IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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

AMENDED REPLY IN SUPPORT OF DEFENDANT ROBERT DAVID CHEELEY'S JOINT GENERAL AND SPECIAL DEMURRER, PLEA IN BAR, AND MOTION TO QUASH

I. INTRODUCTION

"A defendant is entitled to a charging instrument that is *perfect* in *form* as well as *substance*[.]" *City of Peachtree City v. Shaver*, 276 Ga. 298, 301 (2003). This means that all facts and allegations supporting the charges must affirmatively appear in the Indictment, which must allege all essential elements (including *mens rea*) of the purported crimes and specify sufficient facts. *See State v. Mondor*, 306 Ga. 338, 341 (2019); *Kimbrough v. State*, 300 Ga. 878, 881 (2017); *McLane v. State*, 4 Ga. 335, 340 (1848). Absent a perfect indictment (meaning the State must earn a 100% pleading grade), the State's charges must be dismissed.

The Indictment, at least with respect to Defendant Robert David Cheeley, is *im*perfect both in form and substance because: (1) the crimes alleged therein are preempted by the Electoral Count Act of 1887 ("ECA"); (2) the alleged crimes are barred by freedom of speech, association, and petition guarantees enshrined in the U.S. and Georgia Constitutions; and (3) it does not adequately plead any of the counts against Cheeley.[1] The State's Response fails to show otherwise. While the

[1] Most strikingly, the Indictment completely avoids Georgia's Election Code despite alleging election-related crimes. The Indictment instead struggles to retrofit a host of

State attempts to revive its moribund Indictment through its *argument*, the Indictment fails within its four corners.[2] *See Youngblood v. State*, 232 Ga. App. 327, 328 n.2 (2002) (citing *O'Brien v. State*, 109 Ga. 51, 51 (1900)) (explaining that a defective indictment cannot be aided by argument or inference). Accordingly, the Court must dismiss the Indictment against Cheeley with prejudice.

II. ARGUMENT

A. Federal law preempts the charges against Cheeley.

The ECA preempts Georgia law to the extent it criminalizes Cheeley's alleged conduct related to the 2020 presidential election. The syllogism mandating this result is simple and clear: (1) the ECA exclusively governs any disputes involving presidential electors and their votes; (2) the ECA vests the ***exclusive power*** to count those electoral votes in ***Congress***; (3) the ECA vests in ***Congress*** the ***exclusive power*** to determine the validity of any electoral votes or slates submitted to it, so long as a sending state has not adjudicated the validity of its electoral votes prior to the ECA's safe harbor date; (4) Georgia did not meet the safe harbor deadline following the 2020 presidential election; and accordingly, (5) ***Congress*** had the exclusive authority to determine the validity of Georgia's electors and electoral votes. Congress's role in determining the validity of the electoral slates sent to it, including determining whether the slates were valid, invalid, fraudulent, real, is for it alone per the ECA.[3]

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inapposite crimes to capture Cheeley's civic and political activities. As explained below, that process of straining and stretching criminal statutes beyond their express terms and historical application infects every single count.#

[2] The State largely attempts to defer consideration of issues that are ripe for consideration in light of Cheeley's comprehensive joint demurrer, plea in bar, and motion to quash. This strategy serves no other purpose than running up Cheeley's attorney fees while he endures a lengthy trial—all while the Indictment fails on its face.

[3] The ECA ***requires*** Congress to be the entity to resolve any disputes regarding the validity of the electors submitted to it. *See U.S. v. Puma*, 596 F. Supp. 3d 90, 99 (D.D.C. 2022); *see*

The State's Response ***admits*** this. *See* Response at 2 and 4. But the State inexplicably goes on to argue that while the ECA and Congress exclusively govern the core issue in this case, namely the validity of the electoral slates submitted to it, the State can still prosecute Defendants for "conspiring" to "change the election" by submitting "fake electors" to Congress. How?

It is easy to imagine[4] a situation in which Congress approves an alternate slate of electors other than the one submitted by the Governor of a sending state. As much as the State wants to ignore this reality, it has happened before. *See Bush v. Gore,* 531 U.S. at 98, 127 & n.5 (Stevens, J., dissenting) (discussing 1960 Hawaii precedent).[5] If Congress were to affirm an alternate electoral slate, the State here argues it could ***still*** prosecute those confirmed electors, or persons "conspiring" with the electors, as illegitimate. Again, how? Such a situation would lead to a direct conflict between what Congress determined (namely the validity of the electors) and what the State would want to find (the ***in***validity of the electors). And this is the problem.

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also Bush v. Gore, 531 U.S. 98, 153–54 (2000) (Breyer, J., dissenting); *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008). This leaves no room for State intervention, except as provided in the ECA's "safe harbor" clause. And the ECA completely preempts this field, thus precluding states from interfering with it. *See*, *e.g., Bush*, 531 U.S. at 155 (Breyer, J., dissenting); 15 Cong. Rec. 5461 (1884) (remarks of Rep. William M. Springer). At the very least, "[u]nder the doctrine of implied or conflict preemption, Congressional intent to impliedly preempt state law can be found when there is an actual conflict between state and federal law." *Synovus Bank v. Griner*, 321 Ga. App. 359, 363 (2013) (quotation omitted).

[4] The State in its response says this situation is "unimaginable." *See* Response at 4. Clearly the State is wrong.

[5] In a terse footnote the State basically argues that (1) 2023 isn't 1960 and (2) Hawaii isn't Georgia. Resp. at 2. True but irrelevant. The State has no ***real*** answer for the Hawaii precedent, *Bush v. Gore*, or the numerous other instances in which Congress rejected or challenged electors under the ECA. #

As the cases the State cites illustrate, the aforementioned situation would (1) create a direct conflict between state and federal outcomes, (2) stand as an obstacle to effectuating the ECA, and (3) directly impede Congressional objectives. *See RJ Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130,140 (1986); *Aman v. State*, 261 Ga. 669, 671 (1991). And other than just saying its prosecution would not create such a conflict, the State offers no credible argument as to why that is so.

As the State admits, Congress has the tools and exclusive authority to "provide for a lawful and orderly account of each state's electoral votes to provide for a peaceful transition of power following each presidential election." Response at 4. That is precisely what Congress did here. It weighed the various slates submitted to it, including the multiple Georgia slates, and determined which one it would count. The State has no authority to impede on this process.

Again, the State otherwise has no satisfactory answer for the fundamental question: what would happen if Congress had (as it did in 1960) counted votes from an alternate slate of electors in 2023? The plain import of the 1960 presidential election, and the lack of any rebuke during the intervening decades, is that Congress serves as the ultimate electoral vote arbiter. Any state law or enforcement that could potentially interfere with Congress's determination is preempted by the ECA. If the Court agrees with the State, then it must also acknowledge that Hawaii could have prosecuted its alternate electors after Congress counted their votes in 1960. That novel conclusion flies in the face of the ECA's plain text, doctrine, history, and tradition.

B. The Federal and Georgia Constitutions protect Cheeley's speech and expressive conduct.

i. Cheeley's demurrer on First Amendment grounds is ripe.

The State avoids grappling with the contention that it is prosecuting Cheeley for nothing

more than exercising his free speech rights.[6] Rather, the State's only argument is that Cheeley's free speech arguments are not ripe because no factual record has been developed regarding his "as-applied" constitutional claims. The State misconstrues the law for at least two reasons.

The Georgia Supreme Court has also repeatedly explained that First Amendment challenges to criminal indictments (unlike other constitutional challenges) must be considered when raised in a demurrer, even if the factual record has not been developed. *See Baker v. State*, 280 Ga. 822, 823 (2006); ("Where, as here, the challenged statute ***does not involve the First Amendment***, it is examined in light of the facts" as alleged); *see also Hall v. State*, 268 Ga. 89, 91 (1997) (same); *Horowitz v. State*, 243 Ga. 441, 441 (1979) (same).[7] The State also forgets that "a prosecution motivated by a desire to discourage expression protected by the First Amendment is barred [by the U.S. Constitution] and must be enjoined or dismissed, irrespective of whether the challenged action could possibly be found to be unlawful." *U.S. v. P.H.E., Inc.*, 965 F.2d 848, 849 (10th Cir. 1992).

Second, even in instances of non-First Amendment constitutional challenges to an indictment, the Georgia Supreme Court has held that where the matter can be decided based on the State's averments, the court can, and should, resolve the matter at the preliminary stages

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[6] "Free speech" as used herein means Cheeley's political speech and related expressive conduct, his right to associate freely, and his right to petition government, all of which are protected by the U.S. and Georgia Constitutions.

