IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA, v. ROBERT DAVID CHEELEY, ET AL., Defendants.	Case No. 23SC188947

POST-HEARING BRIEF IN SUPPORT OF DEFENDANT ROBERT DAVID CHEELEY'S JOINT GENERAL AND SPECIAL DEMURRER, PLEA IN BAR, AND MOTION TO QUASH

I. INTRODUCTION

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).[1] The Indictment seeks to punish Cheeley for his peaceful political speech regarding the 2020 presidential election. The State has not disputed this fact. Rather, the State claims because ***it*** disagrees with Cheeley's speech and thinks it is "false" then Cheeley should be jailed. The State's unprecedented Indictment ignores the uniform constitutional jurisprudence and election history rejecting its premises.[2] This Court should decline the State's novel invitation to chart a path that will upend political speech as we know it.

II. ARGUMENT

These things are clear: (1) Cheeley's constitutional challenge to the Indictment, based on the Indictment's factual allegations, is timely; (2) political/election speech is sacrosanct and is subject to a strict scrutiny review; (3) constitutional jurisprudence uniformly precludes restrictions on even false political speech;[3] (4) constitutional jurisprudence precludes prosecutions punishing political speech; and (5) each of the Counts against Cheeley targets political speech. Based on this,

---#

[1] The Indictment violates Cheeley's rights of free speech, association, expression, and his right to petition government. "Free speech" herein means all of these.

[2] The State admits the Indictment is unique. *See also* State Brief at 39 ("there is little precedent for such a prosecution."). The situation underlying it is not. *See, e.g.,* the 1800, 1824, 1876, 1960, and 2000 presidential elections, (to include Electoral Count Act challenges), the 1946 and 2014 Georgia governor elections, and countless other election and issue challenges. None of these situations resulted in prosecutions. Looking back, no reasonable person could have known the conduct charged here was illegal, because it is not. *See Perkins v. State*, 277 Ga. 323, 325 (2003) (due process requires that a person must have fair notice that what they are doing is illegal). And the State's fertile imagination does not justify the otherwise unconstitutional and ill-pled Indictment.

[3] None of the counts are predicated on "time, place, manner" restrictions and thus those types of restrictions are not discussed.

the Indictment fails. The individual counts here (applied and facially) do not withstand constitutional scrutiny. This brief addresses these and several other points raised at the December 1, 2023, hearing.

A. The Constitutional Challenges Should be Ruled On At Demurrer Stage

Georgia law mandates review of Cheeley's facial and as-applied constitutional arguments now. *See Hall v. State*, 268 Ga. 89, 89 n.2 (1997) (as-applied constitutional challenges should be heard on State's uncontested facts and averments); *Santos v. State*, 284 Ga. 514, 514–16 (2008) (same); *Perkins v. State*, 277 Ga. 323 (2003) (same); *Randolph v. State*, 269 Ga. 147, 149 (1998) (same).[4] This is especially true regarding a free speech challenge. *See Baker v. Hall*, 280 Ga. 822, 823 (2006); *Hall*, 268 Ga. at 91; *Horowitz v. State*, 243, Ga. 441, 441 (1979). The State ignores these cases because it knows the Indictment fails on the merits. But ignoring the law is not an option.

B. Political Speech Restrictions are Subject to Strict Scrutiny

"The First Amendment affords the broadest protection to … political expression … to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quotation omitted). "[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Equity Prime Mortgage v. Greene for Congress, Inc.*, 366 Ga. App. 207, 214 (2022) (quotation omitted).[5] These protections ensure dissidents' voices are heard, issues of public

———————————#

[4] Federal courts can permanently enjoin and "restrain[] prosecution of … pending indictments" when the charges infringe the defendant's First Amendment rights. *See Dombrowski v. Pfister*, 380 U.S. 479, 497 (1965). This court can too.

[5] *See also McCutchen v. Federal Election Comm'n*, 572 U.S. 185 (2014); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Eu v. San Francisco Democratic Central Committee*, 489 U.S. 214 (1989); *Meyer v. Grant*, 486 U.S. 414 (1988); *Bouie v. City of Columbia*, 378 U.S. 347

concern are debated freely, and no one's political opinions are silenced for fear of retribution. *See Sweezy v. New Hampshire*, 354 U.S. 234, 251 (1957). Free political exchanges are so important that protections regarding them are extended even to "false" speech. *See 281 Care Committee v. Arneson*, 766 F.3d 774, 782 (8th Cir. 2014).[6]

Restrictions on political speech are subject to a strict scrutiny analysis. *Arneson*, 766 F.3d at 783-85 (citing numerous U.S. Supreme Court cases). Under that analysis, a State's regulation must be narrowly tailored to meet a compelling state interest in a manner that least infringes on speech. *Arneson*, 766 F.3d at 784. This is the Indictment's death knell. While the State may have an interest in protecting elections, courts have consistently rejected any restrictions on political speech aimed at accomplishing that goal. *See id*. at 787–96. "[W]hen these preservation goals [regarding eliminating election fraud] are achieved at the expense of public discourse, they become problematic. A State that is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Id*. at 786 (*citing Eu*, 489, U.S. at 228). Courts have held that where opposition or "counterspeech" can respond to allegedly false speech negatively impacting an election, "[t]here is no reason to presume that [such] counterspeech would not suffice to achieve the interests advanced and [in] a less restrictive means [than statutory speech limitations], certainly, to achieve the same end goal." *Id*. at 793. *see also Hartlage*, 456 U.S. at 61 ("in a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent" and

———————————#

(1964); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Bates v. Little Rock*, 361 U.S. 516 (1960); *Roth v. U.S.*, 354 U.S. 476 (1957); *Stromsberg v. California*, 283 U.S. 359 (1931).

[6] *See also U.S. v. Alvarez*, 567 U.S. 709, 736 (2012) (Breyer, J., concurring); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 411-412 (2000) (Thomas, J., dissenting); *Meyer v. Grant*, 486 U.S. 414, 419-20 (1988); *Brown v. Hartlage,* 456 U.S. 45, 61-62 (1982); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971).

counterspeech is the least intrusive remedy; striking down application of criminal statute to election speech).

> Possibly there is no greater arena wherein counterspeech is at its most effective [than in election contests]. It is the most immediate remedy to an allegation of falsity. The theory of our Constitution is that the best test of truth is the power of the truth to get itself accepted in the competition of the market. It is the citizenry that can discern themselves what the truth is, not a [prosecutor] behind closed doors. The preferred First Amendment remedy of more speech not enforced silence … has special force.

