

# **Fulton County, Georgia's Trump Investigation**

**An Analysis of the Reported  
Facts and Applicable Law**

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## Executive Summary

On Saturday, January 2, 2021, at around 3:00 p.m., former President Donald J. Trump placed a call to Georgia’s Republican Secretary of State Brad Raffensperger. Throughout the roughly hour-long call, the former president repeatedly insisted that he had won the state of Georgia “by hundreds of thousands of votes.”<sup>1</sup> As purported evidence, Trump cited “rally size” and “political people” who he said assured him that “there’s no way they [the Biden campaign] beat me.”<sup>2</sup> He cycled through a list of conspiracy theories to explain his loss, covering “3,000 pounds” of shredded ballots; drop boxes “being delivered and delivered late”; a particular “professional vote scammer and hustler” who Trump claimed destroyed no fewer than 18,000 of his votes; and “the other thing, dead people.”<sup>3</sup> At one point, when Raffensperger responded to one of Trump’s false claims by cautioning him that “the problem you have with social media [is that]...people can say anything,” Trump answered: “Oh, this isn’t social media. This is Trump media.”<sup>4</sup>

But Trump did more than merely complain about the election and catalog disinformation. He urged, and ultimately threatened, Raffensperger to reverse the election outcome—culminating in a demand that Raffensperger “find 11,780 votes” that could be deemed fraudulent and tossed out.<sup>5</sup> That number mattered to Trump for a single reason: It was exactly one more vote than the margin of Joe Biden’s 11,779-vote victory in the state.<sup>6</sup> As Trump apparently saw it, if Raffensperger’s office complied with his request and identified 11,780 votes for

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<sup>1</sup> Amy Gardner & Paulina Firozi, Here’s the full transcript and audio of the call between Trump and Raffensperger, THE WASHINGTON POST (Jan. 15, 2021, 1:15 PM), [https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356\\_story.html](https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Georgia Presidential Election Results 2020, NBC NEWS (March 6, 2021, 10:11 PM), <https://www.nbcnews.com/politics/2020-elections/georgia-president-results>.

disqualification, Trump would be named the winner of the state’s presidential election (and presumably could use that development to seek a broader unraveling of the certified election results in other states confirming his defeat).

The transcript and audio file were reported by *The Washington Post* the following day, garnering widespread attention across a nation already aware of Trump’s refusal to accept the certified election results and assent to a peaceful transition of power. But this was no mere transgression of norms alone. Georgia law was also implicated. Trump’s entreaties to Raffensperger on the January 2 call, along with other steps he took to reverse his Georgia election loss, have exposed him and others involved to potential criminal liability in Georgia. On February 8, 2021, Raffensperger’s office opened a probe into Trump’s efforts to overturn his loss in the state.<sup>7</sup> Two days later, Fulton County District Attorney Fani Willis announced the launch of a criminal investigation into Trump’s conduct vis-à-vis the election.<sup>8</sup> At issue was not just Trump’s January 2 call to Raffensperger. The former president had publicly pressured and personally contacted several other officials in Georgia—including the governor, the attorney general, and the secretary of state’s chief investigator—about the election and how they might assist him in flipping the state’s electoral votes over to him even after the results had been duly certified.<sup>9</sup>

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<sup>7</sup> Linda So, Georgia Secretary of State’s office launches probe into Trump’s election phone call, REUTERS (Feb. 8, 2021, 5:06 PM), <https://www.reuters.com/article/us-usa-trump-georgia-investigation-exclu/georgia-secretary-of-states-office-launches-probe-into-trumps-election-phone-call-idUSKBN2A82HO>.

<sup>8</sup> Richard Fausset & Danny Hakim, Georgia Prosecutors Open Criminal Inquiry Into Trump’s Efforts to Subvert Election, THE NEW YORK TIMES (Feb. 10, 2021), <https://www.nytimes.com/2021/02/10/us/politics/trump-georgia-investigation.html>.

<sup>9</sup> *Id.*

In this report, we consider the relevant facts and context of Donald Trump's push to overturn the 2020 election results in Georgia. We analyze the extent to which these actions make the former president vulnerable to state criminal liability. We also assess how Trump's attorneys may defend his conduct in pre- and (if any) post-indictment proceedings, as well as in the court of public opinion.

We conclude that Trump's post-election conduct in Georgia leaves him at substantial risk of possible state charges predicated on multiple crimes. These charges potentially include: criminal solicitation to commit election fraud; intentional interference with performance of election duties; conspiracy to commit election fraud; criminal solicitation; and state RICO violations. Our conclusion is based entirely on publicly available reporting and evidence, including the recording of Trump's call to Raffensperger.<sup>10</sup> Our view is anchored by a close reading of the relevant portions of Georgia's legal code, an unpacking of the extant case law defining the stated crimes, and a searching examination of the main likely defenses. The latter pose some serious questions but (at least, based upon what is currently known of the facts) appear to be unavailing.

Our aim in writing this report is to bring the facts, the law, and the possible defenses together to provide a comprehensive and accessible overview of the investigation and the possible crimes on which it is predicated. Our hope is that such an exercise offers a clear picture to the public, officials, and the press of this possible avenue of accountability for Trump's ongoing attempts to attack election processes and subvert American democracy. We undertake our analysis with the recognition that, as of September 2021, DA Willis's investigation is

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<sup>10</sup> Gardner & Firozi, *supra* note 1.

ongoing.<sup>11</sup> The district attorney will ultimately bear the burden to prove any charges beyond a reasonable doubt using credible evidence in a court of law, and that high hurdle is a paramount consideration in determining whether Fulton County will bring charges at all. It is impossible to know whether, or (if so) when, criminal charges may eventually be brought in Georgia against the former president. We make no prediction in that regard, only a current assessment of the risk. Trump is innocent until proven guilty, and if charged, will have the opportunity to present the defenses like those we describe below. If past behavior is indicative of his response to future allegations, Trump will undoubtedly vigorously defend himself.

As a threshold matter, we note the deference that is due under principles of federalism to the state of Georgia in investigating and, if appropriate, prosecuting any transgressions of its own state law. In our federal system, governmental powers are divided between the national and the state governments. States have both the primary responsibility and authority to make determinations about matters within their purview.<sup>12</sup> Those principles apply with full force here: Trump's communications with state officials potentially violated state criminal laws on matters of immense state interest. While Trump was president at the time he sought to interfere with the election in Georgia, our constitutional scheme (and its protection of federal interests) poses no barrier to the vindication of Georgia's interests in enforcing its criminal code.<sup>13</sup> Following settled Supreme Court precedent (including the recent case of *Trump v. Vance*<sup>14</sup>), Georgia state

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<sup>11</sup> Sara Murray & Jason Morris, Georgia criminal probe into Trump's attempts to overturn 2020 election quietly moves forward, CNN (Sept. 17, 2021, 1:50 PM), <https://www.cnn.com/2021/09/17/politics/georgia-probe-trump-election/index.html>; Jose Pagliery & Asawin Suebsaeng, Georgia DA Interviews Witnesses About Trump's Call to 'Find' Votes, THE DAILY BEAST (Sept. 5, 2021, 8:55 AM), <https://www.thedailybeast.com/georgia-district-attorney-investigates-donald-trumps-call-to-find-votes>.

<sup>12</sup> Comparing Federal & State Courts, United States Courts, <https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts>.

<sup>13</sup> National Center for State Courts, Georgia, COURT STATISTICS PROJECT, [https://www.courtstatistics.org/state\\_court\\_structure\\_charts/georgia](https://www.courtstatistics.org/state_court_structure_charts/georgia).

<sup>14</sup> *Trump v. Vance*, 140 S. Ct. 2412 (2020).

prosecutors certainly have the power to investigate and charge a former president for willfully reaching into their jurisdiction to allegedly transgress their laws and interfere with their officials on a matter of utmost state interest: the administration of Georgia’s election procedures. If it were otherwise, then states would lack authority to enforce important election integrity laws against perhaps the most significant potential violators: the candidates themselves.

Our report proceeds in four parts.

## **I. Facts.**

In Section I, we review the facts and events on which any eventual charges will likely be based. We recount Trump and his surrogates’ campaign to overturn his loss in Georgia, beginning with his claim of victory in the state (along with other battleground states) even before vote-counting concluded.<sup>15</sup> As election workers processed Georgians’ votes in the first weeks of November, Trump bombarded the state’s election officials with tweets containing baseless claims of voter fraud and pushed those officials to diverge from the state’s settled election procedures.<sup>16</sup> Meanwhile, his campaign and his allies filed a series of lawsuits to challenge the validity of mail-in ballots and otherwise prevent Joe Biden’s win from being certified.<sup>17</sup> Trump’s attacks escalated as two recounts affirmed Biden’s narrow victory.<sup>18</sup> In December, he reportedly began to place direct calls to officials in the state, including Governor Brian Kemp and Attorney

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<sup>15</sup> Daniel Dale, Fact check: Trump makes series of egregious false claims in Election Night address, CNN (Nov. 4, 2020, 4:33 AM), <https://www.cnn.com/2020/11/04/politics/fact-check-trump-election-night-speech/index.html>.

<sup>16</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Nov. 4, 2020, 4:56:10 PM), <https://www.thetrumparchive.com/?results=1&dates=%5B%222020-11-03%22%2C%222020-11-05%22%5D>; Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Nov. 13, 2020, 7:53:20 PM), <https://www.thetrumparchive.com/?searchbox=%22georgia%22&dates=%5B%222020-11-10%22%2C%222020-11-14%22%5D>.

<sup>17</sup> See, e.g., Wood v. Raffensperger, Civil Action No. 1:20-cv-04651-SDG (N.D. Ga. 2020); Brooks v. Mahoney, III, Civil Action No. 4:20-cv-00281-RSB-CLR (S.D. Ga. 2020), <https://www.courtlistener.com/docket/18620507/1/brooks-v-mahoneyiii/>.

<sup>18</sup> Kate Brumback, Georgia again certifies election results showing Biden won, AP NEWS (Dec. 7, 2020), <https://apnews.com/article/election-2020-joe-biden-donald-trump-georgia-elections-4e3b24f10de886bcdeab6c26b680a>.



General Chris Carr, in order to urge them to go along with his increasingly desperate plans to decertify his loss.<sup>19</sup> His personal lawyer, Rudy Giuliani, appeared before committees in the state legislature with the intent of convincing state lawmakers to take extraordinary action to reverse Biden’s win.<sup>20</sup> Finally, as the January 6 congressional certification of Joe Biden’s victory neared, Trump called Secretary of State Brad Raffensperger on January 2.<sup>21</sup> In the now infamous call, Trump both threatened and pleaded with Raffensperger to “find” 11,780 votes for Biden that could be invalidated, thereby tilting the state’s presidential election to Trump.<sup>22</sup>

We also in Section I touch upon larger 2020 election events beyond Georgia, but for context only. In our view the case under investigation is one about intrusions into Georgia, concerning a Georgia election and affecting state officials and interests. The investigation and prosecution, if any, does not require the resolution of allegations about what happened in other states or even as to federal officials working in Georgia (such as the former U.S. Attorney B.J. Pak<sup>23</sup>). The more such extraneous matters are emphasized, the more the federal defenses and jurisdiction discussed in Section IV may be brought to bear. Of course, there may be some quantum of such information that is needed, e.g., to the extent Trump’s January 6, 2021, public record statements bear upon his state of mind, it may be relevant. We discuss some of those public facts but in as limited a fashion as possible to avoid moving the focus away from Georgia.

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<sup>19</sup> Marshall Cohen, Jason Morris & Christopher Hickey, Timeline: What Georgia prosecutors are looking at as they investigate Trump’s efforts to overturn the election, CNN (Aug. 5, 2021), <https://www.cnn.com/interactive/2021/08/politics/trump-georgia-2020-election/>.

<sup>20</sup> Stephen Fowler, Fact Checking Rudy Giuliani’s Grandiose Georgia Election Fraud Claim, GEORGIA PUBLIC BROADCASTING (Dec. 4, 2020), <https://www.gpb.org/news/2020/12/04/fact-checking-rudy-giulianis-grandiose-georgia-election-fraud-claim>.

<sup>21</sup> Gardner & Firozi, *supra* note 1.

<sup>22</sup> *Id.*

<sup>23</sup> Katelyn Polantz, Evan Perez, & Chandelis Duster, Trump hand-picks replacement for Atlanta’s US attorney after surprise resignation, CNN (Jan. 5, 2021), <https://www.cnn.com/2021/01/05/politics/georgia-us-attorney-byung-pak-bobby-christine/index.html>.

## II. Status of the Investigation.

In Section II, we take stock of the investigation led by Fulton County DA Willis and where it stands as of this writing. Willis announced her office's investigation on February 10, 2021, when she sent letters to Georgia officials who were in some way privy to election-reversal efforts by Trump and his principal allies requesting that they preserve any records that may be relevant to her investigation.<sup>24</sup> Two days later, Willis confirmed that her investigation would examine both Trump and his allies.<sup>25</sup> Though public reporting on the status of the DA's probe remained relatively sparse through the spring and summer of 2021, Willis appeared to be ramping up, including hiring subject matter experts to assist with the investigation.<sup>26</sup> Recent accounts suggest that the investigation is now picking up speed,<sup>27</sup> including the DA interviewing four important witnesses in the secretary of state's office.<sup>28</sup>

In this section we also discuss parallel federal and state investigations, and how they relate to the Fulton County one. We discuss the fact that the congressional investigation is likely to generate information useful to that in Fulton County. We address the importance for accountability of the state proceeding because of the lack of any indication of a federal criminal investigation of the ex-president for his conduct in Georgia.

