

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,

v.

DONALD JOHN TRUMP, ET AL.,

Defendants.

INDICTMENT NO. 23SC188947

**JOINT MOTION FOR CERTIFICATE OF IMMEDIATE REVIEW
OF ORDER ON DEFENDANTS' MOTIONS TO DISMISS
UNDER THE FIRST AMENDMENT BY DEFENDANTS**

Defendants President Donald John Trump, Rudolph William Louis Giuliani, John Charles Eastman, Mark Randall Meadows, Jefferey Bossert Clark, Ray Stalling Smith, III, Robert David Cheeley, Michael A. Roman, David James Shafer, Shawn Micha Tresher Still, Stephen Cliffgard Lee, Harrison William Prescott Floyd, Cathleen Alston Latham, and Misty Hampton AKA Emily Misty Hayes file this Joint Motion and request the Court grant a Certificate of Immediate Review of the Court's April 4, 2024 Order on Defendants' Motions to Dismiss Under the First Amendment ("April 4 Order") pursuant to O.C.G.A. § 5-6-34(b).

The April 4 Order addresses whether U.S. Constitution, Amend. I or Ga. Const. Art. I, Sec. I, Pars. V & IX (collectively the "First Amendment")¹ bars the Indictment. While

¹ For the purposes of this Joint Motion, the "First Amendment" challenges and "free speech" references include Defendants' rights to free speech, freedom of association, and freedom to petition government under the U.S. and Georgia Constitutions. The petitions to government officials in the Georgia General Assembly or other otherwise and the association of like-minded persons advancing a political cause or challenge are integral to the protected speech and expressive

this Court held the Indictment is not subject to dismissal, and that the challenged criminal statutes withstand Defendants’ facial and as-applied First Amendment challenges, interlocutory appellate review of Defendants’ “vital constitutional protections,” April 4 Order at 1, is both prudent and warranted.

Interlocutory appellate review is prudent because Defendants’ challenges, if successful, would bar virtually every count of the Indictment against virtually every Defendant. Resolution of these outcome determinative issues before multiple, lengthy jury trials makes sense. Immediate appellate review is warranted because the challenges relate to Defendants’ core political, free speech rights in the context of then-ongoing aftermath of the 2020 Presidential election. While Defendants cited a plethora of U.S. Supreme Court and U.S. Circuit Court cases supporting their position, no Georgia appellate courts have addressed whether the challenged Georgia statutes can survive the criminalization of Defendants’ core political speech.²

“Prosecution decisions ... cannot turn on the exercise of free speech rights.” *Frederick Douglass Foundation, Inc. v. District of Columbia*, 82 F.4th 1122, 1141 (D.C. Cir. 2023). This is especially true in the context of political speech where the First Amendment is at its zenith. *See McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347

conduct at issue. But the rights to freely associate and petition government independently foreclose this prosecution.

² *Haley v. State*, 289 Ga. 515, 528 (2011) did deal with a First Amendment challenge to O.C.G.A. § 16-10-20. But that challenge was outside the context of *political speech*. Had *Haley* involved political speech, and had it applied or even considered strict scrutiny to the challenge, the outcome of that case would likely have been different. If *Haley* does apply to this case, it should be overruled.

(1995); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). And these protections extend in the political context to even “false” speech. *See 281 Care Committee v. Arneson*, 766 F.3d 774, 782 (8th Cir. 2014). Even if alleged false political speech is “knowingly” or “willfully” false,³ which is not this case, it is still subject to heightened First Amendment protection. *See List v. Ohio Elections Com’n*, 45 F. Supp. 3d 765, 775 (S.D. Ohio 2014). When reviewing restrictions on core political speech, a strict scrutiny analysis must be applied—and the State is not given the benefit of the doubt. *See Arneson*, 766 F.3d at 783-85.⁴