Arneson, 766 F.3d at 793 (cleaned up). "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed the enlightened to the straightout lie, the simple truth." *U.S. v. Alvarez*, 567 U.S. 709, 727 (2012) (citing *Whitney v. Calif.* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)). And if this is the case, then the Indictment must fail. Every contested action in the Indictment is targeted at Cheeley's political speech and counterspeech was available to respond. The State's interest in election integrity does not outweigh Cheeley's political speech rights and the statutes it invokes do not more narrowly meet its targeted goal of election integrity than does counter speech.

The State cannot show any of the Title 16 criminal restrictions it invokes are narrowly tailored to accomplish its end of election integrity. The Election Code, Title 21, specifically protects election integrity by criminalizing various forms of election fraud and misconduct.[7]

———————————#

[7] There are over 80 sections of the Election Code criminalizing fraud and misconduct. Moreover, the Election Code deals with: (1) selection and voting of presidential electors (O.C.G.A. §§ 21-2-10 through 21-2-14), (2) certification and transmission of presidential elector votes (O.C.G.A. §§ 21-2-499 and 21-2-502(e)), and (3) contests challenging primaries or elections (O.C.G.A. §§ 21-2-524 through 21-2-528)—the issues in the Indictment. Even so, the Indictment does not refer to the Election Code at all. The General Assembly did not intend to regulate election fraud or misconduct through Georgia RICO or any of the statutes referenced in the Indictment. If it did, it would have included violations of the Election Code as RICO predicates–which it did not. *See* O.C.G.A. § 16-14-3(5)(A). The State's broad reading of Georgia RICO's does a disservice to the General Assembly's competence. In contrast, Defendants' reading gives the General Assembly credit for narrowly tailoring Georgia RICO to avoid the present constitutional concerns—if

Ignoring the specific criminal statutes in the Election Code, the Indictment is instead premised on the Georgia RICO Act. As broadly read by the State, the Georgia RICO Act is not tailored at all, let alone narrowly, to minimize its impact on political speech. If the Georgia RICO Act is read narrowly, as proposed by Defendants, to exclude "isolated acts of misdemeanor conduct or acts of civil disobedience" and to include only "interrelated pattern[s] of criminal activity motivated by or the effect of which is pecuniary gain or economic or physical threat or injury," as mandated by O.C.G.A. § 16-14-2(b), then Georgia RICO Act might survive a free speech challenge. But only if, as Defendants say, the Georgia RICO Act is inapplicable to issues of election integrity and political speech.

In seeking Georgia RICO's broad reach, and because Title 21 violations are not racketeering activities, the State premises its Georgia RICO Count 1 and Counts 9, 11, 13, 14, 17, 19, 23, and 29 on listed racketeering activities in O.C.G.A. § 16-14-3(5)(A). These include: (1) O.C.G.A. § 16-10-20 (false statements and writings to departments and agencies); (2) O.C.G.A. § 16-10-20.1 (filing false lien documents); (3) O.C.G.A. § 16-4-7 (solicitation of violation of oath); (4) O.C.G.A. § 16-10-23 (impersonating an officer); and (5) forgery (O.C.G.A. § 16-9-1). But just like the Georgia RICO Act itself, the State cannot show any of these other criminal statutes can be constitutionally and narrowly applied to the political speech the Indictment seeks to punish. It certainly cannot show the prosecution of these statutes here is the least restrictive means to regulate Cheeley's election speech.

———————————#

Georgia RICO is read to ***exclude*** claims involving election integrity and political speech. *See also* Sections III(D)(5) and (E) *infra.* Either way, the Georgia RICO claims fail. As do the individual counts which, similarly, as read by the State, are not tailored to protect free speech and free political speech rights.

Every count against Cheeley is based on his political speech and expressive conduct. Count 1 seeks to hold Cheeley criminally liable for sending and receiving e-mails and phone calls that supposedly concerned the 2020 presidential election. *See* Indictment at 28, 59–60 (Acts 34–37, 127). Count 1, along with Counts 23 and 26, further attempts to criminalize a recitation of his personal observations from the State Farm Arena video that Cheeley delivered at a subcommittee meeting of the Georgia Senate Judiciary Committee. *See id*. at 46, 48 (Acts 102, 105), 84–85. Counts 11, 13, 15, 17, and 19 accuse Cheeley of conspiring to make and transmit certain writings related to the 2020 presidential election. *See id*. at 77–81. But "whether [his] speech [and expressive conduct] is protected does not depend on whether judges, or communities, like it." *See Otto v. City of Boca Raton, Florida*, 41 F.4th 1271, 1276 (11th Cir. 2022) (Grant, J., concurring in denial of *en banc* review).[8] Where, as here, Cheeley's election-related speech (true or false) was subject to vigorous and open counterresponses, no regulation could be more narrowly tailored than the counterspeech that actually occurred.

———————————#

[8] The panel decision in *Otto* recognized the broad protection of the First Amendment against the State restrictions on political speech. *Otto v. City of Boca Raton*, *Florida*, 981 F.3d 854, 80-61 (11th Cir. 2020). Of note, the Eleventh Circuit recognized "local governments [cannot] evade the First Amendment's ordinary presumption against content- based speech restrictions by saying that the plaintiffs' speech is actual conduct . . . Our Court . . . has already rejected the practice of relabeling controversial speech as conduct. . . . [T]he enterprise of labeling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and suspectable to manipulation." *Id*. at 861. "The First Amendment does not protect the right to speak about banned speech; it protects the speech itself no matter how disagreeable that speech might be to the government." *Id.* at 863. The "First Amendment *forbids* the government to regulate speech in ways that favor some viewpoints or ideas at the expensive of others." *Id*. at 86 (emphasis in original). Here the State's efforts to prosecute Cheeley is based entirely on his oral and written speech . is prohibited. *See id*. at 865–66.#

C. Prosecutions Aimed at Political Speech Are Unconstitutional

"Prosecutorial decisions … cannot turn on the exercise of free speech rights." *Frederick Douglass Foundation, Inc. v. District of Columbia*, 82 F.4th 1122, 1141 (D.C. Cir. 2023).[9] It is well settled that "[i]t would undermine the First Amendment's protections for free speech if the government could enact a content-neutral law and then discriminate against disfavored viewpoints under the cover of prosecutorial discretion." *Id*. at 1142. Courts should accordingly be cognizant that "content-neutral enactments may be enforced in a content-discriminatory manner" if courts ignore that possibility "the First Amendment's guarantees would risk becoming . . . empty formalities." *Hoye v. City of Oakland*, 653 F.3d 835, 854 (9th Cir. 2011). That is happening here.

