IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA v. DAVID JAMES SHAFER *et al*. Defendants.	Case No. 23SC188947

DEFENDANT SHAFER'S SUPPLEMENTAL BRIEF REGARDING SHAFER PLEA AT BAR AND MOTION TO QUASH INDICTMENT

NOW COMES David Shafer and submits this Supplemental Brief Regarding Plea at Bar and Motion to Quash Indictment ("Plea at Bar"), showing this Court as follows:

I. The Appointment Power Given to State Legislatures By Art. II, Section 1 Ends On Election Day and, Therefore, Does Not Provide The State of Georgia With Authority or Jurisdiction to Pursue This Indictment As To The Presidential Electors.

"Congress has the final authority over federal elections." *Oregon v. Mitchell,* 400 U.S. 112, 125 (1970). "[T]he constitutional structure... allows the States but *a limited role in federal elections*, and maintains *strict checks on state interference with the federal election process*." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 822 (1995) (emphasis added). As established in Shafer's Plea at Bar and in the December 1, 2023 Hearing, because Presidential Electors are created by the Constitution and the election of Presidential Electors is a federal election, States have *no* original, reserved, or traditional police power over them. *See* Shafer Plea at Bar

at 4-11; *see also Mitchell,* 400 U.S. at 125; *Term Limits*, 514 U.S. at 805; Shafer Dec. 1 Hearing and PowerPoint. Any State authority to regulate them "had to be *delegated to, rather than reserved by*, the States." *Term Limits*, 514 U.S. at 805 (emphasis added). The Tenth Amendment "could only 'reserve' that which existed before the Constitution and "*the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government,* which *the constitution does not delegate to them*. No state can say that it has reserved *what it never possessed*." *Id.* (quoting 1 Story § 627) (emphasis added).

For Presidential Electors, the Constitution's only express delegation to the States is a delegation to State *legislatures* found in Art. II, § 1, cl. 2: "Each State shall appoint, in such Manner *as the Legislature thereof may direct*," its Presidential Electors.[1] Thus, the Constitution gives State legislatures the power to decide the manner of Presidential Elector *appointment*. As used in the Electors Clause, the word "Manner" refers to the "form" or "method" of selection of the Presidential Electors. It requires state legislatures merely to *set the approach* for selecting Presidential electors. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2330 (2020) (Thomas, J., concurring) (citations omitted). "It has been said that the word

[1] In Georgia, Presidential Elector nominees are chosen by the state's political parties and then elected based upon the results of the state's popular vote. *See, e.g.,* O.C.G.A. § 21-2-134 (nomination of presidential electors); O.C.G.A. § 21-2-172 (nomination of candidates by convention).

'appoint' is not the most appropriate word to describe the result of *a popular election* [of presidential electors]. Perhaps not; but it is sufficiently comprehensive to cover that mode[.]" *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (emphasis added).

A. The State's Indictment Is Outside Of and Cannot Be Based Upon the State Legislature's Constitutional Appointment Power.

The State acknowledges that the Constitution only gives its legislature authority over the manner of Presidential Elector appointment, *see* State Response at 5-6, but it fails to recognize what that appointment power *is* – and is *not* – and that the acts for which it has indicted the Presidential Electors fall entirely *outside* of any such constitutional appointment authority. Specifically, in Georgia, the legislature has chosen the popular vote as the manner of appointing Presidential Electors. *See, e.g.,* O.C.G.A. § 21-2-10. Each slate of Presidential Electors is put on the ballot every four years in federal presidential elections,[2] and the citizens vote for the slate of electors that they want to appoint to the Electoral College to vote for President and Vice President. Once the citizens have voted on Election Day, ***the appointment power of the State is at an end*****,** and the State's constitutional authority over

[2] In Georgia, the names of the Presidential Electors themselves are not placed on the ballot. Instead, the name of the presidential candidate for the political party is printed on the ballot. *See, e.g.,* O.C.G.A. § 21-2-285 ("When *presidential electors are to be elected*, the ballot shall not list the individual names of the candidates for presidential electors but shall list the names of each political party or body and the names of the candidates of the party or body for the offices of President and Vice President of the United States.") (emphasis added)**.**

Presidential Electors, therefore, ends. *See* Art. II, § 1, cl. 3 ("The Congress may determine *the Time of chusing the Electors*, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.") (Emphasis added); Amend. XII; 3 U.S.C. § 1 (*T]he electors of President and Vice President* ***shall be appointed, in each State, on the Tuesday next after the first Monday in November***, in every fourth year succeeding every election of a President and Vice President.") (Emphasis added).

