IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA v. DONALD JOHN TRUMP, RUDOLPH WILLIAM LOUIS GIULIANI, JOHN CHARLES EASTMAN, MARK RANDALL MEADOWS, KENNETH JOHN CHESEBRO, JEFFREY BOSSERT CLARK, JENNA LYNN ELLIS, RAY STALLINGS SMITH III, ROBERT DAVID CHEELEY, MICHAEL A. ROMAN, DAVID JAMES SHAFER, SHAWN MICAH TRESHER STILL, STEPHEN CLIFFGARD LEE, HARRISON WILLIAM PRESCOTT FLOYD, TREVIAN C. KUTTI, SIDNEY KATHERINE POWELL, CATHLEEN ALSTON LATHAM, SCOTT GRAHAM HALL, and MISTY HAMPTON a/k/a EMILY MISTY HAYES, Defendants.	CASE NO. 23SC188947

MOTION OF *AMICI CURIAE* FORMER FEDERAL AND STATE CRIMINAL JUSTICE OFFICIALS TO FILE A BRIEF IN SUPPORT OF STATE OF GEORGIA'S FIRST CONSOLIDATED MOTIONS IN LIMINE

STATEMENT OF INTEREST OF AMICI

Amici curiae Donald B. Ayer, Steven G. Calabresi, John J. Farmer, Jr., Charles Fried, Stuart M. Gerson, Jonathan C. Rose, Fern M. Smith, Stanley A. Twardy, Jr., and William F. Weld respectively seek leave of this Court to appear as *amici curiae* and file their brief in support of the State of Georgia's First Consolidated Motions in Limine. The brief is attached to this Motion as Exhibit A. In support of this motion, *amici curiae* state the following.

Interest of *Amici Curiae*

Amici curiae are former federal and state criminal justice officials, including judges, senior U.S. Department of Justice officials, a state Attorney General, and United States Attorneys, one of whom also served as a governor. A summary of the *amici's* experience is attached as Exhibit B. They have served in different Republican administrations federally and in diverse regions of the country, and together they have vast experience prosecuting and adjudicating complex trials, including those raising important constitutional issues. Additionally, they have a strong interest in ensuring the fair and proper administration of justice, especially in a case of this historic magnitude. Based on their years of experience handling issues similar to those raised in the State's motions in limine, *amici* respectfully submit that their amicus brief may assist the Court in its decisional process and in its evaluation of the legal issues raised herein. The proposed amicus brief is narrowly tailored to the key issues before the Court, and granting leave would not cause any delay or prejudice to the parties.

WHEREFORE, *amici curiae* respectfully request this Court accept and consider the brief attached hereto.

Respectfully submitted this 19th day of October, 2023.

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EXHIBIT A

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	
	CASE NO.
v.	
	23SC188947
DONALD JOHN TRUMP,	
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MISTY HAMPTON a/k/a EMILY MISTY HAYES,	
Defendants.	

BRIEF OF *AMICI CURIAE* FORMER FEDERAL AND STATE CRIMINAL JUSTICE OFFICIALS IN SUPPORT OF STATE OF GEORGIA'S FIRST CONSOLIDATED MOTIONS IN LIMINE

Amici are former federal and state criminal justice officials, including judges, senior U.S. Department of Justice officials, a state Attorney General, and United States Attorneys, one of whom also served as a governor. Based on their experience and scholarship, they submit this brief in support of the State's first four motions in its First Consolidated Motions in Limine. All four motions respond to the same profoundly mistaken legal position advanced by defendant Kenneth Chesebro: that legally defective "alternate" electoral slates for a losing presidential and

vice presidential candidacy can be utilized by that same unsuccessful vice president during the January 6th meeting of Congress to assert unilateral power to usurp the legal authority of Congress and to refuse to recognize the certificates of the successful candidate. In Mr. Chesebro's theory, the vice president has the power to recognize himself and his running mate as the winners of the election despite the fact that the electorate and every court that had reviewed the matter decided they lost—or to send the choice of who won to partisan state legislatures aligned with them.