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<sup>24</sup> Fausset & Hakim, *supra* note 8.

<sup>25</sup> *Id.*

<sup>26</sup> Linda So, Exclusive: Georgia prosecutor probing Trump taps leading racketeering attorney, REUTERS (Mar. 6, 2021), <https://www.reuters.com/article/us-usa-election-georgia-racketeering-exc/exclusive-georgia-prosecutor-probing-trump-taps-leading-racketeering-attorney-idUSKBN2AY0L0>.

<sup>27</sup> Patricia Murphy, Greg Bluestein, & Tia Mitchell, The Jolt: Fulton County investigation into Donald Trump moving forward, THE ATLANTA JOURNAL-CONSTITUTION (Sept. 7, 2021), <https://www.ajc.com/politics/politics-blog/the-jolt-fulton-county-investigation-into-donald-trump-moving-forward/ZDPWQS2UVRHPBEFF2SODWEV4XM/>.

<sup>28</sup> Pagliery & Suebsaeng, *supra* note 11.

### III. Potential Crimes.

In Section III, we survey the relevant state criminal statutes and analyze how they may apply to Trump’s conduct. In Section III.A we focus on **potential election crimes** in the Georgia Code. Under Title 21 dealing with elections, there are three principal potentially relevant criminal statutes: (1) solicitation to commit election fraud, Ga. Code Ann. § 21-2-604(a); (2) intentional interference with performance of election duties, Ga. Code Ann. § 21-2-597; and (3) conspiracy to commit election fraud, Ga. Code Ann. § 21-2-603. While the elements vary, the gravamen of these offenses is that through conduct such as the Raffensperger call demanding the state “find 11,780 votes,”<sup>29</sup> Trump was clearly exhorting Georgia officials to get them to change the lawful outcome of the election. His actions are required to be intentional,<sup>30</sup> and we explain why, legally speaking, they were. His full course of conduct from December 23 through January 2<sup>31</sup>—as well as his actions preceding and following that time period—demonstrates his consistent intent to solicit, pressure, and threaten government officials to participate in schemes to reverse the election results. Although many of these efforts failed, that only bolstered his resolve to keep trying, as evidenced by his continued calls to Georgia officials.<sup>32</sup> We note that criminal liability may attach not only to Trump but to others who allegedly assisted his attempt to subvert the election, such as his former counsel Rudy Giuliani, who traveled to Georgia and trafficked in falsehoods as part of the alleged scheme.<sup>33</sup>

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<sup>29</sup> Gardner & Firozi, *supra* note 1.

<sup>30</sup> Ga. Code Ann. § 21-2-597.

<sup>31</sup> See, e.g., Jason Morris & Sara Murray, Trump pressured Georgia investigator to find 'the right answer' in baseless fraud push, CNN (Mar. 11, 2021), <https://www.cnn.com/2021/03/10/politics/donald-trump-georgia-phone-call/index.html>; Gardner & Firozi, *supra* note 1.

<sup>32</sup> *Id.*; Jim Rutenberg, Jo Becker, Eric Lipton, Maggie Haberman, Jonathan Martin, Matthew Rosenberg & Michael S. Schmidt, 77 Days: Trump’s Campaign to Subvert the Election, THE NEW YORK TIMES (last updated June 15, 2021), <https://www.nytimes.com/2021/01/31/us/trump-election-lie.html>.

<sup>33</sup> Fowler, *supra* note 20.

In addition, evidence in the public realm suggests that Trump or his cohort may have committed **other crimes outside of the election title**. These are analyzed in Section III.B and include a variety of possible offenses found in Title 16 of the Georgia Code, the general criminal title. In this Section we look at three main possible charges: for making false statements (Ga. Code Ann. § 16-10-20), improperly influencing government officials (Ga. Code Ann. § 16-10-93), and criminal solicitation (Ga. Code Ann. § 16-4-7). The same core fact pattern comes into play: Trump is alleged to have repeatedly lied about the 2020 election to Georgia officials and to have used that misleading conduct as well as intimidation and threats to try to get them to change the outcome of the election.<sup>34</sup>

Finally, possible violations of an additional major Title 16 crime, Georgia’s **Racketeer Influenced and Corrupt Organizations (RICO) Act**, are considered in Section III.C. While the term “RICO” conjures up prosecutions of Mafia bosses,<sup>35</sup> the statute is much broader than that. It recognizes that if violations of individual criminal statutes by a single person are bad, an enterprise that repeatedly violates the law is worse and should be subject to additional sanction.<sup>36</sup> The statute requires a “pattern” of misconduct,<sup>37</sup> as shown by violations of two or more of a long list of specified crimes,<sup>38</sup> including a number of those such as false statements or improper influence analyzed in Section III.B. We address the evidence prosecutors may rely on to sustain a RICO charge against Trump and his associates based upon their repeated assaults on the Georgia election outcome. We think the possibility of RICO charges merits serious attention based upon that evidence, and also because of other factors. The Fulton County DA’s Office

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<sup>34</sup> Maggie Astor, A Timeline of the Certification Process That Trump Is Trying to Disrupt, THE NEW YORK TIMES (Dec. 13, 2020), <https://www.nytimes.com/article/us-election-results-trump-biden.html>.

<sup>35</sup> So, *supra* note 26.

<sup>36</sup> Ga. Code Ann. § 16-14-4(a)–(c).

<sup>37</sup> *Id.*

<sup>38</sup> Ga. Code Ann. § 16-14-3.

signaled in its February 10 letter to Governor Kemp that racketeering is one of the crimes being investigated.<sup>39</sup> The DA has well-known and successful experience with RICO,<sup>40</sup> and she has hired a RICO expert to work on the case.<sup>41</sup>

#### **IV. Defenses.**

Finally, in Section IV, we surmise how Trump's legal team may defend him in court if the charges described in Section III are brought against the former president. If Georgia brings charges, no doubt Trump's defenses will include claims of immunity grounded in the structure of our constitutional system, which generally protects federal officials from infringements on authorities vested in them by the Constitution and federal laws. However, we explain that in the unusual (and indeed unprecedented) circumstances of this case, constitutional principles point the other way. Fidelity to the rule of law and our federal system of government requires protecting state authority over counting and tabulating ballots and over certifying presidential election results from encroachments by a candidate (who is also a president) if he violates state criminal law.

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<sup>39</sup> Fausset & Hakim, *supra* note 8.

<sup>40</sup> Tamar Hallerman & Christian Boone, Fulton DA's comfort with racketeering law could influence Trump probe, THE ATLANTA JOURNAL-CONSTITUTION (Mar. 15, 2021), <https://www.ajc.com/news/crime/fulton-das-comfort-with-racketeering-law-could-influence-trump-probe/CNOO3VLPBFBQPKCBKRYTT6ARDQ/>.

<sup>41</sup> Kate Brumback, RICO expert hired by prosecutor investigating Trump call, AP NEWS (Mar. 10, 2021), <https://apnews.com/article/donald-trump-georgia-general-elections-elections-racketeering-6c488fce674bc0f375b60c6be55054a4>.

As we detail below, Trump might—as he did in cases that arose during his term as president—advance arguments based on immunity arising from his position as president at the time the challenged actions were undertaken. These claims could take two forms. One would claim a categorical immunity of presidents from prosecution and would rest upon authorities including a legal opinion of the Department of Justice Office of Legal Counsel (OLC) that a president may not be prosecuted while in office because it would be unduly disruptive of his ability to do his job. This claim should clearly fail: While it may be attempted by a *sitting* president (who might argue that prosecution while occupying the White House disrupts his performance of his duties), it clearly has no application once a president leaves office. As we explain, a great deal of precedent and practice makes this clear, including OLC precedent<sup>42</sup> and express admissions by Trump before the Supreme Court.<sup>43</sup>

Trump’s second and more likely immunity argument would raise a broader claim that he cannot *ever* be second-guessed in court for anything he did while president. As a general proposition, it is true that former presidents enjoy a measure of immunity for actions undertaken while in office—to protect the president’s exercise of discretion in doing his job.<sup>44</sup> But substantial authority establishes that this immunity from liability extends, at the very most, to actions taken by the president that fall somewhere within the scope of his lawful duties as a

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<sup>42</sup> A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222 (Oct. 16, 2000) (“[A]n immunity from prosecution for a sitting President would not preclude such prosecution once the President’s term is over or [the President] is otherwise removed from office by resignation or impeachment.”).

<sup>43</sup> *Trump v. Vance*, 140 S. Ct. 2412, 2426–27 (2020) (“[T]he President is not seeking immunity from the diversion occasioned by the prospect of future criminal *liability*. Instead, he concedes—consistent with the position of the Department of Justice—that state grand juries are free to investigate a sitting President with an eye toward charging him after the completion of his term.”).

<sup>44</sup> See A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222 (Oct. 16, 2000).

federal official.<sup>45</sup> And that standard is not satisfied here. It is not a close call. Neither the Constitution nor federal law confer any authority on the president over the process of counting or tabulating ballots or certifying the results of an election. To the contrary, the Constitution assigns primary responsibility for the elections to the states.<sup>46</sup> Article II states that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors” who will vote on the president.<sup>47</sup> Congress has a role at the very end of the process in accepting the certifications; the president, none.

Trump’s reported efforts to twist the arms of various state officials to change the outcome in his favor were thus well outside the scope of his official duties. Stated simply, soliciting and then threatening senior state officials to alter the outcome of a presidential election does not fall within any reasoned conception of the scope of presidential power. There is thus no basis for Trump to claim that the Constitution renders him immune for criminal wrongdoing here. For that reason, we also explain, efforts by Trump to seek to remove the case to federal court based upon having a colorable federal defense would not be well-founded.

If the immunity issues will anchor the legal response to any charges, the most important factual defense will likely be Trump’s claim that he was just pressing his strong good faith conviction that he actually had won—that he was simply trying to secure the proper outcome under the true facts. Given Trump’s established ability to lie forcefully and in ways that a great many people find persuasive, the impact of this possibility cannot be discounted.<sup>48</sup>

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<sup>45</sup> Art. II.S2.C3.2.4.1.1 Presidential Immunity to Criminal and Civil Suits: Civil Cases, Constitution Annotated, [https://constitution.congress.gov/browse/essay/artII-S2-C3-2-4-1-1/ALDE\\_00001153/\['constitution',%20'annotated'\]#ALDF\\_00003184](https://constitution.congress.gov/browse/essay/artII-S2-C3-2-4-1-1/ALDE_00001153/['constitution',%20'annotated']#ALDF_00003184).

<sup>46</sup> Cong. Rsch. Serv., RL30747, Congressional Authority to Direct How States Administer Elections (2014), [https://www.everycrsreport.com/files/20141204\\_RL30747\\_ffc309dc278cd2558c38f0b8b1596c47c6046ea0.pdf](https://www.everycrsreport.com/files/20141204_RL30747_ffc309dc278cd2558c38f0b8b1596c47c6046ea0.pdf).

<sup>47</sup> U.S. Const. art. II, § 1, cl. 2.

<sup>48</sup> Glenn Kessler, Salvador Rizzo & Meg Kelly, Trump’s false or misleading claims total 30,573 over 4 years, THE WASHINGTON POST, (Jan. 24, 2021, 12:00 AM), <https://www.washingtonpost.com/politics/2021/01/24/trumps-false-or-misleading-claims-total-30573-over-four-years/>.

There are two major flaws in this defense. First, a candidate who believes he has won an election does not enjoy any legal warrant to commit possible crimes in furtherance of that belief. There are procedures in Georgia to lawfully contest an election result.<sup>49</sup> An electoral loser who believes he is an electoral winner must follow those procedures.<sup>50</sup> It would be wrong and unprecedented to accept claims that a strong enough belief in electoral irregularity (even if wholly baseless) allows candidates to commit possible violations of Georgia’s criminal law. That is especially true when the candidate also happens to be the president, who is expected to know and follow the law.

Second, it must be said that the record here is uniquely free of any evidence that would support a reasonable person in the belief that Trump actually won the 2020 presidential election in Georgia. To the contrary, there is an extraordinary absence of any evidence suggestive of irregularity in any respect in the Georgia process.<sup>51</sup> The fact that the existing outcome was arrived at and consistently reaffirmed in a process overseen by Republican officeholders, in a series of acts against their political interest,<sup>52</sup> is a powerful refutation of any such argument Trump might offer.<sup>53</sup> And the categorical rejection of a whole range of allegations offered in lawsuits as some semblance of evidence for Trump’s claims, by courts again having no interest

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<sup>49</sup> Citizens for Election Integrity Minnesota, Georgia Recount Laws (last updated June 8, 2020), <https://ceimn.org/searchable-databases/recount-database/georgia>.

<sup>50</sup> *See, e.g.*, O.C.G.A § 21-2-495(d).

<sup>51</sup> Press Release, Office of Georgia Secretary of State Brad Raffensperger, Historic First Statewide Audit of Paper Ballots Upholds Result of Presidential Race (Nov. 19, 2020), [https://sos.ga.gov/index.php/elections/historic\\_first\\_statewide\\_audit\\_of\\_paper\\_ballots\\_upholds\\_result\\_of\\_presidential\\_race](https://sos.ga.gov/index.php/elections/historic_first_statewide_audit_of_paper_ballots_upholds_result_of_presidential_race).

<sup>52</sup> Stephen Fowler, ‘Someone’s Going To Get Killed’: Ga. Official Blasts GOP Silence On Election Threats, NPR (Dec. 1, 2020), <https://www.npr.org/sections/biden-transition-updates/2020/12/01/940961602/someones-going-to-get-killed-ga-official-blasts-gop-silence-on-election-threats>.