All constitutional authority over Presidential Electors (including those contingently elected) after Election Day, therefore, resides *solely with Congress*, *see* Art. II, § 1; Amend. XII; 3 U.S.C. §§ 1, 15[3], including Congress' sole authority to adjudicate disputes between two or more contingently elected sets of Presidential Electors from a State**.** *See* Amend. XII; 3 U.S.C. § 15.[4] Additionally, all duties and

[3] Section 15 explains in detail how Congress will adjudicate between multiple Presidential Elector "return[s] *or paper[s] purporting to be a return from a State*," mentioning the same at least *five times* and explaining in detail how it will adjudicate two slates in all the different factual scenarios in which that situation could arise, including the situation that arose in Georgia in 2020 where one slate is certified by the State's Governor and the other is not. *Id.* In that scenario, the slate certified by the Governor is *not* presumptively valid or the lawful electors of a State: the Governor's certification only comes in to play at the *end* of the process in Congress on January 6 if the two houses cannot otherwise agree on which slate is the valid slate. *See* 3 U.S.C. § 15. Until that time, as a matter of law under the Constitution and the ECA, neither slate is the final, conclusive, or definitive lawful slate of the State, and both sets of electors are contingently elected until that dispute is resolved by Congress on January 6.

[4] As the Supreme Court has noted, the ECA's legislative history clarifies that Congress alone has the power to resolve such disputes: "The two Houses are, by the Constitution, authorized to make the count of electoral votes. *They can only count legal votes, and in doing so must determine, from the best evidence to be had, what are legal votes ... The power to determine rests with the two houses, and there is no other constitutional tribunal*." *Bush v. Gore*, 531 U.S. 98, 154 (2000)

functions that Presidential Electors (including those contingently elected) perform after Election Day are exclusively federal functions: "Presidential electors exercise *a federal function* in *balloting for President and Vice-President*[.]" *Ray v. Blair*, 343 U.S. 214, 224–25 (1952) (emphasis added); *Burroughs v. United States*, 290 U.S. 534, 545 (1934) (Presidential Electors "*exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States*") (emphasis added); *see also* Art. II, § 1; Amend. XII; 3 U.S.C. § 15.

B. The Supreme Court Has Clarified That State Authority In Federal Elections Is Limited And Does Not And Cannot Extend Past The Legislative Appointment Power.

The State attempts to rely on some early Supreme Court *dicta* in which the Court spoke in looser terms about the power of the States with regard to Presidential Electors to broaden its supposed authority over Presidential Electors. *See* State Response at 12-13, *see generally* State's Dec. 1 Argument and PowerPoint. But what the State fails to mention or address is that the Supreme Court itself has since clarified and backed away even from this *dicta*, and the State's position conflicts directly with the Supreme Court's holdings in *Mitchell* and *Term Limits*.

In *Mitchell,* for example, the Court emphasized the State's *limited* role in federal elections. 400 U.S. at 125. It upheld Congress' right to set the voting age for

(Souter, J., dissenting) (*quoting* H.R. Rep. No.1638, 49th Cong., 1st Sess., 2 (1886) (emphasis added)).

federal elections and, in doing so, relied on the fact that *the election of presidential electors is a federal, not state, election*. 400 U.S. at 117-18. Justice Harlan's dissenting opinion in *Mitchell* makes the majority's break with the prior language in *Green* and *Ray* even clearer. There, Justice Harlan cited *Green* and *Ray* in dissenting from the *majority's holding* that the selection of presidential electors is a *federal election*, noting that the majority's position was inconsistent with what the Supreme Court had previously said in *dicta* in those cases about State authority. *See Mitchell,* 400 U.S. at 212 n.89 (Harlan, J., dissenting).