[7] In *Major v. State*, for example, the defendant filed a demurrer contesting his prosecution on First Amendment grounds. 301 Ga. 147 (2017). While the demurrer was heard and denied, neither the trial court nor the Georgia Supreme Court denied it as premature. That case challenged on First Amendment grounds the constitutionality of Georgia's Terroristic Threats statute. The Court determined that because the defendant's as-applied First Amendment challenge was premised on whether he had the requisite intent to commit a crime of violence, that issue could be decided only by a jury. *Id.* at 152–53. Here, Cheeley's free speech challenges, based on his core political speech, can be resolved by application of the averments in the Indictment without further factual development.

without the development of any factual record. *See Hall*, 268 Ga. at 89-90 (even though underlying facts had not been fully developed, the court could hear the constitutional challenges based on the State's averments).

Cheeley's First Amendment challenge to the Indictment can and should be considered based on the four corners of the Indictment. If all of the allegations in the Indictment are correct and accepted as true, the State's prosecution clearly violates Cheeley's core First Amendment rights. No further factual record is required. All that needs to be considered is the speech and expressive conduct at issue and the Indictment's unabashed attempts to quell it through criminalization. The State offers no argument as to why this is not the case—likely because it has none. Because the State refuses to engage with the First Amendment arguments on the merits it has waived any argument to the contrary. The Court should therefore rule that the First Amendment issues are ripe and dismiss the Indictment.

ii. The Indictment violates Cheeley's First Amendment rights.

"[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces … unrest, creates dissatisfaction with conditions …, or even stirs people to anger. Speech is often provocative and challenging. It may strike at … preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

The First Amendment to the U.S. Constitution therefore "does not permit a State to make criminal the peaceful expression of unpopular views." *Edwards v. South Carolina*, 372 U.S. 229, 235, 237 (1963). Any statute that directly or indirectly punishes facilitating and exercising "free political discussion [so] that government may be responsive to the will of the people …. is repugnant to the guaranty of liberty contained in the Fourteenth Amendment['s]" Due Process

clause. *Stromberg v. California*, 283 U.S. 359, 369 (1931). Freedom of speech is "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference[,]" such as via post-hoc prosecutions for political expression and activities under the guise of enforcing general criminal provisions. *See Bates v. Little Rock*, 361 U.S. 516, 523 (1960).[8]

Here, the State is prosecuting Cheeley for his political expression including, unbelievably, his comments and statements before a sub-committee of Georgia's State Senate regarding the 2020 presidential election. *See* Indictment at 14 (prosecuting Defendants for refusal to accept Trump's loss); 15-19 (saying Defendants engaged in criminal conduct by participating in the political process, petitioning and interacting with elected officials regarding election concerns, acting as electors under the ECA, and testifying and providing documents related to their beliefs related to the election); Counts 9, 11, 13, 15, 17, and 19 (charges related to participating in political processes and expression of who might or could be proper electors); Counts 23 and 26 (testimony before the Georgia Senate subcommittee and petitioning elected officials).

The State does not shy away from this fact. Indeed, the Indictment's entire premise is to criminalize ***any*** statements or actions by Defendants that question the process or validity of the 2020 presidential election. *See* Indictment at p. 14. The State says it is prosecuting Defendants,

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[8] Even though "the Georgia Constitution's Speech Clause … is textually different from the First Amendment[]" the latter represents a constitutional floor and the former a constitutional ceiling. *Tucker v. Atwater*, 303 Ga. 791, 794 n.3 (2018) (Peterson, J., concurring). Indeed, the Georgia Supreme Court has "interpreted the Georgia Speech Clause's identically worded predecessor as *more protective* of speech than the First Amendment in at least one context." *Id*. (citing *K. Gordon Murray Productions, Inc. v. Floyd*, 217 Ga. 784, 790–93 (1962)). This is important. The Court should view the free speech challenges here under Georgia's broader protections and any and all doubts in favor of this critical issue should be construed against the State.

including Cheeley for "refus[ing] to accept that Trump lost …"[9] *Id*. But the State is ***not permitted*** to prosecute persons for espousing or advocating a position with which the State disagrees—especially with regard to a presidential election. If the State gets its way here, anyone questioning the validity of any future election should take warning that their peaceable protests, advocacy, or petitions for change may find them within the crosshairs of a zealous district attorney. If this potential loss of one's freedom for engaging in the political process does not chill debate and speech, not much else will.

a. The Indictment impermissibly criminalizes Cheeley's right to petition the government.

Cheeley has constitutional rights to petition the federal and state governments. The U.S. and Georgia Constitutions guarantee "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I; *see also McDonald v. Smith*, 472 U.S. 479, 482 (1985); Ga. Const. Art. I, § I. ¶ 9.

Yet, Counts 1, 23, and 26 ***criminalize*** remarks that Cheeley delivered at a subcommittee meeting of the Georgia Senate Judiciary Committee. *See* Indictment at 46, 48 (Acts 102, 105), 84–85. And Counts 11, 13, 15, 17, and 19 accuse Cheeley of conspiring to make and transmit certain writings related to the 2020 presidential election, which were all ultimately directed towards some government actor or official. *See* Indictment at 77–81. Cheeley merely spoke and offered his opinion on what he observed in the State Farm Arena video tape. There were no threats. There was

[9] The upshot is that Defendants would not be prosecuted if their speech and actions touted Joe Biden as the winner of Georgia's electoral votes in 2020. Indeed, just replace every instance of "Trump" with "Biden" throughout the Indictment, and the prosecution would disappear. The entire prosecution is therefore based solely on the content and viewpoint of Defendants' political speech, expressive conduct, associations, and petitions. That violates every tenet of First Amendment doctrine and harkens back to the bad old days of the Alien and Sedition Acts.

no violence. There was no predetermined outcome demanded. He just asked the subcommittee to look into potential vote counting irregularities. That is it. And for this, the State seeks to jail him. The Indictment cannot hold Cheeley liable for speech and conduct directed towards government for political ends without violating Cheeley's right to petition.[10] To the extent that it does, the Indictment is subject to dismissal.

b. The Indictment impermissibly criminalizes Cheeley's speech and expressive conduct.

The Indictment also impermissibly charges Cheeley with a number of offenses based on his speech or expressive conduct alone. For example, 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

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[10] No General Assembly committee has authority to either subpoena witnesses or compel testimony under oath. *See, e.g.,* O.C.G.A. § 28-1-16 (Senate or House Committees on Ethics can only compel testimony through application to the Superior Court of Fulton County, though no other committees may do so). This stands in stark contrast to the authority of other branches of Georgia's government to compel sworn testimony. *See, e.g.,* O.C.G.A. § 45-15-17(b) (permitting Attorney General to compel witness testimony under oath). It further stands in stark contrast to the ability of Congress and other state legislatures to compel witness testimony under oath. *See*, *e.g.* James Hamilton, *et al.*, *Congressional Investigations: Politics and Process*, 44 Am. CRIM. L. REV. 115, at fn. 154 (2007).

The Georgia General Assembly purposefully chose to allow all persons testifying before it to be unencumbered by an oath. For instance, H.B. 475 was introduced during the General Assembly's 2021-2022 Session to amend O.C.G.A. § 28-1-6 and allow any House or Senate committee "to administer an oath to persons testifying before such committee for such person to swear or affirm that such person shall truthfully testify." *See* H.B. 475 attached as **Exhibit A**. That bill was rejected. In rejecting H.B. 475, the General Assembly reaffirmed its choice to allow all persons petitioning it, or testifying before it, to do so freely and without fear of prosecution for allegedly violating an oath. The General Assembly's choice encourages citizens to freely speak their minds and advance their concerns, whatever they might be. The Indictment, in addition to violating Cheeley's free speech rights and the separation of powers, seeks to undo the General Assembly's purposeful choice by prosecuting Cheeley for allegedly testifying falsely before the Senate subcommittee. This cannot be allowed.#

23 and 26, further attempts to criminalize remarks that Cheeley delivered at a subcommittee meeting of the Georgia Senate Judiciary Committee. *See* Indictment at 46, 48 (Acts 102, 105), 84–85. And Counts 11, 13, 15, 17, and 19 accuse Cheeley of conspiring to make and transmit certain writings related to the 2020 presidential election. *See* Indictment at 77–81.

Whether the First Amendment protects the alleged conduct depends on if it was "intended to be communicative" and, "in context, would reasonably be understood by the viewer to be communicative." *Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 294 (1984). Here, "[t]he expressive, overtly political nature of [the conduct attributed to Cheeley is] both intentional and overwhelmingly apparent." *Johnson*, 491 U.S. at 406. And the Indictment nowhere identifies the State's interest in prosecuting Cheeley "that is unrelated to the suppression of [his] expression[s]." *Id*. at 407. In other words, the charges against Cheeley are mere subterfuge meant to quiet, and punish, his speech. They also send a signal that similar, disfavored political speech will be punished.

