERS: Yes, sir.

CHAIRMAN SHAFER: So if you would -- do you know these people by sight or probably not?

MR. SINNERS: Yes.

CHAIRMAN SHAFER: So how are you going to distribute the --

MR. SINNERS: The ballots?

CHAIRMAN SHAFER: Yeah.

MR. SINNERS: One at a time individually today to cast their ballot.

CHAIRMAN SHAFER: So why don't we . . .

Okay. I want to thank Carolyn Fisher for her service as the secretary of the meeting.

Because the documents have been prepared with Shawn Still listed as the secretary of the meeting -- of the meeting, I would like to avoid reprinting the documents, that there would be a motion to thank Carolyn Fisher for her service and to elect Shawn Still as the proper secretary of the meeting. Is there --

MR. CARROLL: So moved.

CHAIRMAN FISHER: And is there a second?

MS. LATHAM: Second.

CHAIRMAN SHAFER: Is there any discussion on that motion? No discussion.

All those in favor signify so by saying "Aye."

Those opposed "No."

The "Ayes" have it. The motion carries. Shawn Still is elected to Permanent Secretary of this meeting.

MR. STILL: Mr. Chairman, I'd like to take a moment to thank Carolyn for her hard work in this role, and I appreciate all that you've done.

MS. FISHER: Thank you.

CHAIRMAN SHAFER: Shawn, if you would come forward and sign these documents electing the substitute electors so we can move next to the vote.

All right. So the certificates have been executed. Are we prepared now to vote?

MR. SINNERS: Yes, we are.

CHAIRMAN SHAFER: Are the ballots individual?

MR. SINNERS: Yes.

CHAIRMAN SHAFER: So do you want me to -- do you want to call out the name and have that person raise their hand and maybe --

MR. SINNERS: Come up to sign.

CHAIRMAN SHAFER: Huh?

MR. SINNERS: Come up to sign.

CHAIRMAN SHAFER: Okay. So call the name. And then if the elector would come forward and complete the ballot and sign. So why don't you call the name.

MR. SINNERS: Joseph Brannan.

James Ken Carroll.

Vikki Consiglio.

Carolyn Fisher.

Kay Godwin.

David Hanna.

Mark Hennessy.

Mark Amick.

Brad Carver.

The Honorable Burt Jones.

Cathy Latham.

John Downey.

Chairman David Shafer.

Shawn Still.

Chandra Yadav.

CHAIRMAN SHAFER: Did you call Daryl Moody?

MR. SINNERS: Daryl Moody.

16 votes.

CHAIRMAN SHAFER: Do we have 16 votes cast?

MR. SINNERS: 16 have been cast for Vice

President Pence. And 16 have been cast for President Trump. Congratulations.

CHAIRMAN SHAFER: Is there any other business to come before this meeting?

Hearing none, the chair declares this meeting of the Republican Nominees for the Electoral College.

Are you trying to get my attention?

MR. SINNERS: Yes. We must complete some paperwork in private to certify.

CHAIRMAN SHAFER: Okay. So we'll adjourn this meeting. And then if the electors would remain behind for a few minutes for us to complete the paperwork.

But hearing nothing else, this meeting of the electors is hereby adjourned.

(The meeting adjourned at 12:31 p.m.)

C E R T I F I C A T E

STATE OF GEORGIA)
)
COUNTY OF HENRY)

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The above certification is expressly withdrawn and denied upon the disassembly or photocopying of the foregoing transcript, unless said disassembly or photocopying is done under the auspices of AHReporting, Certified Court Reporters, and the signatures and original seal is attached thereto.

I further certify that I am not a relative, employee, attorney of any present, nor am I financially interested in the outcome of this meeting.

This, the 18th day of December, 2020.

Anne Hansen

Anne Hansen, RPR, CCR #2711

Commission expires 3/31/2021

D I S C L O S U R E

STATE OF GEORGIA)
)
COUNTY OF HENRY)

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