<sup>53</sup> David Siders & Maya King, Trump unloaded on Georgia’s GOP governor. But Brian Kemp is still standing, POLITICO (June 6, 2020), <https://www.politico.com/news/2021/06/06/gop-convention-491993>.



but to apply the law fairly, also weighs heavily against any such argument.<sup>54</sup> So, while no one can be sure that Trump would fail to seduce a jury with his claim that he really thought he had won and thus was just trying to secure a fair result, there is no plausible argument that such beliefs can have any substantial factual basis.

Section IV also addresses other likely legal and factual defenses. They include claims that Trump’s conduct was protected by the First Amendment and accusations of selective or retaliatory prosecution. As to the former, it is black letter law that “speech integral to criminal conduct, such as fighting words, threats, and solicitations, remains categorically outside” the protection of the First Amendment.<sup>55</sup> The Supreme Court influentially articulated this principle in *Giboney v. Empire Storage & Ice Company* and has reaffirmed it many times since then.<sup>56</sup> On that basis, courts have repeatedly upheld laws criminalizing solicitation, conspiracy, and the like—the types of offenses that Trump could potentially be charged with under Georgia’s criminal code.<sup>57</sup>

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<sup>54</sup> Reuters Staff, Fact check: Courts have dismissed multiple lawsuits of alleged electoral fraud presented by Trump campaign, REUTERS (Feb. 15, 2021), <https://www.reuters.com/article/uk-factcheck-courts-election/fact-check-courts-have-dismissed-multiple-lawsuits-of-alleged-electoral-fraud-presented-by-trump-campaign-idUSKBN2AF1G1>.

<sup>55</sup> *United States v. Williams*, 553 U.S. 285, 297 (2008).

<sup>56</sup> *Giboney v. Empire Storage & Ice Company*, 336 U.S. 490, 498 (1949); *United States v. Williams*, 553 U.S. 285, 297 (2008); *United States v. Stevens*, 559 U.S. 460, 468–69 (2010).

<sup>57</sup> *See, e.g., United States v. Petrovic*, 701 F.3d 849, 855 (8th Cir. 2012); *United States v. Coss*, 677 F.3d 278, 289 (6th Cir. 2012); *United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010); *United States v. Bly*, 510 F.3d 453, 458 (4th Cir. 2007).

As to claims of prosecutorial abuse, he would have to make “a credible showing of different treatment of similarly situated persons” or like infirmities.<sup>58</sup> As we explain, there is no evidence that is the case. Based on our review of the public record concerning Trump’s conduct—and our understanding of relevant constitutional and legal principles—we explain that these defenses too would be meritless.

For all these reasons, we assess that Trump is at substantial risk of prosecution in Fulton County based upon what is currently known of the facts. Additional evidence uncovered by the DA’s ongoing investigation may expand or contract the scope of conduct upon which charges, if any, may be brought. But it is critical to the integrity of our rule of law system, and our constitutional republic, that the investigation proceed. As we explain in the conclusion to this paper, we of course recognize the norm that our nation does not use the courts to persecute unsuccessful candidates for high office. But there is a countervailing and even more foundational principle here at stake. As Justice Kavanaugh noted in *Trump v. Vance*, “no one is above the law.”<sup>59</sup>

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<sup>58</sup> *United States v. Armstrong*, 517 U.S. 456, 470 (1996). *Armstrong* was a case about selective prosecution on the basis of race, but criminal defendants have also alleged selective prosecution under the Fifth and Fourteenth Amendments on the basis of political affiliation. See *Walker v. United States*, No. CV109-036, 2012 WL 902797 (S.D. Ga. Mar. 5, 2012) (applying *Armstrong* standard); *United States v. Scrushy*, No. 2:05CR119-MEF, 2012 WL 139259 (M.D. Ala. Jan. 18, 2012) (same).

<sup>59</sup> *Trump v. Vance*, 140 S. Ct. at 2432 (Kavanaugh, J., concurring in the judgment); *see id.* at 2420 (“Since the earliest days of the Republic, ‘every man’ has included the President of the United States.”).

## **I. Reported Facts.**

Trump's efforts to reverse the outcome of the 2020 election targeted many of the electoral map's battleground states, but perhaps none so intensely as Georgia.<sup>60</sup> His efforts only intensified after the state certified the Democratic candidate's win. All of that culminated in the January 2 call to Raffensperger but was by no means limited to it.

### **A. The 2020 Presidential Election Results in Georgia.**

President Biden won the 2020 presidential election in Georgia by a total of 2,473,633 votes to Trump's 2,461,854.<sup>61</sup> Trump had won Georgia by 5.1% in the 2016 presidential election,<sup>62</sup> but the outcome was no bolt from the blue.<sup>63</sup> Although Georgia had not voted for a Democratic presidential candidate since 1992<sup>64</sup>—and although Republicans held the governor's mansion, the state legislature, and both U.S. Senate seats—political trends in the state had been shifting for years. Trump's 5.1-point victory over Hillary Clinton in 2016 was nearly three points shy of Mitt Romney's 7.8-point win over President Barack Obama in 2012.<sup>65</sup> And the state's widely followed gubernatorial race in 2018 saw Democratic candidate Stacey Abrams lose to Republican Brian Kemp by only 1.4 points.<sup>66</sup> Analysts point to the suburbs of Atlanta, where a

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<sup>60</sup> Stephen Fowler, Trump Continues Georgia Focus with Planned 'Save America' Rally in Perry, GPB NEWS (Sept. 7, 2021), <https://www.gpb.org/news/2021/09/07/trump-continues-georgia-focus-planned-save-america-rally-in-perry>.

<sup>61</sup> Elena Moore, Biden Flips Coveted Georgia, The Last State To Be Called By The AP, AP NEWS (Nov. 19, 2020), <https://www.npr.org/sections/live-updates-2020-election-results>.

<sup>62</sup> The New York Times, Georgia Presidential Race Results: Donald J. Trump Wins, THE NEW YORK TIMES (last updated Aug. 1, 2017), <https://www.nytimes.com/elections/2016/results/georgia-president-clinton-trump>.

<sup>63</sup> Sarah McCammon, How Georgia Turned from Red to Purple, NPR (Nov. 6, 2020), <https://www.npr.org/2020/11/06/932236941/how-georgia-turned-from-red-to-purple>.

<sup>64</sup> Moore, *supra* note 61.

<sup>65</sup> THE NEW YORK TIMES, *supra* note 62.

<sup>66</sup> RealClear Politics, Georgia Governor – Kemp vs. Abrams, REALCLEAR POLITICS (accessed Jun. 25, 2021), [https://www.realclearpolitics.com/epolls/2018/governor/ga/georgia\\_governor\\_kemp\\_vs\\_abrams-6628.html#](https://www.realclearpolitics.com/epolls/2018/governor/ga/georgia_governor_kemp_vs_abrams-6628.html#).

diversifying and increasingly educated electorate has bolstered Democratic vote totals, as the primary driver of this trend.<sup>67</sup>

Georgia's status as a swing state was widely recognized in the months preceding Election Day 2020. On June 13, 2020, Biden surpassed Trump in the state's polling averages.<sup>68</sup> Biden maintained this lead through July 2020, when Trump regained his prior advantage.<sup>69</sup> In October, however, Biden vaulted back to a 1.2-point lead over Trump that persisted through November 3.<sup>70</sup> In apparent response to the Biden campaign's unexpected competitiveness, Trump held rallies in Georgia twice between October 16 and November 3.<sup>71</sup>

Georgians began casting their ballots on October 12, 2020, when 128,000 voters went to the polls for early voting.<sup>72</sup> The number of total votes cast nearly doubled the next day.<sup>73</sup> By October 31, more than 3.9 million Georgians had voted either in person or by mail.<sup>74</sup> Because

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<sup>67</sup> David Weigel & Lauren Tierney, How votes shifted in the six political states of Georgia, THE WASHINGTON POST (Dec. 8, 2020), <https://www.washingtonpost.com/graphics/2020/politics/georgia-senate-political-geography/>. See also Vanessa Williams & Reis Thebault, In Georgia, get-out-the-vote operations that helped Biden win haven't stopped, THE WASHINGTON POST (Nov. 19, 2020, 7:41 PM), [https://www.washingtonpost.com/politics/in-georgia-get-out-the-vote-operations-that-helped-biden-win-havent-stopped/2020/11/19/7c10ceac-2851-11eb-8fa2-06e7cbb145c0\\_story.html](https://www.washingtonpost.com/politics/in-georgia-get-out-the-vote-operations-that-helped-biden-win-havent-stopped/2020/11/19/7c10ceac-2851-11eb-8fa2-06e7cbb145c0_story.html). Beyond these demographic changes, get-out-the-vote initiatives such as Stacey Abrams' New Georgia Project played a vital role in engaging first-time and inconsistent voters in the political process.

<sup>68</sup> FiveThirtyEight, Who's Ahead in Georgia?, FIVETHIRTYEIGHT (updated May 4, 2021), <https://projects.fivethirtyeight.com/polls/president-general/georgia/>.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> John Bailey, President Trump to headline rally in Rome on Sunday at 8:30 p.m., ROME NEWS TRIBUNE (Oct. 30, 2020), [https://www.northwestgeorgianews.com/rome/news/local/faa-records-show-president-trump-headed-to-rome-on-sunday-local-gop-says-no-details/article\\_72a6032c-19f7-11eb-9108-67609dc925c0.html](https://www.northwestgeorgianews.com/rome/news/local/faa-records-show-president-trump-headed-to-rome-on-sunday-local-gop-says-no-details/article_72a6032c-19f7-11eb-9108-67609dc925c0.html).

<sup>72</sup> Kate Brumback, Georgia breaks turnout record for first day of early voting, AP NEWS (Oct. 13, 2020), <https://apnews.com/article/virus-outbreak-election-2020-elections-georgia-atlanta-afa309fad367434a5bde9888fec89537>.

<sup>73</sup> WSBTV.com News Staff, Early voting day 2: Massive turnout, long lines at polling places after record day in Georgia, WSB-TV 2, (Oct. 13, 2020, 11:40 PM), <https://www.wsbtv.com/news/local/least-1-metro-atlanta-county-making-changes-after-record-breaking-first-day-early-voting/HRN7M2MLBBHA3CN6ZSUN4AQ2OI/>.

<sup>74</sup> Mark Niese, Early voting brought record turnout in Georgia ahead of Election Day, THE ATLANTA JOURNAL-CONSTITUTION, (Oct. 31, 2020), <https://www.ajc.com/politics/early-voting-brought-record-turnout-in-georgia-ahead-of-election-day/76JRESFLMVEYBGX2J7AAGKABQ4/>; This marked a 63% increase in Georgia's pre-election turnout from 2016, when 2.3 million early votes were cast in person or by mail. Steve Patrick, Georgia voters crush all-time turnout record before Election Day, NEWS4JAX (Oct. 31, 2020), <https://www.news4jax.com/news/georgia/2020/10/31/georgia-voters-crush-all-time-turnout-record-before-election-day/>.

many Georgians opted to vote by mail (due to the pandemic), hundreds of thousands of mail-in ballots continued rolling into election offices through the deadline for receipt of 7 p.m. on November 3.

This many lawfully cast mail-in and early in-person ballots could not be counted all at once.<sup>75</sup> As a result, the outcome of the 2020 presidential election in Georgia was not known on November 3. Although day-of votes heavily favored Trump as expected, many mail-in and early in-person votes had not yet been tabulated, and these votes were expected to heavily favor Biden.<sup>76</sup> On November 4, Secretary of State Raffensperger stated that 200,000 mail-in ballots and between 40,000 and 50,000 early in-person votes remained to be counted.<sup>77</sup> One week later, citing Biden's thin lead over Trump, Raffensperger announced a discretionary hand recount by election workers of the 4.9 million-plus ballots cast.<sup>78</sup> On November 16, Raffensperger revealed that Georgia counties had rejected a total of 2,011 mail-in ballots—out of more than 1.3 million cast in that manner—because of signature-matching issues.<sup>79</sup> (Trump was thus mistaken when he claimed on Twitter three days later that Georgia rejected “almost ZERO ballots.”<sup>80</sup>)

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<sup>75</sup> Georgia law stipulates that election workers may begin *processing* absentee ballots when they are received. In this case, processing refers to conducting a second signature check (the first occurs when voters apply for an absentee ballot) and preparing the ballot for eventual tabulation. Tabulation (i.e., counting) of those ballots, however, cannot begin until 7 A.M. on Election Day. For the relevant Georgia law, see Ga. Ann. Code § 21-2-386 (2019).

<sup>76</sup> Gregory Krieg, Joe Biden becomes first Democrat in 28 years to win Georgia, CNN (Nov. 13, 2020, 3:21 PM), <https://www.cnn.com/2020/11/13/politics/joe-biden-wins-georgia/index.html>.

<sup>77</sup> Georgia Officials Press Briefing on Election Vote Count Transcript November 4, REV (Nov. 4, 2020), <https://www.rev.com/blog/transcripts/georgia-officials-press-briefing-on-election-vote-count-transcript-november-4>.

<sup>78</sup> Melissa Quinn, Georgia secretary of state announces hand recount of presidential race, CBS NEWS (Nov. 11, 2020, 12:40 PM), <https://www.cbsnews.com/news/georgia-election-hand-recount-audit-presidential-race/>.