While the Indictment's form invokes general criminal statutes, its substance seeks to prosecute Cheeley's protected speech and expressive conduct. The Indictment cannot seek "an unforeseeable judicial enlargement of a criminal statute[]" by criminalizing speech and expressive conduct via mundane prohibitions without "depriv[ing] [the defendant] of due process of law in the sense of fair warning that his … conduct constitute[d] a crime." *Bouie v. City of Columbia*, 378 U.S. 347, 353–55 (1964). Put differently, "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *U.S. v. Lanier*, 520 U.S. 259, 265 (1997).

c. The Indictment also impermissibly criminalizes Cheeley's freedom of association.

"[I]t is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States." *Bates*, 361 U.S. at 523. Georgia courts also recognize that "freedom of association[]" is a "[f]undamental right[]." *Siegrist v. Iwuagwa*, 229 Ga. App. 508, 514 n.2 (1997).

The Indictment charges Cheeley with a number of violations based on little more than his associations with other like-minded citizens for the purpose of advancing political and civic ideas. As mentioned before, Counts 11, 13, 15, 17, and 19 all concern an alleged conspiracy to make and transmit certain documents supposedly related to the 2020 presidential election. *See* Indictment at 77–81. And Count 1 attempts 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).

Whatever the truth of the underlying allegations, these Counts ultimately and impermissibly criminalize associating "for the purpose of advancing ideas and airing grievances." *See Bates*, 361 U.S. at 523. The Indictment's theory is that Cheeley committed a crime by joining with others to make statements and documents that advanced an alternate slate of Georgia electors. But that very activity is exactly what the freedom of association protects. To criminalize the conduct alleged is to violate the core right of association. The Indictment is therefore subject to dismissal to the extent it seeks to criminalize Cheeley's freedom to associate.

C. The Indictment fails to properly allege that Cheeley committed any crime.

i. Count 1 does not State a Georgia RICO claim.

a. Georgia's RICO Act does not apply to "acts of civil disobedience" alleged by Count 1.

The State's response contends the General Assembly's express limitations on RICO's scope do not apply. The State is demonstrably wrong based on the evidence and authority below.

"[T]he preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute." 1 J. Story, Commentaries on the Constitution of the United States § 459, p. 443 (1833). So, as then-Judge Peterson put it, "codified preambles are part of the act and appropriate to read in *pari materia." Harrison v. McAfee*, 338 Ga. App. 393, 400 (2016) (*en banc*). That means a "codified preamble becomes part of the statutory context in which [courts] read individual passages." *Id*. at 400 n. 5. The State's brief ignores this completely.

Accepting that the codified preamble here is law, every syllable of Georgia's RICO Act must be construed in light of its preamble, codified at O.C.G.A. § 16-14-2. The preamble's plain language, in turn, makes it abundantly clear that Georgia's RICO Act does not apply to "isolated incidents of misdemeanor conduct or acts of civil disobedience," such as those alleged here. *See* O.C.G.A. § 16-14-2(b); *see also* O.C.G.A. § 16-14-4(a). Indeed, the scope of Georgia's RICO Act does not extend to any activities not motivated by economic or financial ends or threats and acts of violence. *See* O.C.G.A. § 16-14-2(b).

Apart from the preamble's plain text though, the original public meaning assigned to its words forecloses Count 1 entirely. The language removing "isolated incidents of misdemeanor conduct" and "acts of civil disobedience" from the scope of Georgia's RICO Act "was included in the Act's only [1997] amendment, a floor amendment adopted in the House and introduced by

Representatives Brian Joyce and William Randall." Lisa M. Gable, *Racketeer Influenced And Corrupt Organizations: Apply Georgia RICO Act To Interrelated Patterns Of Criminal Activity Motivated By Or The Effect Of Which Is Pecuniary Gain Or Economic Or Physical Threat Or Injury To Others*, 14 GA. ST. U.L. REV. 90, 92 (1997). "Unlike similar acts in other states, the purpose of [Georgia's RICO] Act ***was not to stifle political dissent***." *Id*. (emphasis added). "Representative Joyce wanted to limit the language to ensure that forms of civil disobedience, such as protests …, would not be violations under Georgia RICO. The General Assembly did not intend this sort of political dissent to be the basis for a RICO action."[11] *Id*; *see also Georgia Mental Health Inst. v. Brady*, 263 Ga. 591, 592 (1993) ("in ascertaining the purpose of legislation, courts may look to the history of the legislation on the subject matter of the particular statute"). Georgia's RICO Act also expressly excludes matters not involving "acts motivated by pecuniary gain or economic or physical threat or injury." O.C.G.A. § 16-14-2(b). Of course, § 16-14-2(b) is not an *element* of a Georgia RICO charge, but it expressly removes a certain subset of cases from the statute's scope.

Despite § 16-14-2(b)'s plain language and the overwhelming evidence of its original public meaning, the State wrongly insists that it is meaningless surplusage. Nothing could be further from the truth. Again, every part of the General Assembly's enactments must be given full effect, including statements of intent and purpose. *See Schick v. Board of Regents of Univ. Sys. of Georgia*, 334 Ga. App. 425 (2015); *Judicial Council of Georgia v. Brown & Gallo, LLC*, 288 Ga. 294, 297 (2010). Indeed, Georgia's appellate courts routinely invoke § 16-14-2(b) and actively rely on it to delineate the scope of Georgia's RICO Act. *See Narjarian Capital LLC v. Clark*, 357

[11] Nothing suggests that the public's understanding of § 16-14-2(b) was any different. Cheeley contends that the original public meaning of § 16-14-2(b) was that Georgia's RICO Act could not be used to prosecute political and civic dissent.

Ga. App. 685 (2020); *Five Star Athlete v. Davis*, 355 Ga. App. 774 (2020); *Roberts v. State*, 344 Ga. App. 324 (2018); *All Fleet Refinishing, Inc. v. West Georgia Nat'l. Bank*, 280 Ga. App. 676, 679 (2006), *Williams v. General Corp. v. Stone*, 279 Ga. 428, 430–31 (2005).

Undeterred by contrary, on-point authority, the State invokes three inapposite decisions that it says undermine § 16-14-2(b)'s importance: *State v. Shearson,* 188 Ga. App. 120 (1988), *Reaugh v. Inner Harbour Hospital, Ltd.,* 214 Ga.. App. 259 (1994) and *Cotton Inc. v. Phil-Dan Trucking, Inc.,* 270 Ga. 95 (1997). Resp. at 5–9. But *Shearson, Reaugh,* and *Cotton* all involve civil RICO claims and address (1) whether the State pleaded a cause of action despite not incorporating language contained in the prior version of § 16-14-2 as an "element" of the claim or (2) whether the statute limited certain damages. The decisions answered those questions in the negative based upon "notice pleading" standards that apply in certain civil cases. *Cotton*, 270 Ga. at 95.

Shearson, *Reaugh*, and *Cotton* also highlight one of the Indictment's core failings. Unlike here, the racketeering activity alleged in those cases ***was*** motivated by pecuniary gain or economic or physical threat or injury and was thus within § 16-14-2(b)'s scope. *See Shearson*, 188 Ga. App. at 121–22 (noting fraudulent obtainment of money); *Reaugh*, 214 Ga. at 259–60, 64 (physical abuse, false billings for services not performed, and allowing damages for physical abuse); *Cotton*, 270 Ga. at 95 (alleging fraudulent misappropriation of funds). The State has pointed to ***no cases*** extending Georgia's RICO Act beyond the limited scope articulated by § 16-14-2(b).

The Indictment at issue must be perfect in form and substance; cases applying civil notice-pleading standards cannot paper over its imperfections. *See Shaver*, 276 Ga. at 301. No reasonable person would see what Cheeley is accused of as anything more than civil disobedience, if that. There is certainly no indication he utilized violence or was motivated by pecuniary ends.

The question, again, is: Does Count 1 falls within the Georgia RICO Act's scope when taken as true? It does not. *See* O.C.G.A. § 16-14-2(b).

