IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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

JOINT GENERAL AND SPECIAL DEMURRER TO, PLEA IN BAR TO, AND MOTION TO QUASH THE INDICTMENT OF DEFENDANT ROBERT DAVID CHEELEY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

In December 2020, two Georgia state senators contacted a respected Georgia lawyer, Robert Cheeley, to answer their legal questions regarding the 2020 presidential election. In addressing the senators' inquiries, Cheeley facilitated communications among various persons, including other attorneys. He also shared his concerns about presidential ballot counting at State Farm Arena before a subcommittee of the Georgia State Senate's Judiciary Committee. Cheeley's activities—advocating for clients and petitioning government regarding election issues—are protected under the Federal Constitution, conform with federal election law, and accord with historical precedent regarding election challenges. Nonetheless, based on that same conduct, the Indictment charges Cheeley with state law crimes. The question is whether Cheeley's alleged conduct violates Georgia criminal law as charged in the Indictment. It does not.

The Indictment fails on multiple grounds. *First,* the Indictment is preempted by the Electoral Count Act of 1887 ("ECA") and is therefore barred by the Supremacy Clause. *Second,* the Indictment unconstitutionally infringes on Cheeley's rights secured by the U.S. Constitution and the Georgia constitution. *Third,* the Indictment fails to allege required legal elements or sufficient facts to support the crimes alleged. Cheeley is entitled to a "perfect" Indictment regarding the charges against him. This Indictment is, however, far from "perfect." The Court should therefore dismiss all charges against Cheeley.

II. INDICTMENT ALLEGATIONS AGAINST CHEELEY

Following the November 2020, presidential election, Cheeley advised two Georgia senators regarding their concerns about the selection of Georgia's presidential electors and a potentially flawed vote-counting process. According to the Indictment, Cheeley contacted a law professor and constitutional scholar, John Eastman, in early December 2020 for legal advice pertaining to his clients' election concerns.[1] Indictment at Count I (Acts 34-36). The Indictment claims Cheeley's involvement, related to these legal inquiries into to the propriety of the 2020 presidential election and the validity of the presidential electors, is somehow criminal. *See* Indictment at Count 1 (Acts 34-37) (discussions related to legal issues surrounding the election and electors); Counts 9, 11, 13, 15, 17, and 19 (same).

The Indictment further insists that Cheeley's election-related statements to the Georgia Senate's Judiciary Committee on December 30, 2020, were also criminal. *See* Indictment at Count I (Act 102); Count 23. In particular, the Indictment maintains Cheeley violated Georgia law by testifying: (1) election workers suspended ballot-counting efforts at State Farm Arena on November 3, 2020 because of an alleged "major watermain break"; and (2) some election workers at that same location also voted certain ballots "over and over." *See* Indictment at Count 1 (Act 105); Count 26.

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[1] Cheeley's communications with his clients are protected by the attorney-client privilege. O.C.G.A. § 24–5–501(a)(2). Initial discovery provided by the State shows the State may have impermissibly secured attorney-client privileged communications and used them in the Indictment. Cheeley intends to raise this issue separately with the Court.

Cheeley's remarks to the subcommittee were limited, as a transcript and video indicate, to observations based on the surveillance video of Fulton County's ballot-processing operations and the surrounding circumstances. At the hearing, Cheeley displayed a video of the ballot counting at State Farm Arena and expressed his concerns about actions recorded in the video. Cheeley simply brought public attention to those issues.[2] The Indictment does not claim or show otherwise.

As to the alleged "false statements" to the subcommittee, over a month prior to Cheeley's statements, District Attorney Fani Willis commented on the exact same events and echoed the same concerns Cheeley discussed before the subcommittee relating to irregular vote counting at State Farm Arena. D.A. Willis posted the following message on Facebook:

> [A]bsentee balloting in Georgia's most populous county delayed 4 hours after a water pipe burst ... Georgia could determine who is our next president. A TEAM of lawyers needs to watch them count every single VOTE. They can start in Fulton where we are having water leaks. What ballots are they throwing out? Georgia let's give an honest accounting. No stunts!"

See November 4, 2020, Facebook Post, attached as **Exhibit A**. Willis's comments show three things: (1) many people, including the D.A., were concerned about vote counting at State Farm Arena after a "water pipe burst"[3]; (2) those concerns led to

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[2] Relevant portions of the December 30, 2020, hearing are attached hereto as **Exhibit B**. A video of the proceeding is attached as **Exhibit C**. The hearing transcript and video can be considered as part of Cheeley's Motion because they are: (1) referenced in the Indictment; (2) central to the Indictment; and (3) are undisputed. *See Hi-Tech Parms., Inc. v. HBS In'tl Corp.*, 910 F.3d 1186, 1189 (11th Cir. 2018) (dealing with motion to dismiss a complaint). Whether or not they are considered, the Indictment still fails for the reasons discussed herein.

[3] The Indictment says Cheeley did not tell the truth to the subcommittee because he said there was a "major watermain break" at State Farm Arena. *See* Indictment at 48, 85 (Act 105 and Count 26). This was what D.A. Willis said. It is also what was reported by the media (including the Atlanta

public calls for an investigation and monitoring; and (3) the D.A. is now targeting certain persons for political reasons regarding speech that was nearly identical to her own.[4]

The video played to the subcommittee shows the same ballots being run through the machines several times. Even if the ballots had not actually been "counted" twice, the Indictment seeks to criminalize public testimony before a legislative body based on a video showing that the ballots appear to have been counted more than once.

When the subcommittee met on December 30, 2020, the General Assembly was both statutorily and constitutionally without any power to affect the outcome of the 2020 election. By that time, the matter was in Congress's hands pursuant to the ECA. Rather than seeking to change the outcome of the 2020 election, the subcommittee was a forum to discuss and evaluate election process concerns that might be addressed in future legislation. All of these are issues of great public concerns, and they in fact resulted in legislative change.[5]

Journal Constitution). *See* https://www.ajc.com/news/atlanta-news/fulton-election-results-delayed-after-pipe-bursts-in-room-with-ballots/4T3KPQV7PBEX3JVAIGJBNBSVJY/. All this a month before Cheeley's testimony.

[4] If this Indictment is not dismissed, as it should be, Cheeley reserves the right to call D.A. Willis as a witness in this case and cross examine her regarding her November 4, 2020 Facebook post and her myriad of other public statements regarding the 2020 presidential election.

[5] After the 2020 presidential election was resolved by Congress on January 6, 2021, the 2021 Georgia General Assembly passed, and the Governor signed, S.B. 202 which substantially amended the manner in which elections are conducted in Georgia. These amendments included changes in the manner, timing, and oversight of election night ballot counting. The concerns addressed by these changes were among the issues discussed at the subcommittee on December 30, 2020—including those raised by Cheeley.

The Indictment also maintains that, in January 2021, Cheeley allegedly received and placed a number of phone calls (including those from clients) that involve persons associated with post-election litigation and challenges, though the substance of those calls (and whether the alleged calls ever went through) is not set forth in the Indictment. *See* Indictment at Count 1 (Act 127). The Indictment finally claims Cheeley perjured himself to the special grand jury in 2022. *See* Indictment at Count 1 (Act 161); Count 41.

The Indictment says nothing more about Cheeley. What it does say is insufficient to sustain any of the 11 charges against him.

III. LEGAL STANDARD

Defendants in Georgia are "entitled to a charging instrument that is perfect in form as well as substance." *City of Peachtree City v. Shaver*, 276 Ga. 298, 300 (2003). The right to a perfect indictment "serves to satisfy the Sixth Amendment's due process requirement that the defendant 'be informed of the nature and cause of the accusation,' and the Fifth Amendment's indictment requirement ensuring that a grand jury return an indictment only when it finds probable cause to support all the essential elements of the offense." *Sneiderman v. State*, 336 Ga. App. 153, 154 (2016) (citation omitted).

Defendants can challenge an indictment by general and special demurrers. A *general* demurrer "challenge[s] the sufficiency of the substance of the indictment." *Green v. State*, 292 Ga. 451, 452 (2013) (cleaned up). By doing so, the defendant argues that he "could admit each and every fact alleged in the indictment and still be innocent of any crime[.]" *Kimbrough v. State*, 300 Ga. 878, 880 (2017). "[T]o withstand

a general demurrer, an indictment must (1) recite the language of the statute that sets out all the elements of the offense charged, or (2) allege the facts necessary to establish violation of a criminal statute."[6] *Jackson v. State*, 301 Ga. 137, 141 (2017). If an Indictment "fails to allege all the essential elements of the ... crimes charged ... [it] violates due process, is void, and cannot withstand a general demurrer." *State v. Mondor*, 306 Ga. 338, 341 (2019) (cleaned up).

A *special* demurrer challenges the charge's form, contending it is "imperfect . . . or that the [defendant] is entitled to more information." *Kimbrough*, 300 Ga. at 880–81 (cleaned up). "[T]he test for determining the constitutional sufficiency of an indictment when faced with a special demurrer is whether it contains the elements of the offense intended to be charged [to] sufficiently apprise[] the defendant of what he must be prepared to meet[.]" *Sanders v. State*, 313 Ga. 191, 195 (2022) (quotation omitted).

Under ***either*** a general or specific demurrer, "[a]n indictment is to be strictly construed against the state when a demurrer has been filed against it." *State v. Wright*, 333 Ga. App. 124, 126 (2015). The Court must "strictly" construe the underlying criminal statutes "against criminal liability" and interpret them in a

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[6] Decisions differentiating general demurrer from special demurrer have been, at times, somewhat inconsistent. The Georgia Court of Appeals recently said that "an allegation that an indictment was deficient because it did not contain all the essential elements of the crime is, in essence, a special demurrer seeking greater specificity." *Holtzclaw v. State*, 367 Ga. App. 687, 690 (2023) (quotation omitted). This conflicts with *Mondor* and other Georgia Supreme Court cases. At other times, and recently, the Court of Appeals recognizes that an "accusation [is] subject to a general demurrer" when it "does not contain an essential element of the offense[.]" *Woods v. State*, 361 Ga. App. 844, 852 (2021). Which standard applies to which demurrer has recently been debated internally by the Court of Appeals. *Compare Tate-Jesurum v. State*, 890 S.E.2d 78, 80–82 (2023), *with id.* at 82–86 (Dillard, J., dissenting). Here, whether viewed as a general or special demurrer, each count of the Indictment charged against Cheeley fails.

manner that is "most favorable to" the defendant where the statutes are "susceptible to more than one reasonable interpretation[.]" *Jenkins v. State*, 284 Ga. 642, 645 (2008) (cleaned up).

Defendants can also raise "constitutional objection[s]" by filing a "motion to quash[] or plea in bar[]" in addition to a demurrer. *See Simmons v. State*, 246 Ga. 390, 391 (1980). Like a general demurrer, a plea in bar "in confession and avoidance ... rests upon the assertion that, even if all the facts as alleged in the indictment are true, the defendant cannot be held liable." *Davis v. State*, 307 Ga. 784, 787 (2020). A motion to quash can challenge an indictment on the grounds that the underlying criminal statutes are "unconstitutional ... as applied to [the defendant] because [they] violated [his] First Amendment right to free speech and his Fourteenth Amendment right to due process." *Major v. State*, 301 Ga. 147, 148 (2017).

Here, regardless of the procedural vehicle, and Cheeley asserts them all as to every count against him, all charges against Cheeley fail as a matter of law and should be dismissed.

IV. ARGUMENT

A. Federal law preempts the Indictment's charges against Cheeley.

"The preemption doctrine is a product of the Supremacy Clause, ... which invalidates state laws that interfere with, or are contrary to, federal law." *Norfolk Southern R. Co. v. Zeagler*, 293 Ga. 582, 598 (2013) (cleaned up); *see also Arizona v.*

Inter Tribal Council of Arizona, Inc., 570 U.S. 1, 15 (2013).[7] Here, the federal law is the Electoral Count Act of 1887, 3 U.S.C. § 1, *et seq.* ("ECA"),[8] which governs the counting of presidential electoral votes—an area that is uniquely and exclusively within the authority of Congress. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995) ("[P]owers over the election of federal officers ha[ve] to be delegated to, rather than reserved by, the States."); *accord McCulloch v. State*, 17 U.S. 316, 317 (1819).

