IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	
v.	CASE NO. 23SC188947
KENNETH CHESEBRO, ET AL.,	JUDGE MCAFEE
DEFENDANTS.	

MOTION TO DISMISS UNDER THE SUPREMACY CLAUSE

COMES NOW, Defendant Kenneth Chesebro, by and through undersigned counsel, and moves this Honorable Court to dismiss the indictment as a violation of the Supremacy Clause of Article VI of the U.S. Constitution. In support thereof, Mr. Chesebro states as follows:

BACKGROUND

Mr. Chesebro is charged with a total of seven counts that allegedly occurred between the dates of November 4, 2020, through September 15, 2022.[1] The first count of the indictment involves Mr. Chesebro and 18 co-defendants. The charges against Mr. Chesebro are as follows:

Count 1: RICO;

Count 9: Conspiracy to Commit Impersonating a Public Officer;

Count 11: Conspiracy to Commit Forgery in the First Degree;

Count 13: Conspiracy to Commit False Statements and Writings;

Count 15: Conspiracy to Commit Filing False Documents;

[1] However, the relevant dates applicable to Mr. Chesebro's alleged conduct are December 6, 2020, through January 4, 2021.

Count 17: Conspiracy to Commit Forgery in the First Degree; and

Count 19: Conspiracy to Commit False Statements and Writings.[2]

In support of these counts, the State has enumerated twenty-one overt acts that Mr. Chesebro allegedly undertook in furtherance of the above counts. These overt acts, as stated in the indictment, occurred between December 7, 2020, and January 6, 2021. Of these twenty-one acts, only one act—Act 39—occurred before December 8, 2020, the 2020 Georgia election's "Safe Harbor" deadline.

ARGUMENT AND CITATION TO AUTHORITY

The U.S. Constitution vests Congress alone with the authority to receive, adjudicate, and count presidential electoral ballots or returns. *See* U.S. CONST. amend. XII. To address the inconsistent interpretations of the Twelfth Amendment and the resulting chaos that had ensued in previous presidential elections, Congress passed the Electoral Count Act ("ECA") in 1887. The ECA was to govern how Congress would receive, adjudicate, and count the presidential elector ballots.

Under the ECA, Congress delegated to the States limited authority to determine their presidential electors for their State. Specifically, the ECA provides that if there is a dispute, then the State's adjudicative body (i.e., a court in a judicial contest) must issue a final decision in disputes regarding Presidential Electors at least six days in advance of the date that Presidential Electors have to meet and cast their presidential ballots,

[2] All of these counts, with the exception of the RICO, are based on conduct that allegedly occurred between December 6 and December 14, 2020. This is important, as anything that occurred after December 8, 2020, is excluded from state prosecution under the Supremacy Clause.

otherwise known as the "Safe Harbor" deadline.[3] *See* 3 U.S.C. § 5 (codified 1948) (amended Dec. 29, 2022).[4] The State's final judicial decision will be given conclusive effect by Congress on January 6th. *See* 3 U.S.C §§ 5, 15.

When States fail to issue a final adjudication of such disputes on or before the ECA's Safe Harbor deadline, their authority to determine who their valid Presidential Electors are is extinguished, and all authority returns to Congress to resolve any remaining disputes. *See* 3 U.S.C. §§ 5, 6, and 15.[5]

Importantly, the ECA makes explicit that Congress is to receive both Presidential Elector ballots and contingent Presidential Elector ballots. *See* 3 U.S.C. § 15 (referring to "all certificates and *papers purporting to be certificates* of the electoral votes" (emphasis added)).[6] The ECA states that "if" Congress receives Presidential Elector ballots and

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[3] In 2020, the Safe Harbor deadline was December 8, 2020.

[4] The ECA of 1887 was codified in Title 3, Chapter 1 of the United States Code in 1948. The ECA was significantly revised by the Electoral Count Reform and Presidential Transition Improvement Act of 2022, and the current version went into effect on Dec. 29, 2022. Accordingly, the relevant version of the ECA that is applicable to this case was the pre-2022 version. Therefore, all citations to the ECA are to the prior version of Code section codified in 1948, e.g., "3 U.S.C. § 5 (codified 1948) (amended Dec. 29, 2022)." For this reason, the parenthetical information is omitted in subsequent citations to the ECA.

[5] The legislative history of the ECA clarifies its intent to give Congress alone the power to resolve such disputes:

> The two Houses are, by the Constitution, authorized to make the count of electoral votes. They can only count legal votes, and in doing so must determine, from the best evidence to be had, what are legal votes. . . . The power to determine rests with the two houses, and there is no other constitutional tribunal.

Bush v. Gore, 531 U.S. 98, 154 (2000) (Breyer, J., dissenting) (quoting H.R. Rep. No. 1638, 49th Cong., 1st Sess., 2 (1886) (report submitted by Rep. Caldwell, Select Committee on the Election of President and Vice-President)).