Three years after the fact, and with the aid of hindsight, the Indictment's allegations admit the State disagrees with what Cheeley said and did regarding the 2020 presidential election and it is prosecuting him for this disagreement. The State does not like that Cheeley: (1) questioned the vote counting process at Fulton County; (2) pointed out that the vote counting there was interrupted;[10] (3) pointed out that ballots were run through counting machines multiple times; (4) sought advice on the Electoral Count Act's plain language to advocate an alternate slate of electors might be needed to preserve election challenges; or (5) took his concerns regarding the election process to a subcommittee of the Georgia Senate. The State cannot premise a prosecution on not liking Cheeley's speech.

---

[9] *See also, U.S. v. P.H.E., Inc.*, 965 F.2d 848, 853 (9th Cir. 1992); *see also Cox v. Louisiana,* 379 U.S. 536, 557 (1965) *U.S. v. Faulk*, 479 F.2d 616, 624 (7th Cir. 1973) (en banc).

[10] The State concedes D.A. Willis raised the exact same concerns regarding the voting process at State Farm Arena that Cheeley made. *See* Cheeley Demurrer at 3. Cheeley is indicted for these statements. D.A. Willis was not. If this does not show ultimate viewpoint discrimination and bias not much else will.

D. Each Count Violates Cheeley's Free Speech Rights

1. O.C.G.A. §§ 16-10-20 and 16-10-20.1(b)(1) (alleged in Counts 13, 15, 19, and 26) infringe on Cheeley's free speech rights

Counts 11, 13, 17, 19 and 26 allege Cheeley violated O.C.G.A. § 16-10-20 by conspiring[11] to make, use or submit "false documents, namely the "CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM GEORGIA" and "RE: Notice of Filling of Electoral College Vacancy,"[12] and by making certain statements regarding the State Farm Arena vote counting process before the Georgia Senate Judiciary Subcommittee. Count 15 says Cheeley conspired to file the elector certificates in a court in violation of O.C.G.A. § 16-10-20.1. All of this is election and political speech.[13]

a. O.C.G.A. § 16-10-20 and 16-10-20.1(b)(1) Are Facially Invalid

"The [Federal] Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). Overbreadth challenges are proper where "a substantial number of [the

---

[11] The O.C.G.A. § 16-4-8 conspiracy claims fail because the substantive claims underlying them fail. *See Hourin v. State*, 301 Ga. 835, 839 (2017). The conspiracy claims also fail because the Indictment does not allege Cheeley agreed to join any criminal conspiracy. *See Drane v. State*, 265 Ga. 255, 257 (1995).

[12] Cheeley had no role in preparing either of these documents, and the Indictment does not sufficiently allege that he prepared, reviewed, or had knowledge of these documents.

[13] Again, (1) all of the O.C.G.A. § 16-10-20 counts fail to allege an essential element of that statute, and (2) O.C.G.A. § 16-10-20.1 only applies to lien and property related filings and is inapplicable. If the counts are dismissed on these pleading failures, the constitutional issues need not be reached.

statute's] applications are unconstitutional, judged in relation to [its] plainly legitimate sweep." *U.S. v. Stevens*, 559 U.S. 460, 472–73 (2010) (cleaned up).[14]

Together, O.C.G.A. § 16-10-20[15] and O.C.G.A. § 16-10-20.1 broadly criminalize false statements and the provision of false documents "within the jurisdiction of any [state] department or agency" or to a federal or state court. Both statutes cover speech and expressive conduct because they criminalize "false, fictitious, or fraudulent" statements, writings, and related expressive conduct, including "representations of … opinion[s]" under 16-10-20.1. The only way to determine whether something is "false, fictitious, or fraudulent" is to carefully examine its content and the viewpoint of the speaker. They also cover speech petitioning government. Here the State is looking to determine whether Cheeley's ***political speech*** is true or false.

Given that §§ 16-10-20 and 16-10-20.1(b)(1) reach speech and expressive conduct, the Court must assess whether it is constitutionally protected. While §§ 16-10-20 and 16-10-20.1(b)(1) target "false, fictitious, or fraudulent" expressions, "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials[.]" *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964). As noted already in Section II(B) *supra*, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters," *Gertz*

———————————#

[14] Overbreadth can also be shown where there are no set of circumstances where the statute would be valid. *Stevens*, 559 U.S. at 472–73.

[15] In *Haley v. State* 289 Ga. 515 (2011), the Georgia Supreme Court reviewed O.C.G.A. § 16-10-20 and found it constitutional on a narrowed reading. Cheeley maintains in good faith the statute is facially unconstitutional and the Supreme Court should revisit *Haley*. But importantly here, *Haley* did not address the statute in the context of political speech. In that context and viewed under strict scrutiny, O.C.G.A. § 16-10-20 fails.

v. Robert Welch, Inc., 418 U.S. 323, 341 (1974); *see also Alvarez,* 567 U.S. at 736; *Arneson*, 766 F.3d at 782.

By indiscriminately criminalizing ***all*** manner of "false, fictitious, or fraudulent" expressions, ***including political speech*** and government petitions, §§ 16-10-20 and 16-10-20.1(b)(1) reach constitutionally protected speech and expressive conduct. These provisions "make[] criminal the speech itself regardless of ***any*** defining context that assures … the law targets legitimately criminal conduct." *U.S. v. Alvarez*, 617 F.3d 1198, 1213 (9th Cir. 2010) (emphasis added). "Without any element[s] requiring the speech to be related to criminal conduct, this historical exception from the First Amendment does not apply to [§§ 16-10-20 and 16-10-20.1(b)(1)] as drafted." *Id*. And so it is here. O.C.G.A. § 16-10-20 reaches not only highly protected political speech, but satire and other forms of protected speech made within government earshot. Thus, there are clearly a substantial number of applications of the statute that would render it facially void. Similarly, and interpreted by the State, O.C.G.A. § 16-10-21.1(a) criminalizes ***any*** false documents filed, or arguments made in state or federal court. It thus fails for the reasons above.[16]

———————————#

[16] For example, in *Alpha Phi Alpha Fraternity v. Raffensperger*,__F. Supp. 3d ___, 2023 WL 7037537 (N.D. Ga. Oct. 26, 2023), a federal court just found some challenges to Georgia's 2023 redistricting maps valid and some invalid. If the State's theory on O.C.G.A. §§ 16-10-20 and 16-10-20.1 is right, the map challengers (who spoke publicly) could be prosecuted for "not accepting" the valid maps (and filing papers and evidence in court regarding this), and the defendants (who spoke publicly) could be prosecuted for defending invalid ones. Advocates for either side are at risk for advancing a political position or facts supporting it the State may in hindsight say is "false." And that is the problem. *Alpha Phi Alpha* is just a recent exemplar of hotly contested, highly public, political disagreements regarding issues that impact Georgia voters. Those debates (and court cases) are necessary in a free republic. The alternative is either no debate or jail for those who dare it.