Under this doctrine, Congress can preempt state law in three ways: "(1) express preemption; (2) field preemption (regulating the field so extensively that Congress clearly intends the subject area to be controlled only by federal law); and (3) implied (or conflict) preemption." *Smith v. Hi-Tech Pharmaceuticals, Inc.*, 364 Ga. App. 476, 479 (2022). All three preemption theories apply here. Most fundamentally, however, the ECA preempts the charges against Cheeley by establishing an exclusive federal interest in electing the federal executive.

The ECA provides the exclusive manner by which Congress counts presidential electoral votes submitted the states. Importantly, the ECA expressly contemplates the submission of alternate slate of electors from a single state when there is an ongoing dispute about the results of the vote count and the methodology for determining which slate is counted. Cheeley's alleged actions, which ultimately all

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[7] The Supremacy Clause states the federal "Constitution, and the Laws of the United States ... [are] the supreme Law of the Land; and the Judges in every State shall be bound thereby, [anything] in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. ART. VI, CL. II.

[8] The version discussed herein is the ECA's version existing in 2020. It is attached hereto as **Exhibit D** for the Court's convenience. Congress amended the ECA in 2022.

relate to the selection of presidential electors, are thus governed by the ECA's processes. Pursuant to the Supremacy Clause, the ECA preempts those Georgia criminal laws alleged in the Indictment and this requires dismissal of the Indictment.

1. The Electoral Count Act of 1887

Prior to the ECA, numerous presidential elections featured dubious electoral votes without a clear means by which Congress could resolve such disputes. In the election of 1796, for example, "Vermont electors might have been constitutionally invalid." Nathan Colvin & Edward Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475, 485 (2010). Four years later, "Thomas Jefferson counted votes from Georgia that some argue were facially defective." *Id.* Following the 1808 election, "a Representative introduced a resolution stemming from complaints by Massachusetts residents suggesting that the appointment of the Massachusetts electors was irregular and unconstitutional." *Id.* at 491 (citation and punctuation omitted). Then, following the 1836 election, several of Michigan's electors "were [deemed] ineligible because they held federal office," which prompted "Congress [to] declare[] the voting of the ineligible electors vitiated *ab initio*, and the President of the Senate and tellers did not include their votes." *Id.* at 495. The election of 1876 involved Florida and Louisiana submitting three alternate elector slates, while South Carolina and Oregon each submitted two. *Id.* at 503–05. This was enough, and Congress finally decided it had to step in.

These controversies demonstrated there was no express statutory provision "for the discussion or decision of any questions ... as to the regularity and authenticity of the returns of the electoral votes, or the right of the persons, who gave the votes,

or the manner, or circumstances, in which they ought to be counted .... Yet it [was] easily to be conceived, that very delicate and interesting inquiries [could and did] occur, fit to be debated and decided by some deliberative body." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1464 (Boston, Hilliard, Gray, & Co. 1833). Congress thus enacted the ECA in 1887 to provide a clear process by which electoral vote challenges could be resolved.

One item the ECA addresses is potential challenges regarding competing electoral slates—the very scenario presented here. Indeed, this was the primary dispute in the 1886 election that prompted enactment of the ECA and the ECA addressed it.

The ECA contemplates that "*more than one return or paper purporting to be a return from a State* [could] be[] received by the President of the Senate[.]" 3 U.S.C. § 15 (emphasis added).[9] When there is a pending dispute about the results of the election, as there with Georgia's 2020 electors, the ECA requires votes for the alternate slate to be cast by "the first Tuesday after the second Wednesday in December" following the election to preserve an alternate electoral slate challenge, which here was December 14, 2020. *See* 3 U.S.C. § 7. This timing is critical because if an alternate slate of electors contemplated by the ECA does not meet and cast votes

[9] To resolve electoral slate disputes, the ECA provides alternative processes. *First*, if the sending state resolves the dispute at least six days before the electors vote, the state's resolution is conclusive. *See* 3 U.S.C. § 5. *Second*, if the state does not resolve the dispute six days before the electors vote, the authority to resolve the dispute shifts to Congress. *See* 3 U.S.C. § 6, 15. If the matter goes to Congress, then both its houses will evaluate competing electoral slates. 3 U.S.C. § 15. If the two houses can agree on which slate to adopt, they adopt that slate. Id. If they cannot, then the slate certified by the governor of the sending state is the one counted. *Id.* This was the ECA process in 2020.

by this date, Congress cannot consider that alternate slate at all—even if the pending challenges are subsequently resolved in favor of the alternate slate electoral votes.[10]

Here, under 3 U.S.C. § 5, the ECA's "safe harbor clause," a determination by "judicial or other methods" of any "controversy or contest concerning the appointment of any or all of the electors" on or before December 8, 2020, would have been conclusive of which slate of Georgia electors would be counted by Congress. But, given the ongoing presidential election challenges in Georgia on December 8, 2020, none of which were resolved by that date, it was reasonable for "alternative electors" to conclude based on the ECA's process that they needed to meet and preserve any electoral challenges they might have. Indeed, Hawaii's alternate electors reached the same conclusion after the Nixon-Kennedy Presidential election in 1960, which saw the alternate slate of electors ultimately prevail. And several U.S. Supreme Court Justices recognized this procedure as appropriate in resolving litigation over the results of the 2000 presidential election.[11]

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[10] In many ways this is like a statute of limitations in a civil case. Whether the case might ultimately succeed, if it is not filed within the limitations period it is forever barred.

[11] In addition to all the foregoing, Congress's 2022 amendments to the ECA prove multiple electoral slates were permitted prior to 2022. In the 2022 amendments to the ECA, Congress removed all language previously allowed a process regarding a "controversy or contest concerning the appointment of all or any of the electors," 3 U.S.C. §§ 5 & 6, and the possibility of "more than one return or paper purporting to be a return from a State," *id.* § 15. "When Congress acts to amend a statute, we presume it intends its amendment to have a real and substantial effect." *Stone v. I.N.S.*, 514 U.S. 386, 397 (1995); *see* Norman J. Singer, IA Southerland Statutory Construction, § 22.29 at 264 (5th ed. 1993) ("When the statute is amended and words are omitted, the general rule of construction is to presume that the legislature intended the statute to have a different meaning than it had before the amendment."). Rules of statutory interpretation "demand that we attach significance to the Legislature's action in removing . . . language." *Transp. Ins. Co. v. El Chico Restaurants, Inc.*, 271 Ga. 774, 776 (1999).

In sum, and in the absence of a resolution on or before December 8, 2020, any alternate slate that Congress *might* have considered due to an electoral slate challenge had to be cast by December 14, 2020. In the abundance of caution, and given then-existing ECA process, this is what happened here—and what all of Cheeley's actions as a lawyer on behalf of his clients sought to further. In all events, however, the process that is challenged in the Indictment is the one provided by the ECA. And the ECA controls.

2. Cheeley's actions to facilitate an alternate slate of electors

Because of the pending or potential challenges to Georgia's 2020 presidential vote count, including the judicial challenge filed in Fulton County on December 5, 2020,[12] certain Defendants organized an alternate slate of electors who met on December 14, 2020. They did so based on the express provisions and guidance of the ECA—the only law dealing with such issues. Because the "safe harbor deadline" was not met, these electors met to preserve the possibility of an alternative slate that could be presented should on-going challenges to the 2020 election prove successful.

In Cheeley's case, every allegation in the Indictment against him prior to President Biden taking the oath of office relates to, or is derivative of, his actions, as a lawyer, to facilitate and preserve the challenges afforded by the ECA. *See* Indictment, Acts 34-37, 102, 127 (communications related to electors); 105 (communication to subcommittee).

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12 *See, e.g., Donald J. Trump for President, Inc.*, et al., 2020-CV-343255 (Fulton Cnty. Superior Ct. Dec. 5, 2020).

3. The ECA preempts state law—and bars the "criminalization" of Cheeley's conduct taken in accord with the ECA and ample historical and caselaw precedent.

The ECA preempts the charges against Cheeley by establishing an exclusive federal interest in electing the federal executive. *See* 3 U.S.C. § 1, *et seq.* Upon introducing the ECA before the House of Representatives in 1886, its sponsor explained that even though "[t]he mode of ... appoint[ing] [Presidential Electors] is left solely to the States ... the elector is a Federal functionary, as much as a Senator or a Representative. And the duties of an elector, as soon as he is chosen by the State, are prescribed by the Constitution of the United States." 18 Cong. Rec. 30 (1886) (remarks of Representative Caldwell). Moreover, "[t]he interests of all the States in their relations to each other in the Federal Union demand that the ultimate tribunal to decide upon the election of President should be a constituent body, in which the States in their federal relationships and the people in their sovereign capacity should be represented." *Id.* "Under the Constitution who else could decide? Who is nearer to the State in determining a question of vital importance to the whole union of States than the constituent body upon whom the Constitution has devolved the duty to count the vote?" *Id.* at 31. The alleged conduct attributed to Cheeley is in accord the ECA's original meaning and therefore preempted by federal law.

The ECA's particularized process for addressing competing presidential electoral slates has been invoked since its 1887 enactment to preserve alternate electoral slates. For example, nearly this precise scenario occurred in the 1960 Nixon-Kennedy presidential election when "presidential electors pledged to Nixon's

candidacy had cast their votes for him, but a later recount in the state had shown that the slate of presidential electors pledged to Kennedy had received more ballot cast by citizens on Election Day."[13] Per the ECA, in January 1961, Congress had "Hawaii alternative certificates, one showing that [Nixon] had received the state's Electoral votes, the other showing that Kennedy had." *Id.*[14] Later, during the 2000 presidential election contest, Justice Stevens, joined by Justices Ginsburg and Breyer, referred to this precedent as a valid method to challenge state electors under the ECA. *See Bush v. Gore*, 531 U.S. 98, 127 & n.5 (2000) (Stevens, J., dissenting). Justice Stevens noted that, just as here, "[b]oth Democratic and Republican electors met on the appointed day to cast their votes." *Id.* at n.5. No one was arrested in 1960 for presenting these alternate slates. And in 1961, the slate that was not initially certified by Governor prior to the safe harbor date was, in fact, ultimately accepted by Congress.

The 1960 Hawaii episode is not the only historical example of when the ECA processes were utilized. Since 1969, members of Congress have challenged electors and underlying elections in accord with the ECA at least *five* separate times (in 1970, 2000, 2004, 2017, and 2021) by objecting to electoral vote certificates as not being "regularly given" or not "lawfully certified. " *See* Derek T. Muller, *Electoral Votes Regularly Given*, 55 GA. L. REV. 1529, 1531, 141–44 (2021). Notably, all of these

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13 American Law Institute, *Principles of the Law, Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes*, Intro. Note (Tent. Draft No. 1 (Apr. 6, 2016)).

14 Because Kennedy would win either way, Nixon accepted "Hawaii's Electoral votes cast for Kennedy rather than the ones cast for him" but the model for making these challenges was demonstrated. *Id.*

objections challenged the lawfulness of the votes pursuant to the ECA; all were resolved under the ECA's federal process; and none resulted in criminal prosecutions, or even allegations or suggestions of criminal conduct.

Because the ECA provides for an alternative slate of electors, precisely the type of challenge that Cheeley is alleged to have participated in facilitating by referring his clients to a constitutional scholar versed in election law, and because it preempts any state criminal law regarding the electoral challenges at issue here, the State's attempt to criminalize Cheeley's conduct is barred by the Supremacy Clause.