<sup>79</sup> Reuters Staff, Fact check: Georgia rejected ballots did not go from 4% to “almost zero” in 2020, REUTERS (Nov. 23, 2021), <https://www.reuters.com/article/uk-factcheck-georgia-rejected-ballots-fo/fact-check-georgia-rejected-ballots-did-not-go-from-4-to-almost-zero-in-2020-idUSKBN2832CM>.

<sup>80</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Nov. 19, 2020, 8:59:47 AM), <https://www.thetrumparchive.com/?results=1&searchbox=%22almost+zero%22>.

On November 19, the Associated Press called the election for Biden, concluding that Biden had received 49.51 percent of the vote and Trump had received 49.25 percent.<sup>81</sup> The very next day, Raffensperger and Governor Brian Kemp formally certified the election results.<sup>82</sup>

Biden's victory in Georgia, the last state to be certified, solidified his electoral college count at 306, besting Trump's 232 votes and matching the incumbent president's 2016 total.<sup>83</sup> A subsequent recount at the request of the Trump campaign on November 21 did little to change the result: Biden finished with 49.5 percent of the vote and Trump finished with 49.26 percent.<sup>84</sup> On December 7, Raffensperger formally recertified the election results in favor of Biden.<sup>85</sup>

### **B. On Election Day, Trump Immediately Claims He Won Georgia.**

From the closing of the polls in Georgia on November 3, through his threatening phone call to Raffensperger on January 2, Trump and his allies went to extraordinary lengths in their efforts to overturn the certification of the state's election results. Trump fired the first shot on November 3. That night, after all votes had been cast but long before they had been fully counted, Trump stated at the White House: "Millions and millions of people voted for us tonight, and a very sad group of people is trying to disenfranchise that group of people. And we won't stand for it."<sup>86</sup> Trump then falsely claimed that the election "was just called off" while he was

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<sup>81</sup> Moore, *supra* note 61; Emil Moffatt, With Biden Ahead, Georgia Begins Hand Recount Of Nearly 5 Million Ballots, NPR (Nov. 13, 2020, 1:46 PM), <https://www.npr.org/2020/11/13/934592764/with-biden-ahead-georgia-begins-hand-recount-of-nearly-5-million-ballots>.

<sup>82</sup> Quinn Scanlan, Georgia certifies election results, making Biden victory official, ABC NEWS (Nov. 20, 2020, 5:50 PM), <https://abcnews.go.com/Politics/georgia-secretary-state-certifies-election-results-making-biden/story?id=74315511>.

<sup>83</sup> Arnie Seipel, FACT CHECK: Trump Falsely Claims A 'Massive Landslide Victory', NPR (Dec. 11, 2016, 5:03 PM), <https://www.npr.org/2016/12/11/505182622/fact-check-trump-claims-a-massive-landslide-victory-but-history-differs>.

<sup>84</sup> Weigel & Tierney, *supra* note 67.

<sup>85</sup> Max Greenwood, Georgia secretary of state recertifies election results after recount, THE HILL (Dec. 7, 2020, 10:42 AM), <https://thehill.com/homenews/campaign/529028-georgia-secretary-of-state-says-he-will-recertify-election-results-after>.

<sup>86</sup> Dale, *supra* note 15.

“winning everything.”<sup>87</sup> He insisted “we did win this election. They can’t catch us.”<sup>88</sup> (He made similar claims about Pennsylvania and Michigan.<sup>89</sup>) He wrongly described the continued counting of lawfully cast ballots as “a fraud on the American public.”<sup>90</sup> He added, “We want all voting to stop. We don’t want them to find any ballots at 4 o’clock in the morning and add them to the list, okay?”<sup>91</sup> In a sign of things to come, Trump singled out Georgia: “It’s also clear that we have won Georgia... . They’re never gonna.”<sup>92</sup>

Trump’s election day remarks must be considered in the context of his long run-up to challenging that and other states’ outcomes if those outcomes were not in his favor—regardless of how the people actually voted. In July 2020, he declined to agree that he would accept the results of the election, telling *Fox News* host Chris Wallace, “Look, you—I have to see. No, I’m not going to just say ‘yes.’ I’m not going to say ‘no.’ And I didn’t last time, either.”<sup>93</sup> In September 2020, he responded to a pointed question about the peaceful transfer of power by stating, “We’re going to have to see what happens.”<sup>94</sup> These statements were accompanied by many others in which he insisted that he could lose the election only through fraud. In August 2020, he asserted that “the only way we’re going to lose this election is if this election is rigged”<sup>95</sup>—and one week later, he stated that “the only way they can take this election away

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Felicia Sonmez, Trump declines to say whether he will accept November election results, *THE WASHINGTON POST* (July 19, 2020), [https://www.washingtonpost.com/politics/trump-declines-to-say-whether-he-will-accept-november-election-results/2020/07/19/40009804-c9c7-11ea-91f1-28aca4d833a0\\_story.html](https://www.washingtonpost.com/politics/trump-declines-to-say-whether-he-will-accept-november-election-results/2020/07/19/40009804-c9c7-11ea-91f1-28aca4d833a0_story.html).

<sup>94</sup> Allison Pecorin & Trish Turner, Unanimous Senate commits to peaceful transfer of power after Trump refuses, *ABC NEWS* (Sept. 24, 2020, 5:58 PM), <https://abcnews.go.com/Politics/unanimous-senate-commits-peaceful-transfer-power-trump-refuses/story?id=73216758>.

<sup>95</sup> Kevin Liptak, Trump warns of 'rigged election' as he uses conspiracy and fear to counter Biden's convention week, *CNN* (Aug. 18, 2020, 11:08 AM), <https://www.cnn.com/2020/08/17/politics/donald-trump-campaign-swing/index.html>.

from us is if this is a rigged election.”<sup>96</sup> As we discuss further below, this is relevant evidence of Trump’s *mens rea*—his culpable state of mind.

### **C. Trump and His Allies Launch Efforts to Overturn Georgia’s Election Results.**

Following Trump’s remarks on November 3, he and his allies began pressuring Georgia’s political leaders to disregard lawfully cast ballots from Democratic-leaning counties and to vary from established election administration procedures. They also began filing a barrage of meritless lawsuits. These efforts set the stage for Trump’s more extreme conduct in December and January; they also illuminate his state of mind and total refusal to abide an electoral defeat.

On the afternoon of November 4, even as Georgia was hard at working counting all lawfully cast votes, Trump publicly “claimed” Georgia (and several other battleground states) for his campaign.<sup>97</sup> That same day, the Trump campaign filed its first post-election lawsuit, joined by the Georgia Republican Party.<sup>98</sup> The two plaintiffs alleged that a Republican poll watcher in Chatham County had “witnessed absentee ballots that had not been properly processed apparently mixed into a pile of absentee ballots that was already set to be tabulated” after the absentee ballot-receipt deadline of 7 p.m. on Election Day.<sup>99</sup> The plaintiffs sought the collection and storage of these purportedly late-arriving ballots by the county’s Board of Elections.<sup>100</sup> The

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<sup>96</sup> Nick Niedzwiadek, The 9 most notable comments Trump has made about accepting the election results, POLITICO (Sept. 24, 2020, 6:04 PM), <https://www.politico.com/news/2020/09/24/trump-casts-doubt-2020-election-integrity-421280>.

<sup>97</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Nov. 4, 2020, 4:56:10 PM), <https://www.thetrumparchive.com/?results=1&dates=%5B%222020-11-03%22%2C%222020-11-05%22%5D>.

<sup>98</sup> Makini Brice & Jan Wolfe, Trump campaign files lawsuit over Georgia county ballot sorting, REUTERS (Nov. 4, 2020, 7:18 PM), <https://www.reuters.com/article/us-usa-election-georgia/trump-campaign-files-lawsuit-over-georgia-county-ballot-sorting-idUSKBN27L012>.

<sup>99</sup> Petition to Command Enforcement of Election Laws Pursuant to O.C.G.A. § 21-2-412, *In re* Enforcement of Election Laws and Securing Ballots Cast or Received After 7:00 P.M. on November 3, 2020, No. SPCV20-00982, at 14 (Ga. Super. Civil 2020).

<sup>100</sup> *Id.*



court summarily dismissed the case in a one-page order the next day, citing the plaintiffs’ lack of evidence that the ballots in question had in fact arrived after the 7 p.m. deadline.<sup>101</sup>

On November 6, Trump again tweeted about Georgia: “Where are the missing military ballots in Georgia? What happened to them?”<sup>102</sup> Subsequent analysis confirmed that Trump’s reference to “missing military ballots” was not based in fact.<sup>103</sup> Exactly one week later, after Raffensperger initiated a discretionary hand recount of Georgia’s ballots,<sup>104</sup> Trump targeted both Raffensperger and Kemp in a tweet: “Georgia Secretary of State, a so-called Republican (RINO), won’t let the people checking the ballots see the signatures for fraud. Why? Without this the whole process is very unfair and close to meaningless. Everyone knows that we won the state. Where is @BrianKempGA?”<sup>105</sup> (Of course, the “people checking the ballots” as part of the state’s first recount were election workers verifying the initial totals by hand recount. For more on why Trump’s claim that those workers weren’t able to “see the signatures for fraud” makes no sense, see [Box 3 “Georgia’s Signature-Matching Law”](#) in Section I.F.) A few days after Trump criticized Raffensperger and Kemp, he fired Chris Krebs—Director of the Federal Cybersecurity and Infrastructure Security Agency (CISA, the federal agency responsible for ensuring that state and local election infrastructure is secure)—for daring to describe the 2020 presidential election as “the most secure in American history.”<sup>106</sup> Trump thus made clear his willingness to abuse

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<sup>101</sup> Order on Petition to Command Enforcement of Election Laws, *In re* Enforcement of Election Laws and Securing Ballots Cast or Received After 7:00 P.M. on November 3, 2020, No. SPCV20-00982, (Ga. Super. Civil 2020).

<sup>102</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Nov. 6, 2020, 12:38:17 PM), <https://www.thetrumparchive.com/?results=1&dates=%5B%222020-11-06%22%2C%222020-11-08%22%5D>.

<sup>103</sup> Tara Subramaniam, Fact Check: Georgia's Military Ballots Are Not Missing, CNN, (Nov. 6, 2020, 5:26 PM), <https://www.cnn.com/2020/11/06/politics/georgia-military-ballots-fact-check/index.html>.

<sup>104</sup> Moffatt, *supra* note 81.

<sup>105</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Nov. 13, 2020, 7:53:20 PM), <https://www.thetrumparchive.com/?searchbox=%22georgia%22&dates=%5B%222020-11-10%22%2C%222020-11-14%22%5D>.

<sup>106</sup> Cybersecurity and Infrastructure Security Agency, Joint Statement From Elections Infrastructure Government Coordinating Council & The Election Infrastructure Sector Coordinating Executive Committees, CISA (Nov. 12, 2020), <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election>.

presidential power to punish those who opposed his insistence that this was a “Rigged Election!”<sup>107</sup>

Following Trump’s cue, several of his most prominent allies amplified his attacks on Georgia’s leaders and election administration. On November 9, U.S. Senators Kelly Loeffler and David Perdue of Georgia called for Raffensperger’s resignation.<sup>108</sup> The next day, U.S. Rep. Doug Collins of Georgia—appointed by Trump to lead his campaign’s recount operation—gave a host of interviews repeating Trump’s fraud claims and also sent Raffensperger a letter baselessly alleging the unlawful counting of “tens of thousands of ballots.”<sup>109</sup> And on November 13, two days after the hand recount commenced, Trump ally and U.S. Senator Lindsey Graham of South Carolina called Raffensperger, supposedly to discuss recount procedures.<sup>110</sup> According to Raffensperger, Graham (then the chairman of the Senate Judiciary Committee) asked him to clarify Georgia’s signature-matching law for absentee ballots.<sup>111</sup> Graham then reportedly questioned whether election workers in Atlanta may have accepted mail-in votes with non-matching signatures because of “political bias” against Trump.<sup>112</sup> Finally, Graham asked Raffensperger if his office had the power to disqualify all mail-in ballots from counties where the

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<sup>107</sup> Donald J. Trump (@realDonaldTrump), The Trump Twitter Archive (Nov. 10, 2020, 9:37:06 PM), <https://www.thetrumparchive.com/?searchbox=%22Rigged+Election%21%22&results=1>.

<sup>108</sup> Marianne Levine & James Arkin, Loeffler, Perdue call on Georgia’s Republican secretary of state to resign, POLITICO (Nov. 9, 2020, 4:50 PM), <https://www.politico.com/news/2020/11/09/loeffler-perdue-georgia-secretary-state-resign-435484>.

<sup>109</sup> Reis Thebault & Amy Gardner, His fellow Republicans turned on him, but Georgia Secretary of State Brad Raffensperger isn’t backing down, THE WASHINGTON POST (Nov. 11, 2020, 8:07 PM), [https://www.washingtonpost.com/politics/brad-raffensperger-georgia/2020/11/11/2d0a876e-2426-11eb-952e-0c475972cfc0\\_story.html](https://www.washingtonpost.com/politics/brad-raffensperger-georgia/2020/11/11/2d0a876e-2426-11eb-952e-0c475972cfc0_story.html).

<sup>110</sup> Andrew Prokop, Lindsey Graham’s controversial call with the Georgia’s secretary of state, explained, VOX (Nov. 18, 2020, 9:40 AM), <https://www.vox.com/2020/11/18/21571684/lindsey-graham-brad-raffensperger-georgia-ballots>.

