

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,

v.

KENNETH CHESEBRO, ET AL.,
DEFENDANTS.

CASE NO. 23SC188947

JUDGE MCAFEE

**DEFENDANT CHESEBRO'S REPLY BRIEF IN SUPPORT OF HIS MOTION TO
DISMISS UNDER THE SUPREMACY CLAUSE**

COMES NOW, Defendant Kenneth Chesebro, by and through undersigned counsel, and submits this reply to the State's Response to his Motion to Dismiss Under the Supremacy Clause. Because this motion may be case dispositive, Mr. Chesebro respectfully requests this Honorable Court schedule a hearing on this motion. In support thereof, Mr. Chesebro states as follows:

The State claims that Mr. Chesebro has not pointed to any constitutional or statutory provision or cite any case in support of his arguments. However, in his motion, Mr. Chesebro repeatedly cites the Electoral Count Act ("ECA") which, by its clear terms, grants the States limited power to determine its presidential electors. The States' power ends on December 8, 2020, the Safe Harbor deadline. After December 8, 2020, all authority to determine who a State's electors are falls under Congress' authority. Thus, pursuant to the Supremacy Clause, conduct that occurred after December 8, 2020 was subject *solely* to federal law, and therefore could *only* be a violation of *federal law*.

The State misconstrues Mr. Chesebro's argument as a claim for federal officer immunity or a double jeopardy bar. But Mr. Chesebro is not purporting to claim double

jeopardy or federal officer immunity; he is not arguing that the State lacked authority over *his* actions after the Safe Harbor deadline. Instead, Mr. Chesebro is arguing that the State lacked authority over *any* action after the Safe Harbor deadline.¹

The State seems to think that its ability to prosecute fraud and lies to the state government are unrelated to the ECA's preemption of state law after the Safe Harbor deadline. But for a charge such as a violation of O.C.G.A. § 16-10-20 to stand, the state government would need to have authority to act on the statement made to it. But under the ECA and the Supremacy Clause, the state government has *no* authority to act. So while the State is correct that it is *ordinarily* free to prosecute fraud offenses, here the State is attempting to prosecute Mr. Chesebro and others for actions that occurred after the Safe Harbor deadline – actions solely within the purview of federal law.

In its response, the State claims that Mr. Chesebro's motion is not particularized and tells this Court that it should deny his motion without a hearing. But the State seems to equate being particularized and tailored to the facts of the case with asserting only conventional arguments that have been litigated before and that might be found in a run-of-the-mill practice guide. Indeed, the State takes issue with the fact that Mr. Chesebro

¹ This would still leave the State free to prosecute conduct that took place on or before December 8, 2020. Counts 2, 3, 4, and 5 of the indictment all charge offenses that took place before the Safe Harbor deadline; Mr. Chesebro has not been charged with any of those Counts. And Count 1 contains 45 overt acts that occurred on or before the Safe Harbor deadline, two of which are alleged as predicate acts of racketeering activity. Out of Overt Acts 1 through 45, Mr. Chesebro is only mentioned once in Overt Act 39. However, Overt Act 39 addresses conduct between co-defendants John Eastman and Rudy Giuliani in which Mr. Eastman emailed Mr. Giuliani a memo written by Mr. Chesebro. The indictment does not allege that Mr. Chesebro was part of this email correspondence between Mr. Eastman and Mr. Giuliani.

has not provided a case stating this proposition. What the State fails to grasp is that a novel issue of first impression is novel and unique precisely because it has never been litigated before. But that does not mean that it has no basis in law or cannot be easily understood with a rudimentary comprehension of what the ECA or Supremacy Clause says.

WHEREFORE, Mr. Chesebro respectfully requests this Court schedule a hearing on his Motion to Dismiss Under the Supremacy Clause and thereafter grant his motion.

Respectfully submitted, this 6th 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 Reply Brief in Support of Motion to Dismiss Under the Supremacy Clause upon the following counsel for the State of Georgia via the e-filing system.

ON THIS, the 6th day of October, 2023.

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