The 1997 amendment to § 16-14-2 confirms that conclusion. Before the amendment, Georgia's RICO Act applied only to "an interrelated pattern of criminal activity, the motive or effect of which [was] to derive pecuniary gain." Following the amendment, however, § 16-14-2 included the phrase "or economic or physical threat or injury," adding physical threats while retaining the pecuniary-gain element. Most importantly, the General Assembly expressly delineated the Georgia RICO Act's scope so that it ***does not*** extend to acts of civil disobedience. The General Assembly also made clear that the statute does not apply to acts unconnected to pecuniary gain, economic or physical threats or injury. Those express limitations shrunk the RICO statute's scope and altered the statute's meaning. *See Crum v. Jackson Nat'l Life Ins. Co*., 315 Ga. 67, 77–78 (2022). Such amendments designed to include certain items and not others reflect "a matter of considered choice." *White v. Stanley*, __S.E. 2d___, 2023 WL 6413214, *2 & n.15 (Ga. App. Oct. 3, 2023). Had the General Assembly wanted to extend Georgia's RICO Act to acts of civil disobedience or otherwise, it could have done so. And its choice not to do so, means that Georgia's RICO Act does not extend to any of the acts alleged in the Indictment as matter of law.

b. Count 1 does not sufficiently plead the existence of a RICO "enterprise."

Count 1 otherwise does not plead an "enterprise" under Georgia's RICO Act. To establish a RICO enterprise, the State must plead and ultimately prove "an ongoing organization, formal or informal, and … that the various associates function as a continuing unit." *Martin v. State*, 189 Ga. App. 483, 486 (1988) (quoting and agreeing with *U.S. v. Turkette*, 452 U.S. 576, 583 (1981)). A RICO charge must therefore plead that the individuals have some common purpose, relationships with others in the enterprise, and longevity sufficient to accomplish the common purpose and

sufficient to show the individuals are acting as a group. *See, e.g., Abbot Labs. v. Adelphia Supply USA*, 2017 WL 57802, *3–4 (E.D.N.Y. Jan. 4, 2017) (citing *Boyle v. United States*, 556 U.S. 938 (2009)). Here, however, Count 1 merely lists individuals engaged in various independent and uncoordinated activities following the 2020 presidential election, none of which constitutes an enterprise. Also absent are any allegations pertaining to "longevity" of the supposed enterprise, which is required to bring a RICO charge. *See Boyle*, 556 U.S. at 942, 945. Count 1, lacking sufficient allegations to establish an enterprise, is subject to dismissal.

The State responds by unsuccessfully protesting that the alleged RICO enterprise "does not encompass every person who voted for Trump, every person who believed Trump won, every person who was disappointed that he did not win, or every person who questioned the outcome of the election." Resp. at 9–10. To the contrary, the Indictment's "enterprise" includes "Defendants, as well as others not named as defendants," who sought to "change the outcome of the election in favor of Trump" by acting "in Fulton County, Georgia, elsewhere in the State of Georgia, in other states, including, but not limited to, Arizona, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin, and in the District of Columbia." Indictment at 14–15. That covers a nearly unlimited swath of individuals that Cheeley cannot even begin to comprehend. So, the State cannot now pretend that the same "enterprise" ***it*** describes in the Indictment is somehow well defined.

Despite what ***it*** wrote in the Indictment, the State nonetheless insists that it "is no more accusing everyone whoever doubted the outcome of the 2020 election of being a member of RICO enterprise than the federal government accused every bank robber in America being a member of the enterprise in *Boyle*." Rep. at 12. But that is precisely what Count 1 accomplishes and expressly says. Other than identifying 19 Defendants (and alluding to a whole host of un-indicted co-conspirators and "others" located "in other states"), Count 1 does not articulate any meaningful

constraints on its alleged enterprise, which results in dismissal. *See Boyle*, 556 U.S. at 938 n.4. The State replies that *Boyle* "is not Georgia law." Rep. at 12. True enough. But Georgia courts routinely consider federal RICO Act precedents when defining the scope of a Georgia RICO "enterprise." *See, e.g., Kimbrough*, 300 Ga. at 882–83; *Reaugh*, 214 Ga. App. at 263; *Martin*, 189 Ga. App. at 483. Count 1 is therefore still subject to dismissal based on its untethered and boundless enterprise.

c. Count 1 is subject to dismissal because its alleged enterprise lacks any continuity.

The State mistakenly argues that Georgia's RICO Act does not require continuity between the alleged predicate acts. Resp. at 13–17. A pattern of racketeering activity "means … [e]ngaging in at least two acts of racketeering activity in furtherance of one or more incidents, schemes, or transactions." O.C.G.A. § 16-14-3(4)(A). The State, however, seeks to insert an invisible "only" before "means" so that racketeering activity does not require anything else except two related predicate acts. That understanding is in tension with several decisions interpreting the federal RICO Act to mandate that there must be a "continuity" of racketeering activity over a substantial period of time to qualify as a RICO "pattern." *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240–50 (1989); *Jackson v. BellSouth Comms.*, 372 F.3d 1250, 1266 (11th Cir. 2004). The State brushes these decisions off by noting that the federal RICO act uses the term "requires" before defining racketeering activity while Georgia's RICO Act employs "means," as identified above. *See* 18 U.S.C. § 1961(5). These words, while different, connote remarkably similar meanings.

The State relies predominantly on the Court of Appeals decision in *Dover v. State* to contend that there is no "continuity" requirement under Georgia's RICO Act. 192 Ga. App. 429 (1989). That decision, as noted in Cheeley's initial brief, relies on dubious reasoning, which

appears to have been jettisoned indirectly by the Court of Appeals in *Faillace v. Columbus Bank & Trust Co.* 269 Ga. App. 866, 869 (2004). In *Faillice*, the Court of Appeals cited *Northwestern Bell* for the proposition that "predicate acts [must be] 'related' and 'either constitute or threaten ***long term*** criminal activity'" to prove a pattern of racketeering activity. 269 Ga. App. at 869 (emphasis added). Tellingly, the State does not discuss or address *Fallice*, which strongly suggests the continuity requirement has been adopted by Georgia courts. And that requirement is not met here.

d. Count 1 does not identify any nexus between the alleged enterprise and purported racketeering activities.

Count 1 is also subject to dismissal because it does not plead any "connection or nexus between the enterprise and the [alleged] racketeering activity." *Kimbrough,* 300 Ga. at 882. Despite *Kimbrough*'s clear holding, the State maintains that Count 1 need not allege a nexus because it is a RICO conspiracy charge. Alternatively, the State says it has sufficiently alleged the required nexus. Both contentions are wrong.

The State says *Kimbrough*'s nexus requirement applies only to a RICO violation under O.C.G.A. § 16-14-4(b) and that Count 1 alleges a RICO conspiracy under § 16-14-4(c)(1). But § 16-14-4(c) specifically refers to a "conspir[acy] or endeavor to violate any of the provisions of subsection (a) or (b)." By expressly invoking § 16-14-4(a)–(b), § 16-14-4(c) prohibits any conspiracy to engage in "a pattern of racketeering activity." And this means the State must plead a nexus between that pattern of racketeering and the enterprise. The State cites no Georgia authority limiting *Kimbrough* in the manner it suggests. *See* Resp. at 19–20. Quite the opposite, Georgia law says a conspiracy claim fails whenever substantive claims fails, so it makes little sense to drive a wedge between the two. *See Hourin v. State*, 301 Ga. 835, 839 (2017).

Whatever nexus Count 1 attempts to cobble together involves unsupported allegations and legal impossibilities, as Cheeley noted in his initial brief. For example, the Indictment alleges that "[t]he purpose of … false statements [serving as RICO predicate acts] was to persuade Georgia legislators to reject lawful electoral votes cast by the duly elected and qualified presidential electors from Georgia." Indictment at 16. Such allegations make no sense at all, and they certainly do not articulate the nexus required by *Kimbrough*. As repeatedly pointed out in Cheeley's initial brief, state legislators have ***no power*** to affect the outcome of a presidential election once voting occurs. How then were these legislators going to "reject lawful electoral votes" and change the election? The answer is they could not. And again, the State ignores the arguments and law against its position because it has no response.

e. None of the individual predicate acts pass muster under Georgia's RICO Act.

As set forth in Cheeley's initial brief, all of the individual predicate acts and racketeering activity identified in the Indictment are deficient. And because they are all deficient, no RICO charge can stand. The State blithely passes over this fact without directly addressing the challenges Cheeley raises to the validity of the alleged predicate acts. Cheeley relies on arguments related to these ill-pled racketeering activities contained his initial brief.

ii. Count 9 fails to allege a conspiracy to impersonate a public officer under O.C.G.A. §§ 16-4-8, 16-10-23 because presidential electors are not Georgia public officers, and Cheeley had no fair-notice of that novel application.