+11, O.C.G.A. §§ 16-10-20 and 16-10-20.1(b)(1) are unconstitutional as applied by Counts 13, 15, 19, and 26

O.C.G.A. §§ 16-10-20 and 16-10-20.1(b)(1) are unconstitutional as applied by Counts 13, 15, 19, and 26 to Cheeley's speech and expressive conduct—much of which was government petition. A content-based restriction on protected speech must survive strict scrutiny.[17] *See U.S. v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000); *see also Arneson*, 766 F.3d at 783-85. The Indictment claims Cheeley made "false statements" and "false filings" based on his political speech regarding the 2020 presidential election. Based on *Arneson* and the myriad of cases above because the Indictment targets political speech through enforcement of these statutes as-applied they violate Cheeley's free speech rights. *See* Section II(B)-(C), *supra*.

Additionally, statutory or regulatory restrictions are content-based if they regulate speech based on the effect that speech has on its audience. *Cassidy*, 814 F. Supp. 2d at 584 (*citing Playboy Entm't Grp.*, 529 U.S. at 811–12, *Boos v. Barry*, 485 U.S. 312, 321 (1988), and *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 877 (1997)). Sections 16-10-20 and 16-10-20.1(b)(1) are content-based because they criminalize "false, fictitious, or fraudulent" statements, writings, and related expressive conduct, including "representations of … opinion[s]" under 16-10-20.1, based on how they affect government bodies. The *Haley* Court admitted as much with respect to § 16-10-20, explaining that "a knowingly and willfully false statement that is made knowingly and willfully in a matter within a government agency's jurisdiction is a lie that threatens to deceive and thereby harm the government, if *only because the government may need to expend time and resources to*

#

[17] Cheeley challenges §§ 16-10-20 and 16-10-20.1(b)(1) as impermissibly vague. "In an as-applied challenge, a statute is unconstitutionally vague if it fails to put a defendant on notice that his conduct was criminal." *U.S. v. Harris*, 705 F.3d 929, 932 (9th Cir. 2013) (quotation omitted). And when a statute "interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

determine the truth." 289 Ga. at 528 (emphasis added). And the same can be said of courts under § 16-10-20.1(b)(1). Moreover, whether speech is true or false "depend[s] entirely on [its] communicative content," which is the very definition of a content-based restriction. *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015). Thus, these provisions are content based.

Under strict scrutiny, a content-based restriction—and especially one that targets political speech—is "presumptively unconstitutional," *id*. at 163, and may be justified only if the State establishes that the restriction "(1) serves a compelling governmental interest; (2) is narrowly tailored to achieve that interest; and (3) is the least restrictive means of advancing that interest," *In re Subpoena 2018R00776*, 947 F.3d 148, 156 (3d Cir. 2020) (internal quotations, citations, and alterations omitted).

Sections 16-10-20 and 16-10-20.1(b)(1) are unconstitutional as applied to Cheeley's alleged speech and expressive conduct, all of which related to a matter of public concern: the 2020 presidential election.[18] "Speech on matters of public concern is at the heart of the First Amendment's protection." *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (internal quotations, citations, and alterations omitted). Speech relates to a matter of public concern "when it can be fairly considered as relating to any matter of political, social, or other concern to the community, … or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public[.]" *Id*. at 453; *see also Buckley*, 424 U.S. at 14; *Mills*, 384 U.S. at 218; *Sweezy*, 354 U.S. at 251. All Cheeley's speech and conduct is encompassed by these descriptions because it concerned the 2020 presidential election and nothing more. Sections 16-

#

[18] Sections 16-10-20 and 16-10-20.1(b)(1) are also unconstitutional as applied to Cheeley's alleged speech and expressive conduct because they criminalize the mere fact of his association with others who formed an alternative slate of presidential electors. *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589 (1967).

10-20 and 16-10-20.1(b)(1) are therefore unconstitutional as applied to Cheeley by Counts 13, 15, 19, and 26.[19]

As set forth in Section II(B) *supra*, the State cannot show either §§ 16-10-20 or 16-10-20.1(b)(1) was narrowly drawn to protect Cheeley's speech, or that this statute was enacted to preserve a compelling government interest. Without question, these Georgia statutes "could have been drawn more narrowly, without any loss of utility to the [State], by excluding from [their] scope those who intend to engage in public or political discourse." *U.S. v. Popa*, 187 F.3d 672, 677 (D.C. Cir. 1999); *see also Turner Broad. Sys. Inc. v. FCC (Turner II)*, 520 U.S. 180, 217–18 (1997). The General Assembly has dealt with election integrity in Title 21 and tailored those statutes accordingly. And counterspeech was available and utilized in response to all of Cheeley's speech here. Thus, the availability of "less restrictive alternative[s]" that "would serve the [State's] purpose" makes clear that §§ 16-10-20 and 16-10-20.1(b)(1) violate the U.S. and Georgia Constitutions as applied to Cheeley. *See Playboy Ent. Grp.*, 529 U.S. at 813.[20] Additionally, §§ 16-10-20 and 16-10-20.1(b)(1) could have limited the reach of these statutes by excluding the type of political speech at issue here. But the statutes were not so written. They are unconstitutional as applied here.

———————————#

[19] As applied, these statutes also impermissibly restrict Cheeley's free speech because they "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner I*, 512 U.S. at 643; *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 27–28 (2010).

[20] The statutes here fail even the intermediate scrutiny, primarily because the "incidental restriction on the alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest." *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968).

2. O.C.G.A. § 16-10-23, as applied by Count 9, infringes on Cheeley's right to speak, associate, and petition his government

Count 9 avers Cheeley violated § 16-10-23 by "unlawfully conspir[ing] to cause certain individuals to falsely hold themselves out as the duly elected and qualified presidential electors from the State of Georgia . . . .". O.C.G.A. § 16-10-23 states:

> A person who falsely holds himself or herself out as a peace officer, officer of the court, or other public officer or employee with intent to mislead another into believing that he or she is actually such officer commits the offense of impersonating an officer.

As with §§ 16-10-20 and 16-10-20.1(b)(1), § 16-10-23 is content based because it criminalizes "false[ ]" speech and expressive conduct that based on the effect that it has on its audience, *i.e.*, the general public or others. *See Cassidy*, 814 F. Supp. 2d at 584. Whether someone "falsely" holds themselves out as anyone else "depend[s] entirely on [their] communicative content," which is the very definition of a content-based restriction. *Reed*, 576 U.S. at 164. Thus, § 16-10-23 is content based. Once more, a content-based restriction, and one limiting political speech, is "presumptively unconstitutional" under strict scrutiny, *id*. at 163, and may be justified under the "narrowly tailored" and "least restrictive means" test. *In re Subpoena 2018R00776*, 947 F.3d at 156 (cleaned up).

