IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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

STATE'S REPLY TO DEFENDANTS' SUPPLEMENTAL BRIEFS FOLLOWING HEARING ON DECEMBER 1, 2023

The Defendants ask this Court to dismiss the indictment issued against them by a Fulton County grand jury, claiming that all of their actions constituting the crimes charged in the indictment were merely political speech protected by the First Amendment to the United States Constitution. They also claim that many of the statutes charged against them are facially invalid restrictions on core protected political speech.[1] The Defendants are wrong. The Defendants'

[1] The Defendants' remaining arguments, including as-applied constitutional challenges to statutes charged in the indictment, have previously been addressed by the State in briefing or oral

actions, including any speech, that brought about this prosecution are not constitutionally protected speech. Moreover, numerous federal and Georgia cases establish that none of the statutes charged against the Defendants are facially unconstitutional restrictions on speech, and few of them, if any, can even reasonably be categorized as content-based restrictions on speech or expression at all. For these reasons, as set forth fully below, the Defendants' motions should be denied.

I. The Defendants' crimes, as alleged in the indictment, are not protected political speech and are not shielded from prosecution by the First Amendment.

In asking this Court to dismiss the indictment against them, the Defendants repeatedly insist that this prosecution "directly targets core protected political speech and activity." Trump Post-Hrg. Brf. at 6, Dec. 18, 2023, Trump Doc. 99. The Defendants contend that if the Court fails to dismiss the indictment prior to trial, it "will upend political speech as we know it." Cheeley Post-Hrg. Brf. at 2, Dec. 18, 2023, Cheeley Doc. 69. But as the State has previously briefed and argued, the prosecution here is based on criminal acts, not speech. State's Supp. Brf. at 16-18, Dec. 18, 2023, Cheeley Doc. 70. To the extent that the indictment seeks to punish speech, all of that speech constitutes speech integral to criminal conduct, fraud, perjury, threats, criminal solicitation, or lies that threaten to deceive and harm the government. *Id.* These categories of speech—the "prevention and punishment" of which "have never been thought to raise any Constitutional problem"—cannot reasonably be categorized as "core protected political speech" under any definition of that term. *See United States v. Stevens*, 559 U.S. 460, 468 (2010).

The State does not contest that the First Amendment unquestionably provides all citizens with a fundamental right to free speech and expression, and political speech is among the most sacred categories of protected speech. But common sense demonstrates that any speech proscribed

---

argument. The State notes that the reasoning behind its opposition to the Defendants' facial constitutional challenges also applies to the Defendants' as-applied constitutional challenges.

by this prosecution—all of which is itself criminal or is integral to other criminal conduct—is categorically different than the types of protected speech and expression historically recognized as political speech by the United States Supreme Court. A sample of those cases is instructive.

In *Minnesota Voters Alliance v. Mansky*, the Court held that a state cannot prohibit voters from wearing political badges or other items displaying political insignia inside a polling place on election day. 138 S. Ct. 1876 (2018). In *McCutcheon v. FEC*, the Court held that certain limits on individual financial contributions to political candidates violated the First Amendment. 572 U.S. 185 (2014). In *Citizens United v. FEC*, the Court held that a ban on corporate independent expenditures for electioneering communications violated the First Amendment. 558 U.S. 310 (2010). In *Republican Party v. White*, the Court held that a code of conduct preventing state judicial candidates from announcing their views on disputed legal and political issues violated the First Amendment. 536 U.S. 75 (2002). In *Meyer v. Grant*, the Court held that a state's ban on the use of paid petition circulators for ballot initiatives imposed an unconstitutional burden on political expression. 486 U.S. 414 (1988). In *Buckley v. Am. Constitutional Law Found.*, the Court struck down a state law requiring political petition circulators to be registered voters and to publicly reveal their identities, finding that the law unduly restricted political speech. 525 U.S. 182 (1999). In *Buckley v. Valeo*, the Court struck down statutory limitations on campaign expenditures as an unconstitutional restriction on the ability of candidates, citizens, and associations to engage in protected political expression. 424 U.S. 1 (1976). In *W. Va. State Bd. of Educ. v. Barnette*, the Court held that a school board's requirement that all students salute the American flag amounted to unconstitutional compelled political expression. 319 U.S. 624 (1943). In *Stromberg v. California*, the Court invalidated a statute that prohibited the display of a red flag as a sign of opposition to

organized government, finding the statute to be an unconstitutional restriction on political expression. 283 U.S. 359 (1931).