Count 9 avers that Cheeley violated O.C.G.A. §§ 16-4-8[12] and 16-10-23 by "unlawfully conspir[ing] to cause certain individuals to falsely hold themselves out as the duly elected and

[12] O.C.G.A. § 16-4-8 is referenced merely to claim that there was a "conspiracy" to violate O.C.G.A. § 16-10-23. If the substantive claim fails, so does the conspiracy claim. *See Hourin v. State*, 301 Ga. 835, 839 (2017). But the conspiracy claims also fail because

qualified presidential electors . . . .” Indictment at 76. As noted previously, this section does not apply to federal officers, and it certainly does not apply to presidential electors.

O.C.G.A. § 16-10-23 prohibits holding oneself “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.” Count 9 alleges Cheeley and others violated § 16-10-23 by conspiring to impersonate certain presidential electors, who are supposedly “public officers[.]” Indictment at 76. But they are not.

Like grand jurors, presidential electors are “lacking in the element of tenure and duration which must exist in order to qualify [them] as public officers.” *McDuffie v. Perkerson*, 173 S.E. 151, 155 (1933). To be sure, both presidential electors and grand jurors “receive[] compensation based upon the number of days in which the[y] serve[]” and “perform[] important public duties.” *Id*. at 154; *see* O.C.G.A. § 21-2-13. While these attributes may be “consistent with the position or status of public officers[,] [n]one of them are conclusive in determining such a status.” *McDuffie v. Perkerson*, 173 S.E. at 154. For both grand jurors and presidential electors though, “tenure or continuity is still a matter of uncertainty.” *Id*. Indeed, “for a large part of each year in most counties no persons are serving as grand jurors[,]” and grand jurors may otherwise be excused for a host of reasons. *Id*. at 154–55. Presidential electors meet only once every four years and can be easily replaced without any democratic input or even public knowledge. *See* O.C.G.A. §§ 21-2-11–12. And, like grand jurors, no statute suggests that presidential electors must swear the same oath as public officers or that their oaths remain binding after temporary duties conclude, and the Indictment does not allege otherwise. Thus, neither grand jurors nor presidential electors are public

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the Indictment doesn’t allege that Cheeley agreed to join a criminal conspiracy. *See Drane v. State*, 265 Ga. 255, 257 (1995) (“The essence of conspiracy under O.C.G.A. § 16-4-8 is an *agreement*”).

officers as contemplated by § 16-10-23. To the extent the State argues otherwise, it is expanding the reach of the statute beyond recognition.

Importantly, the State has *never* prosecuted anyone for impersonation under § 16-10-23 unless the defendant sought to impersonate a law-enforcement officer or the employee of a state agency. Since 1948, Georgia courts appear to have cited § 16-10-23 on only twenty-three occasions. Twenty of those decisions involved the impersonation of law-enforcement or corrections officers,[13] while two decisions implicated defendants impersonating employees of Georgia Division of Family and Children Services.[14] One involved impersonating an unidentified "public officer" in the context of a rape and kidnapping, strongly suggesting that the officer at issue was either law enforcement or employed by some state agency as well. *See Robinson v. State*, 298 Ga. App. 164 (2009). No state prosecution has ever involved the alleged impersonation of anyone remotely resembling a presidential elector.

The State's contention that the statute reaches presidential electors is "novel" at best. But due process precludes "novel" applications of criminal statutes regarding conduct that has never been fairly contemplated to be within their scope. *See Bouie*, 378 U.S. at 351, 353 (quoting *U.S. v. Harris*, 347 U.S. 612, 617 (1954); *see also Lanier*, 520 U.S. at 265.

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[13] *Schultz v. Lowe*, 364 Ga. App. 345 (2022); *Walker v. State*, 349 Ga. App. 188 (2019); *Libri v. State*, 346 Ga. App. 420 (2018); *Jones v. State*, 320 Ga. App. 681 (2013); *Jones v. State*, 315 Ga. App. 427 (2012); *Powers v. State*, 303 Ga. App. 326 (2010); *Lankford v. State*, 295 Ga. App. 590 (2009); *Cain v. State*, 259 Ga. App. 634 (2003); *Pryor Org., Inc. v. Stewart*, 274 Ga. 487 (2001); *Self v. State*, 274 Ga. 487 (2000); *Stewart v. State*, 240 Ga. App. 375 (1999); *Thompson v. State*, 240 Ga. App. 26 (1999); *Murray v. State*, 269 Ga. 871 (1998); *Sweeney v. State*, 233 Ga. App. 862 (1998); *Walker v. State*, 225 Ga. App. 19 (1997); *Cooper v. State*, 189 Ga. App. 286 (1988); *Parks v. Assoc. Commercial, Corp.*, 181 Ga. App. 235 (1986); *Williams v. State*, 178 Ga. App. 80 (1986); *Loomis v. State*, 78 Ga. App. 153 (1948); *Burke v. State*, 76 Ga. App. 612 (1948).

[14] *Ward v. Carlton*, 313 Ga. 333 (2022); *Kennedy v. Carlton*, 294 Ga. 576 (2014).

The State's contrary arguments are of no avail. Resp. at 26–27. Relying on *In re Green*, makes little sense for the State because that decision says presidential electors are neither federal nor state officers, which favors dismissing Count 9. *See* 134 U.S. 377, 379 (1890). And none of the State's other authorities get around the fundamental problem that § 16-10-23 has always been limited in application to law-enforcement and state employees and that presidential electors are neither. The State's novel construction of the statute is unsupported and presents due-process issues.

iii. Counts 11 and 17 fail to properly allege a conspiracy to commit forgery.

Counts 11 and 17 allege that Cheeley violated O.C.G.A. §§ 16-4-8 and 16-9-1(b) by "unlawfully conspir[ing], with the intent to defraud, to knowingly make" two documents "CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM GEORGIA[]" and "RE: Notice of Filling of Electoral College Vacancy." Indictment at 77, 80. Cheeley and others supposedly 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*. Finally, Cheeley and his alleged co-conspirators "utter[ed] and deliver[ed]" the first document to the Archivist of the United States and the second to the Governor of Georgia. *Id*.

The theory underlying Count 9 completely undermines the rationale of Counts 11 and 17. If Cheeley and others "conspired to cause certain individuals to … hold *themselves out as the duly elected and qualified presidential electors*" (Count 9), then why would they ever conspire to create any document that "purport[ed] to have been made by authority" of some other slate of electors (Counts 11 and 17)? This would be akin to George W. Bush signing "Al Gore" on official documents in January 2001. Either George W. Bush believed he was president and acted as such,

or he thought that Al Gore was the president and pretended to act on Al Gore's authority. Both cannot be true. And the same logic applies here. Either Cheeley and other Defendants conspired to cause certain individuals to hold themselves out as valid presidential electors, or they conspired to make documents that invoked the authority of some other electors. The latter action would entirely undercut the former claim, and vice versa. Counts 11 and 17 are therefore subject to dismissal because they cannot be true in light of Count 9 without profound cognitive dissonance.

Aside from that fundamental flaw, Counts 11 and 17 fail to allege that Cheeley conspired to make or utter the writings at issue "with the intent that they be received as the acts (signatures) of any person[s] than the person[s] signing[.]"*See Ga. Cas., Sur. Co. v. Seaboard Sur. Co.*, 210 F. Supp. 644, 656–57 (N.D. Ga. 1962), *aff'd*, 327 F.2d 657 (5th Cir. 1964) (applying Georgia law). "The essence of forgery is that the writing must purport to be the writing of another than the person making it." 19 Ga. Jur. Criminal Law § 24:1. The writings at issue were undisputedly made with the intention that they be received as acts of the signatories. No part of the writings invokes the authority of any other electors who did not sign. Cheeley therefore cannot be held liable for whatever supposed role he played in making or delivering such writings. Indeed, the State cites no example of anyone being prosecuted for forgery by signing their own name and without any express invocation of any other's name. Counts 11 and 17 are therefore subject to dismissal for this reason too.

Finally, any role that Cheeley had in making or uttering these documents is protected by his First Amendment rights to speak and associate freely and to petition his government. And the ECA otherwise preempts prosecutions based on attempts to advance alternate slates of electors. To the extent any doubt persists, lenity requires the Court to construe §§ 16-4-8 and 16-9-1(b) in

Cheeley's favor.[15]

The State's attempts to withstand dismissal are lacking. Resp. at 27–30. At the outset, allegations from Count 1 cannot rescue Counts 11 and 17 because "each count set forth in an indictment must be wholly complete within itself, and plainly, fully, and distinctly set out the crime charged in that count." *Smith v. Hardrick,* 266 Ga. 54, 54–55 (1995)). And "[a]llegations set forth in one count of an indictment cannot be imputed to a separate count, absent specific reference to the allegation sought to be imputed." *Id*. at 56. Count 1 says nothing about Counts 11 and 17 and vice versa, so the State cannot combine the allegations. The State otherwise persists in maintaining that Cheeley both (1) conspired to encourage others to hold themselves out as valid president electors while also (2) conspiring to forge the signatures of different electors whose validity would undermine the validity of the other electors. The theory still makes absolutely no sense as pleaded.

iv. Count 26 fails to adequately plead false statements in violation of O.C.G.A. § 16-10-20.