Indeed, and also in *Bush v. Gore*, Justice Souter, joined by Justices Stevens, Ginsberg, and Breyer, further opined on the ECA's supremacy in counting electoral votes. *See id.* at 130–31, 146–47 (Souter, J., dissenting). Justice Souter did not think the issue was close. He wrote:

> The 3 U.S.C. § 5 issue is not serious. That provision sets forth certain conditions for treating a State's certification of Presidential electors as conclusive in the event that a dispute over recognizing those electors must be resolved in the Congress under 3 U.S.C. § 15. Conclusiveness requires selection under a legal scheme in place before the election, with results determined at least six days before the date for casting electoral votes. But no State is required to conform to § 5 if it cannot do that (for whatever reason); the sanction for failing to satisfy the conditions of § 5 is simply loss of what has been called its "safe harbor." And even that determine is to be made, if made anywhere in the Congress.

Id. at 130–31; *see also id.* at 146-47. Obviously, if the safe harbor date is missed, which it was here, then resolution of electoral slate disputes is determined by Congress through the ECA's processes. *See* Footnote 9, *supra.* In the event the matter goes to Congress, all slates to be considered by Congress must have voted six days after the "safe harbor date," in this case by December 14, 2020.

The foregoing means: (1) all matters surrounding the counting of electoral college votes are governed exclusively by the ECA; (2) these matters include the resolution of competing electoral slates presented to Congress in the event electoral disputes are not resolved prior to the ECA's safe harbor deadline; (3) the plain language of the ECA supports the foregoing; (4) historical precedent supports the foregoing; and (5) the opinions of four Supreme Court justices in 2000 support the foregoing. If the ECA is the exclusive law governing disputes regarding electoral slates, then the criminal laws of Georgia attempting to resolve or criminalize those disputes are displaced. This means the Indictment must be dismissed.[15]

B. Cheeley's conduct is core protected speech.

The role of an attorney in navigating and, when necessary, challenging the law serves a critical role in American democratic society.[16] The U.S. Supreme Court has long acknowledged the unique role of legal counsel where "under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." *NAACP v. Button*, 371 U.S. 415, 430 (1963). An attorney's advice makes the law accessible to a client and thus, great interests are jeopardized when an attorney's role in providing counsel is impaired.

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[15] Most likely because the language of the ECA is so clear on the point, and because there is prior scholarship and historical precedent supporting it, there is no authority prior to 2021 even suggesting that organizing an alternate electoral slate is anything other than proper. Rather, the Indictment presents a novel theory regarding this issue—which in turn raises substantial due process concerns here in addition to the preemption issue.

[16] *See* Alexis de Tocqueville, *Democracy in America*, 253-54 (Henry Reeve trans. 1838) ("Members of the legal profession . . . [are] the most powerful existing security against the excesses of democracy."); David Luban, *Legal Ideals and Moral Obligations: A Comment on Simon*, 38 WM. & MARY L. REV. 255, 259 (1996) (noting "because lawyers are often better positioned than nonlawyers to realize the unfairness or unreasonableness of a law, lawyers often should be among the first to . . . counsel others that it is acceptable to violate or nullify it").

The State indicted Cheeley for engaging in protected political and civil activity as an advocate for his clients because he expressed concerns regarding the election results before a Georgia Senate subcommittee and because he advocated for his clients' positions. Raising these concerns is not a crime.

1. The Federal and Georgia Constitutions protect Cheeley's conduct.

Both the First Amendment of the United States Constitution and Article I of the Georgia Constitution, inviolably preserve a citizen's right to speak freely, peaceable assemble, and petition the government for redress of grievances. *See* U.S. Const. Amend. I; GA CONST. ART. I, § 1, ¶¶ V, IX. Indeed, "[t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances," and to speak freely as a part of that process. *See Thornton,* 514 U.S. at 843 (Kennedy, J., concurring) (citation and punctuation omitted).

The Supreme Court has long held that "First Amendment rights of speech and association have their 'fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). "Discussion of public issues and debate . . . are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957).

The First Amendment protects political association as well as political expression. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). The First Amendment guarantees "the freedom to associate with others for the common advancement of political beliefs and ideas," a freedom that encompasses the "right to associate with the political party of one's choice." *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).[17] "It follows from these considerations that, consistent[] with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score." *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

Cheeley's charged misconduct, facilitating communications and advocating presidential election concerns and strategies—including before a subcommittee of the Georgia Senate's Judiciary Committee pertaining to the 2020 election (perhaps the most watched and important political and legal dispute of 2020 and 2021)—is protected activity at the core of these fundamental rights. *281 Care Committee v. Arneson*, 766 F.3d 774, 784 (8th Cir. 2014) ("The regulation of political speech or expression is, and always has been, at the core of the protection afforded by the First

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[17] The First Amendment further "protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387 (2011). The right to petition the courts constitute "an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482 (1985). While not explicitly mentioned in the Indictment, Cheeley was advocating for his clients in the courts as well.

Amendment.") (citing *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 346 (1995)). "Political speech is the primary object of First Amendment protection and the lifeblood of a self-governing people." *McCutcheon v. Fed. Election Com'n*, 572 U.S. 185, 228 (2014) (Thomas, J. concurring) (internal quotations omitted). The Indictment does not include charges based on anything that is ***not*** political speech or that is ***not*** advocating a legal position on behalf of his clients. Such "[b]road and sweeping state inquiries into ... protected [speech, assembly, and association], as [Georgia] has engaged in here, discourage citizens from exercising rights protected by the Constitution." *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) (plurality). As such, the State's attempt to criminalize Cheeley's protected rights to speak freely, assemble peaceably, and associate freely violates his First Amendment rights and the Indictment must accordingly be dismissed.

2. O.C.G.A. § 16-10-20 unconstitutionally regulates protected political speech and activities as applied to Cheeley.

Count 26 charges Cheeley with violating O.C.G.A. § 16-10-20 by "knowingly, willfully, and unlawfully" making false statements and representations to members of the Georgia Senate at a Senate Judiciary Subcommittee meeting regarding the November 2020 election, and within the jurisdiction of the Office of the Secretary of State, the Georgia Bureau of Investigation, and otherwise. Indictment at 85 (Count 26). These allegations cannot withstand scrutiny as they impermissibly sweep within the bounds of this statute Cheeley's constitutionally protected speech regarding the

2020 presidential election.[18]

"The notion that the government, rather than the people, may be the final arbiter of truth in political debate is fundamentally at odds with the First Amendment." *Rickert v. State*, 168 P.3d 826, 827 (Wash. 2007). Indeed, "[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . every person must be his own watchman for truth, because the forefathers did not trust any government to separate the truth from the false for us." *Meyer v. Grant*, 486 U.S. 414, 419-20 (1988). As such, the state cannot "substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Riley v. Nat'l Fed'n of Blind, Inc.*, 487 U.S. 781, 791 (1988). Moreover, when the government seeks to regulate protected speech such as the political speech and activities of Cheeley at the center of his Indictment, "the restriction must be the least restrictive means among available, effective alternatives." *United States v. Alvarez*, 567 U.S.

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[18] As discussed below, the Georgia Supreme Court in *Haley v. State*, 289 Ga. 515, 519 (2011), expressed deep reservations about the first amendment restraints of O.C.G.A. § 16-10-20. Regarding Cheeley's statements to the General Assembly, the General Assembly is not a "department or agency of state government" and thus is not covered by O.C.GA. § 16-10-20. As it relates to the other arms of government within whose jurisdiction a contested statement was allegedly made, the Georgia Supreme Court conceded that even making a false statement that may not qualify as "speech" within that jurisdiction, "would have a chilling effect on protected speech that may be close to the line, including statements about public officials and public affairs that are in the heartland of First Amendment protection." *Id.* at 519-20. In an attempt to save the statute and narrowly interpret it, the Georgia Supreme Court determined the statute required a false statement within the jurisdiction of certain public officials, but also had a *mens rea* requirement that a defendant must "know and intend, that is to contemplate or expect, that his false statement will come to the attention of a state or local department or agency with the authority to act on it." *Id.* at 521–22. Here the Indictment nowhere pleads this *mens rea* requirement as to the Secretary of State, the GBI, or any other department or agency and it accordingly fails. Moreover, and unlike in *Haley*, the totality of Cheeley's statements contested in the Indictment are core First Amendment "speech" related to an election contest that protects him from any criminal prosecution here.

709, 729 (2012); *see Coffey v. Fayette Cnty.*, 279 Ga. 111, 111-12 (2005).

Counterspeech, especially as to political speech, "is the tried-and-true buffer and elixir." *281 Care Committee*, 766 F.3d at 793. Indeed, the solution to any speech concerns that arise during political discourse are already contained in that system: more speech. *See Brown v. Hartlage*, 456 U.S. 45, 61 (1982) ("The preferred First Amendment remedy of more speech, not enforced silence . . . has special force."). Significantly, as to the State's allegations of falsity, "there is no greater arena wherein counterspeech is at its most effective." *281 Care Committee*, 766 F.3d at 793. As the Supreme Court explained in *United States v. Alvarez*:

> 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 straight-out lie, the simple truth . . . . The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.

567 U.S. at 728.

It is in the political arena where robust discourse must take place. "Such 'back and forth' is the way of the world in election discourse. [S]ome false statements are inevitable if there is to be open and vigorous expression of views in public and private conversation." *281 Care Committee*, 766 F.3d at 795 (quoting *Alvarez*, 567 U.S. at 718). To interject a government censor into the political fray as the arbiter of truth – especially as to concerns regarding a presidential election made to political officials

or courts – is contrary to these fundamental principles. As applied in this case, O.C.G.A. § 16-10-20 does so and is unconstitutional.

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

The entire Indictment should be dismissed because it violates the Supremacy Clause and Cheeley's free speech rights. Additionally, none of the Counts properly plead that Cheeley committed any crime and should therefore be dismissed.

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

The Indictment charges Cheeley in Count 1 with conspiring to violate the Georgia RICO laws. *See* Indictment at 13-17. Count 1 fails on multiple grounds. *First*, the Indictment extends Georgia RICO's scope beyond its proscribed limits. *Second*, it fails to plead an "enterprise." *Third,* the Indictment fails to allege any factual or legal nexus between the activities complained of to the alleged RICO conspiracy. *Fourth*, the Indictment fails to adequately plead any underlying "racketeering activity" or overt act that would capture Cheeley in the supposed RICO conspiracy. For each of these reasons, Count 1 must be dismissed.

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

The General Assembly passed Georgia RICO to deal with the "severe problem" of "increasing sophistication of various criminal elements" that harm Georgians. O.C.G.A. § 16-14-2(a). Realizing potential prosecutorial abuses of the statute, and to leave no doubt, the General Assembly specifically limited Georgia RICO's scope as follows:

It is not the intent of the General Assembly that isolated incidents of

> misdemeanor conduct or acts of civil disobedience be prosecuted under this chapter. It is the intent of the General Assembly, however, that this chapter apply to an interrelated pattern of criminal activity motivated by or the effect of which is pecuniary gain or economic or physical threat or injury. This chapter shall be liberally construed to effectuate the remedial purposes embodied in its operative provisions.

O.C.G.A. § 16-14-2(b); *see also* O.C.G.A. § 16-14-4(a); *All Fleet Refinishing, Inc. v. W. Ga. Nat'l. Bank*, 280 Ga. App. 676, 679 (2006) (noting boundaries of Georgia RICO's scope). The Indictment does not allege Cheeley's actions were motivated by "pecuniary gain, or economic or physical threat or injury." Rather, the Indictment admits Cheeley's activities were political in nature. At worst, Cheeley's comments can be fairly said to be an act of "civil disobedience"[19] by questioning the propriety of the 2020 election vote counting—and nothing more. The Court "must construe the statute so as to carry out th[at] legislative intent." *Jud. Council of Georgia v. Brown & Gallo, LLC*, 288 Ga. 294, 297 (2010). Because the General Assembly's intent is expressed in O.C.G.A. § 16-14-2(b), and because the Indictment alleges violations outside this scope, it should be dismissed.

b. The Indictment does not plead an "enterprise."