It is difficult to conceive of a more profoundly incorrect set of propositions about American law. Although *amici* have a collective more than two centuries of practice dealing with complex constitutional and other legal issues, one need not be an expert to recognize that if the law says an electoral slate must have a certification from the governor of a state and that certification is missing, then that is not a legally valid electoral certificate. Certainly, the idea that the vice president, an interested party, has the power to disregard the law and the will of the voters in order to perpetuate himself and his boss in their White House tenure based on such legally flawed documentation is inimical to the Constitution and American law.

Accordingly, we offer this *amicus* brief in support of the State's motions pointing out that profound mistake of law and suggesting appropriate safeguards to cabin how it may be addressed at trial. *Amici* agree with the State that relief is necessary in order to avoid offending Georgia law, confusing the issues, misleading the jury, and risking undue delay.

First, Mr. Chesebro should not be allowed to advance these incorrect propositions to the jury in the form of a mistake of law defense because Georgia has expressly barred that defense. The Georgia legislature has made a firm policy determination that individuals are assumed to know the law, O.C.G.A. § 1-3-6, and the Georgia courts have repeatedly and conclusively

precluded defendants from introducing evidence of or arguing mistake of law to the jury. To allow otherwise would provide a loophole that defendants—and in particular attorney defendants—could attempt to exploit, confusing the jury and risking the avoidance of justice and responsibility. This is a textbook case of that potential harm.

Second, Mr. Chesebro's assertions about the false electoral certificates and the role of the vice president on January 6th are legal questions, and as such are not an appropriate subject for expert testimony. It is black-letter law that experts are not allowed to explain, interpret, or opine on the law, as doing so would invade the province of the judge. Permitting expert testimony on legal issues to the jury runs the risk of confusing them. Georgia has decided, like other jurisdictions, that doing so is forbidden.

Third, and relatedly, such legal questions are the exclusive province of the court. It alone has the role of adjudicating them in our legal system and has the expertise to do so. The jury certainly does not. Legal questions like those raised by Mr. Chesebro's assertions about the alternate electoral certificates and the constitutional and statutory role of the vice president are therefore for the court alone to resolve.

Fourth, one particular area where these legal questions about defective electoral slates and the power of the vice president are joined is around the relevance of Hawaii's electoral votes in the 1960 presidential election. That example is also not a subject for argument for the jury. It is clear that the 2020 post-election situation was nothing like that of Hawaii in 1960 for numerous reasons. The margin of victory was orders of magnitude smaller in Hawaii. There was an ongoing recount. And the Hawaii electors convened as a contingency solely in the event that the outcome of the recount flipped the result (which was not the case here). In any event, this too is a question of law and is the exclusive province of the judge.

Amici take no position on the other issues raised in the State's consolidated motions in limine.

ARGUMENT

I. The Court should grant the State's motion in limine to preclude any defendant from raising a mistake of law defense.

It is a deeply rooted principle in common law that neither ignorance nor mistake of law can excuse an otherwise criminal act. The United States Supreme Court acknowledged as much in 1833 while also explaining the rationale of the principle: "It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally; and it results from the extreme difficulty of ascertaining what is, bona fide, the interpretation of the party; and the extreme danger of allowing such excuses to be set up for illegal acts, to the detriment of the public." *Barlow v. United States*, 32 U.S. 404, 411 (1833) (Story, J.).

That "extreme danger of allowing such excuses" is manifest in many criminal cases; it is of paramount importance in this case as applied to these defendants who are alleged to have struck at the heart of Georgia's—and indeed the country's—democratic values. Where a defendant cannot claim mistake of law while on trial for murder, *see* Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. of Chi. L. Rev. 641, 645–46 (1941), similarly a defendant cannot be excused for his actions based on a mistake of law for an attempt to usurp the will of the voters. *See also Shevlin-Carpenter Co. v. State of Minn.*, 218 U.S. 57, 68 (1910) ("[I]nnocence cannot be asserted of an action which violates existing law, and ignorance of the law will not excuse.").