To the extent that the indictment here seeks to punish speech, all of that speech is fundamentally and categorically different from those forms of expression traditionally recognized as protected political speech or expression. None of these Defendants is being prosecuted for displaying a political message, for making campaign contributions, for announcing his or her views on disputed legal or political issues, for circulating political petitions, for refusing to salute the American flag, or for displaying a flag or other symbol as an opposition to government. Instead, they are being prosecuted for conspiring to conduct and participate in a criminal enterprise through a pattern of racketeering activity, for soliciting government officials to commit crimes, for knowingly and willfully making false statements concerning matters within the jurisdiction of government agencies and with intent that the statements would come to the attention of agencies with authority to act on them, for impersonating government officers, for making and uttering forged documents, for filing false documents in court, for influencing witnesses, for conspiring to commit election fraud, for conspiring to commit computer crimes, for conspiring to defraud the State of Georgia, and for perjury. None of these criminal acts, to the extent that they are or involve speech at all, are in any way protected political expression. Moreover, "[i]t has never been deemed an abridgment of freedom of speech … to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Cox v. Louisiana*, 379 U.S. 536, 555 (1965) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). The Court should reject the Defendants' categorization of their crimes as protected political speech.

II. O.C.G.A. §§ 16-10-20 and 16-10-20.1 are not facially unconstitutional.

In his post-hearing brief, Defendant Cheeley raises, for the first time, facial challenges to O.C.G.A. §§ 16-10-20 (false statements and writings) and 16-10-20.1 (filing false documents), arguing that both statutes are unconstitutionally overbroad and result in a chilling effect on speech. These argument are easily dispensed with in light of the Georgia Supreme Court's ruling in *Haley v. State*, 289 Ga. 515 (2011). In that case, Justice Nahmias set forth a lengthy analysis of the history and proper construction of O.C.G.A. § 16-10-20, ultimately determining that the statute, "when properly construed to require that the defendant make the false statement with knowledge and intent that it may come within the jurisdiction of a state or local government agency, is constitutional" and does not violate the First Amendment on its face. *Id.* at 516. A "knowingly and willfully false statement that is made knowingly and willfully in a matter within a government agency's jurisdiction is a lie that threatens to deceive and thereby harm the government … ." *Id.* at 528. And "a long line of [United States Supreme Court] cases recogniz[e] that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest." *United States v. Alvarez*, 567 U.S. 709, 739 (2010) (Alito, J., dissenting).

The validity of O.C.G.A. § 16-10-20.1 follows the same logic, applying protection against harmful false statements to the judicial branch of government. The statute, as charged in the indictment pursuant to O.C.G.A. § 16-10-20.1(b)(1), criminalizes a person's knowing filing of any document in a public record or court knowing or having reason to know that the document is false or contains a materially false, fictitious, or fraudulent statement or representation. First, like in *Haley*, a knowingly false statement that is made knowingly to the judicial branch of government is a lie that threatens to deceive and thereby harm the government. 289 Ga. at 528. Prohibiting such a statement does not violate the First Amendment. *Id.* at 516. Second, O.C.G.A. § 16-10-

20.1(b)(1) criminalizes the *act of filing a false document* and not simply the making of a false statement itself. It does not implicate the First Amendment. *See United States v. Daly*, 756 F.2d 1076, 1082 (5th Cir. 1985) (holding that federal false statements statute, 18 U.S.C. § 1001, punished actions, not speech, and therefore did not implicate the First Amendment).

Finally, to the extent that O.C.G.A. § 16-10-20.1(b)(1) may punish false or fraudulent speech, fraud has never been shielded by the First Amendment. "[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few history and traditional categories [of expression] long familiar to the bar. Among these categories … [is] fraud … ." . *Alvarez*, 567 U.S at 717; *see also United States v. Hansen*, 143 S. Ct. 1932, 1947 n.4 (2023) (holding that "fraudulent representations through speech for personal gain … are not protected by the First Amendment"); *Illinois v. Telemarketing Assoc.*, 538 U.S. 600, 612 (2003) (holding that "the First Amendment does not shield fraud.").

For these reasons, neither O.C.G.A. §§ 16-10-20 nor 16-10-20.1 are unconstitutional, and the Court should deny the Defendants' facial challenges to them.

III. None of the remaining statutes charged against Defendant Cheeley or any other Defendant is facially unconstitutional.

While Defendant Cheeley categorizes his constitutional challenges to O.C.G.A. §§ 16-10-23 (impersonating a public officer), 16-9-1(b) (forgery), 16-4-7 (criminal solicitation), and 16-10-1 (violation of oath by public officer) as as-applied challenges, he argues that each of these statutes is a presumptively unconstitutional content-based restriction on speech subject to strict scrutiny analysis. Cheeley Post-Hrg. Brf. at 15-19, Dec. 18, 2023, Cheeley Doc. 69. He further argues that each of the statutes could have been drawn more narrowly by specifically excluding public or political discourse. *Id.* Despite his characterizing these challenges as "as-applied," Defendant

Cheely directly attacks these statutes on their face, and the State is compelled to respond to what are, in substance, facial First Amendment challenges to each of the statutes.