In the more recent *Term Limits* case, the Supreme Court broke even more directly and sharply from its prior language suggesting that a State's authority over constitutionally created federal officers (such as Members of Congress and Presidential Electors) is derived from the States:

> [W]e have noted that *"[w]hile, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states*, ... this ***statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject*** as provided by § 2 of Art. I." *United States v. Classic,* 313 U.S. 299, 315, 61 S. Ct. 1031, 1037, 85 L. Ed. 1368 (1941).

514 U.S. at 805 (emphasis added). And the *Term Limits* decision, of course, went on to specifically hold that States have *no* authority over entities created by the

Constitution, such as Members of Congress and Presidential Electors, other than that *specifically granted to them by the Constitution*. *Id.*[5]

The State also relied in its briefing and in its December 1 argument on the Supreme Court's decisions in *Chiafalo* and *Green* – but *both* of those cases address only the State's *appointment* power, which has no application here, and fully support Mr. Shafer's position. In *Chiafalo*, the Supreme Court held that States could enforce a Presidential Elector's pledge to vote for the candidate of the Party for whom the Elector was elected to serve. 140 S. Ct. at 2323-2329. In so holding, the Supreme Court expressly relied upon the fact that requiring such pledges and the ability to enforce them was within a State legislature's *appointment power*: "[T]he ***power to appoint*** a [presidential] elector (in any manner) *includes power to condition his appointment*—that is, to say what the elector must do for the appointment to take effect." *Id.* at 2324 (emphasis added).

And although the Supreme Court has, as noted, walked back and broken with its *dicta* in *Green*, that case, too, only addresses a State's appointment power over Presidential Electors, and even then, only tangentially. There, a lower federal court

[5] In *Term Limits*, the Supreme Court specifically analogized Presidential Electors to Members of Congress, stating that the duty for States to set the times, places, and manner of elections for Members of Congress under Art. I, § 4, cl. 1 *"parallels the duty under Article II"* that State legislatures choose the manner of Presidential Elector appointment and noting that *"[t]hese Clauses* are *express delegations of power to the States* to act with respect to federal elections. This conclusion is consistent with our previous recognition that, in certain limited contexts, the power to regulate the incidents of the federal system is *not a reserved power of the States*, but rather is *delegated by the Constitution*." 514 U.S. at 805 (emphasis added).

had granted habeas relief to a Virginia citizen who was charged under state law with voting illegally because he was a convicted felon ineligible under Virginia law to vote. The Supreme Court reversed the grant of habeas, determining that Virginia had the authority to prosecute its *citizens* for fraudulently *voting for* presidential electors because such authority was included in the State's constitutional appointment power. 134 U.S. at 379-80. This decision makes sense, of course, because *voting for* presidential electors by ballot is how they are *appointed*.

As established here, however, the actions for which the State has indicted the Republican Presidential Electors are their exclusively federal actions after Election Day and, as such, fall entirely *outside* of any State legislature appointment power. Through its Indictment, the State seeks to assign to itself authority it is not given by the Constitution to inject itself into and intrude upon Congress' exclusive federal authority over Presidential Elector ballots and disputes after Election Day. The Constitution and federal law are plain, however, that the State has no authority or jurisdiction to do so. *See Mitchell,* 400 U.S. at 117-18, 125; *Term Limits,* 514 U.S at 805; Art. II, § 1, cl. 3; 3 U.S.C. §§ 1, 15.

In other words, in order to prosecute (or otherwise exercise authority or dominion over) Presidential Electors, the State must articulate a specific delegation of authority given to it by the Constitution to do so – the State cannot invoke or rely upon its traditional police powers or any power reserved to it under the Tenth

Amendment. Here, the only constitutional authority identified by the State – and the only constitutional power *given* to States with regard to Presidential Electors -- is the appointment power given to state *legislatures*. Not only is this authority given only to State legislatures and not to any other branch of the State government, but that authority *ends* on Election Day, and all constitutional authority over Presidential Electors *and* disputes about Presidential Electors resides at that point solely with Congress. *See* Art. II, § 1, cl. 3; 3 U.S.C. §§ 1, 15. As a result, the State's indictment with regard to the Presidential Electors is wholly outside of its authority and jurisdiction and is preempted by the Supremacy Clause and the ECA under structural preemption, conflict preemption, and field preemption. [6] *See* Shafer Plea at Bar at 4-22; *see also* Shafer Dec. 1 Argument and PowerPoint**.** [7]