It is therefore no surprise that Georgia law provides no defense to criminal charges based on any mistake or misapprehension of the law. This principle is in fact codified by statute in Georgia: "After they take effect, the laws of this state are obligatory upon all the inhabitants

thereof. Ignorance of the law excuses no one." O.C.G.A. § 1-3-6. It is hard to imagine the legislature being any clearer. This statute is not subject to a nuanced construction. Courts in Georgia "must presume that the General Assembly meant what it said and said what it meant." *Deal v. Coleman*, 294 Ga. 170, 172 (2013). Here, the General Assembly was unambiguous: "Ignorance of the law excuses no one." Consequently, courts in this state uniformly apply O.C.G.A. § 1-3-6 as written. *E.g.*, *Mincey v. State*, 303 Ga. App. 257, 257–58 (2010) ("A defendant's ignorance of the fact that he was violating the law does not relieve him of criminal intent if he intended to do the act that the legislature prohibited."); *Payne v. State*, 209 Ga. App. 780, 782 (1993) ("[I]t may be said that [appellant] did not intend to violate the law, and did not know that he was doing so. The reply is that [OCGA § 1-3-6] declares that 'Laws after promulgation are obligatory upon all inhabitants of this state, and ignorance of the law excuses no one.'" (quoting *Gurley v. State*, 65 Ga. 157, 158 (1880)) (alterations in original)); *Jenga v. State*, 166 Ga. App. 36, 37 (1983) ("Furthermore, it is axiomatic that '[i]gnorance of the law excuses no one.'" (quoting O.C.G.A. § 1-3-6)). Simply put, there is no support under Georgia law for a defense based on ignorance or mistake of law.

Nowhere is the rationale to deny a mistake of law defense more apparent than under the alleged facts of this case—involving the claim that defective and false electoral certificates for the loser of a duly counted, recounted, and certified state election could be used by the vice president to usurp the powers of Congress on January 6, 2021, and either block that body from proceeding, have it recognize the loser as the winner, or send the matter back to partisan state legislatures to overturn the will of the voters. The proposition that such a profound mistake of law could be presented to a jury as a defense is an affront to the Constitution. As the Seligman memorandum attached as Exhibit A to the State's First Consolidated Motions in Limine makes

abundantly clear, the United States Constitution plainly articulates how electoral certificates are to be created and voted upon, and the ceremonial role of the vice president in that process. *See* Matthew A. Seligman, *Analysis of the Lawfulness of Kenneth Chesebro's Elector Plan Under Federal Election Law*, Just Security at 5–13 (Oct. 9, 2023) [hereinafter "Seligman Memo"]. Article II, section 1, clause 2 provides that states appoint electors in "such Manner as the Legislature thereof may direct." Georgia, by statute, provides the "Manner as the Legislature thereof may direct." *See* O.C.G.A. § 21-2-10–13. Notably, Georgia law does not provide for any mechanism for any alternate electors to be elected in any other fashion. Additionally, the Twelfth Amendment to the Constitution provides that the "President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted." Seligman Memo at 6. The Constitution provides no possibility for the President of the Senate to consider any certificates during this process other than those submitted pursuant to state law. It is simply inconceivable to *amici* that any lawyer could read these provisions and believe the alleged schemes at issue in this case—to overturn the results of a presidential election—were somehow permitted by law. Even if a lawyer were to hold such an outlandish belief, it is appropriate that Georgia law prevents the presentation of such evidence to a jury in support of a mistake of law defense. All lawyers, upon being admitted to the bar of any jurisdiction of the United States, swear an oath to uphold and defend the Constitution of the United States. Robert Anthony Gottfried, *The Anatomy of our Oath*, American Bar Association (Jan. 8, 2021), https://www.americanbar.org/groups/young_lawyers/resources/after-the-bar/professional-development/anatomy-of-our-oath/. Allowing a defense based on ignorance of the content of a document that they swore to protect would not just be an error of law but would also

be contrary to the fair and impartial administration of justice which all lawyers are by oath committed to defend.[1]

II. Evidence explaining, interpreting, or opining on federal election law invades the province of the court and should be excluded.