O.C.G.A. § 16-10-23, as applied by Count 9, infringes on Cheeley's rights to speak, associate, and petition his government. Cheeley has a right to communicate and associate with others regarding an alternative slate of presidential electors as a method of preserving an election challenge. Indeed, this is a long-recognized means of petitioning the government and such an undertaking requires political association amongst those involved. *See Bush*, 531 U.S. at 98, 127 & n.5 (Stevens, J., dissenting).

Any efforts to preserve an election challenge regarding the 2020 presidential election, including the voting of alternate electors, necessarily involves a petition to Congress regarding the

validity of some electors over others. As such, Count 9 all relates to political matters of public concern that receive the greatest First Amendment protections. *See Snyder*, 562 U.S. at 451–53. The State's application of this statute forecloses the possibility of presenting of an alternate slate to Congress despite this option being available to contest the result of an election under the Electoral Count Act. *See Bush*, 531 U.S. at 98. This unconstitutionally targets Cheeley's political action and speech.

O.C.G.A. § 16-10-23 "could have been drawn more narrowly, without any loss of utility to the [State], by excluding from [its] scope those who intend to engage in public or political discourse." *Popa*, 187 F.3d at 677 (overturning conviction because "as applied" 47 U.S.C. § 223(a)(1)(C) violated the First Amendment where defendant made harassing telephone calls to U.S. Attorney). The statute could have excluded presidential electors, at minimum, from its scope.[21] That alternative would be substantially "less intrusive on a speaker's First Amendment interests" by eliminating those who seek to advance an alternative slate of presidential electors from the statute's scope. *See Turner II*, 520 U.S. at 217–18 (1997). And again, the counterspeech that arose in December 2020 regarding the competing electoral slates in Georgia is itself the least restrictive means to challenge even a "false" alternate slate.

3. O.C.G.A. § 16-9-1(b), as applied by Counts 11 and 17, violates Cheeley's free speech relating to alternate electors

Counts 11 and 17 allege Cheeley violated O.C.G.A. § 16-9-1(b) by conspiring to "forge" the alternate elector slate documents. The Indictment says Cheeley and others supposedly

———————————#

[21] "[T]he obvious intent and purpose of the General Assembly in enacting [§ 16-10-23 was] to protect the people of this State from intimidation and other potential abuses and dangers at the hands of an individual misrepresenting himself or herself as one cloaked with the authority and power which may attend public office or employment." *Kennedy v. Carlton*, 294 Ga. 576, 579 (2014). It makes no sense to apply the statute where no one is intimidated. There are no allegations that Cheeley acted anything other than peaceably.

conspired to make these documents "in such manner that the writing[s] … purport[] to have been made by authority of the duly elected and qualified presidential electors from the State of Georgia, who did not give such authority[.]" *Id*. As shown, this claim fails on non-constitutional grounds because the Indictment does not allege any alternate elector "forged" another's signature, purported to be someone they were not, or said "the qualified presidential electors" (electors for Joe Biden) gave the alternate slate any authority. Rather, the Indictment contends the alternate slate signed their own names, said they were Trump electors, and they did so with no alleged grant of authority. Again, this was all well publicized and subject to counterspeech as it happened.

As with §§ 16-10-20, 16-10-20.1(b)(1), Counts 11 and 17 are content based because O.C.G.A. §§ 16-10-23 and 16-9-1(b) criminalizes expressive conduct based on the effect that it has on its audience, *i.e.,* those who read the allegedly "forged" writings. *See Cassidy*, 814 F. Supp. 2d at 584. In short, there is no way to tell if something is forged without reading and examining the writing at issue based on its content. That means, § 16-9-1(b) is "presumptively unconstitutional" under strict scrutiny, *id*. at 163. This is certainly true in the context of the electoral challenge the electors were preserving through the Electoral Count Act. *Bush*, 531 U.S. at 98. Application of O.C.G.A. § 16-9-1(b) here is meant to foreclose a seemingly viable procedure to contest the electoral slate ***to Congress***, and thus foreclose Defendants' free speech challenging the election.

Section 16-9-1(b) is unconstitutional as applied to Cheeley's speech and expressive conduct as alleged by Counts 11 and 17, all of which related to a matter of public concern—the 2020 presidential election and a petition to Congress. *See Snyder*, 562 U.S. at 451–53. The alleged forgeries at issue were public documents that, by the State's own admission, were distributed for official consideration as part of a government process. So § 16-9-1(b) is unconstitutional as applied

on that basis alone. But § 16-9-1(b) "could have been drawn more narrowly, without any loss of utility to the [State], by excluding from [its] scope those who intend to engage in public or political discourse." *Popa*, 187 F.3d at 677. Like the prior statutes, this was not done here, and yet again, the counterspeech related to the competing electoral slates was the least restrictive means of regulating this speech.

4. O.C.G.A. § 16-10-1, as applied by Count 23, infringes on Cheeley's rights to speak freely and petition his government

Count 23 alleges Cheeley violated O.C.G.A. §§ 16-4-7 and 16-10-1 by "solicit[ing], request[ing], and importun[ing] certain public officers then serving as elected members of the Georgia Senate" to appoint "presidential electors from the State of Georgia, in willful and intentional violation of the terms of the oath of said persons as prescribed by law[.]" Indictment at 84. Beginning with the solicitation statute, O.C.G.A. § 16-4-7(a) provides that:

> A person commits the offense of criminal solicitation when, with intent that another person engage in conduct constituting a felony, he solicits, requests, commands, importunes, or otherwise attempts to cause the other person to engage in such conduct.

Next, the underlying criminal prohibition at issue here, O.C.G.A. § 16-10-1, provides that:

> Any public officer who willfully and intentionally violates the terms of his oath as prescribed by law shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years.

The Indictment fails to properly plead these claims as there is no oath pled and the General Assembly had no authority regarding the 2020 Presidential election on December 30, 2020 when Cheeley exercised his constitutional right to petition government for redress by noting that absentee ballots were counted multiple times in Fulton County.[22] Additionally, both §§ 16-4-7 and

———————————#

[22] Count 23 makes little sense. It is premised on comments made at the December 30, 2020, Senate Subcommittee hearing, though Cheeley never requested anyone to appoint presidential electors at that hearing. And the alternate electoral had already been sent to Congress. Moreover, on December 30, 2020, the Georgia General Assembly had no authority to act with regard to the

16-10-1 are content-based restrictions and their application here attempts to preclude Cheeley from exercising his right to petition government with regard to the 2020 presidential election.