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[6] In prior arguments, the State contended that Judge Jones rejected Mr. Shafer's Supremacy Clause and preemption arguments on their merits. Judge Jones' Order, however, dispels that notion. In his September 29 Order, Judge Jones specifically declined to address these issues for procedural reasons, including deference to the State courts in making this determination in the first instance. *See State v. Shafer*, ECF No. 27 at 32-35, Case No. 1:23-cv-03720-SCJ (N.D. Ga. 2022). Thus, no court has addressed or ruled upon the merits of these Supremacy Clause and preemption arguments other than this Court's self-described preliminary decision in a different context when presented with different and less complete information regarding these issues.

[7] These constitutional premises are not new or novel – scholars in this area of constitutional and election law have acknowledged these fundamental precepts for decades. *See generally* Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 Fla. L. Rev. 541 (2004) (describing Congress' post-Election Day authority over Presidential Electors and Presidential elector disputes, including Congress' adjudication of multiple presidential elector ballots from one State); Dan T. Coenen & Edward J. Larson, *Congressional Power over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 Wm. & Mary L. Rev. 851 (2002) (same); *see also* Michael L. Rosin and Jason Harrow, *How to Decide a Very Close Election/or Presidential Electors: Part 2* (Oct. 23, 2020), available at https://takecareblog.com/blog/how-to-decide-a-very-close-election-for-presidentialelectors-part-2 (arguing that Hawaii's approach in the 1960 contested presidential election of having both sets

II. The State Has No Original Power or Power Reserved Under The Tenth Amendment To Regulate or Prosecute Presidential Electors In Performing Their Federal Functions.

Unable to identify any applicable, specific delegation of constitutional authority that would authorize its Indictment of the Presidential Electors, the State continues to claim that it has such authority based upon its original or reserved police

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of electors meet and case votes for their candidate "*should serve as a model for a close election this year or in any year*," noting "the way the recount was handled by all involved [in the 1960 election in Hawaii] provides *a model for how a very close election should be determined*" and that "[f]ortunately, because both slates of electors had voted on the proper day, there was still a chance to tell Congress which slate was actually appointed by the voters.") (emphasis added); *id.* at 17 ("[I]f, by elector voting day, a result is still uncertain and no presidential electors from a particular state cast votes, then Congress probably cannot count any electoral votes from that state for that particular election. . . . That means if a state wants to have its electoral votes counted, but which presidential electors were appointed by the voters on election day remains uncertain . . . . *there is only one possible solution: both potentially-winning slates of electors should case elector votes on the day required while the recount continues.*") (emphasis added); Van Jones and Larry Lessing, *"WHY PENNSYLVANIA SHOULD TAKE ITS TIME COUNTING VOTES*," *https://www.cnn.com/2020/11/04/opinions/pennsylvania-take-time-countingvotes-opinion-jones-lessig/index.html* (Nov. 4, 2020) (citing the 1960 Hawaii precedent and noting that "[t]he key – *and this is the critical fact for 2020 as well* – is that the Democratic slate had also met on December 19 and had also cast their ballots in the manner specified by the Constitution. *When they voted, no one knew whether their votes would matter. But at least someone recognized that the only way their votes could matter was if they were cast on the day that Congress had set.* History does not record who had that *genius legal insight*.") (emphasis added). As one constitutional and election law scholar aptly summarized:

> [W]hile state and federal courts may play significant roles in shaping the dynamics of a dispute that reaches Congress, by declaring who is the lawful winner of the state's popular vote and which slate of presidential electors the state's governor must certify as authoritative, *ultimately* ***neither the state nor federal judiciary can prevent a party's slate of presidential electors from purporting to meet on December 14 and acting as if they can cast the state's electoral votes--even if those individuals lack any indicia of authority under state law***. As long as these individuals do meet and do purport to send their electoral votes to the President of the Senate, ***then even the intervention of the Supreme Court cannot stop a dispute regarding a state's electoral votes from reaching Congress***.