Count 26 insists that Cheeley violated O.C.G.A. § 16-10-20 by "knowingly, willfully, and unlawfully" making at least one false statement and representation during his testimony before a subcommittee of the Georgia Senate Judiciary Committee. Indictment at 85. That testimony, according to Count 26, came "within the jurisdiction of the Office of the Georgia Secretary of State and the Georgia Bureau of Investigation, departments and agencies of state government, and county and city law enforcement agencies." *Id*.

Count 26 is subject to dismissal for at least five reasons. *First*, no authority suggests that

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[15] Cheeley supposedly conspired to (1) commit forgery in violation of and § 16-9-1(b) and (2) make false statements in violation of O.C.G.A. § 16-10-20 (more on that below) based on the exact same documents. *See* Indictment at 77–78 (Counts 11, 13), 80–81 (Counts 17, 19).). "[B]ecause these two statutes provide for different penalties for the same conduct at issue in this case, the rule of lenity applies[.]" *Martinez v. State*, 337 Ga. App. 374, 379 (2016).

the Georgia Secretary of State or the Georgia Bureau of Investigation exercise jurisdiction over the Georgia Senate—if they did, separation-of powers principles would be in jeopardy. *See* Ga. Const. Art. I, § II, ¶ I; *Vill. of North Atlanta v. Cook*, 219 Ga. 316, 319–20 (1963). *Second*, the Georgia Senate is not a "department or agency of state government" under § 16-10-20. *See Ga. Dept. of Hum. Resources v. Sistrunk*, 249 Ga. 543, 543 (1982), *overruled on other grounds by Ga. Ports Auth. v. Harris*, 274 Ga. 146 (2001). *Third*, Cheeley's testimony to the General Assembly is protected by his rights to speak freely and petition the government for redress of grievances. *See Bates*, 361 U.S. at 523; *Stromberg*, 283 U.S. at 369. *Fourth*, Count 26 fails[16] to allege that (1) Cheeley contemplated his testimony coming "to the attention of an agency with the authority to act on [it]," or (2) that he intended to deceive and harm any government department or agency—both of which are required to allege a violation of § 16-10-20. *See Haley*, 289 Ga. at 521; *Martinez*, 337 Ga. App. at 378–79. *Fifth*, there is no identifiable record of any prosecution under § 16-10-20 arising out of testimony before the General Assembly, which presents serious fair-notice and due-process issues. *See Bouie*, 378 U.S. at 353–55.

For its part, the State counters that "[i]t is of no consequence that the false statements alleged in Count 26 were made to members of the General Assembly" and that "the forum in which the statement was made" is irrelevant under § 16-10-20. Resp. at 31. It then cites examples of defendants being charged under § 16-10-20 for making public statements. *Id*. But that ignores the unique nature of the General Assembly and unsworn legislative testimony. The Secretary of State is an "executive officer," Ga. Const. Art. V. § III, ¶ I, and the Georgia Bureau of Investigation is a law-enforcement agency that exercises historically executive functions. There is no identifiable

16 If Cheeley believed his petition to the senate subcommittee was protected speech, he could not believe it was actionable under O.C.G.A. § 16-10-20.

tradition of executive functionaries reaching into legislative chambers and interfering with unsworn testimony delivered therein. Count 26 therefore lacks any legal basis. And, as reiterated above and below, an allegation that a defendant violated § 16-10-20 requires pleading that the defendants' conduct fell within an agency's jurisdiction. *See Haley*, 289 Ga. at 527. Unsworn testimony before a legislative body does not satisfy that requirement.

v. Counts 13 and 19 fail to plead a conspiracy to make false statements and writings in violation of O.C.G.A. §§ 16-4-8 and 16-10-20.

Counts 13 and 19 profess that Cheeley violated O.C.G.A. §§ 16-4-8 and 16-10-20 by "conspir[ing] to knowingly and willfully make and use [ ] false document[s]" entitled "CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM GEORGIA" and "RE: Notice of Filling of Electoral College Vacancy,"[17] which are the same documents Counts 11 and 17 invoke. Indictment at 78, 81. The former document was supposedly false because the signatories identified themselves as Georgia's valid presidential electors (same theory propounded by Count 11). Indictment at 78. And the second document "contained the [allegedly] false statements that David Shafer was Chairman of the 2020 Georgia Electoral College Meeting and Shawn Still was Secretary of the 2020 Georgia Electoral College Meeting" (also the basis of Count 17). Indictment at 81.

Counts 13 and 19 must be dismissed for at least five reasons as well. *First*, each count fails to allege that (1) Cheeley contemplated either document coming "to the attention of an agency with the authority to act on [it]," or (2) that Cheeley intended these documents and their statements to deceive and harm any government department or agency—both of which are required to allege

[17] As matter of fact, 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.

a violation of § 16-10-20. *See Haley*, 289 Ga. at 521; *Martinez*, 337 Ga. App. at 378–79. *Second*, Counts 13 and 19 do not even allege to whom the documents at issue were directed; they merely suggest the documents were within the jurisdiction of certain agencies without explaining how that came to be. *Third*, any involvement Cheeley had with making or transmitting these documents is protected by his rights to speak and associate freely and to petition the government for redress of grievances. *See Bates*, 361 U.S. at 523; *Stromberg*, 283 U.S. at 369. *Fourth*, the ECA's express contemplation of Congress resolving disputes between competing elector slates preempts the State's ability to interfere with that process. *See* 3 U.S.C. § 15; *see also Bush*, 531 U.S. at 127 & n.5 (Stevens, J., dissenting). *Fifth*, the strict construction requirement leads to the conclusion that § 16-10-20 does not encompass Cheeley's alleged conduct because a reasonable person in his position would not have understood himself to be conspiring to file false statements. *See Martinez*, 337 Ga. App. at 379.

The State's two-sentence response to Cheeley's arguments to demur Counts 13 and 19 illustrates how little faith it has in those counts. Resp. at 32. The State first maintains that all it must allege under § 16-10-20 is that Cheeley "acted knowingly and willfully[.]" *Id*. (punctuation omitted). That seriously misreads *Haley*, which requires allegations "that the defendant [(1)] knowingly and willfully made a false statement and that he [(2)] knowingly and willfully did so *in a matter within the jurisdiction of a state or local department or agency*." *Haley*, 289 Ga. at 527. Whether a defendant acted knowingly and willfully is irrelevant if the matter in which he acted did not fall within an agency or department's jurisdiction. And the State's allegation that unsworn legislative testimony falls within the jurisdiction of an external agency or department is legally impossible under the Georgia Constitution. *See* Ga. Const. Art. I, § II, ¶ III.

But perhaps the most glaring omission from the State's response is any attempt to identify

to whom Cheeley allegedly transmitted the false documents at issue in Counts 13 and 19. The only statement in the indictment is that the documents were "made and used in Fulton County, Georgia." But where did they go? In the mail? In the trash? One is left to wonder. Because any false-document or false-statement accusation requires identifying to whom the false document or statement was made, and the Indictment fails to clear that elementary hurdle, the Court should dismiss Counts 13 and 19 with prejudice.

vi. Count 15 fails to allege a conspiracy to file false documents in violation of O.C.G.A. §§ 16-4-8 & 16-10-20.1(b)(1).

Count 15 alleges that Cheeley violated O.C.G.A. §§ 16-4-8 and 16-10-20.1(b)(1) by "conspir[ing] to knowingly file, enter, and record a document titled "CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM GEORGIA," in a court of the United States, having reason to know that said document contained the materially false statement," namely that the signatories were valid presidential electors. Indictment at 79. That should sound familiar by now because the same theory supports Counts 11 and 13. *See* Indictment at 77–81.

Section 16-10-20.1(b)(1) does not apply for at least three reasons.

First, § 16-10-20.1(b)(1) would be unconstitutional if it applied. The Georgia Constitution provides that "No bill shall pass which refers to more than one subject matter or contains matter different from what is expressed in the title thereof." Ga. Const. Art. III, § V, ¶ III. "The purpose of this constitutional provision requiring that the act's title must alert the reader to the matters contained in its body is to protect against surprise legislation." *Mead Corp. v. Collins*, 258 Ga. 239–40 (1988). Section 16-10-20.1(b)(1) is entitled "Filing false lien or encumbrance." That title is not remotely related or naturally connected to filing a certificate of presidential elector votes in a federal court action. Nor is filing such a certificate in federal court even germane to the general subject-matter embraced in the title of § 16-10-20.1. No reasonable person would ever stop to read

a Georgia statute entitled "Filing false lien or encumbrance" before making a filing in federal court unless the filing actually involved lien, encumbrance, or some other property-related issue. So, to the extent that § 16-10-20.1 encompasses filing a certificate of presidential elector votes in federal court, it violates Ga. Const. Art. III, § V, ¶ III and renders Count 15 subject to dismissal.