Application of these statutes here fails to satisfy strict scrutiny, as applied, because they criminalize speech and conduct directed towards a matter of public concern and are content based. *See Snyder*, 562 U.S. at 451–53. And these are matters of public concern expressed in an open December 30, 2020, Senate Subcommittee Meeting. Petitioning the government with regard to a presidential election cannot be subject to criminal prosecution because it is core protected speech. Just like the application of the prior statutes, these are not narrowly tailored to either exclude the particular political speech that is challenged or allow other avenues of such speech. Moreover, they are directed to completely silence a contested election concern.

5. Georgia's RICO Act, as applied by Count 1, infringes on Cheeley's free speech rights.

The State says Cheeley violated O.C.G.A. § 16-14-4(c) by conspiring to violate the substantive provisions of Georgia's RICO Act. As discussed in Section II(B) *supra*, and in prior briefing, the Georgia RICO Act has no applicability to the present dispute. Because Count 1 is predicated on the "racketeering activities" discussed in Sections II(D)(1)-(5) above, it unconstitutionally impairs Cheeley's free speech rights.

As applied here, Georgia's RICO Act infringes on Cheeley's rights to speak, associate, and petition his government. Count 1 alleges that Cheeley was associated with an "enterprise" designed to "unlawfully chang[e] the outcome of the November 3, 2020, presidential election in Georgia in favor of Donald Trump." Indictment at 16–17. With respect to Cheeley, it unashamedly criminalizes remarks that he delivered at a subcommittee meeting of the Georgia Senate Judiciary

———————————#

presidential election. By December 30, 2020, per the Electoral Count Act, all presidential electoral issues were completely within Congress' jurisdiction. All of this is shown in prior briefing and the State has no answer for it.

Committee on Elections. *See* Indictment at 46, 48 (Acts 102, 105), 84–85. It also seeks to hold Cheeley criminally liable for sending and receiving e-mails and phone calls that supposedly concerned the 2020 presidential election. *See* Indictment at 28, 59–60 (Acts 34–37, 127). It further attempts to criminalize petitions to Congress and the courts regarding these election concerns. All of this constitutes core political speech and expressive conduct surrounding an election. It is therefore covered by Cheeley's protected right to speak, associate, and petition his government. To the extent it applies here at all, Georgia's RICO Act is unconstitutional as applied by Count 1.

E. Strict construction of penal statutes is required

At the December 1, 2023, hearing, the State misstated Cheeley's lenity argument as applying only to sentencing. The State's stance is clearly wrong. Criminal laws "ought to be most strictly construed against the prosecution, and most liberally in favor of the accused." *Allen v. State*, 28 Ga. 395, 398 (1859); *see also Curtis v. State*, 102 Ga. App. 790, 801–02 (1960). This is a hallmark of the law. *See Hobbs v. State*, 334 Ga. App. 241, 246 (2015) ("We emphasize penal statutes are always construed strictly against the State and liberally in favor of human liberty.").[23] Georgia courts routinely apply the rule of lenity without any discussion of ambiguity beyond the presence of "equally reasonable" interpretations. *See Vines v. State*, 269 Ga. 438, 439 (1998)[24]

---

[23] This has also been referred to as "the rule of strict construction." *See Frix v. State*, 298 Ga. App. 538, 542-43 (2009). "[T]he rule of strict construction [provides that] [w]hen a criminal statute fairly and reasonably is subject to two constructions, one which would render an act criminal, the other which would not, the statute must be constructed strictly against the State and in favor of the accused. Accordingly, even if the State's broad construction were reasonable, the contrary strict construction of the criminal statute must be accepted because it is at least equally reasonable." *Id.* (cleaned up). #

[24] *See also Rice v. State*, 357 Ga. App. 873, 876–77 (2020); *Mays v. State*, 351 Ga. App. 434, 436 (2019); *Prophitt v. State*, 336 Ga. App. 262, 269 (2016); *Ultra Telecom, Inc. v. State*, 288 Ga. 65, 69 (2010).

Georgia courts construe penal statutes strictly when faced with demurrers challenging them.[25] *See Frix v. State,* 298 Ga. App. 538, 543 (2009) (applying rule of strict construction to statutory interpretation in granting demurrer); *see also Beckman v. State*, 229 Ga. 327, 331 (1972); *Wood v. State*, 219 Ga. 509, 513 (1963).

Here, if the Court views any of the statutes at issue as ambiguous, it must construe them in a manner most favorable to Defendants and against the State. For instance:

- O.C.G.A. § 16-10-20.1 clearly applies only to lien and encumbrance related filings. *See* O.C.G.A. § 16-10-20.1(a). But if the Court sees ambiguity in light of the State's argument that the terms "including but not limited to" expand the types of filings subject to the statute, then the Court must read it narrowly to only cover lien and encumbrance related filings.

- Defendants say Georgia RICO does not apply to civil disobedience (including election-related political activities) and is limited only to "interrelated pattern[s] of criminal activity motivated by or the effect of which is pecuniary gain or economic or physical threat or injury." O.C.G.A. § 16-14-2(b). The State says the statute is broader. If the Court finds ambiguity here, it must read the Georgia RICO Act in the narrower manner suggested by Defendants.

- Defendants say O.C.G.A. § 16-20-23 does not reach presidential electors because they are not public officers under Georgia law and that the statute only reaches "officers" akin to law enforcement officers. Again, the State says the statute is broader. If the Court finds the statute ambiguous, it must read it as Defendants propose.

Additionally, "under the canon of constitutional doubt, if a statute is susceptible of more than one meaning, one of which is constitutional and the other not, [Georgia courts] interpret the statute as being consistent with the Constitution." *See Premier Health Care Investments, LLC v. UHS of Anchor, LP,* 310 Ga. 32, 48 (2020). As shown in Sections II(B)-(D) above, ***all of the statutes fail constitutional muster*** as read by the State. If the Court can read them narrowly to avoid constitutional infringement, then it should. But either a narrow reading or a finding they

---

[25] *Lovett v. State*, 111 Ga. App. 295, 295 (1965) (citing *Wiltberger* and treating strict construction as constitutionally required); *Plummer v. State*, 90 Ga. App. 773, 779 (1954); *Mills v. State*, 33 Ga. App. 151 (1924); *Peterson v. State*, 13 Ga. App. 766 (1913).

cannot be saved requires dismissal.