The second and third motions in limine in the State's consolidated filing seek to exclude, respectively, evidence concerning legal conclusions and evidence concerning the history, operation, interpretation, and applicability of the Electoral Count Act or related constitutional provisions. That evidence is most likely to come in the form of expert testimony explaining, interpreting, or opining on the law but could also be presented in the form of the written law (e.g., the Constitution, federal statutes, or legislative history)—introduced either through the documents themselves or a witness's recitation thereof, including an expert witness or witnesses. The law supporting these two motions is overlapping, and we therefore address them together. For the reasons stated below, *amici* urge this Court to grant these motions.

The rules of evidence in this State clearly limit expert testimony to issues of fact, not law. Rule 702(a) expressly limits that "the opinion of a witness qualified as an expert under this Code section may be given *on the facts* as proved by other witnesses." O.C.G.A. § 24-7-702(a) (emphasis added). Rule 702(b)(1) similarly limits expert testimony: "[t]he expert's scientific, technical, or other specialized knowledge [must] help the trier of fact *to understand the evidence or to determine a fact in issue*." O.C.G.A. § 24-7-702(b) (emphasis added). Additionally, although Rule 704(a) provides that expert testimony is not objectionable "because it embraces an ultimate issue to be decided by the trier of fact," legal explanations and interpretations are not issues to be decided by the trier of fact.

[1] While this brief is principally concerned with Mr. Chesebro's mistake of law defense, we note that the State makes an analogous point about the defense of his co-defendant Sidney Powell. *Amici* agree that it appears to suffer from the same deficiency under Georgia law.

The prohibition on expert witnesses testifying about legal issues is black-letter law, as explained by secondary sources.

> As a general rule, an expert witness may not give their opinion on a question of domestic law or on matters that involve questions of law, and an expert witness cannot instruct the court with respect to the applicable law of the case, or infringe on the judge's role to instruct the jury on the law. Similarly, experts are prohibited from offering opinions about legal issues that will determine the outcome of a case. Thus, the trial court must limit expert testimony so as not to allow experts to testify regarding legal conclusions by offering opinions on what the law requires or by testifying as to the governing law, and such testimony should ordinarily be excluded because it is not the way in which a legal standard should be communicated to the jury.

32 C.J.S. Evidence § 838 (2023). The reason why expert testimony on the law is generally disallowed is because it would "usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it." *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991) (distinguishing between "factual conclusions" that may be included in expert testimony even though "they embrace an ultimate issue to be determined by the jury" versus "opinions embodying legal conclusions that encroach upon the court's duty to instruct the law"). This is not a controversial legal principle but an inescapable conclusion:

> [T]he conclusion cannot be escaped that expert legal testimony on the law is inadmissible under both Federal Rules of Evidence 403 and 702. Rule 702 initially allows only expert testimony that is of assistance to the trier of fact. If the testimony by the expert is to instruct the jury on the proper legal issues, the testimony usurps the role of the judge. The judge is the proper party to provide instruction on the law to the jury; and because the jury is instructed to apply the law as set forth by the judge, the testimony by an expert upon the law by definition cannot be of any assistance to the jury. If the expert's testimony conflicts with that of the judge, the testimony may actually make the jury's determination more difficult. This effect would be diametrically opposed to the essential function of expert testimony as contemplated in Rule 702.

Thomas E. Baker, *The Impropriety of Expert Witness Testimony on the Law*, 40 U. Kan. L. Rev. 325, 337 (1992).