Defendants contend: (a) their challenged speech is core political speech related to the 2020 Presidential Election; (b) other than this speech, the Indictment does not challenge or point to any other activity that subjects them to prosecution; (c) and even if the Indictment alleges the speech “knowingly” or “willfully” false, which is what the law requires the Court to assume in considering Defendants’ pretrial motions, their speech is still protected by the First Amendment. Again, other than saying Defendants’ *speech*

³ The Court contends that whether the speech was “knowingly” or “willfully” false is a question for the jury. But Defendants assume the challenged speech is “knowing” or “willful” for the purposes of their First Amendment challenge. And even assuming willful falsity, precedent instructs that speech and expressive conduct, especially in the contest of an ongoing election challenge, is absolutely protected. Assessing the veracity of speech and expressive conduct does not require a jury trial here. It requires an answer to whether the speech is “political” and whether it is restricted by the criminal statutes alleged—which are legal questions. If the answer to both questions is “yes” then the underlying statutes are unconstitutional.

⁴ The Court “interpret[ed] the indictment’s language liberally in favor of the State as required at this pretrial stage[.]” Order at 8. But it must be remembered that Defendants are entitled to a “perfect” indictment. *See Youngblood v. State*, 232 Ga. App. 327, 328 n. 2 (2002). More importantly, as discussed below, Defendants were entitled to strict construction of criminal statutes at issue at the demurrer phase. *See Mitchell v. State*, 239 Ga. 3, 3 (1977) (*per curiam*). And strict scrutiny of these statutes (facially and as applied) is required when core political expression is at play. *See Arneson*, 766 F.3d at 783–85. This heightened review should have yielded a different result.

violated some criminal statutes, the Indictment does *not* specify what other “criminal conduct” Defendants’ speech advanced outside the context of advancing views on the 2020 Presidential election.⁵

Based on the more than 45+ (mostly U.S. Supreme Court) cases and historical precedent cited to the Court, Defendants believe their arguments are well-founded and fall squarely within the almost absolute First Amendment protections in the context of their core political speech regarding 2020 Presidential election contest. There are *no* cases, cited by this Court or the State,⁶ in which a statute criminalizing core political speech survives First Amendment strict scrutiny. Thus, what appears to be a *sui generis* finding in the April 4 Order, based on a novel legal theory by the State, cries out for immediate review.

Importantly, the Court’s April 4 Order questions, without finding, whether the speech alleged in the Indictment was indeed “political” in nature. The Court claims “[t]he defense has not presented, nor is the Court able to find, any authority that the speech and conduct alleged is protected political speech.” April 4 Order at 11. But the deluge of caselaw cited by Defendants *does* plainly characterize the speech alleged in the indictment as protected political speech. The Court is, however, correct that Georgia appellate courts

⁵ Again, no remaining Defendant is charged with preventing someone from voting, falsifying ballots, or violating Title 21 (the Election Code) in any way. No remaining Defendant is charged with financial gain or financial fraud. No remaining Defendant is charged with physically intimidating anyone or inciting violence. Rather, they are indicted solely for the words that came out of their mouths or words they wrote regarding the 2020 Presidential election—nothing more.

⁶ The Court did cite *McDonald v. Smith*, 472 U.S. 479, 487 (1985) (Brennan, J., concurring) which talked about the right to petition government in a limited, non-applicable context where a citizen merely wrote the President a letter regarding a nominee. *See* April 4 Order at 10-11. This three-justice concurrence is not binding and, as applied here, is counter the voluminous cases cited by Defendants.

have not directly addressed the speech alleged, especially as it relates to challenges made under the Electoral Count Act, statements and petitions to the Georgia General Assembly or other public officials, and other similar election-related statements outlined in the Indictment. Indeed, Georgia appellate courts have not addressed Defendants’ political speech challenges in the context of the criminal statutes alleged in the Indictment at all.