F. Counts 4, 13, 19, 25 and 26 Fail to Plead all Elements of O.C.G.A. § 16-10-20

Cheeley showed in prior briefing and oral argument that O.C.G.A. § 16-10-20 has two elements: (1) "defendant must knowingly and willfully make a false statement" and (2) "he [must] knowingly and willfully d[o] so within the jurisdiction of a state or local department or agency." *See Haley v. State*, 289 Ga. 515, 527 (2011). It is undisputed that Counts 4, 13, 19, 25, and 26 do not plead that Cheeley "knowingly and willfully" did an act "within the jurisdiction" of a particular State department or agency.

The State is required to plead every element of the crime in the Indictment. *See State v. Mondor*, 306 Ga. 338, 341 (2019); *Kimbrough v. State*, 300 Ga. 878, 881 (2017). If this case proceeds to trial, and the Indictment is read to the jury at the end of a trial, the trial court would have to instruct the jury that "the state had the burden of proving every material allegation and ***every essential element*** of the crimes charged beyond a reasonable doubt." *See Wright v. State*, 327 Ga. App. 451, 453 (2014); *see also Kimbro v. State*, 893 S.E.2d 678, 691 (2023).

At oral argument, the State said it only had to ***prove*** the second *mens rea* element of O.C.G.A. § 16-10-20 and it did not need to ***allege*** it in the Indictment, *i.e.,* this is an evidentiary issue and not a pleading issue. The State is wrong. *Haley* defines the essential elements of the crime while *Mondor* and *Kimbrough* say they must be pled in the Indictment. The Indictment does not plead the second essential *mens rea* element in Counts 4, 13, 19, 25, and 26. This requires dismissal of these claims.

This point is equally shown by looking forward to jury instructions at trial. If this Court were to instruct the jury regarding the "essential elements" of an O.C.G.A. § 16-10-20 violation the State had to prove, the Court would have to tell the jury it must find beyond a reasonable doubt that: (1) "defendant [] knowingly and willfully ma[d]e a false statement" ***and*** (2) "that he

knowingly and willfully did so within the jurisdiction of a state or local department or agency." Failure to do this would be reversable error under *Haley, Wright* and *Kimbro.* If the Court's instructions were made by reading Counts 4, 13, 19, 25, and 26 of the Indictment,[26] the jury ***would not be properly instructed*** because the Indictment does not say Cheeley must "knowingly and willfully" make a false statement "within the jurisdiction of a state or local department or agency." If reading the Indictment to the jury would not properly instruct it on all essential elements of an O.C.G.A. § 16-10-20 claim, then the Indictment does not properly plead that claim and these counts must be dismissed.

G. Count 15 is subject to demurrer because elector certificates are not "documents" as contemplated by O.C.G.A. § 16-10-20.1

O.C.G.A. § 16-10-20.1 statute criminalizes knowingly filing a "document" that contains a false, fictitious or fraudulent statement or representation. Although the defense also contends that the "CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM GEORGIA" does not contain any false, fictitious or fraudulent representations, Count 15 fails because the elector certificate does not fall within the definition of "document" in this statute.

> [T]he term "document" that is covered by this statute as is one that "shall include, but shall not be limited to, liens encumbrances, documents of title, instruments relating to a security interest in or title to real or personal property, or other records, statement, or representations of fact, law, right, or opinion." The elector certificate is not, and the State does not contend otherwise, a "lien[ ] encumbrance[ ], document[ ] of title, instrument[ ] relating to a security interest in or title to real or personal property."

O.C.G.A. § 16-10-20.1(a). Thus, the applicability of this statute turns on whether the elector certificate falls within this definition and in particular whether it is encompassed in the phrase "or other records, statement, or representations of fact, law, right, or opinion." It is not.

---

[59] Reading of indictment can be jury charge or part of jury charge. *See, e.g., Ward v. State*, 324 Ga. App. 230, 234 (2013); *Doe v. State*, 306 Ga. App. 348, 352 (2010); *Simmons v. State*, 207 Ga. App. 171, 171 (1993).

In *Kinslow v State*, 311 Ga. 768 (2011), the Georgia Supreme Court used the statutory construction rules of lenity, *noscitur a sociis*, and *ejusdem generis*, to narrowly read the term "interfering" at the end of the list of prohibited conduct of "obstructing, interrupting, or in any way interfering with the use of a computer program or data" in O.C.G.A. § 16-9-93. Kinslow was an IT employee who, before he was fired, "altered his employer's computer network settings so that e-mail messages meant for Kinslow's boss would also be copied and forwarded to Kinslow's personal e-mail account." *Id*. at 768.

The *Kinslow* Court noted that the dictionary definition could be read broadly to include "meanings such as intrude in the affairs of others, meddle, and intervene." *Id*. at 772 (internal quotations and citations omitted). However, after examining the list of terms using the aforementioned rules of statutory construction, the *Kinslow* Court held that, while "interfering" is a general term of enlargement, it nonetheless must be "construed as being of the same kind or class as [the preceding words in the list] 'obstructing' and 'interrupting." *Id*. at 774. To give a broad dictionary definition—as the State is trying to give to "other records" in the present case—would render the more specific preceding words "surplusage and redundant; in such an event, the relevant text would need to list only 'interfering.'" *Id*. at 774–75. The Court then "presume[d] that the General Assembly included the words 'obstructing' and 'interrupting' for a reason and avoid[ed] reading 'interfering' so broadly as to effectively render the preceding terms unnecessary." *Id*. at 775.[27]

———————————#

[5]## *See also Yates v. United States*, 574 U.S. 528 (2015). In *Yates,* the U.S. Supreme Court reversed the conviction of a commercial fisherman who threw undersized fish overboard in an effort to conceal his violation of fish and wildlife rules and after being stopped by a federal agent. *Id.* 533–34. Yates was charged with a violation of 18 U.S.C. § 1519, which criminalizes "[w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department

The State argues *Kinslow* does not answer the question because O.C.G.A. § 16-10-20.1 inserts the phrase "shall include, but shall not be limited to" prior to its listing of prohibited court filings. The State says this phrase is meant to broadly encompass ***all*** court filings even if they are not related to the listed "liens encumbrances, documents of title, instruments relating to a security interest in or title to real or personal property." The State's position makes no sense given the aforementioned statutory construction rules, and it has been expressly rejected by Georgia appellate courts. *See Wilson v. Clark Atlanta University, Inc.*, 339 Ga. App. 814, 834 (2016) ("Under the rule of *ejusdem generis* [and *nositur a sociis*] the words 'including but not limited to' ordinarily should be construed to referring to [items] of the same kind as those specially named.").