The State's motion cites cases from federal and Georgia courts affirming the principle that an expert witness may state conclusions on ultimate issues of fact but not of law.[2] *See* State's First Consolidated Motions in Limine at 5-6. Here, any testimony about the meaning of federal election law and the legal implications of conduct concerning federal election law is clearly inadmissible. *See, e.g.*, *Plott v. NCL Am., LLC*, 786 F. App'x 199, 203–04 (11th Cir. 2019) (affirming ruling that an expert could not testify in a slip-and-fall case about whether the defendant was "unreasonable" by not providing floor mats or warning signs); *Commodores Ent. Corp. v. McClary*, 879 F.3d 1114, 1129 (11th Cir. 2018) (affirming ruling that an expert could not testify in a trademark dispute about ownership, use of, and waiver of rights regarding the trademark in question); *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1540 (11th Cir. 1990) (holding that the district court abused its discretion by allowing an expert to testify about the construction of an insurance policy and whether the facts of the case triggered any duty under the policy); *Architects Collective v. Pucciano & Eng., Inc.*, 247 F. Supp. 3d 1322, 1335 (N.D. Ga. 2017) (prohibiting an expert from testifying in a copyright dispute about whether the allegedly infringing plans are "substantially similar" to the plaintiff's plans).

Trial courts generally have broad discretion to determine the admissibility of expert evidence, *Montgomery*, 898 F.2d at 1541, but they "must remain vigilant against the admission of legal conclusions, and an expert witness may not substitute for the court in charging the jury regarding the applicable law." *Cook v. Sheriff of Monroe County*, 402 F.3d 1092, 1112 (11th Cir.

[2] Where the relevant Georgia evidentiary rule is "materially identical to a Federal Rule of Evidence"—as is the case with Rules 702 and 704—Georgia courts look for guidance from the U.S. Supreme Court and federal Courts of Appeals, as directed by the General Assembly. *Miller v. Golden Peanut Co., LLC*, No. S22G0905, 2023 WL 5337865, at *4 (Ga. Aug. 21, 2023).

2005). Therefore, regardless of whether the evidence is offered through an expert witness, a lay witness (including any defendant), or the legal texts themselves, this Court should exercise its gatekeeping function and preclude any testimony or other evidence about the meaning, interpretation, or application of federal election law as it pertains to any defendant's conduct.

III. The Court should grant the State's motion to preclude evidence concerning multiple purported slates of electors from Hawaii in the 1960 presidential election.

Based on all of the foregoing, it is clear that evidence pertaining to the 1960 presidential electors in Hawaii—and any purported parallels to the actions taken by Mr. Chesebro and his alleged co-conspirators in the wake of the 2020 election—should be excluded by the court. Such evidence would be irrelevant as a factual matter and wholly inappropriate from a legal perspective.

Mr. Chesebro has indicated he may attempt to introduce evidence aligning his conduct with that of the Kennedy campaign in 1960; and he may argue, on this basis, that his actions were not illegal. However, Mr. Chesebro's alleged false electors scheme is categorically different from the contingent electors in Hawaii in 1960.

As the Seligman Memo explains at 15-17, in 1960, the initial margin of victory in Hawaii between Richard Nixon and John F. Kennedy was only 140 votes, and a court-ordered recount of the ballots was still ongoing on the safe harbor date of December 19, 1960. The Kennedy campaign convened its own electors to cast votes in the event that the tally flipped in Kennedy's favor as a result of the recount, which ultimately occurred; these electors were wholly *contingent* upon the outcome of the court-ordered recount. In 2020, there were no active recounts in Georgia on the safe harbor date of December 14th; indeed, by then, the votes in Georgia had already been recounted and recertified twice, affirming Joe Biden's 12,000-plus vote victory. Crucially, by the

time Mr. Chesebro was actively arranging for the "alternate" Trump-Pence electors to meet, cast votes, and submit false certificates—in December 2020—he had abandoned the notion that the "alternate" electors were contingent on the Trump campaign winning any of its challenges in court. Instead, his plan called for the new illegitimate Trump-Pence electors' votes to be considered by Congress on January 6, 2021, *even if no litigation yielded a court order in Mr. Trump's favor*. He suggested that there should be at least one "pending" lawsuit in each of the six states—including Georgia—where Mr. Trump planned on submitting electors despite losing the popular vote. He also proposed that the vice president or the President of the Senate possessed the sole power to both open *and* count the votes, and could refuse to count a state's votes if there were two competing slates presented. Mr. Chesebro allegedly sought to engineer such a scenario by convening unauthorized substitute Trump-Pence electors in Georgia, among other states, on December 14, 2020.[3]