The legal question regarding the nature and characterization of the speech at issue (core political or non-political speech) is outcome determinative when strict scrutiny applies to the challenged statutes. So, the question of what type of speech is targeted in the Indictment, and in the challenged statutes, demands appellate clarification and review. Whether the statements in the Indictment are “political” in nature is a question of law for the courts to decide. Courts “are compelled to examine for [them]selves the statements in issue and the circumstances under which they are made to see whether or not they ... are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.” *Connick v. Myers*, 461 U.S. 138, 150 n. 10 (1983) (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)) (ellipses in original). In other words, “[t]he inquiry into the protected status of speech is one of law, not fact.” *Id.* at 148 n. 7. For example, in the criminal context, “a prosecution motivated by a desire to discourage expression protected by the First Amendment is barred and must be enjoined or dismissed, irrespective of whether the challenged action could possibly be found to be unlawful.” *U.S. v. P.H.E., Inc.*, 965 F.2d 848, 849 (10th Cir. 1992).

Numerous other decisions rendered in related First Amendment contexts illustrate the legal nature of speech characterizations. *See Stow v. Coville*, 644 N.E. 2d 674, 677

(2014) (assessing actual malice in the defamation context); *see also Jortiz v. Gray-Little*, 822 F. Appx 731, 738 (10th Cir. 2020) (whether speech addresses a matter of public concern is a question of law); *Snyder v. Phelps*, 580 F.3d 206, 222 (4th Cir. 2009) (nature of speech is question of law); *Service Employees Int’l Union Local 73 v. Bd. Of Trustees of University of Ill.*, 2023 WL 3587534 (C.D. Ill. 2023) (“a key question of law in this case is what type of speech forum the public comment period at Defendant’s meetings represents”); *Harris v. Noxubee Cnty., Miss.*, 350 F. Supp. 3d 592 (S.D. Miss. 2018) (whether person was speaking as a citizen on a matter of public concern in a public forum (thus distinguishing public versus private speech) is a question of law). These decisions further confirm *Connick’s* finding that whether the First Amendment prohibits the Indictment as pled presents a question law. *Stow*, 655 N.E. 2d at 677 (“[T]he court reversed judgment for the plaintiff on that basis, declaring that even if the plaintiff had proved actual malice, he could not constitutionally recover because, under the heightened protection accorded political speech”) (citing *Greenbelt Co-op Pub. Ass’n v. Bresler*, 398 U.S. 6, 13 (1970)).

“Here, it is clear [Defendants] have a well-established First Amendment right to engage in political speech.” *Moon v. Brown*, 939 F.Supp.2d 1329, 1349 (M.D. Ga. 2013). Defendants therefore contend that their plainly core political “speech is protected under the First Amendment” *as a matter of law*. *See id.* And if this Court is correct that no appellate guidance has been given related to the speech here, and no guidance has been given regarding the scrutiny the applicable statutory restrictions require, such guidance is needed now.

Additionally, the Court premises much of its April 4 Order on the broad principle that “speech integral to criminal conduct, fraud, or speech presenting an immunity threat that the government can prevent” is not protected. April 4 Order at 2. Again, the Court and the State rely on only cases outside the context of political speech that apply a lower standard of review than strict scrutiny. As the *Arneson* Court, citing U.S. Supreme Court precedent, makes clear, political speech in this context is subject to strict scrutiny review. *See* 766 F.3d at 784. And in *this* context the speech at issue regarding the 2020 Presidential election is absolutely protected where the sole criminal allegations are premised upon the challenged speech itself. Appellate guidance is needed as to whether this is so.