In the present case, O.C.G.A. § 16-10-20.1 defines a "document" that is covered by this statute as one that "shall include, but shall not be limited to, liens encumbrances, documents of title, instruments relating to a security interest in or title to real or personal property, or other records, statements, or representations of fact, law, right, or opinion." While the list begins with "includes, but shall not be limited to," the list then provides specific examples of types of documents filed to record a false lien or encumbrance. The list then finishes with the general term of enlargement "or other records, statements, or representations." This final category must be read to refer to the types of documents previously listed (liens encumbrances, documents of title, instruments relating to a security interest in or title to real or personal property), versus a dramatic broadening of the scope of the statutory prohibition. In other words, the statute only reaches any

———————————#

or agency of the United States …." *Id.* at 532. The Court held that "tangible object" as used in section 1519 must be read "to cover only objects one can use to record or preserve information, not all objects in the physical world." *Id*. at 536. The Court found that "tangible object" must be construed in the context of the other words in statutory list and in the context of the statutory purpose as a whole *Id.* at 536–37, 543–46. And that statute, designed as part of the Sarbanes-Oxley Act of 2002, to protect investors and restore the public's trust in financial markets after the collapse of Enron, did not have "fish" in mind. *Id*. at 532, 546.

"other" documents ***of that type, i.e., liens and encumbrances***, however captioned or described. The "other records" does not and cannot be read under the applicable rules of statutory construction to encompass any type of document, such as elector certificates, certificates, but rather must be read to include only those other records of a similar type and nature to the preceding words in the list. If "other records" were interpreted in this manner, as urged by the State, then the preceding part of the definition would be rendered meaningless, redundant, and surplusage because "other records' would capture those preceding terms and many others. *See Kinslow*, 311 Ga. at 775 ("We should presume that the General Assembly included the words 'obstructing' and 'interrupting' for a reason and avoid reading 'interfering' so broadly as to effectively render the preceding terms unnecessary"). It strains all credibility to interpret a statute passed by the General Assembly to address false liens and encumbrances in a manner to also apply to elector certificates. Under *Yates* and *Kinslow*, this is improper. Additionally, under the rule of lenity discussed above, the statute should be so read. The State's argument should be rejected, and the Counts 14, 15, and 27 should be dismissed.

H. Count 23 fails as a matter of temporal impossibility that no facts at trial can fix.

In response to part of the argument regarding Count 23, the State failed to understand the crux of the temporal impossibility argument. Count 23 charges Cheeley and others with solicitation of violation of oath by a public officer in violation of O.C.G.A. §§ 16-4-7 and 16-10-1 by unlawfully soliciting members of the Georgia Senate who were present at a Senate Judiciary subcommittee meeting on December 30, 2020, to violate the unspecified oath by unlawfully appointing presidential electors from the State of Georgia. Indictment, Count 23. This is a temporal impossibility as the electors had been selected and the electoral certificate had been signed and forwarded on December 14, 2020 – sixteen days prior.

The State repeatedly cites *Sanders v. State*, 313 Ga. 191, 196 (2022) for the proposition that when alleged deficiencies in one count of an indictment are addressed in another count, the indictment may be read "as a whole" to determine whether sufficient information has been pled to withstand a special demurrer. The indictment as a whole clearly establishes that the electoral certificate had been prepared and transmitted on December 14, 2020.

For example, the indictment provides in overt act 78 that the "CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM GEORGIA" WAS SIGNED ON December 14, 2020. Overt Act 79 alleges that the elector certificate was mailed on December 14, 2020, to the President of the United States Senate, the Archivist of the United States, the Georgia Secretary of State, and the Chief Judge of the United States District Court for the Northern District of Georgia. Overt Act 80 alleges that the alternative electors created and signed the elector certificate on December 14, 2020, and mailed it to the Archivist of the United States. Overt Act 81 also alleges that the elector certificate was created and signed by the alternate slate of electors on December 14, 2020. Overt Act 82 alleges that the elector certificate was created and signed by the alternate slate of electors and mailed to be filed in the United States District Court on December 14, 2020. Thus, the indictment as a whole conclusively establishes that on December 14, 2020, the elector certificate was completed and transmitted to the various appropriate State and Federal authorities on December 14, 2020—sixteen days prior to the purported solicitation.

Accordingly, Count 23 fails because the defendants could not solicit, on December 30, 2020, the named individuals to violate their oaths "by unlawfully appointing presidential electors from the State of Georgia" when the electors had previously been appointed and cast their electoral votes sixteen days prior. Count 23 is a temporal impossibility and should be dismissed.

III. CONCLUSION

Based upon the facts, legal precedent, authorities and grounds set forth herein, in the initial Joint General and Special Demurrer to the Indictment, Motion to Quash the Indictment, and Plea In Bar, the reply in support thereof, and the Court's hearing on the motion, the Court should dismiss the Indictment against Defendant Robert David Cheeley.

Respectfully submitted, December 18, 2023.

/s/ Christopher S. Anulewicz
Christopher S. Anulewicz
Georgia Bar No. 020914
Jonathan R. DeLuca
Georgia Bar No. 228413
Wayne R. Beckermann
Georgia Bar No. 747995
BRADLEY ARANT BOULT CUMMINGS LLP
1230 Peachtree Street NE, 20th Floor
Atlanta, GA 30309
E-mail: canulewicz@bradley.com
Telephone: (404) 868-2030
Facsimile: (404) 868-2010

/s/ *Richard A. Rice, Jr.*
Richard A. Rice, Jr.
Georgia Bar No. 603203
THE RICE LAW FIRM, LLC
3151 Maple Drive, NE
Atlanta, Georgia 30305
Email: richard.rice@trlfirm.com
Telephone: 404-835-0783
Facsimile: 404-481-3057
Attorneys for Defendant Robert David Cheeley

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA, v. ROBERT DAVID CHEELEY, ET AL., Defendants.	Case No. 23SC188947

CERTIFICATE OF SERVICE

I hereby certify that I have, this 18th day of December 2023, served a true and correct copy of the foregoing **POST-HEARING BRIEF IN SUPPORT OF DEFENDANT ROBERT DAVID CHEELEY'S JOINT GENERAL AND SPECIAL DEMURRER, PLEA IN BAR, AND MOTION TO QUASH** via electronic filing.

/s/ Christopher S. Anulewicz
Christopher S. Anulewicz
Georgia Bar No. 020914
BRADLEY ARANT BOULT CUMMINGS LLP
Promenade Tower
1230 Peachtree Street NE, 20th Floor
Atlanta, GA 30309
E-mail: canulewicz@bradley.com
Telephone: (404) 868-2030
Facsimile: (404) 868-2010

Attorney for Defendant Robert David Cheeley