An "enterprise" is a necessary element of a Georgia RICO claim and it, like all elements of a crime, must be pleaded with legal and factual specificity. The Indictment fails this test. The Indictment alleges that Defendants conspired to "unlawfully change the outcome of the [2020 presidential] election] . . ." *See*

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[19] Cheeley maintains all of his actions identified in the Indictment constitute core civic and political speech. But, even if the Court disagrees, there is no serious argument that any of Cheeley's actions amounted to anything more than civil disobedience in a manner he deemed necessary to preserve free and fair elections.

Indictment at 14-15. How these Defendants are related in such an "enterprise" is unknown—it is not factually pleaded in the Indictment. To apprise a defendant of how he or she is alleged to be associated with an enterprise, an indictment must plead that the individuals have some common purpose, have relationships among those 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)). Simply naming a conclusory string of individuals who have allegedly engaged in parallel conduct is not enough. *Id.* at *4.

In *Boyle v. United States*, 556 U.S. 938, n.4 (2009), the U.S. Supreme Court acknowledged that simply listing individuals engaged in a pattern of racketeering activity, independently and without coordination, does not constitute an enterprise. The "structure" of common purpose, relationships, and longevity must also be shown. *Id.* at 942, 945.[20] None of this is pleaded in the Indictment. Given the millions of Americans, countless politicians (including those from the six other states and District of Columbia cited in the Indictment), members of the media, and hundreds of lawyers who peaceably, even if erroneously, protested or contested the 2020 presidential election through phone calls, text messages, speaking out publicly on some forum or to their representatives, giving money, advocating for their clients, or

[20] In *Martin v. State*, 189 Ga. App. 483, 485 (1988), the Georgia Court of Appeals noted that Georgia RICO "is modeled upon and closely analogous to the Federal RICO statute." Relying pre-*Boyle* federal law, the Georgia Court of Appeals said the State is not required to prove an enterprise by showing every Defendant knew of the other or that the enterprise has to have a specific ascertainable structure. But this case was decided *prior* to *Boyle*, and post-*Boyle* there is a requirement that some such structure be pled.

working to address perceived election irregularities, then the "enterprise" as currently pleaded could conceivably include tens of millions. And if it could, then there is simply no articulated structure, organization, or other characteristic defining the "enterprise" here.

Similar to the "longevity" component of the RICO "enterprise" element, the RICO "pattern" element also incorporates the requirement of "continuity." Evaluating the federal RICO statute, the U.S. Supreme Court and the Eleventh Circuit Court of Appeals have held 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 Circ. 2004). The U.S. Supreme Court held that "predicate acts extending over a few weeks or months, and threatening no future criminal conduct do not satisfy this requirement . . . ." *Northwestern Bell,* 492 U.S. at 242. The Eleventh Circuit also has held that schemes lasting less than one year do not satisfy the "continuity" component of the "pattern" element. *Jackson,* 372 F.3d at 1266.

In *Faillace v. Columbus Bank &Trust Co.*, the Georgia 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. 866, 869 (2004) (emphasis added); *but see J&D. Intern. Trading (Hong Kong) Ltd. V. MTD Equip., LLC,* 2014 WL 1683375, *13 (N.D. Ga. April 18, 2014) (citing *Dover v. State,* 192 Ga. App. 429, 431 (1989) for the

proposition that, unlike the federal RICO statute, Georgia's RICO Act does not have a continuity requirement).[21] In addition to the questionable viability of this part of *Dover* given the contemporaneous U.S. Supreme Court holding in *Northwestern Bell*, the Court of Appeals *Fallice* citation appears to adopt the "continuity" requirement for the "pattern" element, as it should.

Here, Count 1 is premised upon a series of disparate acts none of which lasted more than "a few weeks or months" and certainly none lasted for a year. The purported RICO scheme certainly had ended on January 7, 2021 when Congress certified President Biden's victory, or by January 20, 2021 when President Biden was sworn into office Thus, there is no "pattern" of racketeering activity as there is no continuity of that activity over any substantial period of time.

c. The Indictment does not plead a nexus between the alleged enterprise and the alleged racketeering activities.

A Georgia RICO indictment must state "[1] whether the enterprise is alleged to be a licit or illicit one, [2] how the defendants allegedly were associated with it, [and 3] how the alleged racketeering activity relates in any way to the business or affairs of the enterprise." *Kimbrough,* 300 Ga. at 882-83. The Indictment must plead all legal elements of an alleged violation as well as facts sufficient to apprise the defendant of how he or she purportedly committed that the alleged violation. *Id.* at

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[21] As noted by some commentors, the *Dover* decision was issued only about a week after *Northwestern Bell*, and *Dover* neither cites nor addresses the reasoning of *Northwestern Bell*. *See* Problems with the Georgia RICO Charge - by Randall Eliason (sidebarsblog.com). Moreover, no Georgia appellate court, appears to have addressed the issue at all except for *Fallice*, and *Fallice* (at least in its citation) seems to adopt the continuity model.

882; *see also Jackson*, 301 Ga. at 141. Here, the Indictment does not properly plead "a connection or nexus between the enterprise and the racketeering activity." *Id.* at 882.

Count 1 alleges Defendants were 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. It claims a wide array of alleged "racketeering activities" Defendants allegedly participated in that were supposedly "unlawful." Indictment at 16–19. Yet, the Indictment "fails to set forth any facts that show a connection between the enterprise and the racketeering activity" Cheeley allegedly engaged in. *Kimbrough*, 300 Ga. at 882. Nor is "the nature of that connection ... apparent from the identification of the enterprise, the general description of the racketeering activity in Count 1, or the subsequent counts charging more particularly the predicate acts of racketeering." *Id.*

With respect to Cheeley, all alleged racketeering activity falls into three categories: (1) communications in furtherance of providing and obtaining legal advice for his clients, *see* Indictment at 28 (Acts 34–37); (2) testimony before a Georgia Senate subcommittee about potential vote counting irregularities observed in the video from State Farm Arena, *see* Indictment at 48 (Acts 102 and 105); and (3) statements to the Special Purpose Grand Jury in September 2022, *see* Indictment at 71 (Act 161).[22] Not one of the persons or bodies Cheeley communicated with had any

[22] It is impossible to categorize the alleged phone calls that Cheeley allegedly received or placed on January 5, 2021, because it is unclear whether the other party actually answered any of these calls, much less what the parties discussed. *See* Indictment at 59–50 (Act 127). The Indictment does not say.

authority or ability to "unlawfully chang[e] the outcome of the November 3, 2020 presidential election in Georgia in favor of Donald Trump." Indictment at 16–17. Thus, Cheeley's activities cannot relate to the purported conspiracy, as communicating with the persons listed in the Indictment had no more effect on the 2020 election, potentially or actually, than speaking with any other Georgian on the subject.

Because members of the General Assembly (to say nothing of private citizens) have no authority over post-election issues pertaining to presidential electors, Cheeley's communications to them (as alleged in Acts 102 and 105) are necessarily unconnected to the alleged enterprise. While the General Assembly can choose the method of selecting electors through legislation, it has no role in the elector process or the counting of votes post-election. *See Moore v. Harper*, 143 S. Ct. 2065, 2085 (2023) ("[b]y fulfilling their constitutional duty to craft the rules governing federal elections, state legislatures do not consent, ratify, or elect, they make laws"); *Bush v. Gore*, 531 U.S. 98, 104–111 (2000). Thus, "there is no nexus between the enterprise and the [alleged] racketeering activity" Cheeley allegedly undertook with respect to the General Assembly or otherwise. *See Kimbrough*, 300 Ga. at 882. If such a nexus exists, the Indictment does not allege any facts to establish it.

The lack of any nexus between the enterprise and the alleged racketeering activity is even more obvious as it relates to Cheeley's testimony before the Special Grand Jury. The testimony occurred two years after the 2020 election and two years after President Biden had taken office. It defies common sense for the State to say

Cheeley's testimony constituted a racketeering or overt act in furtherance of any conspiracy regarding the 2020 presidential election. *See* Indictment at 71 (Act 161). If such a nexus allegedly exists, it is not pleaded in the Indictment.

d. Acts 34–37 and 127 do not constitute racketeering activities as defined by O.C.G.A. § 16-14-3(5)(A).

By statute, the only actions that can establish a pattern of racketeering in violation of RICO are the 43 specified racketeering activities defined in O.C.G.A. § 16-14-3(5)(A)(i)–(xliii). *See Cotman v. State*, 342 Ga. App. 569, 590 (2017). To plead a "racketeering activity" an indictment "must contain the essential elements of the predicate offense [racketeering activity], [] the indictment must contain a separate count charging the predicate offense completely ... or the indictment must elsewhere allege facts showing how the compound offense was committed." *Stinson v. State*, 279 Ga. 177, 178 (2005) (citations omitted). In *Kimbrough v. State*, the Georgia Supreme Court made clear the State must plead all of the legal elements of a racketeering activities and the "underlying facts with enough detail to sufficiently apprise the defendant of what he must be prepared to meet." 300 Ga. at 881 (internal quotations and citation omitted).

In Acts 34–36, the Indictment alleges that Cheeley emailed with John Eastman (along with "Individual 8" and Brandon Beach) about nominating electors pursuant to the ECA and the importance of doing this by December 14, 2020. *See* Indictment at 27. Act 37 says Cheeley emailed with "Individual 2" regarding a phone call with David Shaffer, who allegedly "ha[d] been on top of a lot of efforts in the state." *Id.* Act 127 is just a litany of purported phone calls between Cheeley and

others, the content of which is unknown. *Id.* at 59-60. That is it.

While the Indictment unartfully contends that Acts 34-37 and 127 "[were each] an overt act in furtherance of the conspiracy," it fails to allege facts supporting that legal conclusion and to plead that any of the communications underlying these acts are actually encompassed by any of the 43 categories of offenses that constitute racketeering activity. *See* O.C.G.A. § 16-14-3(5)(A). The Indictment's failure to allege facts linking Acts 34–37 and 127 to any specific offenses that constitute racketeering activity means that these Acts cannot serve as a basis to establish a pattern of racketeering activity in violation of O.C.G.A. § 16-14-4(b). *See Carr v. State*, 350 Ga. App. 461, 465 (2019). In turn, this means the Indictment cannot rely on Acts 34–37 and 127 to prove a violation of O.C.G.A. § 16-14-4(c). *See id.* Moreover, and as noted above, the Indictment does not provide any "nexus" between these overt acts and the purported racketeering activity. It fails for all these reasons.

e. Act 102 cannot serve as a predicate act because a violation of O.C.G.A. § 16-10-1 does not constitute racketeering activity.

With respect to Act 102, the Indictment alleges that Cheeley and others violated O.C.G.A. §§ 16-4-7 and 16-10-1 by soliciting members of the Georgia Senate to violate their oaths by, in turn, unlawfully appointing presidential electors. Indictment at 46. The problem is that neither O.C.G.A. §§ 16-4-7 or 16-10-1 are among the 43 categories of offenses that constitute racketeering activity.[23] *See* O.C.G.A. § 16-14-3(5)(A). On that basis alone, Act 102 cannot serve as a basis to

[23] As discussed below, neither of the stand-alone counts related to these solicitation statutes is properly pled.

establish a pattern of racketeering activity in violation of O.C.G.A. § 16-14-4(b)–(c). And again, the allegation also fails to state how this act is a "nexus" to the racketeering conspiracy.

Moreover, as detailed in Section IV(C)(7) *infra,* the Indictment fails to sufficiently allege a violation of O.C.G.A. § 16-10-1. Among other shortcomings, it fails to plead the oath the legislators purportedly breached as required by Georgia law. *See Jowers v. State*, 225 Ga. App. 809, 810–813(2) (1997); *Pierson v. State*, 348 Ga. App. 765, 775 (2019); *Bradley v. State*, 292 Ga. App. 737, 740 (2019). It also fails to explain how Georgia senators—who had no role in, and could not affect the outcome of—the 2020 presidential election, could have violated any provision of whatever oath they supposedly were encouraged to violate. This warrants dismissal.

f. Act 105 does not constitute racketeering activity.