<sup>111</sup> *Id.*

<sup>112</sup> Lauren Gambino, Georgia’s Secretary of State Says Lindsey Graham Suggested He Throw Out Legal Ballots, THE GUARDIAN (Nov. 16, 2020), <https://www.theguardian.com/us-news/2020/nov/16/georgia-brad-raffensperger-lindsey-graham-elections-ballots>.

rate of non-matching signatures was high—an extreme and bizarre suggestion that would have effectively negated thousands of legally cast (and overwhelmingly pro-Biden) votes.<sup>113</sup>

Even as Trump and his allies sought to pressure state officials into disregarding valid Biden votes—and attacked officials who rejected those requests—the legal assault on Georgia’s election continued. On November 11, for instance, four Republican voters filed a federal lawsuit seeking the exclusion of all votes cast in a set of Georgia counties that voted for Biden by significant margins—including Fulton, Cobb, and DeKalb Counties.<sup>114</sup> The plaintiffs based their case on claims and anecdotes that closely tracked Trump’s public statements, but the plaintiffs voluntarily withdrew their case before the Court could address it on the merits.<sup>115</sup>

On November 13, prominent Trump ally Lin Wood filed a federal suit attacking the consent decree signed by Raffensperger and several Democratic groups in March 2020, which had added an additional step to the signature-verification process for absentee ballots and standardized the process by which voters are notified about their ballots being rejected for signature-matching issues. (For more on the consent decree, see [Box 1](#).) Wood asserted that this settlement was unlawful and argued that “the inclusion and tabulation of absentee ballots for the general election (and potentially, for all future elections within this state) is improper and must not be permitted.”<sup>116</sup> The day after Wood filed his case, Trump parroted these claims in a tweet: “The Consent Decree [modifying the signature verification process] signed by the Georgia Secretary of State, with the approval of Governor @BrianKempGA, at the urging of

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<sup>113</sup> *Id.*

<sup>114</sup> Complaint, Brooks v. Mahoney, Civil Action No. 4:20-cv-00281-RSB-CLR (S.D. Ga. Nov. 11, 2020), <https://www.courtlistener.com/docket/18620507/1/brooks-v-mahoneyiii/>.

<sup>115</sup> *Id.*; Plaintiffs’ Notice of Voluntary Dismissal, Brooks v. Mahoney, Civil Action No. 4:20-cv-00281-RSB-CLR (S.D. Ga. Nov. 16, 2020), <https://www.courtlistener.com/docket/18620507/20/brooks-v-mahoneyiii/>.

<sup>116</sup> Verified Complaint for Declaratory and Injunctive Relief at 4, Wood v. Raffensperger, Civil Action No. 1:20-cv-04651-SDG, (N.D. Ga. Nov. 13, 2020), <https://www.democracymocket.com/wp-content/uploads/2020/11/File-Stamped-11-13-20-Complaint-00583801xA4094-1.pdf>.

@staceyabrams, makes it impossible to check & match signatures on ballots and envelopes, etc. They knew they were going to cheat. Must expose real signatures!”<sup>117</sup> Ultimately, the district court and the Eleventh Circuit Court of Appeals held that Wood lacked standing to bring any of his claims, and the U.S. Supreme Court denied Wood’s petition for a writ of certiorari.<sup>118</sup>

### **Box 1: The Georgia Consent Decree**

Trump repeatedly criticized an agreement between Raffensperger and Democratic-aligned groups signed in March 2020. The impetus for this decree was widespread dissatisfaction with election procedures that Georgia used during (and before) the 2018 elections. Prior to the consent decree, Georgia-based election observers and advocates bemoaned the lack of a standardized statewide process for signature-matching on absentee ballots, and for notifying voters whose absentee ballots had been rejected based on a signature mismatch.<sup>119</sup> While state law requires voters to be notified promptly of their faulty ballot, only 1 in 9 voters with rejected ballots ended up voting in the 2018 election.<sup>120</sup> The pre-2020 system was also marked by large discrepancies in rejection rates across counties, with higher rejection rates for racial minorities. Indeed, Democratic and independent analyses noted that it was twice as likely for one’s ballot to be rejected if one were Black or Latino.<sup>121</sup> The March 2020 consent decree required revamped, standardized procedures.<sup>122</sup> Among other things, the second signature match described above was implemented to give absentee voters a second chance to submit a matching signature,<sup>123</sup> and voters were given 24 hours to correct their signatures if they were initially linked to a mismatch 11 days before the election.<sup>124</sup>

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<sup>117</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Nov. 14, 2020, 9:29:25 AM), <https://www.thetrumparchive.com/?searchbox=%22The+Consent+Decree+signed+by+the+Georgia+Secretary+of+State%2C+with+the+approval+of+Governor%22>.

<sup>118</sup> John L. Dorman, A federal appeals court unanimously shut down a conservative lawyer's attempt to block Biden's presidential win in Georgia, *Business Insider* (Dec. 5, 2020), <https://www.businessinsider.com/lin-wood-georgia-election-appeals-lawsuit-dismissed-trump-biden-2020-12>.

<sup>119</sup> Chris Joyner & Jennifer Peebles, *AJC Analysis: Absentee voting pitfalls tripped thousands of Ga. Voters*, THE ATLANTA JOURNAL-CONSTITUTION (Dec. 20, 2018), <https://www.ajc.com/news/state--regional-govt--politics/ajc-analysis-absentee-voting-pitfalls-tripped-thousands-voters/5Qu6ynxydaKrT4le1edtPL/>.

<sup>120</sup> *Id.*

<sup>121</sup> Darragh Roche, *Trump Rails Against Georgia Gov. Kemp for Consent Decree Aimed at Helping Minority Voters*, NEWSWEEK (Nov. 14, 2020, 11:37 AM), <https://www.newsweek.com/trump-georgia-gov-kemp-consent-decree-1547476>.

<sup>122</sup> Jonathan Raymond, *Georgia election official says Trump is 'flat out, 100 percent, four square wrong' about consent decree*, 11ALIVE (Nov. 17, 2020), <https://www.11alive.com/article/news/politics/elections/georgia-consent-decree-election-official-says-trump-wrong/85-db462666-11d4-46c1-97e4-18d9bf79e365>.

<sup>123</sup> Tarik Minor, *Trust Index finds Trump’s claim on Georgia voter signature checks is wrong*, NEWS4JAX (Nov. 16, 2020), <https://www.news4jax.com/vote-2020/2020/11/16/ap-trump-wrong-on-georgia-voter-signature-checks/>.

<sup>124</sup> Raymond, *supra* note 122.

Even as his lawsuits failed, Wood (and fellow Trump ally Sidney Powell) pushed a burgeoning conspiracy theory that Georgia’s voting machines—operated by Dominion System—had been hacked to allow votes to be switched to favor Biden.<sup>125</sup> That theory has since been soundly defeated. (Public reporting has also revealed that communications staff on the Trump campaign knew that the Dominion theory was baseless even before Powell and other Trump surrogates made it a centerpiece of their stolen election claims.<sup>126</sup>)

### **Box 2: The False Dominion Systems Voting Machines Conspiracy Theory**

In 2021, tracking the creation of a conspiracy theory is a Herculean task. It may originate in the dark recesses of the internet or in a speech by a prominent politician or commentator. And, however they may originate, conspiracy theories frequently metastasize and mutate. The full universe of conspiracy theories surrounding the Dominion Systems voting machines used by many states in the 2020 presidential election is impossible to map. But the core theory is that voting machines produced by Dominion Systems automatically switched votes from Trump to Biden, or deleted Trump votes altogether.<sup>127</sup> On some accounts—each more fantastical than the next—Dominion rigged its machines to throw Biden the election because Dominion is controlled by Smartmatic, a voting-technology company founded in Florida by two Venezuelans who distributed their technology to Venezuela during the dictatorial reign of Hugo Chavez.<sup>128</sup> Smartmatic’s technology was purportedly used by Chavez to rig elections in his favor in perpetuity. Though he died in 2013, the theory states that his family still controls Smartmatic, and that Smartmatic controls Dominion, whose voting machines were rigged by communist leaders in Venezuela prior to the 2020 presidential election in order to steal the vote from Trump.<sup>129</sup> Other owners of Dominion, according to the theory’s subscribers, include George Soros and the Clinton family.

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<sup>125</sup> Erik Larson, Trump Booster Lin Wood’s Georgia Runoff Suit Tossed Out By Judge, BLOOMBERG (December 28, 2020, 4:25 PM), <https://www.bloomberg.com/news/articles/2020-12-28/trump-booster-lin-wood-s-georgia-runoff-suit-tossed-out-by-judge>.

<sup>126</sup> Alan Feuer, Trump Campaign Knew Lawyers’ Voting Machine Claims Were Baseless, Memo Shows, THE NEW YORK TIMES (Sept. 21, 2021), <https://www.nytimes.com/2021/09/21/us/politics/trump-dominion-voting.html>.

<sup>127</sup> Camille Caldera, Fact Check: Dominion Voting Machines Didn’t Delete Votes from Trump, Switch Them to Biden, USA TODAY, (Nov. 17, 2020), <https://www.usatoday.com/story/news/factcheck/2020/11/14/fact-check-dominion-voting-machines-didnt-delete-switch-votes/6282157002/>.

<sup>128</sup> CNN, Facts First, CNN (accessed Sept. 21, 2021), [https://www.cnn.com/factsfirst/politics/factcheck\\_829bf37c-cbd5-4a5c-8d87-7e53504997cb](https://www.cnn.com/factsfirst/politics/factcheck_829bf37c-cbd5-4a5c-8d87-7e53504997cb).

<sup>129</sup> Adrienne Dunn, Fact Check: Hugo Chávez’s Family Does Not Own DOMINION Voting Systems, USA TODAY, (Dec. 18, 2020), <https://www.usatoday.com/story/news/factcheck/2020/12/18/fact-check-hugo-chavez-s-family-does-not-own-part-dominion-voting-systems/3926344001/>.

Top Trump surrogates—including Rudy Giuliani, and Sidney Powell—spread versions of the Dominion conspiracy theory on Twitter and Fox News in the weeks following the election.<sup>130</sup> Powell, in particular, put anti-Dominion claims at the heart of her declarations that the election was stolen from Trump, telling Fox Business Network on November 13 that “I can hardly wait to put forth all the evidence we have collected on Dominion.”<sup>131</sup> Trump himself retweeted a story about the Dominion conspiracy theories on November 12.<sup>132</sup> Perhaps inevitably, this theory soon became a favorite of adherents of the QAnon cult and other rightwing groups. No credible evidence supports any of the theories that Dominion’s voting machines were part of a plot to steal the election from Trump. Dominion has no connection to Smartmatic; George Soros and the Clinton Foundation are not controlling shareholders of the company; and a multitude of recounts, machine tests, and independent audits have affirmed the accuracy of the election.<sup>133</sup>

Taken together, these sustained attacks on Georgia’s election—led by Trump and echoed in statements and lawsuits by many of his principal allies—sought to pressure Georgia officials to disregard lawfully cast ballots, to vary from established legal procedures governing election recounts, and to declare Trump the winner of an election he had lost. As a result of these public attacks, officials involved in the state’s election administration received death threats.<sup>134</sup>

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<sup>130</sup> JM Rieger, Analysis | the False Claims from Fox News and Trump Allies Cited in Dominion's \$1.6 Billion Lawsuit, THE WASHINGTON POST (March 26, 2021), <https://www.washingtonpost.com/politics/2021/03/26/fox-trump-election-dominion/>.

<sup>131</sup> *Id.*

<sup>132</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Nov. 12, 2020, 11:34:00 AM), <https://www.thetrumparchive.com/?searchbox=%22Report%3A+Dominion%22>.

<sup>133</sup> Ali Swenson, Smartmatic Does Not Own Dominion Voting Systems, AP NEWS, (Nov. 17, 2020), <https://apnews.com/article/fact-checking-afs:Content:9740535009>.

<sup>134</sup> Fowler, *supra* note 52.

#### **D. Trump and His Lawyers Pressure Georgia Legislators and Governor Kemp.**

Georgia officials displayed admirable courage in resisting Trump’s pressure campaign and hardball political tactics. On November 20, Raffensperger and Kemp formally certified the state’s election results.<sup>135</sup> This prompted another wave of lawsuits—all dismissed for lack of substantive evidence—as well as intensified pressure tactics by Trump and his allies, ultimately leading to a call on December 5 in which Trump personally solicited Kemp to abet a scheme to overturn the election results by “call[ing] a special election.”<sup>136</sup>

Pro-Trump actors filed four especially notable lawsuits between the certification of the election on November 20 and the recertification of the election on December 7. The first suit was filed in state court by John Wood of the Georgia Voters Alliance seeking decertification of the election; it failed because it named improper parties as defendants.<sup>137</sup> The second suit was filed in federal court as part of Trump lawyer Sidney Powell’s so-called “Kraken” operation.<sup>138</sup> While the district court granted a preliminary request to preserve voting records on Dominion

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<sup>135</sup> Kate Brumback, Georgia officials certify election results showing Biden win, AP NEWS (Nov. 20, 2020), <https://apnews.com/article/georgia-certify-election-joe-biden-ea8f867d740f3d7d42d0a55c1aef9e69>.