Edward B. Foley, *Preparing for A Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 Loy. U. Chi. L.J. 309, 345 (2019) (emphasis added).

powers. *See* State Response at 2-6, *see generally* State's Dec. 1 Argument and PowerPoint presentation. But, as established, this claim is *directly contrary* to the Supreme Court's *holding* in *Term Limits* that States have *no* such original or reserved powers under the Tenth Amendment over entities, like Members of Congress and Presidential Electors, who are created by the Constitution. *See Term Limits*, 514 U.S. at 805.[8] As *Term Limits* makes plain, the State does *not* have and, therefore, *cannot* rely upon, any original powers or power reserved under the Tenth Amendment with regard to Presidential Electors because, like Members of Congress, Presidential Electors were created by the Constitution.[9]

In short, neither the constitutional delegation of authority to State legislatures to set the manner of Presidential Electors' appointment nor the non-existent traditional or reserved powers of the States can or does authorize the State's prosecution of the Presidential Electors. The State has no authority, therefore, to act in this exclusively federal arena, its prosecution of the Presidential Electors is barred

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[8] As noted, the Supreme Court specifical compared and analogized Presidential Electors to Members of Congress in that decision. *See Term Limits*, 514 U.S. at 805.)

[9] As outlined above, the State's attempted reliance on the *Chiafalo* decision is also misplaced. That case dealt with actions taken by Washington's state legislature that the Supreme Court held were within the bounds of the constitutional appointment power given to that legislature. *Chiafalo* does not, as the State mistakenly asserts, stand for the proposition that a State has broad power over Presidential Electors *outside* of or *in addition* to the constitutional appointment power given to the State legislatures. In short, *Chiafalo* is an appointment power case – and nothing in the State's indictment has any relation to or can be based upon the State legislature's appointment power. Not only is that power given only to the State legislature, but the allegations and charges in the State's Indictment relate only to post-appointment power federal conduct of the Presidential Electors that have no relationship with the State's appointment power.

as a matter of law, and the portions of the Indictment relating to and charging the Presidential Electors must be dismissed or quashed.

III. The Submission of Multiple Presidential Elector Ballots to Congress Has Occurred Regularly Throughout the Nation's History, It is Expressly Contemplated and Authorized By the ECA, And No Presidential Elector Has Ever Before Been Criminally Prosecuted By a State for Complying With This Federal Law.

One of the primary reasons that Congress passed the ECA to set out rules for itself in adjudicating multiple presidential elector ballots was because of the chaos it encountered in attempting to perform this function in the presidential elections in the 1800s, particularly the Hayes-Tilden election in 1876. *See* Siegel at 578-651; Coenen & Larson at 866-67 Despite the fact that such submission of multiple presidential elector ballots to Congress has been commonplace throughout the Nation's history, at no time either before or after the ECA's passage in 1887 has any scholar, commentator, elected representative, or court ever suggested that the presentation of multiple ballots to Congress for it to adjudicate pursuant to the Constitution and the ECA was anything but expected, permissible, and legal.[10]

[10] These facts also amplify both the federal preemption of the State's Indictment and its plain violation of Due Process: "[A] *'State may not prohibit the exercise of rights which the federal Acts protect."' United Mine Workers of Am. v. Arkansas Oak Flooring Co.,* 351 U.S. 62, 75 (1956) (emphasis added) (citation omitted). "To *punish a person because he has done what the law plainly allows him to do* is *a due process violation of the most basic sort..."' Taylor v. State,* 315 Ga. 630, 639 (2023) (emphasis added) (quoting *Bordenkircher v. Hayes,* 434 U.S. 357, 363 (1978) (citing *Corbitt v. New Jersey,* 439 U.S. 212, 221-225 (1978); *North Carolina v. Pearce,* 395 U.S. 711, 725 (1969)).