Regarding Act 105, the State avers Cheeley made at least one false statement to members of the Georgia Senate Judiciary Committee and that the alleged statements were "within the jurisdiction of the Office of the Georgia Secretary of State and the Georgia Bureau of Investigation[.]" Indictment at 48. According to the State, those allegedly false statements were acts of racketeering activity as contemplated by O.C.G.A. § 16-14-3(5)(A)(xxii). *Id.* That racketeering activity subsection encompasses "[f]alse statements and writings or false lien statements ***against public officers or public employees*** in violation of [O.C.G.A. §] 16-10-20." (emphasis added).

The racketeering activity defined in O.C.G.A. § 16-14-3 (5)(A)(xxii) does not embrace the totality of O.C.G.A. § 16-10-20's scope. Rather, the actionable

racketeering activity extends only to alleged false statements "***against*** public officers or public employees." (emphasis added). This is not alleged in Act 105. *See* Indictment at 48. Indeed, Act 105 does not say the purportedly false statements were made "against" anyone at all, let alone a public officer or public employee. Thus, the Indictment fails to allege this element of the racketeering activity.

Additionally, to the extent that a "poll watcher"[24] or "election worker" is mentioned in Act 105, the Act lacks any factual or legal information indicating that such persons were "public officers" or "public employees" as contemplated by O.C.G.A. § 16-14-3 (5)(A)(xxii). The Indictment thus fails to allege a racketeering act or facts to support it.

Further, and as discussed in detail below with regard to Count 26, *see* Section IV(C)(4) *infra*, Cheeley's alleged statements to Georgia State Senators in Act 105 (1) are not actionable, as the General Assembly is not a "department or agency" of the State; (2) were not made "within the jurisdiction of any department or agency of state government or of the government of any county, city, or other political subdivision of this state;" and (3) were not alleged to have been knowingly made to any department or agency with the intention that such department or agency would act upon the statements. All of these legal elements are required to be pleaded with factual support by the plain language of O.C.G.A. § 16-10-20, *Kimbrough*, *Jackson*, and *Haley*. Because they were not, Act 105 fails to allege a racketeering act.

g. Act 161 does not constitute racketeering activity because it is unconnected to the alleged enterprise.

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[24] Reference is also made in Act 105 to the "media."

With respect to Act 161, the State identifies five statements Cheeley made to the Special Purpose Grand Jury, which it says constitute perjury. Indictment at 71. The State collectively casts those statements as a single instance of racketeering activity under O.C.G.A. § 16-14-3(5)(A)(xxv).

The Indictment fails to articulate a nexus between the statements to the Special Purpose Grand Jury in September 2022 and the alleged enterprise of "unlawfully chang[ing] the outcome of the November 3, 2020, presidential election in Georgia in favor of Donald Trump" because President Biden had been in office for 20 months. Indictment at 16–17. As noted above, the 2020 election had been over for years by the time of this testimony, a new President had taken office, and the testimony could do nothing to affect the outcome. Any alleged perjury in September 2022 cannot serve as a predicate act, as there is no legally cognizable nexus to the RICO enterprise. *See Kimbrough*, 300 Ga. at 882.

2. 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.

Turning to the non-RICO counts against Cheeley, the State first alleges Cheeley violated both O.C.G.A. §§ 16-4-8[25] and 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, public officers, with intent to mislead 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 into believing

[25] 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).

that they actually were such officers.

Indictment at 76 (Count 9).

O.C.G.A. § 16-10-23 only applies to persons holding themselves out as ***Georgia*** "public officers," and therefore does not apply to presidential electors for at least three reasons. Besides those reasons, the Indictment's allegations regarding Count 9 are insufficient, as least with respect to Cheeley.

First, in light of the Federal Constitution's Supremacy Clauses it strains credulity to believe the General Assembly intended for the State to prosecute Georgians for allegedly impersonating federal presidential electors. Cheeley has already shown that the ECA preempts state law criminalizing his conduct related to challenging presidential electors—who are federal officers under the ECA and U.S. Const. Amend. XII.[26] Bolstering this argument, "[i]f congress has power to do a particular act" with respect to punishing the impersonation of federal public officials, then "no state can impede, retard or burden it." *See McCulloch v. State*, 17 U.S. 316, 317 & 395 (1819). Here, Congress passed 18 U.S.C. § 912, which makes it a crime to "falsely assume[] or pretend[] to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and act[] as such." Congress has preempted through 18 U.S.C. § 912 any state criminal law purporting to criminalize "impersonation" of those acting pursuant to federal law, such as federal president electors. Thus, 18 U.S.C. § 912 would preempt O.C.G.A. § 16-10-23 if the latter applies to federal officers.

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[26] Presidential Electors' roles and duties are set forth in U.S. CONST. ART. II, § 1, CL. 3 and AMEND. XII. They are further specifically defined in the ECA as noted above.

Second, The Georgia Constitution also recognizes that O.C.G.A. § 16-10-23 applies only to Georgia public officers or employees. "[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). While "public officer" is not defined in Title 16, Chapter 10 of the Georgia Code, the State Constitution provides that "[p]ublic officers are the trustees and servants of the people and are at all times amenable to them." GA. CONST. ART. I, § II, ¶ 1. Thus, anyone not amenable to the people of Georgia is not a public officer.

Finally, Georgia courts have recognized the foregoing by refusing to allow claims to proceed where "all of the allegations of fraud and misrepresentation concern statements and representations [directed towards] ... federal [actors], about [federal laws and] regulations." *See Gentry v. Volkswagen of America*, 238 Ga. App. 785, 791 (1999). Because O.C.G.A. § 16-10-23 does not apply to impersonating a federal officer, Count 9 fails.

Based on the foregoing, presidential electors are not public officers as contemplated by O.C.G.A. § 16-10-23. Recall that "the elector is a Federal functionary, as much as a Senator or a Representative. And the duties of an elector, as soon as he is chosen by the State, are prescribed by the Constitution of the United States." 18 Cong. Rec. 30 (1886) (remarks of Representative Caldwell). And Georgia law recognizes that presidential electors "perform the duties required of them by the

Constitution and laws of the United States," implying that they do not act pursuant to Georgia law. O.C.G.A. § 21-2-11; *see Milgram v. Chase Bank USA, N.A.*, 72 F.4th 1212, 1219 (11th Cir. 2023) (quotation omitted) ("Nothing is to be added to what the text states or reasonably implies").

Apart from those fatal flaws, the Indictment also neither alleges that Cheeley conspired to falsely hold anyone out as a presidential elector, nor that he intended to mislead anyone. No alternate elector "impersonated" anyone. As discussed *supra*, the alternate electors purported to be electors as expressly contemplated under the ECA. Nothing more. And again, saying one is an "elector," in order to preserve an election challenge is recognized by federal law. *See Bush v. Gore*, 531 U.S. 98, 127 n.5 (2000) (Stevens, J., dissenting).

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

In Counts 11 and 17, the Indictment alleges that Cheeley violated both O.C.G.A. §§ 16-4-8 and 16-9-1(b) by:

> unlawfully conspir[ing], with the intent to defraud, to knowingly make a document titled "CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM GEORGIA[]" ... in such manner that the writing as made purports 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, and to utter and deliver said document to the Archivist of the United States.

and

> unlawfully conspir[ing], with the intent to defraud, to knowingly make a document titled "RE: Notice of Filling of Electoral College Vacancy[]" ... in such manner that the writing as made purports to have been made by the authority of the duly elected and qualified presidential electors from the State of Georgia, who did not give such authority, and to utter and deliver said document to the Archivist of the United States and the Office of the Governor of Georgia.

Indictment at 77 (Count 11), 80 (Count 17).

O.C.G.A. § 16-9-1(b) provides:

> A person commits the offense of forgery in the first degree when with the intent to defraud he or she knowingly makes, alters, or possesses any writing, other than a check, in a fictitious name or in such manner that the writing as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority and utters or delivers such writing.

The State fails to allege: (1) the forgery was made using a "fictious name"; (2) the writing purports to be from another person; or (3) was made by the authority of one who did not give such authority. Rather, the State acknowledges the signatories, and their alleged co-conspirators held the signatories out as "THE 2020 ELECTORS FROM GEORGIA."[27] Indictment at 77. None of these signatures purported to be on behalf of or in the name of anyone other than the persons who signed the document.

The State does say that the alternate electors' signatures "purport[ed] to have been made by the authority of the duly elected and qualified presidential electors from the State of Georgia." Indictment at 77 (Count 11), 80 (Count 17). But this cannot be and is inconsistent with its other allegations. According to the Indictment, the signatories purported to ***be*** 2020 presidential electors and acted with the authority attached to that role. If the alternate slate said they ***were*** the presidential electors, they could not be claiming to act as such with the authority of anyone else.

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[27] It is also noteworthy that the State does not explain what role (if any) that Cheeley played in the allege forgery conspiracy. Does the State claim that he personally made the documents? That he facilitated the making of the documents? That he personally delivered them? Or did he merely facilitate the delivery through others? Such glaring omissions, present throughout the Indictment, make it impossible for Cheeley "to prepare his defense intelligently," which undermines his right to a perfect indictment and precludes Counts 11 and 17 from surviving the instant demurrer. *See English*, 276 Ga. at 346 (citation omitted).

The Indictment says that the alternate electors purported to be electors from Georgia. But this is not forgery under O.C.G.A. § 16-9-1(b).

In levying these allegations, the State forgot the well-established "distinction between forgery and a fraudulent assumption of authority." *Deutsche Bank Nat'l Trust Co. v. JP Morgan Chase Bank, N.A.*, 307 Ga. App. 307, 313 (2010). The signatories to the documents in question *may* have lacked authority to hold themselves out as electors (a highly debatable proposition as set forth above);[28] but, even absent such authority, the State does not explain how the signatories ever claimed to exercise authority belonging to any other set of electors because it cannot. The alternate slate of electors is expressly contemplated by the ECA. In accordance with the ECA, the signatories stated that they *were* "THE 2020 ELECTORS FROM GEORGIA." Indictment at 77. Because the State fails to allege that any Defendant conspired to (or actually did) 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, they were not forgeries," Cheeley cannot be held liable for whatever supposed role he played in making or delivering them. *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).[29]

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[28] *See Bush v. Gore*, 531 U.S. 98, 127 & n.5 (2000) (Stevens, J., dissenting); William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 166, n. 154 (1996).

[29] It strains credulity to argue otherwise. On December 14, 2020, news organizations reported the Democrat slate of electors voted to confirm President Biden as winner of the 2020 Presidential Election at the State Cap. https://www.ajc.com/politics/georgia-casts-its-16-electoral-ballots-for-joe-biden/V6T526HRYVHMHMM75QSOZ5L45M/. Those same news stories reported that Republican alternative electors met to "'check legal boxes' to preserve Trump's legal challenges if any of his long-shot lawsuits prevail. Over an hour-long ceremony, Republicans assigned their own shadow slate of

The rule of lenity also applies here because the State contends that Cheeley is guilty of conspiring to commit forgery in violation of and § 16-9-1(b) and guilty of conspiring to make false statements to the government 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 (Count 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*, 337 Ga. App. a t 379.

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

In Count 26, the State alleges Cheeley violated O.C.G.A. § 16-10-20 by "knowingly, willfully, and unlawfully:"

> making at least one of the following false statements and representations to members of the Georgia Senate present at a Senate Judiciary Subcommittee meeting:
>
> i. That poll watchers and media at State Farm Arena were told late in the evening of November 3, 2020, that the vote count was being suspended until the next morning and to go home because of "a major watermain break";
>
> ii. That Fulton County election workers at State Farm Arena "voted" the same ballots "over and over again" on November 3, 2020

And that those statements were:

> 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, contrary to the laws of said State, the good order, peace and dignity thereof.