Therefore, evidence pertaining to the 1960 Hawaii presidential electors is not "relevant evidence" since it would not "make the existence of *any fact* that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." O.C.G.A. § 24-4-401 (emphasis added). While the facts surrounding Mr. Chesebro's conduct will be the subject of this trial, it is apparent his actions did not follow the Hawaii

[3] For example, in his memorandum dated December 13, 2020, Mr. Chesebro envisioned that the president pro tempore "opens the two envelopes from Arizona, and announces that he cannot and will not, at least as of that date, count any electoral votes from Arizona because there are two slates of votes, and it is clear that the Arizona courts did not give a full and fair opportunity for review of election irregularities, in violation of due process." *See* Email from Kenneth Chesebro to Rudy Giuliani, Subject: PRIVILEGED AND CONFIDENTIAL – Brief Notes on "President of the Senate" strategy, (Dec. 13, 2020 9:48 pm), *available at* https://www.govinfo.gov/content/pkg/GPO-J6-DOC-Chapman004708/pdf/GPO-J6-DOC-Chapman004708.pdf. The Seligman Memo further details how Mr. Chesebro's proposal contravenes federal election law. *See* Seligman Memo at 26-34.

precedent. The events of 1960 will not help the jury establish what happened in 2020. As such, it "shall not be admissible." O.C.G.A. § 24-4-402.

In addition to the aforementioned factual irrelevance of the 1960 Hawaii presidential election, as a legal matter it would be wholly inappropriate to introduce such evidence to the jury. Any evaluation of election law is, necessarily, the province of the judge. As demonstrated in Section II *infra*, the jury may not hear testimony pertaining to legal issues. Thus, to the extent Mr. Chesebro wishes to argue that he was right about the law by pointing to the Hawaii precedent, that is definitively not for the jury to consider. Evidence pertaining to Hawaii does not illuminate the facts in this case; it is only relevant insofar as it helps determine the law around presidential electors. Nor should the jury be faced with ascertaining whether the 1960 Hawaii presidential electors acted lawfully, or establishing the legality of Mr. Chesebro's President of the Senate proposal. These are all questions of law upon which the jury should be instructed by the court if necessary. If Mr. Chesebro wishes to raise these issues, it would be appropriate only as a subject of future motion practice surrounding jury instruction later in this litigation.

CONCLUSION

This case is unique in terms of the magnitude of its allegations, but the bedrock legal principles that dictate how it should proceed are universal. Mr. Chesebro—and potentially other defendants—cannot be allowed to create a sideshow by confusing the jury with incorrect and immaterial theories about what they believed the law to be. This Court—not Mr. Chesebro, any other defendant, nor any expert legal witness—is the sole arbiter of the law and has the exclusive province to explain the relevant law to the jury for its deliberations. Accordingly, *amici* support the State's request that the Court grant the motions in limine discussed herein.

Respectfully submitted this 19th day of October, 2023.

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EXHIBIT B

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John J. Farmer Jr.
New Jersey Attorney General, nominated by Governor Christine Todd Whitman (R) of New Jersey (1999-2002)
Chief Counsel to Governor Christine Todd Whitman (R) of New Jersey (1997-1999)
Deputy Chief Counsel to Governor Christine Todd Whitman (R) of New Jersey (1996-1997)
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Special Assistant to the Attorney General in Reagan Administration (1984-1985)

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Defendants.	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Motion to File Amicus Brief upon all counsel who have entered appearances as a counsel of record in this matter via the Fulton County e-filing system.

This 19th day of October 2023,

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