Second, the court filing at issue in Count 15 is not a "document" under § 16-10-20.1.[18] A "document" in this context "include[s] but [is] … not … 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." § 16-10-20.1(a). The "CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM GEORGIA" is none of those things. While the final category of "other records, statements, or representations of fact, law, right, or opinion" might appear to apply, it does not because statutory terms must be construed in light of the surrounding terms to avoid "ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to an act of the General Assembly."[19] *Kinslow v. State*, 311 Ga. 768, 773 (2021) (quotation omitted). The *ejusdem generis* canon and rule against surplusage also foreclose a broad reading of final category. *Id*. at 774–76.

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[18] At the very least the term "document" is ambiguous and ""[t]he title of a statute or section can aid in resolving an ambiguity in the legislation's text." *I.N.S. v. Nat'l Ctr. for Immigrants' Rts., Inc.*, 502 U.S. 183, 189 (1991). For example, the U.S. Supreme Court holds that a "generic reference to 'employment' should be read as a reference to the 'unauthorized employment' identified in the paragraph's title." *Id*. (emphasis in original). The same principle applies here. A generic reference to a "document" should therefore also be read in context of the title.

[19] Note that ascribing a broad meaning to "document" under § 16-10-20.1(a) also re-creates the Constitutional problem identified above—namely that a statute entitled "Filing false lien or encumbrance" cannot prohibit "filing a false anything in any court" without violating Const. Art. III, § V, ¶ III. The State cannot have it both ways. If § 16-10-20.1 is really that broad, then its misleadingly narrow title creates an insurmountable Constitutional issue.

And, to the extent the Court is evaluating two reasonable interpretations of "document," lenity requires a decision in Cheeley's favor. *Id*. at 776. Count 15 is therefore subject to dismissal on this basis as well.

Third, there is no meaningful record or tradition of prosecuting attorneys for filing documents like this. The absence of any similar prosecutions suggests a fair-notice problem because no reasonable person would read § 16-10-20.1(b)(1) to prohibit the conduct at issue and apparently neither has the State for any number of years until now. Cheeley's alleged conduct is a square peg that does not align with the round hole formed by § 16-10-20.1(b)(1), Count 15 should therefore be dismissed for lack of fair notice. *See Brown v. Sate*, 86 Ga. 633 (Lumpkin, J.) (the use of a word, like document, "which has both a generic and a specific signification," is *not* "sufficient to give the defendant full and fair notice" when the charges at issue lie at the outer edges of the word's definition).

Nothing in the State's response overcomes these fatal flaws. Resp. at 33–34. Most revealing is that the State totally ignores the title of § 16-10-20.1. It then proceeds to cite a civil case involving an actual lien and several other decisions that have nothing to do with § 16-10-20.1. Resp. at 33–34. Again, if the State is correct that § 16-10-20.1 covers any document filed in any case in any court situated in Georgia (whether state, federal, military, or otherwise), then that section is unconstitutional under Art. III, § V, ¶ III. The State also did not address the extensive list of exemplar "documents" (all related to property) that circumscribe the term's definition in context.

vii. Count 23 fails to allege solicitation of a public officer to violate their oath under O.C.G.A. §§ 16-4-7, 16-10-1.

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.

This Count must be dismissed for at least three reasons. *First*, Count 23 neglects to identify or articulate the terms of the oath at issue, which is required to allege a violation of § 16-10-1. *See Jowers v. State*, 225 Ga. App. 809, 812 (1997); *see also Pierson v. State*, 348 Ga. App. 765, 775 (2019); *Bradley v. State*, 292 Ga. App. 737, 740 (2019). *Second*, there is no nexus between "appointing presidential electors from the State of Georgia" and the senators' official duties, which is also required by O.C.G.A. § 16-10-1. *State v. Tullis*, 213 Ga. App. 581, 582 (1994) (collecting cases). *Third*, it is legally debatable whether members of the General Assembly are public officers contemplated by § 16-10-1, as some authority suggest they "are servants of the House and [Senate and] are answerable only to [the Assembly] under its rules and regulations. They owe to citizens generally no duty whatsoever in their official capacities." *Richter v. Harris*, 62 Ga. App. 64, 64 (1940). And as long as that issue remains unresolved, lenity suggests Georgia Senators are not public officials under § 16-10-1, which render Count 23 subject to dismissal.

These fundamental issues persist despite the response's attempts to smooth them over. Resp. at 35–38. The State begins by insisting that Count 23 does not have to "allege exactly which portion of the oath the Defendant solicited legislators to violate." Resp. at 35. This at argument is in tension with Justice Bethel's decision in *Sanders v. State*, where the defendant was charged with soliciting another to violate Georgia's Controlled Substances Act. 313 Ga. 191, 201–02 (2022). That solicitation charge, however, "fail[ed] to allege any underlying facts, such as what drug [the defendant] requested that [another person] possess or in what quantity, that constitute a felony violation of the Georgia Controlled Substances Act." *Id*. at 202. The solicitation charge therefore

did not provide the defendant with "enough information about the criminal solicitation charge to prepare [his] defense intelligently[.]" *Id*. (quotation omitted). So too here. Arguably, Cheeley could have solicited any number of Senators to violate various portions of their respective oaths. Without knowing (1) which Senators took what oaths, (2) what those oaths consist of, and (3) which portions of those oaths Cheeley allegedly solicited Senators to violate, Cheeley cannot hope to prepare any intelligent defense. The State's insistence that it can keep Cheeley guessing is flatly wrong in light of *Sanders* and a host of similar precedents.

The State also impermissibly smuggles allegations from Count 1 into Count 23 as a means to patch various holes in the latter. Resp. at 36–37. Though an indictment is read as a whole, it is fundamental that "each count set forth in an indictment must be wholly complete within itself, and plainly, fully, and distinctly set out the crime charged in that count." *Smith*, 266 Ga. at 55. And "[a]llegations set forth in one count of an indictment cannot be imputed to a separate count, absent specific reference to the allegation sought to be imputed." *Id*. at 56. Count 23 says nothing about Count 1 and vice versa, so the State cannot rely on allegations in the former to smooth the latter's flaws.

Finally, the State's response still fails to establish any nexus between "appointing presidential electors from the State of Georgia" and the senators' official duties as required by O.C.G.A. § 16-10-1. Indeed, the State cites a multitude of decisions involving law-enforcement officers and state employees who engaged in various conduct connected to their positions, like accepting or stealing funds they could not have otherwise accessed but for their jobs. Resp. at 37–38. But no member of the Georgia General Assembly had any power to affect the counting of presidential elector votes. Indeed, the State cites no constitutional provision, statute, or regulation that draws any connection between the General Assembly and the Federal Congress's counting of

electoral votes. The facts here are therefore unlike those in any case cited by the State, where the defendants' conduct occurred as result of their positions. Count 23 is still subject to dismissal.

viii. Count 41 fails to adequately allege perjury.

Count 41 must be dismissed for the simple reason that it neglects to allege any facts establishing that Cheeley's alleged perjurious statements were material. "The 'test of materiality is whether the alleged false statement could have influenced the decision as to the question at issue in the judicial proceeding in which the perjury is alleged to have been committed[.]'" *Walker v. State*, 314 Ga. App. 714, 717 (2012) (quoting *Hardison v. State*, 86 Ga. App. 403 (1952)). There is no allegation regarding how any of Cheeley's alleged statements influenced any decision as to the question at issue before the Special Grand Jury. Lacking that essential element, Count 41 is therefore subject to dismissal.

Nothing in the State's response ameliorates this issue. Resp. at 38. The State emphasizes the Indictment's suggestion that allegedly false statements made before the Fulton County Special Purpose Grand Jury were "material to the accused's own involvement in the December 14, 2020, meeting of Trump presidential elector nominees in Fulton County, Georgia, and to the accused's communications with others involved in said meeting, the issues in question." Indictment at 97. But that is a legal conclusion lacking any meaningful basis in fact. Count 41 is devoid of any explanation as to how the specific statements identified are actually material. The Indictment otherwise omits any facts that actually impeach Cheeley's testimony before the Special Purpose Grand Jury.

ix. The rule of lenity applies when an indictment faces a demurrer.