Indictment at 85 (Count 26).

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electors." *Id.* There was no attempt to "fool" anyone. Everyone in America (and indeed the World) knew which electors were which and why each group had met and voted.

O.C.G.A. § 16-10-20 provides:

> A person who knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact; makes a false, fictitious, or fraudulent statement or representation; or makes or uses any false writing or document, knowing the same to contain any false, fictitious, or fraudulent statement or entry, in any matter within the jurisdiction of any department or agency of state government or of the government of any county, city, or other political subdivision of this state shall, upon conviction thereof, be punished by a fine of not more than $1,000.00 or by imprisonment for not less than one nor more than five years, or both.

To obtain a conviction under § 16-10-20, the Indictment must allege, and the State must prove, "that the defendant knowingly and willfully made a false statement and that he knowingly and willfully did so in a matter within the jurisdiction of a state or local department or agency." *Haley v. State*, 289 Ga. 515, 527 (2011). The State fails to allege any of these elements.

First, statements to the Senate subcommittee do not fall within this statute because the General Assembly is not a "department or agency of state government." *See Ga. Dept. of Hum. Resources v. Sistrunk*, 249 Ga. 543, 543 (1982) ("member[s] of the General Assembly represent[] not the government of our State, nor any of its branches, departments, or agencies, but the electorate which is [their] constituency"); *overruled on other grounds by Ga. Ports Auth. v. Harris*, 274 Ga. 146 (2001); *Harrison Co. v. Code Revision Comm'n*, 244 Ga. 325, 328 (1979) ("[T]he General Assembly, including its committees, commissions and offices, is not subject to a law unless named therein or the intent that it be included be clear and unmistakable."); *Coggin v. Davey*, 233 Ga. 407, 411 (1975) (A statute that " is applicable to the departments, agencies, boards, bureaus, etc. of this state and its political subdivisions ... is not applicable to the General Assembly").

Second, as noted above, statements made to the General Assembly are protected under the First Amendment as speech and the right petitioning of government—whether or not it was "within the jurisdiction" of the Secretary of State, the GBI or other entity named in the statute.

Third, there is no authority for the Indictment's incorrect conclusion that the Secretary of State, the GBI, or others can exercise any "jurisdiction" over statements made to the General Assembly during an official committee hearing. Indeed, that theory runs afoul of the command that "legislative ... and executive powers shall forever remain separate and distinct" and the principle that "[m]embers of the General Assembly are entitled to immunity against ... any type of legal action against them in connection with the acts done by them in a strictly official capacity." GA. CONST. ART. I, § II, ¶ I; *Vill. of North Atlanta v. Cook*, 219 Ga. 316, 319–20 (1963). If the Secretary or the GBI could invade a legislative chamber and prosecute un-sworn witnesses, that would severely undermine and infringe on the General Assembly's legislative functions.

Fourth, O.C.G.A. § 16-10-20 "require[s] the defendant to have made the false statement in some intended relationship to a matter within the state or local agency's jurisdiction, that is, to have contemplated that it would come to the attention of an agency with the authority to act on it." *Martinez v. State*, 337 Ga. App. 374, 378-79 (2016). This *mens rea* requirement must be specifically pleaded. *See Haley* 289, Ga. at 521; *Martinez*, 337 Ga. App. at 378-79. The state must also allege that a defendant

intended "to deceive and thereby harm the government." *Haley* 289 Ga. at 528; *see also Martinez*, 337 Ga. App. at 397.

Count 26 of the Indictment does not allege Cheeley "contemplated that [the statements identified above] would come to the attention of an agency with the authority to act on [them]," or that he intended to deceive and harm any department or agency of the government. *See Haley*, 289 Ga. at 527. Thus, even assuming "jurisdiction," the State fails to plead these necessary *mens rea* elements of the crime and Count 26 fails. *Id.* at 528; *see also Martinez*, 337 Ga. App. at 397.

5. 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.

The State alleges that Cheeley violated O.C.G.A. §§ 16-4-8 and 16-10-20 by unlawfully:

> conspir[ing] to knowingly and willfully make and use a false document titled "CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM GEORGIA," with knowledge that said document contained the false statement, "WE, THE UNDERSIGNED, being the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Georgia, do hereby certify the following," said document being within the jurisdiction of the Office of the Georgia Secretary of State and the Office of the Governor of Georgia, departments and agencies of state government

and

> unlawfully conspir[ing] to knowingly and willfully make and use a false document titled "RE: Notice of Filling of Electoral College Vacancy," with knowledge that said document contained the 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, said document being within the jurisdiction of the Office of the Georgia Secretary of State and the Office of the Governor of Georgia, departments and agencies of state government

Indictment at 78 (Count 13), 81 (Count 19).

The same problem that dooms Count 26 (a violation of § 16-10-20), namely the lack of requisite *mens rea*, also dooms these charges that Cheeley conspired to violate § 16-10-20. The Indictment purports that the alleged documents at issue were within the jurisdiction of (1) the Secretary, and (2) the Governor. *See id.* It does not, however, allege that Cheeley "contemplated that [those documents] would come to the attention of an agency with the authority to act on [them]." *Haley*, 289 Ga. at 527. Again, this dooms the Indictment for the reasons set forth above.

Relatedly, the Indictment also neglects to allege that Cheeley knew the alleged documents would harm Georgia's government or that they did actually cause any harm. Section "16-10-20 may only be applied to conduct that persons of common intelligence would know was wrongful because it could result in harm to the government" of Georgia. *Haley*, 289 Ga. at 528. The Indictment fails for this reason too.

And to the extent the Indictment alleges documents were sent to federal authorities, including the "Archivist of the United States" the allegation fails because O.C.G.A. 16-10-20 applies only to particular departments and agencies of the State or its subdivisions—not the federal government. *See Gentry v. Volkswagen of Am.*, 238 Ga. App. 785, 791 (1999).

Finally, as mentioned before, lenity also applies because the State uses the same underlying conduct regarding the same two documents to content that Mr. Cheeley conspired to commit forgery in violation of and § 16-9-1(b) and conspired to

make false statements to the government in violation of O.C.G.A. § 16-10-20. See Indictment at 77–78 (Counts 11, 13), 80–81 (Count 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*, 337 Ga. App. at 379 (2016). The rule, once applied, lenity requires reading O.C.G.A. §§ 16-4-8 and 16-10-20 strictly against the State. *See Bittner*, 598 U.S. at 101–02.

6. 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).

In Count 15, the Indictment alleges that Cheeley violated O.C.G.A. §§ 16-4-8 and 16-10-20.1(b)(1) by:

> unlawfully 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, "WE, THE UNDERSIGNED, being the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Georgia, do hereby certify the following."

Indictment at 79 (Count 15).

O.C.G.A. § 16-10-20.1(b)(1) makes it a crime to:

> [k]nowingly file, enter, or record any document in a public record or court of this state or of the United States knowing or having reason to know that such document is false or contains a materially false, fictitious, or fraudulent statement or representation

The first fatal flaw with Count 15 is that O.C.G.A. § 16-10-20.1(b)(1) does not apply here. O.C.G.A. § 16-10-20.1(a) defines "document" as used in (b)(1) to include, but not be limited to: "liens, encumbrances, documents of title, instruments, relating to security interest in or title to real or personal property, or other records,

statements, or representations of fact, law, right, or opinion." This list relates to title and lien documents. It does not relate to the certificate mentioned in Count 15.

The terms "or other records, statements, or representations of fact, law, right, or opinion" in the definition are constrained by the prior terms in that list. In *Kinslow v. State*, 311 Ga. 768, 773-74 (2021), the Georgia Supreme Court determined that the statutory construction doctrines of *noscitur a sociis*, *ejusdem generis*, and the rule of lenity in the context of a criminal statute, all require this result.

The *noscitur a sociis* canon requires words that appear in a statute together to be construed in light of the other words in the same statute. *Id.* at 733; *see also Warren v. State*, 294 Ga. 589-90 (2014). This avoids "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." *Kinslow*, 311 Ga. at 773 (quoting *Gustafson v. Alloyd Co*, 513 U.S. 561, 575 (1995).

Similarly, the *ejusdem generis* canon says:

> [W[hen a statute or documents enumerates by name several particular things, and concludes with a general term of enlargement, this latter term is to be construed as being ejusdem generis [i.e., of the same kind or class] with the things specifically named, unless, of course, there is something to show that a wider sense was intended.

Id. at 774 (quoting *Ctr. for a Sustainable Cost v. Coastal Marshlands Protection Comm.*, 284 Ga. 736, 737-38 (2008)).[30] Here the general terms of enlargement in O.C.G.A. § 16-10-20.1(a) must be read with the particular terms to mean documents

[30] The rule against surplusage also applies. *Kinslow*, 311 Ga. at 775-76. Here there would be no need for the first particular items in the list (namely those related to liens and titles) if the latter terms were to be read so broadly as to make them mere surplusage.

related to liens and title.

Finally, as discussed in detail below, the *Kinslow* court also pointed out that "[f]or more than 50 years, this Court has recognized and employed the rule of lenity when construing statutes in criminal cases." *Id.* at 776. That rule requires that if there is ambiguity in a statute it must be resolved in defendant's favor and against the state. This rule too requires reading the definition of "document" in O.C.G.A. § 16-10-20.1(a) to include only documents related to liens and titles.

Based on this, O.C.G.A. § 16-10-20.1(b)(1) has no applicability to the facts pleaded and accordingly Count 15 must be dismissed.

Moreover, Count 15 fails for an independent and equally fatal reason: the Indictment does not allege how the statement is "material to a specified issue or point in question in a described judicial proceeding." *Clackum v. State*, 55 Ga. App. 44, 49 (1936). "Materiality for the purpose of [perjury] has been defined as 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." *DeVine v. State*, 229 Ga. App. 346, 350 (1997) (cleaned up). The presumption of consistent usage dictates that materiality has the same meaning under O.C.G.A. § 16-10-20.1(b)(1) given that the "statutes hav[e] similar purposes" and the General Assembly expressed no intent to the contrary. *See Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality).

"Whether particular statements were material depends upon the nature of the proceeding and the matters at issue, and can be determined in each case for that case

only." *West v. State*, 228 Ga. App. 713, 714 (1997) (quoting *Clackum*, 55 Ga. App at 49). The Indictment, however, provides no allegations regarding (1) the nature of the proceeding in which Cheeley supposedly conspired to file this document, (2) the matters at issue in that proceeding, or (3) how the statement identified in the Indictment bears any material relationship to any specific matters at issue in that proceeding. Absent such information, Cheeley cannot hope "to prepare his defense intelligently. *English*, 276 Ga. at 346 (citation omitted).[31] Count 15 must be dismissed.

7. 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 of the Indictment alleges Cheeley violated O.C.G.A. §§ 16-4-7 and 16-10-1 by unlawfully:

> solicit[ing], request[ing], and importun[ing] certain public officers then serving as elected members of the Georgia Senate and present at a Senate Judiciary Subcommittee meeting, including unindicted co-conspirator Individual 8, Senators Brandon Beach, Bill Heath, William Ligon, Michael Rhett, and Blake Tillery, to engage in conduct constituting the felony offense of Violation of Oath by Public Officer, O.C.G.A. § 16-10-1, by unlawfully appointing 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, with intent that said persons engage in said conduct, said date being a material element of

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[31] Not only this charge, but most of the charges in the Indictment directed to Cheeley appear to amount to an unconstitutional selective enforcement. *See Lee v. State*, 177 Ga. App. 698, 700 (1986) (citing *United States v. Batchelder*, 442 U.S. 114, 124–25 (1979); *Bordenkircher v. Hayes*, 434 U.S. 357, 360 (1978)). For instance, as it relates to the 2018 gubernatorial election, and despite her subsequent protestations to the contrary, Stacey Abrams stated of the election that "I won", the election was "rigged", it was not a "free and fair election," the election was "stolen from the people of Georgia." *See* https://www.washingtonpost.com/politics/2022/09/29/stacey-abramss-rhetorical-twist-being-an-election-denier/. If State departments or officers were listening she was not charged. Abrams caused to be filed federal court documents supporting her public claims of election fraud. Her judicial contests were unsuccessful. *See* https://sos.ga.gov/news/raffensperger-defeats-stacey-abrams-stolen-election-claims-court. Again, Abrams was not charged, despite losing the contests. Abrams should not have been charged because she committed no crime. But her conduct is no different from Cheeley's.