<sup>136</sup> Amy Gardner, Colby Itkowitz, & Josh Dawsey, Trump calls Georgia governor to pressure him for help overturning Biden’s win in the state, THE WASHINGTON POST (Dec. 5, 2020), [https://www.washingtonpost.com/politics/trump-kemp-call-georgia/2020/12/05/fd8d677c-3721-11eb-8d38-6aea1adb3839\\_story.html](https://www.washingtonpost.com/politics/trump-kemp-call-georgia/2020/12/05/fd8d677c-3721-11eb-8d38-6aea1adb3839_story.html); On September 25, 2021, Trump confirmed that he asked Kemp to call a ‘special election’ to decertify his loss in Georgia: “Remember we wanted to call a special election, so that we could go, Marjorie, into election integrity. What is wrong with that? And he said, ‘No, we won’t.’ And I think the governor is the only one that can call it. And he wouldn’t do it. He wouldn’t do it. So when these guys, they’re young and nice guys, they came back, they said. “He won’t do it.” So I said, “Let me handle it. This is easy. I got this guy elected. One thing has nothing to do with the other. One thing has nothing... There’s no quid pro quo... I’ll call them up.” I said, “Brian, listen. you have a big election integrity problem in Georgia. I hope you can help us out and call a special election and let’s get to the bottom of it for the good of the country.” Donald Trump, Perry, Georgia Rally Speech Transcript September 25, REV (Sept. 26, 2021), <https://www.rev.com/blog/transcripts/donald-trump-perry-georgia-rally-speech-transcript-september-25>.

<sup>137</sup> Final Order, Wood v. Raffensperger, No: 2020-CV-342959, (Ga., Super. Ct., 2020), <https://www.democracymocket.com/wp-content/uploads/2020/11/2020.12.08-John-Wood-v.-Raffensperger-Final-Order-KH623841x9D7F4-1.pdf>.

<sup>138</sup> Jonathan Raymond, Sidney Powell 'Kraken' election lawsuit dismissed in federal court, 11ALIVE (Dec. 7, 2020, 6:22 PM), <https://www.11alive.com/article/news/politics/elections/sidney-powell-kraken-georgia-election-lawsuit-hearing-today/85-338163f4-ac47-4bdb-8c3b-982b8d174659>.

machines,<sup>139</sup> it rejected Powell’s request to have the election results decertified and later dismissed the suit in its entirety.<sup>140</sup> The third suit was filed in state court by a Georgia voter named Paul Andrew Boland, seeking decertification of the election based on supposedly faulty signature verification procedures.<sup>141</sup> The trial court dismissed this case for its reliance on “speculation,”<sup>142</sup> and the Georgia Supreme Court rejected a subsequent emergency petition before Boland withdrew the case.<sup>143</sup> The fourth suit was filed in state court by the Trump campaign itself and one Trump elector, arguing that “many thousands of illegal votes were cast, counted, and included in the tabulations”<sup>144</sup> due to “significant systemic misconduct, fraud, and other irregularities.”<sup>145</sup> The Georgia state courts rejected the Trump campaign’s request for “a new presidential election to occur at the earliest opportune time,”<sup>146</sup> and the lawsuit was later withdrawn.<sup>147</sup>

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<sup>139</sup> *Pearson v. Kemp*, Civil Action No. 1:20-cv-04809-TCB (N.D. Ga. Nov. 29, 2020), ECF No. 14, [https://storage.courtlistener.com/recap/gov.uscourts.gand.284055/gov.uscourts.gand.284055.14.0\\_6.pdf](https://storage.courtlistener.com/recap/gov.uscourts.gand.284055/gov.uscourts.gand.284055.14.0_6.pdf) (granting petitioners’ request for a temporary restraining order).

<sup>140</sup> Minute Sheet for proceedings held In Open Court, *Pearson v. Kemp*, Case No. 1:20-cv-04809-TCB (N.D. Ga. Dec. 7, 2020), ECF No. 74, [https://www.democracymocket.com/wp-content/uploads/2020/11/show\\_temp.pl\\_-7-1.pdf](https://www.democracymocket.com/wp-content/uploads/2020/11/show_temp.pl_-7-1.pdf).

<sup>141</sup> Verified Complaint, *Boland v. Raffensperger*, Civil Action No. 2020CV343018 (Ga. Ct., Fulton Cnty. Nov. 30, 2020), <https://www.democracymocket.com/wp-content/uploads/2020/11/2020-11-30-Verified-Complaint-1.pdf>.

<sup>142</sup> Final Order, *Boland v. Raffensperger*, Civil Action No. 2020CV343018 (Ga. Ct., Fulton Cnty. Dec. 8, 2020), <https://www.democracymocket.com/wp-content/uploads/2020/11/2020.12.8-Final-Order-Granting-MTDs-2020CV343018-Boland-v.-Raffensperger-et-al.-KH623927x9D7F4-1.pdf>.

<sup>143</sup> *Boland v. Raffensperger*, No. S21M0565 (Ga. Sup. Ct. Dec. 14, 2020), <https://www.democracymocket.com/wp-content/uploads/2020/11/2020.12.14-Boland-denial-GASC-1.pdf>; Notice of Voluntary Dismissal, *Boland v. Raffensperger*, No. S21M0565 (Ga. Sup. Ct. Jan 7, 2021), <https://www.democracymocket.com/wp-content/uploads/2020/11/2021.01.07-Boland-Voluntary-Dismissal-and-Exhibit-1.pdf>.

<sup>144</sup> Verified Petition to Contest Georgia’s Presidential Election Results For Violations Of The Constitution And Laws Of The State Of Georgia, And Request For Emergency Declaratory And Injunctive Relief, *Trump v. Raffensperger at 7*, Civil Action No. 2020CV343255 (Ga. Ct., Fulton Cnty. Dec. 4, 2020), <https://www.democracymocket.com/wp-content/uploads/2020/12/Trump-v.-Raffensperger-1.pdf>.

<sup>145</sup> *Id.*

<sup>146</sup> *Trump v. Raffensperger*, Civil Action No. 2020CV343255, *supra* note 142, at 267(j); Order on Case Status, *Trump v. Raffensperger*, Civil Action No. 2020CV343255 (Ga. Ct., Fulton Cnty. Dec. 9, 2020), <https://healthyelections-case-tracker.stanford.edu/file?id=180>; *Trump v. Raffensperger*, No. S21M0561 (Ga. Sup. Ct. Dec. 12, 2020), <https://www.democracymocket.com/wp-content/uploads/2020/12/D97B3026-6647-46A7-B909-B137A938BC43-converted-1.pdf>.

<sup>147</sup> Notice of Voluntary Dismissal Without Prejudice, *Trump v. Raffensperger*, No. 2020CV343255 (Ga. Ct., Fulton Cnty. Jan. 7, 2021), <https://www.democracymocket.com/wp-content/uploads/2020/12/2021.01.07-Notice-of-Voluntary-Dismissal-KH628899x9D7F4-1.pdf>.



Trump’s attorneys did not just rely on lawsuits to overturn the election. On December 3, Trump’s legal team—led by his personal lawyer, Rudy Giuliani—appeared before Republicans on Georgia’s Senate Judiciary Subcommittee. Reciting a laundry list of conspiracy theories endorsed by Trump and his allies, Giuliani implored the legislators to usurp Kemp’s prerogative to name electors for president and appoint an alternative slate of electors for Trump.<sup>148</sup> This request for *ultra vires* action by the Georgia legislators failed. Nonetheless, Giuliani tried again one week later while appearing before the Georgia House Governmental Affairs Committee, where he opined that election workers in Atlanta “look like they’re passing out dope, not just ballots,” and that “every single vote should be taken away from Biden.”<sup>149</sup>

This conduct by Giuliani, acting as Trump’s lawyer, was consistent with Trump’s own continuing efforts to interfere with Georgia’s election administration by soliciting *ultra vires* and illegal acts from state officials. On December 5, Trump crossed another line by reportedly calling Kemp and urging him to convene a special session of the legislature so that state lawmakers could override the (certified) election results and appoint electors for Trump.<sup>150</sup> Trump also reportedly entreated the governor to order a statewide audit of all signatures on mail-in ballots.<sup>151</sup> Kemp turned down both requests.

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<sup>148</sup> Fowler, *supra* note 20.

<sup>149</sup> Beau Evans, Trump attorney Giuliani again lobs election fraud claims in Georgia House hearing Thursday, AUGUSTA CHRONICLE (Dec. 10, 2020), <https://www.augustachronicle.com/story/news/politics/2020/12/10/giuliani-again-makes-election-fraud-claims-georgia-house-hearing/3884219001/>.

<sup>150</sup> Kristen Holmes & Veronica Stracqualursi, Trump pressured Georgia governor in call to help overturn Biden's win in state, CNN (Dec. 5, 2021), <https://www.cnn.com/2020/12/05/politics/trump-georgia-brian-kemp-phone-call/index.html>.

<sup>151</sup> Gardner, Itkowitz, & Dawsey, *supra* note 136.

Later that night, Trump personally attacked Kemp during his rally for Perdue and Loeffler in Macon, Georgia: “Your governor could stop [the steal] very easily if he knew what the hell he was doing. He could stop it very easily...so far we haven’t been able to find the people with the courage to do the right thing. And that is true in Georgia, certainly.”<sup>152</sup>

**E. Trump Pressures Georgia’s Attorney General and a Senior Election Official.**

Trump’s efforts to interfere with the administration of the election in Georgia by pressuring state officials continued after his December 5 call to the Governor. On December 8, he went on to urge Georgia’s attorney general not to oppose a lawsuit seeking to undo the election results.<sup>153</sup> Then, weeks later, on December 23, he called the chief investigator in Raffensperger’s office, urged her to find “dishonesty” that would overturn the state’s election results, insisted that he had won the election, and said she would be praised if she found the “right answer” while spearheading Georgia’s audit of election results.<sup>154</sup>

Trump’s call to Attorney General Chris Carr arose from a lawsuit filed at the United States Supreme Court by Texas Attorney General Ken Paxton on December 7, which bizarrely sought to influence the outcome of the election counts in Georgia, Michigan, Wisconsin, and Pennsylvania, and requested relief that would all but ensure Trump’s re-election.<sup>155</sup> Many Republican officeholders quickly jumped in to support Paxton by signing on to a multistate brief in support of the complaint,<sup>156</sup> but a number of others were steadfast in their rejection of the filing. Those holdouts included Carr, who deemed the suit “constitutionally, legally, and

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<sup>152</sup> *Id.*

<sup>153</sup> Cohen, Morris, & Hickey, *supra* note 19.

<sup>154</sup> Morris & Murray, *supra* note 31.

<sup>155</sup> Emma Platoff, In new lawsuit, Texas contests election results in Georgia, Wisconsin, Michigan, Pennsylvania, THE TEXAS TRIBUNE (Dec. 8, 2020), <https://www.texastribune.org/2020/12/08/texas-ken-paxton-election-georgia/>.

<sup>156</sup> Emma Platoff, Trump, Republicans pin hopes on Texas lawsuit to overturn election results, but legal experts say it's a long shot, THE TEXAS TRIBUNE (Dec. 9, 2020), <https://www.texastribune.org/2020/12/09/texas-lawsuit-election-trump/>.

factually wrong.”<sup>157</sup> Trump reportedly responded to Carr’s statement by calling him on December 8 and warning him not interfere in the proceedings<sup>158</sup>—an unsubtle presidential and political threat intended to interfere with the Georgia attorney general’s defense of the state’s election.<sup>159</sup>

On December 23, Trump also reportedly called Frances Watson, the chief investigator in the office of Georgia’s secretary of state.<sup>160</sup> At the time of the call, Watson was overseeing an inquiry into claims (ultimately deemed baseless) of mismatched signatures on mail-in ballots in Cobb County, a Democratic stronghold in suburban Atlanta where Biden won 56.35 percent of the vote.<sup>161</sup> This small-sample audit had been launched by Raffensperger on December 14 in response to allegations deemed “credible” that election workers in Cobb County improperly conducted the routine signature-matching processes described earlier.<sup>162</sup> Eighteen two-person teams composed of agents from the Georgia Bureau of Investigations would check the signed outer envelopes of more than 15,000 absentee ballots against signatures in voters’ registration files.<sup>163</sup> In initial cases of mismatch, a three-member investigative team would then conduct a follow-up check to make a final ruling on any potential mismatches.<sup>164</sup>

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<sup>157</sup> Rutenberg et al., *supra* note 32.

<sup>158</sup> Cohen, Morris & Hickey, *supra* note 19.

<sup>159</sup> Greg Bluestein, Trump warns Georgia AG not to rally other Republicans against Texas lawsuit, THE ATLANTA JOURNAL-CONSTITUTION (Dec. 9, 2020), <https://www.ajc.com/politics/trump-warns-georgia-ag-not-to-rally-other-republicans-against-texas-lawsuit/37ASZD4PJNENHOLVIXZHRXCIJI/>; Ariane de Vogue & Paul LeBlanc, Battleground states issue blistering rebukes to Texas’ lawsuit to invalidate millions of votes, CNN (Dec. 10, 2020), <https://www.cnn.com/2020/12/10/politics/2020-election-supreme-court-texas-trump/index.html>.

<sup>160</sup> Cameron McWhirter, Trump Call to Georgia Lead Investigator Reveals New Details, THE WALL STREET JOURNAL (Mar. 11, 2021), <https://www.wsj.com/articles/recording-of-trump-phone-call-to-georgia-lead-investigator-reveals-new-details-11615411561>.

<sup>161</sup> Office of Brad Raffensperger, November 2020 General Election Results, <https://results.enr.clarityelections.com/GA/107231/web.264614/#/summary>.