And in this context, the “integral to illegal conduct” exception just does not apply here. And neither the State nor the Court wrestled with this context. “[T]he best understanding of the ‘integral to illegal conduct’ exception is this: (a) When speech tends to cause, attempts to cause or makes a threat to cause some illegal conduct (*illegal conduct other than the prohibited speech itself*)—such as murder, fights restraints of trade, child sexual abuse, discriminatory refusal to hire and the like ... (b) But the scope of such restrictions must still be narrowly defined in order to protect speech that persuades or informs people who were not engaged in illegal conduct.” Eugene Volokh, *The “Speech Integral to Criminal Conduct” Exception*, 101 CORNELL L. REV. 981, 986 (2016) (emphasis added); *see also id.* at 1006 (citing *NAACP v. Claiborne Hardware, Co.*, 458 U.S. 886, 903–04 (1982)); *id.* at 1049 (citing *Gerhart v. State*, 360 P.3d 1194 (2015)); *Otto v. City of Boca Raton*, 981 F.3d 854, 865 (11th Cir. 2020); *State v. Melchert-Dinkel*, 844 N.W. 2d 13, 19-20 (Minn. 2014). Nowhere in the Indictment, or the April 4 Order, does

the State or the Court point to any “illegal conduct other than the prohibited speech itself.” Defendants review of the Indictment also reveals none.

Rather, the State says that because it pled Defendants’ speech allegedly violates particular criminal statutes it is necessarily “integral” to the violations of those statutes, and nothing else need be alleged. This novel, and purely circular, theory needs to be vetted by the Georgia appellate courts. For if it is accurate, then *any* First Amendment challenges (let alone core political speech challenges) are dead on arrival and can never support a demurrer in Georgia. That is because to hurdle the high First Amendment barriers to speech restriction, all the State would need to plead is that a defendant’s speech constituted a Georgia RICO violation (for instance) and nothing more. If this is the case, and the Court seems to say it is, then this is momentous, as it would vitiate First Amendment challenges to virtually all criminal indictments. The appellate courts should comment on this far-reaching, and erroneous, proposition.⁷

Finally, the facial and overbreadth challenges to O.C.G.A. §§ 16-10-20 (false statements) and 16-10-21.1(b)(1) (false filings)⁸ also present questions of law on which appellate guidance is needed. Again, *Haley* did not apply to core political speech. And if

⁷ The Court says *Arneson* is not applicable because it deals explicitly with a statute “criminal[izing] participat[ion] in political advertising or campaigning,” whereas the Georgia criminal statutes challenged (both facially and as applied) do not facially proscribe false political advertising or campaigning. *See* April 4 Order at 13. This distinction needs to be vetted. If it is accurate, then a criminal statute that has the *actual effect* of criminalizing participation in political advertising or campaigning (or such similar core First Amendment activities), but does not do so facially, escapes constitutional review. Defendants do not believe the First Amendment supports such a distinction. But if one exists, the Georgia appellate courts should say so and say how.

⁸ Defendants note that in their demurrers they further show the State has not pled all the elements necessary to plead a violation of O.C.G.A. § 16-10-20, and that O.C.G.A. § 16-10-21.1 has no applicability outside the context of lien and similar filings.

the Supreme Court says it does, it should say why--or it should reverse *Haley* altogether as it is untenable in light of U.S. Supreme Court jurisprudence. There is no appellate guidance so far on whether O.C.G.A. § 16-10-21.1 (even if it applies to the Indictment's alleged false filings) could meet a facial First Amendment challenge. Again, the Georgia appellate courts should weigh in.

The Court has already recognized the clear importance of the “vital constitutional protections” at play in the April 4 Order. Defendants’ First Amendment challenges are of paramount concern both for the efficient resolution of this matter and for the protection of Defendants’ core First Amendment rights. This is especially true given that very little Georgia appellate guidance is currently available regarding the particular challenges to the statutes at issue in the context of core political speech amidst the backdrop of an electoral contest.

Defendants respectfully request the Court certify the April 4 Order for interlocutory review pursuant to O.C.G.A. § 5-6-34(b).

Respectfully submitted, April 8, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I have, this 8th day of April 2024, served a true and correct copy of the within and foregoing JOINT MOTION FOR CERTIFICATE OF IMMEDIATE REVIEW OF ORDER ON DEFENDANTS' MOTIONS TO DISMISS UNDER THE FIRST AMENDMENT BY DEFENDANTS via electronic filing.

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