As an initial matter, none of these statutes constitutes a content-based restriction on speech. A content-based restriction is one that "restrict[s] expression because of its message, its ideas, its subject matter, or its content." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987). This includes both "restrictions on particular viewpoints … [and] prohibition of public discussion of an entire topic." *Id.* None of these statutes prohibits speech or expression because of its message, its ideas, its subject matter, or its content, and all of the statutes can be violated without a defendant engaging any speech or expression at all.

A person can impersonate a public officer by installing blue lights on his or her vehicle and pulling over a driver. *Stewart v. State*, 240 Ga. App. 375 (1999). This is not speech or expression. A person can commit forgery by possessing a fraudulent check made by another person and cashing the check. *King v. State*, 277 Ga. App. 190 (2006). This is not speech or expression. A person can commit criminal solicitation by attempting to cause another person to engage in conduct constituting a felony without any speech or expression, so long as the person does something to create a clear and present danger of another person committing a felony. *See State v. Davis*, 246 Ga. 761, 762 (1980). Finally, there are countless ways in which a public officer can violate his or her oath without engaging in any speech or expression. *See Poole v. State*, 262 Ga. 718 (1993) (conviction for violation of oath by public officer upheld where police officer pawned confiscated handgun), *Pierson v.* State, 348 Ga. App. 765 (2019) (conviction upheld where police officer sexually assaulted victim during traffic stop), Gaskins *v. State*, 318 Ga. App. 8 (2012) (conviction upheld where police officer obtained victim's taxpayer identification number using a police database), *Bradley v. State*, 292 Ga. App. 737 (2008) (conviction upheld where corrections

officer was found bringing drugs into a prison). None of these statutes can reasonably be categorized as a content-based restriction on free speech.

Moreover, to the extent that any of these statutes may have some effect that limits speech, none of the proscribed categories of speech enjoy First Amendment protection. "It is fundamental First Amendment jurisprudence that prohibiting and punishing speech 'integral to criminal conduct' does not 'raise any Constitutional problem.'" *United States v. Trump*, No. 23-257, 2023 U.S. Dist. LEXIS 215162 at *48 (D.D.C., Dec. 1, 2023) (Chutkan, J.) (quoting *Stevens*, 559 U.S. at 468). Nor is there any constitutional protection for speech involving fraud, perjury, threats, criminal solicitation, or lies that threaten to deceive or harm the government. See, e.g., *Stevens*, 559 U.S. at 468-469 (fraud); *United States v. Williams*, 553 U.S. 285, 298 (2008) (solicitation); *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 244 (4th Cir. 1997) (threats, perjury); *Haley*, 289 Ga. at 528 (harmful lies to the government); *Davis*, 246 Ga. at 762 (solicitation). Finally, as previously stated, "it has never been deemed an abridgment of freedom of speech … to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Cox*, 379 U.S. at 555.

Each of the statutes challenged by Defendant Cheeley can be violated without necessarily requiring a defendant to engage in any speech or expression at all, and to the extent that any of the statutes may have some effect that limits speech, none of that speech enjoys First Amendment protection. Accordingly, the Defendants' facial challenges to O.C.G.A. §§ 16-10-23 (impersonating a public officer), 16-9-1(b) (forgery), 16-4-7 (criminal solicitation), and 16-10-1 (violation of oath by public officer) should be denied.

For the reasons set forth above, the Defendants' motions should be denied.

Respectfully submitted this 16th day of January 2024,

FANI T. WILLIS
District Attorney
Atlanta Judicial Circuit

F. McDonald Wakeford
Georgia Bar No. 414898
Chief Senior Assistant District Attorney
Fulton County District Attorney's Office
136 Pryor Street SW, 3rd Floor
Atlanta, Georgia 30303
fmcdonald.wakeford@fultoncountyga.gov

/s/ John W. "Will" Wooten
John W. "Will" Wooten
Georgia Bar No. 410684
Deputy District Attorney
Fulton County District Attorney's Office
136 Pryor Street SW, 3rd Floor
Atlanta, Georgia 30303
will.wooten@fultoncountyga.gov

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of this STATE'S REPLY TO DEFENDANTS' SUPPLEMENTAL BRIEFS FOLLOWING HEARING ON DECEMBER 1, 2023, upon all counsel who have entered appearances as counsel of record in this matter via the Fulton County e-filing system.

This 16th day of January 2024,

FANI T. WILLIS
District Attorney
Atlanta Judicial Circuit

/s/ John W. "Will" Wooten

John W. "Will" Wooten
Georgia Bar No. 410684
Deputy District Attorney
Fulton County District Attorney's Office
136 Pryor Street SW, 3rd Floor
Atlanta, Georgia 30303
will.wooten@fultoncountyga.gov