Indeed, such individuals and entities have opined that this practice is not only expected and permissible, but desirable, "genius," and the gold standard in how to best manage a close, contested presidential election. See, e.g., Footnote 6, *supra.*

Additionally, in the almost 250 years before the fraught and politically divisive 2020 presidential election, no State attempted to inject itself into this exclusively federal arena, and no court, scholar, or commentator has ever suggested that a State has any authority to interfere with or usurp Congress' exclusive authority in this realm. In fact, as noted herein, the Supreme Court has made explicit that the States are strictly limited with regard to Presidential Electors to the authority given to their State legislatures to appoint presidential electors, *Term Limits*, 514 U.S. at 805, and it has only permitted State actions with regard to Presidential Electors that fall squarely *within* that appointment power. *See, e.g., Ray v. Blair,* 343 U.S. 214, 225 (1952) (upholding Alabama's requirement that Presidential Electors, *as part of their qualification for appointment*, must pledge to vote for the candidate of their respective political party who received the most votes for President and Vice-President); *Chiafalo,* 140 S. Ct. 2316, 2323-2329 (upholding Washington's right to enforce such pledges as a condition of presidential elector appointment); *Green,* 134 U.S. at 379-80 (upholding Virginia's right to prosecute a citizen for voting illegally in an election in which Presidential Electors were elected pursuant to the State's appointment power).

That no Presidential Electors have ever been prosecuted by a State in the last 248 years for the exercise of their federal responsibilities under the Constitution and ECA is not a tough mystery to solve. The States have no original or constitutionally delegated authority over such Presidential Electors after Election Day, and any attempt by a State to exercise such authority is categorically preempted by the Supremacy Clause and federal law.[11] *See* Shafer Plea at Bar at 4-22; Shafer Dec. 1 Hearing and PowerPoint.

For 247 years, States have understood and respected these boundaries imposed by the Constitution and the important principles of federalism that underpin it. In the fraught political environment in which the Nation currently finds itself, the temptation has arisen to ignore or abandon these fundamental Constitutional principles, but that very context is what makes hewing strictly to these essential tenets all the more crucial. The Constitution, federal law, and the Supreme Court have declared that the State has no authority here, and those edicts must be enforced.

[11] As discussed in Shafer's Plea at Bar and at the December 1 Hearing, Congress, through the ECA, gave States the ability to have a role in conclusively deciding who its Presidential Electors were in a contested election despite the fact that they no longer have any constitutionally delegated power after Election Day. *See* 3 U.S.C § 5, 15. Specifically, through the ECA, Congress delegated to the States the opportunity to decide presidential elector disputes *if* the State could do so by a final decision of its adjudicative process (in Georgia, a judicial contest) by the Safe Harbor date, which in the 2020 election was December 8. *See* 3 U.S.C § 5, 15. But that statutory delegation to the States under Section 5 of the ECA has no application in this case, as it is undisputed that no such final decision was rendered by the Georgia courts by December 8, and the State, therefore, failed to avail itself of the ECA's Safe Harbor opportunity.

IV. The Portion of Section 15 of the ECA Addressing Situations In Which Only *One* Ballot Has Been Received By The Senate Has No Application In This Case.

Perplexingly, the State argues that the ECA's numerous references to Congress' adjudication of multiple ballots and papers *purporting* to be presidential elector ballots in Section 15 have no application here because, according to the State, only one such ballot was submitted to Congress from Georgia in 2020. *See* State's December 1 Argument. But the State's own Indictment specifically and repeatedly alleges that the Republican Presidential Electors executed their "false" presidential elector ballots on December 14, 2020 *and sent the same to the U.S. Senate*; indeed, these are the very acts that form the basis for the charges the State has brought against Mr. Shafer and the other Presidential Electors (and other co-defendants). *See, e.g.,* Indictment at p. 17 (Manner and Means, ¶ 3); p. 28 (Acts 36-37); p. 31 (Acts 47-48); p. 39 (Act 78); p. 40 (Acts 79-80); p. 41 (Acts 81-82); p. 42 (Act 83); p. 76 (Count 8); p. 77 (Count 10); p. 80 (Count 16). Thus, the State's argument that only one slate of presidential elector ballots was sent to Congress is fully and repeatedly contradicted by its own Indictment and gravamen of its actual charges against the Presidential Electors.