> the offense, contrary to the laws of said State, the good order, peace and dignity thereof.

Indictment at 84 (Count 23).

Beginning again 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.

First, Count 23, fails because it does not assert the terms of the oath allegedly violated. "[I]t is unmistakable that the 'terms' of the oath averred to be violated are a necessary fact" to establish a violation of O.C.G.A. § 16-10-1 and, by extension, to convict someone of soliciting an officer to violate that statute. *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). Because this is not pleaded, the count fails. Moreover, it is unsurprising that the Indictment does not allege the oath at issue—as, again, the members of the General Assembly could not have violated any oath as they had no ability or power to affect the 2020 presidential election here.

Second, there is no 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. It is well established that a conviction under O.C.G.A. § 16-10-1 requires that there

be "some connection between the offense and the public officer's official duties." *State v. Tullis*, 213 Ga. App. 581, 582 (1994) (collecting cases). So, for example, senators do not violate § 16-10-1 by "fail[ing] to obey a traffic signal" while commuting to the Capitol because such an offense is unconnected with his or her official duties. *See id.* The same is true here. As discussed throughout, neither the Georgia Senate nor any subdivision had a role in the 2020 election contest and the Indictment certainly does not articulate what such a role might have been. For all these reasons, Count 23 fails.

Simply stated, the Indictment does not allege a criminal violation because the "solicitation" was for an act authorized by the ECA (the alternate slate of electors) which does not violate any oath imposed by the State of Georgia.

8. Count 41 fails to adequately allege perjury.

Count 41 of the Indictment alleges Cheeley violated O.C.G.A. § 16-10-70(a) by:

> knowingly, willfully, and unlawfully making at least one of the following false statements before the Fulton County Special Purpose Grand Jury, a judicial proceeding, after having been administered a lawful oath:
>
> (i) That he was unaware of the December 14, 2020, meeting of Trump presidential elector nominees in Fulton County, Georgia, until after the meeting had already taken place;
>
> (ii) That he had no substantive conversations with anyone concerning the December 14, 2020, meeting of Trump presidential elector nominees in Fulton County, Georgia, until after the meeting had already taken place;
>
> (iii) That he never suggested to anyone that the Trump presidential elector nominees in Georgia should meet on December 14, 2020;
>
> (iv) That the only communication he had with John Eastman concerning the November 3, 2020, presidential election was for the purpose of connecting Eastman to Georgia Senator Brandon Beach and unindicted co-conspirator Individual 8;

(v) That he never worked to connect John Eastman with any Georgia legislators other than Georgia Senator Brandon Beach and unindicted co-conspirator Individual 8.

And that those statements 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, contrary to the laws of said State, the good order, peace and dignity thereof.

Indictment at 97 (Count 41).

O.C.G.A. § 16-10-70(a) provides that:

> A person to whom a lawful oath or affirmation has been administered or a person who executes an unsworn declaration as defined in Code Section 9-1-1 commits the offense of perjury when, in a judicial proceeding, he or she knowingly and willfully makes a false statement material to the issue or point in question.

The essential elements of the offense of perjury thus are: "(1) knowingly and willfully making a false statement, (2) material to an issue in question, (3) while under oath in a judicial proceeding." *Williams v. State*, 244 Ga. App. 692, 696 (2000).

The Indictment fails 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, the charge is therefore subject to dismissal. *See English*, 276 Ga. at 346.

D. The rule of lenity further counsels in favor of dismissing the charges against Cheeley.

As set forth above, the Indictment plainly fails to properly allege any crime against Cheeley under the plain language of the criminal statutes at issue and the caselaw discussing them. To the extent there is any doubt regarding whether any of Cheeley's alleged actions constitute a crime under these statutes, the rule of lenity requires dismissing the Indictment. *See Kinslow*, 311 Ga. at 776 (rule of lenity applied in Georgia criminal case for more than 50 years); *Warren v. State*, 294 Ga. 589, 592 (2014). "[I]f reasonable minds disagree[] as to whether the statute is, in fact, ambiguous," then the rule of lenity counsels in favor of dismissing the indictment for the reasons explained below. *See Coates v. State*, 304 Ga. 329, 332 n.4 (2018).

The rule of lenity, *i.e.*, the strict construction of penal statutes against the government, is beyond cavil.[32] *See Liparota v. United States*, 471 U.S. 419, 429 (1985); *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). And "it *has always been the law* [in Georgia] that criminal statutes must be strictly construed against the state." *Mitchell v. State*, 239 Ga. 3, 3 (1977) (*per curiam*) (cleaned up). Applying it here, the State's attempt to extend the criminal statutes above to Cheeley's conduct must be rejected.

The Indictment's attempt to broaden the reach of the criminal statutes at issue violates due process which requires "'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a

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[32] *See* 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 88 (1765) ("when a "[s]tatute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken [s]trictly."); *see also* 2 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 335 (1736).

certain line is passed."'[33] *Bittner v. United States*, 598 U.S. 85, 102 (2023) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1224-1225 (2018) (Gorsuch, J., concurring). This is required because "citizen[s] cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 393 (1926). Thus, the rule of lenity "protect[s] an indispensable part of the rule of law—the promise that, whether or not individuals happen to read the law, they can suffer penalties only for violating standing rules announced in advance." *Wooden*, 142 S. Ct. at 1083 (Gorsuch J, concurring in part and concurring in judgment).

The Indictment's "interpretations" of O.C.G.A. §§ 16-14-4(c), 16-4-8, 16-9-1(b), 16-10-20, 16-10-20.1(b)(1), § 16-4-7, 16-10-1, and 16-10-70(a) presents serious fair-notice issues. Nothing in any of those provisions or their prior application informs citizens that such civic and political activities directed toward the General Assembly or the federal government would be considered "criminal" or that a citizen may be jailed for contesting an election and seeking redress regarding it.

In particular, and as discussed throughout, Cheeley and other defendants were entitled to rely on, among other things, the ECA and prior case law and commentary regarding it in governing their actions—especially when the case law and

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[33] When a fair-notice problem arises and the Court elects not to apply the rule of lenity, it should still require proof that the defendant was aware that his conduct was unlawful pursuant to the *mens rea* requirements discussed above. *See Wooden v. United States*, 142 S. Ct. 1063, 1076 (2022) (Kavanaugh, J., concurring in full). "Alternatively, another solution could be to allow a mistake-of-law defense in certain circumstances—consistent with the longstanding legal principle that an act is not culpable unless the mind is guilty." *Id.* (citing *Morissette v. United States*, 342 U.S. 246, 250–52 (1952)).

commentary is devoid of contrary positions. *See Bush*, 531 U.S. at 127 & n.5 (2000) (Stevens, J., dissenting) (citing Josephson & Ross, *Repairing the Electoral College*, 22 J. LEGIS. at 166, n. 154). Defendants should also have been entitled to rely on the fact that no other person in Georgia, especially an attorney advocating for his client, has ever been charged with the crimes alleged here on the grounds alleged in the Indictment. Indeed, as noted above, D.A. Willis made statements similar to Cheeley's prior to his. She was not prosecuted. Stacey Abrams took actions similar to Cheeley's. She was not prosecuted. The Indictment's present efforts to criminalize previously non-criminal conduct certainly violates due process and the rule of lenity prohibits it.

In addition to due process considerations, the rule of lenity rests on separation-of-powers concerns. *See Wooden*, 142 S. Ct. at 1083 (Gorsuch J, concurring in part and concurring in judgment); *United States v. Bass*, 404 U.S. 336, 348 (1971). The Georgia Constitution provides that "[t]he legislative power of the state shall be vested in a General Assembly." GA. CONST. ART. III, § I, ¶ I.

The legislative power includes "the power to define crimes and fix punishments." *Nolley v. State*, 335 Ga. App. 539, 545 (2016). And "[t]he legislative, judicial, and executive powers shall forever remain separate and distinct[.]" Art. I, § II, ¶ III. So, "if, by mistake or otherwise, [the General Assembly] has failed to provide for the punishment of a crime, it must go unpunished." *Wood v. State*, 219 Ga. 509, 514 (1963). The judiciary (and certainly not the D.A.) cannot extend criminal prohibitions and penalties to conduct not clearly covered by a statute without invading the General Assembly's role in violation of Art. I, § II, ¶ III. *See id.*; *see also*

Johnson v. State, 152 S.E. 76, 80 (1930); *Wiltberger*, 18 U.S. at 95. In other words, "if [cases] are not provided for in the text of the act, courts of justice do not adventure on the usurpation of legislative authority." *United States v. Open Boat*, 27 F.Cas. 354, 357 (No. 15,968) (CC Me. 1829) (Story, J.).[34]

The State's constructions of O.C.G.A. §§ 16-14-4(c), 16-4-8, 16-9-1(b), 16-10-20, 16-10-20.1(b)(1), § 16-4-7, 16-10-1, and 16-10-70(a) invoke these concerns. Because those provisions cannot be "construed against an accused ... person beyond [their] literal and obvious meaning[s]," which does not include criminalizing the civic and political activities that Cheeley (like many before him) engaged in, the provisions "should be construed so as to operate in favor of life and liberty." *Gee v. State*, 225 Ga. 669, 676 (1969). And their "operation should not be ... extended by application of subtle and forced interpretations." *Foster v. State*, 273 Ga. 555, 556 (2001).

Indeed, that is true even if the State's constructions of these provisions were plausible, which they arguably are not. *See Gee*, 225 Ga. at 676. The statutes' silence regarding political and civic conduct directed towards the General Assembly and federal government "creates an ambiguity" in light of the State's theory because "a [citizen] of ordinary intelligence could fail to appreciate that" engaging in post-election concerns creates criminal liability. *See State v. Langlands*, 276 Ga. 721, 724 (2003). "This Court cannot ... resolve the issue in favor of increased punishment," "no matter how deserving of punishment the conduct at issue may be," and the conduct

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[34] It is therefore "more consonant to the principle of liberty ... that a court should acquit when the legislature intended to punish, than that it should punish, when it was intended to discharge with impunity." *The Enterprise*, 8 F.Cas. 732, 734–35 (No. 4,499) (CC NY 1812) (Livingston, J.) (punctuation omitted).

here is otherwise utterly *undeserving* of criminal punishment. *Glover v. State*, 272 Ga. 639, 641 (2000). To do so would usurp the General Assembly's power and deprive Cheeley of fair notice.

V. CONCLUSION

Based upon the facts, authorities and grounds set forth herein, Defendant Robert David Cheeley requests that the Court grant his Joint General and Special Demurrer to the Indictment, his Motion to Quash the Indictment, and his Plea In Bar to dismiss the Indictment here. The Indictment should be dismissed against Cheeley completely.

Respectfully submitted, October 5, 2023.

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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 5th day of October 2023, served a true and correct copy of the within and foregoing JOINT GENERAL AND SPECIAL DEMURRER TO, PLEA IN BAR TO, AND MOTION TO QUASH THE INDICTMENT OF DEFENDANT ROBERT DAVID CHEELEY via electronic filing.

/s/ Christopher S. Anulewicz
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Attorney for Defendant Robert David Cheeley

Exhibit A

Fani Willis is 😠 feeling annoyed.