<sup>162</sup> ABM Signature Audit Report, Case No. SEB2020- 257, GEORGIA SECRETARY OF STATE (Dec. 29, 2020), <https://sos.ga.gov/admin/uploads/Cobb%20County%20ABM%20Audit%20Report%2020201229.pdf>.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

When Trump called Watson, he told her that her role spearheading the audit meant that she had “the most important job in the country right now.”<sup>165</sup> He once again insisted that he had won Georgia and other states by “hundreds of thousands” of votes and that the contest in the state “wasn’t close.”<sup>166</sup> He then elaborated on his claims that he had decisively won the election, as can be heard in the audio tape:

...the people of Georgia are so angry at what happened to me. They know I won, won by hundreds of thousands of votes, it wasn’t close. And Alabama you know where they go, because I won South Carolina in a record, Alabama in a record, Florida in a record. You know I won Florida by six or seven hundred thousand votes, it’s never happened before with a Republican. And uh with all that money they spent, you know, you heard all about these guys go down spending a fortune. And we won Texas by a record, Texas was won by the biggest, biggest number ever, and it, you know, it didn’t, it didn’t... And Ohio, of course, you know that you know about that. That was won by nine points or something, And it’s uh... all of it. Iowa, I mean. And it didn’t—it never made sense and, ya know, they dropped ballots. They dropped all these ballots. Stacey Abrams—really really terrible, I mean just a terrible thing.<sup>167</sup>

Trump pushed Watson to depart from established procedures for the audit she was supervising, insisting that she should compare signatures on mail-in ballots to signatures from two years prior.<sup>168</sup> He also bluntly urged her to look skeptically at Fulton County, a well-known Biden stronghold: “You know I hope you’re going back two years, as opposed to just checking you know one against the other, because that would be a signature check that didn’t mean

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<sup>165</sup> Amy Gardner, Recording reveals details of Trump call to Georgia’s chief elections investigator, THE WASHINGTON POST (Mar. 11, 2021), [https://www.washingtonpost.com/politics/trump-call-georgia-investigator/2021/03/11/c532ea2e-827a-11eb-ac37-4383f7709abe\\_story.html](https://www.washingtonpost.com/politics/trump-call-georgia-investigator/2021/03/11/c532ea2e-827a-11eb-ac37-4383f7709abe_story.html).

<sup>166</sup> *Id.*

<sup>167</sup> Charles Davis, Trump pressured another Georgia elections official, Frances Watson, to uncover nonexistent voter fraud, BUSINESS INSIDER (Mar. 10, 2021), <https://www.businessinsider.com/transcript-trump-pressures-another-georgia-elections-official-to-find-fraud-2021-3>.

<sup>168</sup> Gardner, *supra* note 165.

anything. But if you go back two years, and if you can get to Fulton, you're going to find things that are gonna be unbelievable, the dishonesty that we've heard from them."<sup>169</sup>

During the call, Trump also claimed that Fulton County—which includes much of Atlanta—was the “mother lode” of “dishonesty.”<sup>170</sup> He implored Watson to continue the investigation past Christmas in order to ensure its conclusion before “the date, which is a very important date”—seemingly a reference to January 6, when Congress would certify Joe Biden’s win.<sup>171</sup> Throughout the discussion, Trump accentuated how “important” Watson’s job was for the nation, insisting that she would be praised when the “right answer” emerged.<sup>172</sup>

Watson’s audit in Cobb County concluded on December 29, after failing to uncover fraud, except for a single case of a signature mismatch occurring when a woman signed both her and her husband’s ballots.<sup>173</sup> But that happened after Trump had called the chief investigator supervising a sensitive audit, wherein he sought to induce her to target his political opponents’ geographic stronghold and to vary from approved audit procedures, sought to convince her that there was fraud when answering that question was her job, and sought to persuade her that she would be praised if she reached the “right answer” before Congress could certify the election.<sup>174</sup> In combination with Trump’s calls to Kemp and Carr, this call to Watson evinced a clear pattern of personal efforts by Trump to interfere with the administration of Georgia’s election.

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Georgia Secretary of State, SEB2020-257, Cobb County: Absentee Ballot Signature Verifications (2020), <https://sos.ga.gov/admin/uploads/Cobb%20County%20ABM%20Audit%20Report%2020201229.pdf>; Mark Niese, No fraud: Georgia audit confirms authenticity of absentee ballots, THE ATLANTA JOURNAL-CONSTITUTION (Dec. 30, 2020), <https://www.ajc.com/politics/no-fraud-georgia-audit-confirms-authenticity-of-absentee-ballots/QF2PTOGHLNLDLNDJEWBU56WEQHM/>.

<sup>174</sup> Gardner, *supra* note 165.

### Box 3: Georgia’s Signature-Matching Law

When election workers in Georgia mail absentee ballot applications to voters upon request, would-be-voters complete and sign their application and mail it back to their county headquarters. Election workers then conduct the first signature check of the process by comparing the signature on the absentee ballot application to the signature on the voter’s registration file. If the signatures are deemed to match, the voter then receives an absentee ballot in the mail.<sup>175</sup> When that ballot is later submitted for the election, poll workers conduct their second signature check by comparing the signature on the outside envelope in which the ballot is sent (the ballot itself contains no personal information to protect voter privacy) to the signature on file.

Trump’s request to Watson thus revealed a clear misunderstanding of the state’s voting process.<sup>176</sup> Signatures are matched—twice—to the signature on the voter’s registration file, which is pulled from any number of sources, including driver’s licenses, passports, voter registration forms, and so on. Depending on the voter, the signatures on file may be anywhere from months to years to decades old. To maintain active registration, voters must re-register to vote if they move or have not voted in three or more years; that said, registrations remain active if a voter goes to the polls at least once every three years or does not change addresses.

For this reason, “going back two years”—as Trump demanded—is arbitrary and nonsensical. The comparison between signatures on the ballot request form and the ballot itself and the signature on file (regardless of the latter’s age) is designed to authenticate the identity of the voter. The age of the signature has no bearing on that process, nor does it affect the accuracy of the signature.

Furthermore, Trump’s repeated request that election workers “see the signatures for fraud” during the first-hand recount was misplaced because the recount is of ballots to confirm the state’s initial totals, not signed outer envelopes; the ballot itself contains no identifying information in order to protect the voter’s identity and to distance them from their ballot selections. Signature verification is a part of the initial vote, not the recount. That verification had already been completed when signed envelopes and ballots were separated during the initial count. To do so after the outer envelopes have been separated from the ballots would be implausible and, in fact, illegal under Georgia state law, which stipulates that elections are to be held by “secret ballot,” i.e. protective of a voter’s identity.

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<sup>175</sup> O.C.G.A. § 21-2-386.

<sup>176</sup> Gardner, *supra* note 165; Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Nov. 13, 2020, 7:50:23 PM), <https://www.thetrumparchive.com/?results=1&searchbox=%22people+checking+the+ballots%2C%22>.

## **F. Trump Solicits the Justice Department to Interfere in Georgia’s Election.**

During the same time period in which Trump called Carr and Watson, he was also involved in a plot to enlist the United States Department of Justice in his campaign to overturn the election outcome. These events are relevant because they further illuminate Trump’s state of mind—and confirm his willingness to use his power and position for personal political gain.

On December 23, the same day that Trump called Watson, United States Attorney General William Barr’s resignation took effect.<sup>177</sup> Several weeks earlier, Barr had stated that “we have not seen fraud on a scale that could have effected a different outcome in the election.”<sup>178</sup> This statement reportedly caused Trump to erupt at Barr for his perceived disloyalty.<sup>179</sup> On December 14, Barr announced his resignation, effective December 23.<sup>180</sup> In his place, Trump appointed Jeffrey Rosen; Richard Donoghue was elevated to deputy attorney general.<sup>181</sup>

Shortly after Rosen became the acting attorney general, Trump reportedly summoned him to the Oval Office and pressed him to throw the Justice Department’s formidable weight behind lawsuits challenging Trump’s electoral defeat.<sup>182</sup> Trump also reportedly implored Rosen to appoint a slew of special counsels to conduct investigations into various conspiracy theories that

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<sup>177</sup> Alexander Mallin & William Mansell, Attorney General William Barr to resign, Trump tweets, ABC NEWS (Dec. 14, 2020), <https://abcnews.go.com/Politics/attorney-general-william-barr-resigning-trump-tweets/story?id=74725942>.

<sup>178</sup> Michael Balsamo, Disputing Trump, Barr says no widespread election fraud, AP NEWS (Dec. 1, 2020), <https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d>.

<sup>179</sup> Michael C. Bender, Frankly, We Did Win This Election: The Inside Story of How Trump Lost (2021).

<sup>180</sup> Kevin Breuninger & Christina Wilkie, Attorney General William Barr resigns, effective Dec. 23, CNBC (Dec. 14, 2020), <https://www.cnbc.com/2020/12/14/attorney-general-william-barr-resigns-effective-dec-23.html>.

<sup>181</sup> Betsy W. Swan, Brooklyn U.S. attorney heads to top DOJ role, POLITICO (Jul. 2, 2020), <https://www.politico.com/news/2020/07/02/richard-donoghue-heads-to-doj-348234>.

<sup>182</sup> Katie Benner, Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General, THE NEW YORK TIMES (Jan. 22, 2021), <https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html>.

Trump and his allies had embraced.<sup>183</sup> Rosen summarily rejected Trump’s requests. Nonetheless, Trump continued pressuring Rosen and the Justice Department to support his position.<sup>184</sup>

These efforts accelerated through late December. On December 27, Trump telephoned Rosen and Donoghue and pressured them to “say the election was corrupt + leave the rest to me” (according to Donoghue’s notes of the call).<sup>185</sup> When Rosen and Donoghue resisted—telling Trump that “much of the info you’re getting is false”—Trump reportedly included Georgia in a list of four states with “corrupted elections.”<sup>186</sup> Trump added that “people are angry” and “blaming DOJ for inaction.”<sup>187</sup> In a by-then-characteristic move, he pivoted from pressure and solicitation to threats, reportedly saying, “People tell me Jeff Clark is great, I should put him in. People want me to replace DOJ leadership.”<sup>188</sup> (Trump has since disputed this characterization of the call.<sup>189</sup>)

Over the following weeks, Trump’s allies and lawyers sought to persuade the Justice Department to align itself against certification of the election.<sup>190</sup> They pushed a dizzying array of conspiracy theories, apparently including the wild claim that an Italian aerospace engineer had worked with the CIA to switch tallies in voting machines via satellite.<sup>191</sup> Trump’s White House Chief of Staff Mark Meadows pursued these efforts by sending Rosen emails alleging election

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Katie Benner, Trump Pressed Justice Dept. to Declare Election Results Corrupt, Notes Show, THE NEW YORK TIMES (last updated Sept. 21, 2021, 5:44 PM), <https://www.nytimes.com/2021/07/30/us/politics/trump-justice-department-election.html?referringSource=articleShare>.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> House Committee on Oversight and Reform, Committee Obtains Key Evidence of President Trump’s Attempts to Overturn the 2020 Election (July 30, 2021), <https://oversight.house.gov/news/press-releases/committee-obtains-key-evidence-of-president-trump-s-attempts-to-overturn-the>.

<sup>191</sup> Jon Swaine & Emma Brown, ‘Italygate’ election conspiracy theory was pushed by two firms led by woman who also falsely claimed \$30 million mansion was hers, THE WASHINGTON POST (June 19, 2021), [https://www.washingtonpost.com/investigations/italygate-michele-edwards-meadows-trump/2021/06/19/2f6314d2-d05f-11eb-8014-2f3926ca24d9\\_story.html](https://www.washingtonpost.com/investigations/italygate-michele-edwards-meadows-trump/2021/06/19/2f6314d2-d05f-11eb-8014-2f3926ca24d9_story.html).



fraud without any evidence; Rosen and Donoghue reviewed these emails and found them absurd.<sup>192</sup>

Meanwhile, Trump schemed to sack Rosen and Donoghue and replace them with Jeffrey Clark, the acting head of the Justice Department's Civil Division.<sup>193</sup> Trump had been introduced to Clark by mid-December by United States Representative Scott Perry of Pennsylvania.<sup>194</sup> Trump and Clark spoke several times in late December, during which time Clark unsuccessfully pushed Rosen and Donoghue to publicly champion Trump's attacks on the integrity of the 2020 presidential election.<sup>195</sup> Especially relevant here, Clark showed Rosen an unsent letter he had written to legislators in Georgia falsely claiming that the Justice Department was investigating grave accusations of voter fraud in their state—with the clear implication that Georgia lawmakers should nullify Biden's win.<sup>196</sup> Clark reportedly discussed the Georgia plan with both Trump and Perry before revealing it to Rosen and Donoghue, who once again rebuffed him.<sup>197</sup>

#### **G. Trump Calls, Pressures, and Threatens Secretary Raffensperger.**

By the end of 2020, Trump's lawsuits had all failed; his calls to Kemp, Watson, and Carr had failed; his lawyer (Giuliani) had failed to convince the Georgia legislature to act *ultra vires*; and he had failed to persuade the Justice Department to challenge Georgia's election certification.

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<sup>192</sup> Ali Breland, Emails Show Mark Meadows Pushed the DOJ to Investigate Election Fraud Conspiracy Theories, MOTHER JONES (June 5, 2021), <https://www.motherjones.com/politics/2021/06/emails-mark-meadows-jeffrey-rosen-donald-trump-election-conspiracies-italygate/>.

<sup>193</sup> Katie Benner & Catie Edmondson, Pennsylvania Lawmaker Played Key Role in Trump's Plot to Oust Acting Attorney General, THE NEW YORK TIMES (Jan. 23, 2021), <https://www.nytimes.com/2021/01/23/us/politics/scott-perry-trump-justice-department-election.html?referringSource=articleShare>.

<sup>194</sup> *Id.*

<sup>195</sup> Benner, *supra* note 182.