To the extent that the State is attempting to argue that only one "real" or "legitimate" ballot was submitted to Congress from Georgia in 2020, this position is similarly unsustainable as a matter of law. As explained in Mr. Shafer's Plea at Bar

and the December 1 Hearing, when a presidential election is contested and a State fails to resolve that dispute under Section 5 of the ECA's Safe Harbor provision (as Georgia failed to do in 2020), both sets of presidential electors are contingently elected and neither set is the "rightful" or "lawful" one until *Congress* settles that dispute on *January 6*. *See* 3 U.S.C. §§ 5, 15. Indeed, the provisions of Section 15 of the ECA specifically addresses how Congress will resolve these very disputes, mentioning its methods for adjudicating multiple ballots and papers purporting to be ballots at least five times. 3 U.S.C. § 15.

This argument by the State further exemplifies its continued misplaced and unsupportable reliance on the Governor's certification of the State's vote as "binding" or "conclusive." The ECA is clear that the Governor's certification is absolutely *not binding on Congress* in its adjudication of multiple ballots before or on January 6 and that the Governor's certification is used only – if at all – as a tiebreaker at the very *end* of Congress' adjudication if the two houses cannot agree on which ballot from a State is the rightful one. *See* 3 U.S.C. § 15; *see also* Siegel at 612 ("We will see that [the ECA] does, under certain circumstances, give the governor's certificate legal import. The point here is that historically the governor's certification had little or no effect on an electoral vote's validity and [the ECA] did not alter that tradition."); *id.* at 628-33 (describing governor's certificate as "fail safe"); Coenen & Larson at 866-67 (noting Governor certification only relevant as

tiebreaker at the end of Congress' adjudication on January 6). As a matter of plain federal law, then, the Governor's certification cannot and does not render one set of Presidential Electors in a contested election "legitimate" or the only "lawful" ones – only Congress has the right and authority to determine that question, and it does so on January 6. *See* 3 U.S.C. §§ 5, 6, 15.

As the Indictment itself makes plain, two presidential elector ballots and papers purporting to be presidential elector ballots were sent to Congress in 2020 from Georgia, which facially invokes the numerous provisions in Section 15 of the ECA permitting such submissions and governing *Congress'* adjudication of the same. And because Georgia failed to avail itself of its opportunity to decide the Presidential Elector dispute under the Safe Harbor provision of Section 5 of the ECA in 2020, both sets of Presidential Elector ballots were contingent -- and neither was or could be conclusively lawful or rightful as a matter of law -- until *Congress* adjudicated and counted Georgia's ballots on January 6. *See* U.S.C. §§ 5, 15. In doing so, Congress was in no way bound by the Governor's certification. *See* U.S.C. § 15. Because the State's Indictment of the Presidential Electors is based entirely upon this incorrect and unsustainable legal premise, it falls as a matter of plain federal law.

Conclusion

For all of the reasons set forth in Mr. Shafer's Plea at Bar, at the December 1 Hearing, and herein, the State's Indictment with regard to Presidential Electors is barred as a matter of law, preempted by the Constitution and federal law, and is due to be dismissed. The damage that the State has already done here by acting well outside of its authority is significant, both to the individuals it has indicted without authority or jurisdiction and to the rule of law, the criminal justice system, and critical principles of federalism. Not only have Mr. Shafer and his co-defendants been very publicly put through hell in this process, but other state law enforcement actors around the country are now seeking to capitalize on and emulate the Pandora's box that the Fulton County District Attorney has opened by trying to inject and assert State authority in the exclusively federal arena where the Constitution and Supreme Court have made clear it has none.

The parade of horribles stemming from this Indictment has already begun and will only compound as long as these federally preempted actions are allowed to continue. For the rule of law and the critical principles of federalism that underpin our very Government to be protected and preserved, it must be stopped.

Respectfully submitted, this 2nd day of January, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 2nd day of January, 2024, filed the foregoing filing with the Court using the Court's Odyssey eFileGa system, serving copies of the filing on all counsel of record in this action, and furthermore have sent a copy of the filing to the parties and the Court.

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