Nov 4, 2020 ·

Georgia could determine who is our next president. A TEAM of lawyers needs to watch them count every single VOTE. They can start in Fulton where we are having water leaks. What ballots are they throwing out? Georgia lets give an honest accounting. No stunts!

123

17 comments • 2 shares

Like Comment Share

Exhibit B

FULTON COUNTY, GEORGIA

GARLAND FAVORITO, MICHAEL SCUPIN, TREVOR TERRIS, SEAN DRAIME, CAROLINE JEFFORDS, STACEY DORAN, CHRISTOPHER PECK, ROBIN SOTIR and BRANDI TAYLOR,

Petitioners,

vs.

MARY CAROLE COONEY, VERNETTA KEITH NURIDDIN, KATHLEEN RUTH, AARON JOHNSON, MARK WINGATE, and RICHARD BARRON in their individual capacities,

Respondents.

Transcript of Video File:

COMMITTEE HEARING FOR THE

STATE FARM ARENA ELECTION BALLOTS

WEDNESDAY, DECEMBER 30, 2020

Video Runtime: 15 minutes 11 seconds

(Beginning of Audio Recording.)

MR. CHEELEY: Thank you, Mr. Chairman. My name is Bob Cheeley. I'm a lawyer, trial lawyer. I've been licensed to practice law in the state since 1982. I'm a graduate of the University of Georgia School of Law and undergraduate, so I'm therefore a double dog. And I wear that -- that -- that badge proudly.

I was born and raised in Buford, Georgia. I've been a lifelong resident of the state. And I've resided in Fulton County since the mid-1980s. I practiced law in Metro Atlanta in Alpharetta. And I try cases against major companies. I hold them accountable based upon evidence and facts.

And I'm here today to share with the members of this committee evidence that shows that what occurred at the State Farm Arena that night, and I've watched that video, every minute of it, should shock the conscience of every red-blooded Georgian, no matter your political persuasion. I've asked Bob if you're --

MR. POSTON: Poston.

MR. CHEELEY: -- Poston.

MR. POSTON: Yes, sir.

MR. CHEELEY: Bob Poston here. He's got the video. I want to pull it up, and I want to show you. For those that may not have taken the time to watch

this video, I want to show you what occurred there that night that should shock the conscience of every Georgian. Bob, if you would.

All right. So this in the upper left-hand corner, you can see the time. That's 11:05 p.m. This is after everyone was told to go home because there was a major water main break. That was false. There was no water main break at all. There was a toilet leak about 16 or 18 hours earlier in the day, leaking from the ceiling from a suite above. It was cleaned up. It had no impact on this election.

The water main break pronouncement was obviously made to -- to clear the room of all poll watchers and the media. So they were told that night that the vote count would be suspended because the water main break and that they would resume the vote count the next morning.

The next morning, everybody was stunned to learn that the people at State Farm Arena, there were five women that worked for about two and a half hours from just before 11:00 p.m. until just before 1:00 a.m. scanning ballots. And the disturbing thing about it is that there were five of these desks with women at each of the five desks, and we've labeled the first one here, kind of focused on her, she was wearing a purple

top, desk 1.

This is at 4X speed, so we don't have to sit there and watch, you know, it in a slower speed. But you can see that this lady is taking the same stack of ballots, and once she runs them through the scanner, there she goes, she sticks them back in and runs them a second time and a third time. And then the lady to her right wearing the yellow top, we -- we've got a second video that shows that she did the same thing with a stack of ballots on her desk. And -- so there's ballot scan number 3 from desk number 1.

One man, one vote just went out the window at the State Farm Arena on the night of November the 3rd, 2020. And it's here for all of us to see. This is -- this is much like going to trial with a who ran the red light case, and instead of having people coming in and testifying about who ran the red light, you got a video showing who ran the red light.

Now, it doesn't take experts, you know, and I'm glad we had an expert here today on the -- on the ballots and the person of Jovan Pulitzer, who is probably one of the most qualified experts I've ever had in the kind of cases that I've ever presented. I'm blown away with his credentials and his ability to -- if he was given access to these ballots, he could -- he

could tell us with 100 percent certainty how many of those ballots are real.

I mean, how many of them are fake? And that's, at the end of the day, that's what all Georgians want to know is, were these ballots, you know, that were being scanned here after everybody was told to clear the room, were these real ballots or were they counterfeit ballots? But they were included in the vote total.

Now, I served an open records request upon Fulton County. There you can see desk number 2, she's gone -- she's on scan number 2 of the same ballots. We -- we need to know who these women are, for example. They need to come before this panel, or somebody, under oath, under penalty of perjury, and testify about those ballots after Jovan Pulitzer has had a chance to inspect the ballots.

Because I think that these people would be pleading the Fifth Amendment if asked questions about what they knew about these ballots. So I've served a -- an open records request upon Fulton County. I wanted to get those ballots and make them available to -- to Jovan Pulitzer so that he could determine are these legitimate ballots or not. And I also wanted access to those computers that you see there and those scanners

so that they could image what's on those computers and scanners to tell the people of Georgia, and particularly the people of Fulton County like me who pay taxes, whether or not our votes are being diluted or stolen.

So what do I get? I get no response from Fulton County Board of Electors. I sent -- I called yesterday. We had this thing set up for this morning. We had a truck loaded with four of these commercial high-speed scanners, specified by Jovan, show up at Fulton County Board of Electors warehouse, which is where they told me yesterday, I should go with the scanners. I had lawyers from my law firm show up there ready to scan these things according to his instructions, Jovan's instructions.

We -- we -- we were then told, oh, we're not doing it here. We're -- those ballots are down at State Farm -- or they're not at State Farm Arena. They're down at World Congress Center. So the trucks load up, drive down to World Congress Center, get down to World Congress Center, people at World Congress Center say, we don't know what you're talking about. We're not -- we haven't been told to expect you.

So then I -- I'm hearing this, you know, this hearing today, getting all these text messages

from my lawyers in my firm saying, what do we do now? I said, we call Ralph Jones. He's the head registrar for Fulton County. Call his office. Find out where the ballots are, when they are going to make them available? Because we've got to a right to see those ballots under Georgia law and under federal law.

Well, the last word I got a little while ago is they're not going to make them available unless we have a court order. So here we go again, kicking the can down the road. Obfuscation, delay, trying to run out the clock. You know, if I had an hourglass here with sand in it, that -- that's the whole goal -- goal here is to run out the sand, run out of time so that the Georgia legislature and the people of Georgia won't have access to these ballots to see if they're -- they're true or not.

And, you know, it's time for the Georgia legislature, the House led by a great man, Speaker Ralston, and it's time for the Senate, led by a -- a man that I've known since we were both little boys growing up in Buford, Georgia, Senator Butch Miller, it's time for these two gentlemen to do their job, call in the House and the Senate to look at this video.

Look at the State Farm video. We all can see it. We know who ran the red light. It didn't take

an expert to tell us who ran that red light. We can see what happened, how many times the same ballots get voted over and over again. So it's time to call a session and let the people one by one, every legislator who's been elected, needs to raise their hand, and say, I'm for one man, one vote. And if I'm seeing one man, one vote violated there, then every person in the legislature needs to say all of those votes under -- under what is called the Adverse Inference Law of Georgia, all of those need to be tossed. You can't rely on them.

So that's the summary of my testimony. And thank you for your time, Mr. Chairman. I'll take any questions at this time.

UNIDENTIFIED SPEAKER: Senator Rhett had a question.

MR. RHETT: I -- I thank you for your testimony, sir, and your video, but just from a legal standpoint, when you and your lawyers showed up with the scanner, legally, would they -- would you be allowed to handle ballots and scan them yourself?

MR. CHEELEY: We were going to allow the Fulton County election workers to instruct us how to put those ballots on the scanner. And if they wanted to do it themselves, they could do it.

MR. RHETT: But is that legal?
MR. CHEELEY: Yes, it is. It's non-destructive testing. And we -- under Georgia law, you're entitled to have access to ballots for the purpose of verifying the authenticity of ballots.
MR. RHETT: Thank you very much, sir.
MR. CHEELEY: Thank you.
UNIDENTIFIED SPEAKER: All right. Okay. Senator Jones, did you have a question?
MR. JONES: Yeah. Thank you, Ms. Cheeley. I appreciate you being here. Appreciate your testimony, and you are dead right in what you're saying. I mean, it's -- as they used to say over at the University of Georgia, the eye in the sky doesn't lie, you know? And when I -- when I was over there playing -- playing ball.
But to your knowledge, has anybody been able to speak with the four or five people who were left in the State Farm Arena as far as -- as far as subpoenaed them or any -- any group or --
MR. CHEELEY: Not to my knowledge.
MR. JONES: And -- and you filed a couple of law -- lawsuits, I think, in Fulton County, and -- and -- and the Fulton County judges have, I know in Mr. Smith's case, they've yet to even assign him to a -- to

a -- to a -- a particular judge, and it's been there for two and a half, three weeks now. And -- and have -- have you filed a suit and had the same luck?

MR. CHEELEY: No, but -- I mean, I -- I have not filed a lawsuit. I know Ray Smith has and others have that have testified here. And I've heard that no judges have been assigned to -- to hear their cases. And there's -- there's just total breakdown in the -- in the system here.

MR. JONES: And it's -- it all centers around Fulton County. But ultimately, the Georgia legislature should, and has, the -- the final say in -- in all of this, though, correct?

MR. CHEELEY: Absolutely. And, you know, I -- I grew up here. My -- my dad, my granddad, were Southern Democrats, and I'm -- I'm related to Richard B. Russell. And I knew him. He was from Winder, Georgia, not far from Buford, Georgia, where I'm from. And I -- I -- I would believe that those fine gentlemen such as Richard B. Russell would be appalled to see what's going on there in that State Farm Arena video, and he would speak out against it.

And it reminded me of the -- the infamous speech given by President Franklin Delano Roosevelt on December the 8th, 1941, when he addressed the nation.

And he said, as follows, "Mr. Vice President, Mr. Speaker, members of the Senate and of the House of Representatives, yesterday, December 7th, 1941, a date which will live in infamy, the United States of America was suddenly and deliberately attacked by naval and air forces of the empire of Japan. The United States was at peace with that nation, and at the solicitation of Japan was still in conversation with its government and its emperor, looking toward the maintenance of peace in the Pacific."

"Indeed, one hour after Japanese air squadrons had commenced bombing in the American island of Oahu, the Japanese ambassador to the United States and his American -- and his colleague delivered to our Secretary of State a formal reply to a recent American message. And while this reply stated that it seemed useless to continue the existing diplomatic negotiations that continued no threat -- or it contained no threat or hint of war or of armed attack, it will be recorded that the distance of -- of Hawaii from Japan makes it obvious that the attack was deliberately planned many days or even weeks ago."

I -- I respectfully submit that this -- this plan was -- regarding this voter fraud at State Farm Arena was deliberately planned, it had to be, many

weeks before this election, and it was -- it represents an imperialist attitude by some, that they have the right to cancel out the votes of the good people of this state.

And that imperialist attitude, if not corrected by this body, the Senate, and this House, will lead to tyranny, just as our Founding Father Thomas Jefferson said when he said, "We in America do not have government by the majority. We have government by the majority who participate. All tyranny needs to gain a foothold is for good people of good conscience to remain silent." I trust that our elected officials in the House and the Senate will not remain silent. Thank you.

UNIDENTIFIED SPEAKER: Thank you, Mr. Cheeley.

(End of Audio Recording.)

CERTIFICATE OF TRANSCRIPTIONIST

I, Doug Yarborough, a transcriptionist located in Charlotte, North Carolina, hereby certify:

That the foregoing is a complete and accurate transcript of the digital audio recording of the proceeding in the above-entitled matter, all to the best of my skills and ability.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS THEREOF, I have hereunto set my hand this 22nd day of August, 2023.

_____

EXHIBIT C

VIDEO RECORDING FILED SEPARATELY