The State says the "final section of Defendant's motion is a jumble of arguments piled together seemingly at random, with no meaningful application of the law to the facts." Resp. at 39. But the State's *ad hominem* attack ignores and undervalues the import of Cheeley's point—namely

that the State's ability to criminalize conduct is constrained by the well-worn application of the rule of lenity to the interpretation of criminal statutes and is further limited by corollary due process constraints. And in the Indictment, the State's stretching and contorting of statutes has gone too far.[20]

The State disingenuously contends that "the rule of lenity is a rule of sentencing that has no application prior to trial." *Id.* To the contrary, "[t]he rule of lenity … is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language." *U.S v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 & n.10 (1992) (plurality). And it applies to define otherwise ambiguous criminal statutes narrowly and against the State. *See Smallwood v. State*, 310 Ga. 445, 451 (2020); *Haley,* 289 Ga. at 527.

Lenity's application cannot be limited to criminal sentencing because it operates outside of the core criminal context. For example, it "[h]istorically … applied to … laws … we might now consider civil forfeitures or fines." *Wooden v. U.S.*, 595 U.S. 360, 396 n.5 (2022) (Gorsuch J, concurring in part and concurring in judgment); *see also* Amy Coney Barrett, Substantive Canons and Faithful Agency, 90 B.U. L. REV. 109, 129 n.92 (2010) (explaining that "the rule of lenity was routinely applied to forfeiture statutes"). The U.S. Supreme Court has also invoked lenity when construing a deportation statute that had criminal and non-criminal applications. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004). The State's attempt to cabin lenity to criminal sentencing

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20 The State's Indictment is premised exclusively on its allegation of election misconduct. It is telling that ***nowhere*** does the Indictment charge any Defendant with a criminal violation of Georgia's Election Code, O.C.G.A. §§ 21-1-1, *et seq.*—which deals with issues such as appointment of presidential electors, the certification of presidential elections, the process of challenging elections, etc. The State apparently found no criminal conduct in the more than 600 annotated pages the General Assembly devoted to these issues, including 90 sections imposing criminal violations related to elections. Finding none, the State set about engaging in a taffy pull and warping sections of Title 16 to fit its ends. And this is where lenity and due process come into play.

is profoundly nonsensical, disingenuous, and ahistorical.

Additionally, and as noted in Cheeley's initial brief and above, the State attempts to stretch the statutes it charges beyond recognition. This violates Cheeley's due process right to fair notice of the potential claims against him. When the State gets creative in its prosecution of criminal statutes, individual rights suffer. And contrary to the State's suggestion, no facts need be developed to see that the Indictment fails on this ground.

III. CONCLUSION

Based upon the facts, authorities and grounds set forth herein and in the initial Joint General and Special Demurrer to the Indictment, Motion to Quash the Indictment, and Plea In Bar, the Court should dismiss the Indictment against Defendant Robert David Cheeley

Respectfully submitted, November 28, 2023.

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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 28th day of November 2023, served a true and correct copy of the within and foregoing AMENDED REPLY IN SUPPORT OF DEFENDANT ROBERT DAVID CHEELEY'S JOINT GENERAL AND SPECIAL DEMURRER, PLEA IN BAR, AND MOTION TO QUASH via electronic filing.

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Exhibit A

House Bill 475

By: Representatives Schofield of the 60th, Davis of the 87th, Scott of the 76th, Burnough of the 77th, McLeod of the 105th, and others

A BILL TO BE ENTITLED

AN ACT

To amend Chapter 1 of Title 28 of the Official Code of Georgia Annotated, relating to general provisions regarding the General Assembly, so as to provide that committees of the General Assembly shall have the ability to subpoena persons to testify before such committees or for the production of documents for examination by the committees; to provide for procedures for the issuance of such subpoenas; to specify certain applications for subpoenas must meet additional requirements; to provide for the enforcement of such subpoenas; to provide that committees may swear witnesses who appear before such committees; to provide penalties for false testimony before such committees; to provide for related matters; to provide for an effective date; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Chapter 1 of Title 28 of the Official Code of Georgia Annotated, relating to general provisions regarding the General Assembly, is amended by revising Code Section 28-1-16, relating to issuance of subpoenas by Superior Court of Fulton County on behalf of the Committees on Ethics of the Senate and House of Representatives, as follows:

"28-1-16.

(a) The chairperson or acting chairperson of each committee of the Senate and House of Representatives shall be authorized to administer an oath to persons testifying before such committee for such person to swear or affirm that such person shall testify truthfully.

~~(a)~~(b) If any committee ~~If the Committee on Ethics~~ of the Senate or House of Representatives determines that the effective functioning of the committee requires the issuance of compulsory process to secure the attendance of a witness or the production of documents and materials, or in the case of the Committee on Ethics of the Senate or House of Representatives if a person whose conduct is called into question in an investigation or other proceeding requests the issuance of such compulsory process, the chairperson or acting chairperson shall make application in writing to the presiding judge of the Superior Court of Fulton County for the issuance of an appropriate subpoena. Such application shall:

(1) Describe in general terms the investigation or other proceeding for which the issuance of subpoena is sought ~~and identify the provisions of the Senate or House rules authorizing the committee to conduct such investigation or proceeding~~;

(2) In the case of process to secure the attendance of a witness, identify the witness; the general nature of the questions to be propounded to the witness; and the reasons for believing that the testimony of the witness is likely to be relevant to the authorized scope of the investigation or proceeding; or

(3) In the case of process to secure the production of documents and materials, identify the person to whom the subpoena is to be directed; the general nature of the documents and materials in question; and the reasons for believing that such documents and materials are likely to be relevant to the authorized scope of the investigation or proceeding~~;~~.

(c) In the case of the Committee on Ethics of the Senate or the House of Representatives, such application shall also:

~~(4)~~(1) State whether confidential treatment of the application for and issuance of the subpoena is requested;

~~(5)~~(2) If the application is submitted on behalf of a person whose conduct is called into question, be accompanied by any materials in support of the application which such person desires to have transmitted to the court with the application; and

~~(6)~~(3) If the application is submitted on motion of the committee, be sought by the chairperson or acting chairperson only after notification to the person whose conduct is in issue that the subpoena will be sought.

~~(b)~~(d) The presiding judge shall act on such application within 48 hours after it is presented to the judge. If the judge finds that the committee is acting within the scope of the authority granted to it by the rules of the Senate or House of Representatives and that the testimony or documents or materials sought to be elicited appear to be likely to be relevant to the authorized scope of the investigation or proceeding, the judge may cause an appropriate subpoena to be issued and transmitted to the chairperson or acting chairperson. If the judge deems it necessary or appropriate, the judge may hold a closed or open hearing with respect to his or her determination of this matter.

~~(c)~~(e) When authorized by the rules of the Senate ~~and~~ or House of Representatives, the confidential treatment of material and information in the course of investigations and other proceedings of ~~the Committees on Ethics~~ any committee of the Senate or House of Representatives shall be recognized by law. Such confidential treatment shall be preserved as applicable in proceedings under this Code section as provided in this subsection. If the application for a subpoena requests confidential treatment, the court shall in any event take any and all steps necessary or appropriate to preserve the confidentiality of the application. The court may, but shall not be required to, issue the subpoena in such a manner as to preserve its confidentiality. If the court determines that a subpoena may be issued but confidential treatment is not warranted under the rules of the Senate or House of

Representatives, the judge shall so notify the chairperson or acting chairperson; and the chairperson or acting chairperson shall then have the option to:

(1) Abandon the request for a subpoena, in which case the application shall remain confidential; or

(2) Accept the determination of the court, in which case the subpoena shall issue, but the application and the issuance shall not be treated as confidential.

~~(d)~~(f) In case of refusal to obey a subpoena issued under this Code section to any person, the Superior Court of Fulton County, upon application by the chairperson or acting chairperson, may issue to the person an order requiring ~~him or her to appear~~ an appearance before the court to show cause why ~~he or she~~ such person should not be held in contempt for refusal to obey the subpoena. Failure to obey a subpoena may be punished by the court as contempt of court.

~~(e)~~(g) A subpoena issued under this Code section may be served at any place in this state and in any manner authorized in Code Section 24-13-24. Fees and mileage shall be paid and tendered as provided in Code Section 24-13-25, notwithstanding the general exemption of the state from tender of fees and mileage, and shall be in the form of a check issued by the Legislative Fiscal Office upon the written request of the chairperson or acting chairperson.

~~(f)~~(h) Any decision of the court under this Code section shall be appealable in the same manner as provided by law for the appeal of a final judgment in a civil action."

SECTION 2.

This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval.

SECTION 3.

All laws and parts of laws in conflict with this Act are repealed.