[6] The pertinent part of Section 15 of the ECA provides as follows:

"paper[s] purporting to be a [presidential elector ballot] from a State,"[7] it must open them and adjudicate them as follows:

> 1. If any of the Presidential Elector ballots or papers purporting to be a presidential electoral ballot submitted to Congress can legitimately claim that they were declared the valid Presidential Electors by the State's adjudicative process outlined in 3 U.S.C. § 5 by the Safe Harbor deadline (discussed above), then those votes are presumptively the "true" returns from that State;
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> 2. If none of the competing Presidential Elector slates or purported presidential electoral slates presented to Congress could properly claim that they were the product of the State's final adjudication of the dispute by the Safe Harbor deadline (which was the case with Georgia in

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> If **more than one** return ***or paper purporting to be a return*** from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in [3 U.S.C. § 5] to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in [3 U.S.C. § 5], is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and ***in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid***, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.

3 U.S.C. § 15 (emphases added).

[7] *Id*.

> 2020), then the House and Senate together have to agree on which of the competing Presidential Elector ballots and purported ballots were the true returns from the State;
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> 3. If the House and Senate cannot agree on which of the multiple competing electoral ballots is the true Presidential Elector ballot from a State, then the ECA requires Congress to count the electoral ballots that the Governor has certified.

See 3 U.S.C. § 15. In this way, the ECA's plain text recognizes the legitimate role of contingent electors in disputed presidential elections. It also dispels any notion that the Presidential Electors who are ascertained or certified by a State's governor before or on the ECA's "Safe Harbor" date are the presumptively valid Presidential Electors.

The only way under the ECA for a State to decide who the State's true Presidential Electors are is by exercising its delegated judicial authority by or before the Safe Harbor deadline to reach a final adjudication of the Presidential Elector dispute. Absent the State achieving this safe harbor status (which Georgia did not do in 2020),[8] neither slate of Presidential Electors is presumptively or conclusively valid. Both can be sent to Congress under the plain language of the ECA, and Congress is free to disregard the Governor's certificate of ascertainment and adjudicate for itself who the State's true or valid electors are. *See* 3 U.S.C. § 15.[9] Only if Congress cannot agree on the valid ballot does the Governor's certificate of ascertainment even become relevant. *See* 3 U.S.C. § 15.

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[8] *See* Mark Niesse & David Wickert, *'Safe Harbor' Deadline Arrives as Georgia Legal Challenges Continue*, ATLANTA J.-CONST. (Dec. 8, 2020), https://www.ajc.com/politics/safe-harbor-deadline-arrives-as-georgia-legal-challenges-continue/WHRZ2C5CK5ADTOK52QDI3MFQTQ/#.

[9] Because of these provisions of the ECA and Georgia law, both sets of Presidential Electors in a State become contingent Presidential Electors by operation of law when a judicial challenge to the Presidential Electors is filed in that State.

Thus, any action taken after December 8, 2020, if actually illegal, would be in violation of *federal* law and subject to the Supremacy Clause; wherefore, the State's authority to bring any criminal charges would be null and void. In other words, a State's authority to determine who its valid Presidential Electors are reverts back to Congress after the Safe Harbor deadline. Once that authority reverts back to Congress, federal law, and only federal law, governs any and all conduct that occurs after the December 8th Safe Harbor deadline. Under the Supremacy Clause, the State cannot prosecute or otherwise regulate conduct that was entirely within the ambit of federal authority. Therefore, the State has no power to prosecute any post-December 8th conduct.

Here, Mr. Chesebro's limited involvement, as alleged in the indictment, occurred between December 6, 2020, and January 4, 2021. Importantly, Mr. Chesebro is only aware, because of the enumerated overt acts in the indictment, of one instance of alleged wrongdoing that occurred before the December 8th Safe Harbor deadline: his drafting of a legal memo. Even if Mr. Chesebro agrees that drafting this memo was improper (and not subject to attorney-client privilege), this memo in no way touched or concerned Georgia or its rules, processes, or procedures it had implemented as a result of its congressional delegation via the ECA. Therefore, the charges against Mr. Chesebro are wholly invalid as drafted in the indictment and should be struck accordingly.

WHEREFORE, based on the foregoing reasons, Mr. Chesebro respectfully requests that this Honorable Court dismiss the indictment as preempted by the Supremacy Clause.

Respectfully submitted, this the 5th day of September, 2023.

/s/ Scott R. Grubman
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the foregoing ***Motion to Dismiss Under the Supremacy Clause*** in the above-referenced action to all parties via the Fulton County e-filing system.

This 5th Day of September, 2023.

/s/ Scott R. Grubman
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