<sup>196</sup> *Id.*

<sup>197</sup> Benner & Edmondson, *supra* note 193.

That is the context in which, on January 2, Trump called Raffensperger, the state’s top election official. According to press reports, Trump had previously attempted to reach Raffensperger at least 18 times since November 3.<sup>198</sup> Those preceding calls reportedly failed to connect because interns in the secretary of state’s office believed that the phone calls said to be from Trump were actually pranks.<sup>199</sup> Other reports suggest that Raffensperger purposely avoided Trump’s calls because he believed they could pose a conflict of interest.<sup>200</sup>

When Trump did reach Raffensperger on January 2, he was joined on the call by Meadows and several of his own lawyers. Raffensperger was joined by his general counsel, Ryan Germany, and deputy, Jordan Fuchs.<sup>201</sup> Everyone on the call knew that Congress would certify the election results just four days later at the Joint Session of Congress scheduled to occur on January 6, 2021.

Based on an audio tape of the call,<sup>202</sup> during the discussion, which lasted roughly an hour, Trump pressed Raffensperger and Germany to “find 11,780 votes, which is one more than we have because we [Trump] won the state.”<sup>203</sup> This number was no accident. 11,780 was the exact number of votes necessary to flip the state’s electoral votes from Biden to Trump. So, Trump’s demand that Raffensperger “find 11,780 votes” was nothing less than a demand that Raffensperger alter the election outcome.

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<sup>198</sup> Steven Harper, *Insurrection Timeline – First the Coup and Then the Cover-Up*, BILL MOYERS (Mar. 7, 2021), <https://billmoyers.com/story/insurrection-timeline-first-the-coup-and-then-the-cover-up-updated/>.

<sup>199</sup> Amy Gardner, *Trump pressured a Georgia elections investigator in a separate call legal experts say could amount to obstruction*, THE WASHINGTON POST (Mar. 11, 2021), [https://www.washingtonpost.com/politics/trump-call-georgia-investigator/2021/01/09/7a55c7fa-51cf-11eb-83e3-322644d82356\\_story.html](https://www.washingtonpost.com/politics/trump-call-georgia-investigator/2021/01/09/7a55c7fa-51cf-11eb-83e3-322644d82356_story.html).

<sup>200</sup> Linda So, *Trump’s chief of staff could face scrutiny in Georgia criminal probe*, REUTERS (March 19, 2021, 6:05 AM), <https://www.reuters.com/article/us-usa-trump-georgia-meadows-insight-idUSKBN2BB0XX>.

<sup>201</sup> Gardner & Firozi, *supra* note 1.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

At times referring to himself in the third person as “the president,” Trump let fly the litany of conspiracy theories and grievances that had become well-known refrains on his Twitter page over the prior months. He asked Raffensperger and Germany to “give me [him] a break” by delivering the roughly 11,000 votes he wanted.<sup>204</sup> To support this solicitation, Trump cited a variety of dubious sources—including “rumors,” “Trump media,” “political people,” and “what I’ve heard.”<sup>205</sup> Interjecting throughout the call, Meadows and Trump Attorney Cleta Mitchell sought to convince Raffensperger and Germany to meet with them personally to “find some kind of agreement to look at this a little bit more fully” by improperly sharing Georgians’ voter data.<sup>206</sup>

At several points, Trump threatened Raffensperger and his deputies, insinuating that they were jeopardizing themselves by not uncovering the fraud Trump described. For instance, at one point he stated of alleged voter fraud, “you are going to find that they are—which is totally illegal—it is more illegal for you than it is for them because, you know, what they did and you’re not reporting it.”<sup>207</sup> Trump intimidatingly told Raffensperger that not identifying this fraud was “a big risk to you and to Ryan, your lawyer,” and that it was “very dangerous” for Raffensperger to publicly insist that there was “no criminality” in the administration of Georgia’s election.<sup>208</sup> Later, Trump claimed that “the people of Georgia are angry” and alluded to the possibility of depressed Republican turnout in the state’s upcoming Senate run-off elections if Raffensperger and other Republican state officials failed to take action.<sup>209</sup>

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> So, *supra* note 200.

<sup>207</sup> Gardner & Firozi, *supra* note 1.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

Despite Trump’s threats, Raffensperger and Germany pushed back against Trump’s claims throughout the conversation. In response to one of Trump’s many assertions that he won the state, Raffensperger replied: “Well, Mr. President, the challenge that you have is the data you have is wrong.”<sup>210</sup> He told Trump that “we don’t agree that you have won [the election],” and he aggressively defended the accuracy and integrity of their administration of the vote.<sup>211</sup> At the end of the call, it was clear that Raffensperger and Germany had refused to concede to Trump’s assorted requests, solicitations, demands, and threats. The parties hung up the phone with conventional niceties. *The Washington Post* reported the call within 24 hours.<sup>212</sup>

#### **H. Trump Continues to Pursue His False Claims of Fraud in Georgia.**

Trump’s objectives on the Raffensperger call—and his state of mind in this period, including his willingness to abuse power and threaten officials to retain his grip on power—are cast in stark relief by his other related conduct. On January 2 (the same day that Trump called Raffensperger), Clark informed Rosen that he intended to discuss with Trump his plan to push the Georgia legislature to overturn the election results.<sup>213</sup> On January 3, Clark told Rosen that Trump was prepared to fire him and to install Clark as the acting attorney general—a step that would give Clark broad power to throw the Justice Department behind Trump’s interference with the 2020 presidential election.<sup>214</sup> That night, Rosen and Donoghue informed Trump that they (and many other senior officials) intended to resign in protest if Trump installed Clark at the head of the Justice Department.<sup>215</sup> It was only at this juncture that attorneys—including White

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> Amy Gardner, ‘I just want to find 11,780 votes’: In extraordinary hour-long call, Trump pressures Georgia secretary of state to recalculate the vote in his favor, *THE WASHINGTON POST* (Jan. 3, 2021), [https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555\\_story.html](https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html).

<sup>213</sup> Benner, *supra* note 182.

<sup>214</sup> Benner, *supra* note 182.

<sup>215</sup> *Id.*

House Counsel Pat Cipollone—successfully urged Trump to abandon this plot, reportedly because Trump fretted that the blowback from his decision would distract from his campaign to overturn the election results.<sup>216</sup>

Also on January 3, United States Attorney Byung J. Pak—the top federal prosecutor in Atlanta, nominated by Trump in July 2017—reportedly learned from Donoghue that Trump was likely to fire him.<sup>217</sup> The next day, Pak abruptly resigned, citing “unforeseen circumstances.”<sup>218</sup> (Pak would confirm to the Senate Judiciary Committee in August that he resigned after being told that Trump planned to fire him.<sup>219</sup>) Almost immediately, Trump called Bobby Christine—the U.S. Attorney for the Southern District of Georgia—to tap him as Pak’s replacement.<sup>220</sup> According to the *Wall Street Journal*, Christine promptly recruited two attorneys from his office in Savannah who were already looking into alleged impropriety in the state’s election.<sup>221</sup> Christine did not, however, bolster Trump’s efforts to thwart Congress from accepting Georgia’s election results; on January 11, Christine stated on a staff call that “there’s just nothing to” the various Trump-supported fraud claims his office was investigating.<sup>222</sup>

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<sup>216</sup> *Id.*

<sup>217</sup> Benner, *supra* note 182.

<sup>218</sup> Alexis Stevens & J. Scott, US Attorney for North Georgia abruptly resigns due to ‘unforeseen circumstances’, THE ATLANTA JOURNAL-CONSTITUTION (Jan. 4, 2021), <https://www.ajc.com/news/breaking-us-attorney-for-north-georgia-resigns-effective-immediately/UDJNKRRKLRFILC4NC5QKWEUKXM/>.

<sup>219</sup> Tierney Sneed & Manu Raju, Former US attorney tells investigators he quit because he heard Trump was considering firing him, CNN (Aug. 11, 2021), <https://www.cnn.com/2021/08/11/politics/pak-trump-georgia-election-testimony/index.html>.

<sup>220</sup> Polantz, Perez, & Duster, *supra* note 23.

<sup>221</sup> Aruna Viswanatha, Sadie Gurman, & Cameron McWirtter, White House Forced Georgia U.S. Attorney to Resign, THE WALL STREET JOURNAL (last updated Jan. 9, 2021, 9:07 PM) [https://www.wsj.com/articles/white-house-forced-georgia-u-s-attorney-to-resign-11610225840?mod=article\\_inline](https://www.wsj.com/articles/white-house-forced-georgia-u-s-attorney-to-resign-11610225840?mod=article_inline).

<sup>222</sup> Chris Joyner, Trump’s pick for U.S. attorney in Georgia dismisses election fraud claims: ‘There’s just nothing to them’, THE ATLANTA JOURNAL-CONSTITUTION (Jan. 12, 2021), <https://www.ajc.com/news/trumps-pick-for-us-attorney-in-georgia-dismisses-election-fraud-claims-theres-just-nothing-to-them/7JMIL37WANHWXCZD4FTJXH4CIQ/>.

## I. Trump's Efforts to Flip Georgia Fail.

Three days after Trump called Raffensperger and solicited him for enough votes to flip the state's election, Georgians went to the polls for a run-off U.S. Senatorial election for both of the state's seats. Republicans Kelly Loeffler and David Perdue faced Democrats Raphael Warnock and Jon Ossoff, and Trump appeared at a rally in Dalton for both Republican candidates on January 4, 2021.<sup>223</sup> From the podium, Trump restated the false claim that "there is no way we lost Georgia."<sup>224</sup> He also railed against state officials who defied his demands, claiming: "They say they are Republicans, I really don't think they are...I will be here in a year and a half, and I will be campaigning against your governor and your crazy secretary of state."<sup>225</sup> The next day, Warnock and Ossoff both prevailed in their races.<sup>226</sup>

Trump's loss in Georgia was still on his mind the following day, January 6. Speaking before a mass of supporters on the Ellipse, south of the White House, Trump once more railed against the election and repeated the lie that it had been rigged against him.<sup>227</sup> He listed off arbitrary totals of votes he claimed were illegally cast in the swing states that tipped the election in Joe Biden's favor, with a heavy focus on Georgia: "They defrauded us out of a win in Georgia, and we're not going to forget it."<sup>228</sup> Trump also returned to his familiar *ad hominem* attacks on Raffensperger and defended the January 2 call, saying about the secretary of state: "I can't believe this guy's a Republican. He loves recording telephone conversations. You know

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<sup>223</sup> Andrew Desiderio & Matthew Choi, Trump uses Georgia rally to pressure GOP on Electoral College challenge, POLITICO (Jan. 5, 2021), <https://www.politico.com/news/2021/01/05/trump-rally-georgia-454923>.

<sup>224</sup> *Id.*

<sup>225</sup> Bloomberg Quicktake: Now, LIVE: Trump Stumps for Georgia Republicans David Perdue, Kelly Loeffler Ahead of Senate Runoff, YOUTUBE (Jan. 4, 2021), <https://www.youtube.com/watch?v=9HisWmJJ3oE>.

<sup>226</sup> Richard Fausset, Jonathan Martin, & Stephanie Saul, Democrats Win Both Georgia Races to Gain Control of Senate, THE NEW YORK TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/warnock-loeffler-ossoff-perdue-georgia-senate.html>.

<sup>227</sup> Brian Naylor, Read Trump's Jan. 6 Speech, A Key Part of Impeachment Trial, NPR (Feb. 10, 2021, 2:43 PM), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial>.

<sup>228</sup> *Id.*

what that was? I thought it was a great conversation personally. So did a lot of other[s]. People love that conversation because it says what's going on.”<sup>229</sup> His personal attacks also included Governor Brian Kemp, whom he called “pathetic” for refusing to carry out Trump’s election subversion in the state.<sup>230</sup>

Ultimately, Trump’s efforts to flip Georgia’s electoral votes proved unsuccessful. After the former president’s insurrectionist supporters were finally driven out of the Capitol on January 6, Congress certified the election results and confirmed President Biden’s victory. Since then, lawsuits filed or supported by the Trump campaign to overturn the election have been withdrawn or dismissed. Nonetheless, Trump has persisted in disputing the integrity of Georgia’s election up to the time of this writing<sup>231</sup>—and has made good on his many threats to attack officials like Raffensperger and Kemp who upheld the rule of law.<sup>232</sup>

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<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> See Donald Trump, Statement by Donald J. Trump, 45<sup>th</sup> President of the United States of America, DONALD J. TRUMP OFFICIAL WEBSITE (July 14, 2021), <https://www.donaldjtrump.com/news/statement-by-donald-j-trump-45th-president-of-the-united-states-of-america-07.14.21>; Rally Speech Transcript, *supra* note 136.

<sup>232</sup> See Davey Alba, Ella Koeze & Jacob Silver, What Happened When Trump Was Banned on Social Media, THE NEW YORK TIMES (June 7, 2021), <https://www.nytimes.com/interactive/2021/06/07/technology/trump-social-media-ban.html>; Brandy Zadrozny, Trump’s blog isn’t lighting up the internet, NBC NEWS (May 11, 2021), <https://www.nbcnews.com/tech/tech-news/trumps-blog-isnt-lighting-internet-rcna890>.

## II. The Fulton County Investigation.

On February 8, Raffensperger announced that his office had opened an investigation into Trump’s attempts to interfere with Georgia’s electoral processes. A spokesman for Raffensperger indicated that a complaint from George Washington University Law Professor John Banzhaf III had prompted the “fact-finding and administrative” probe.<sup>233</sup> The Banzhaf complaint suggested that Trump may have committed three separate crimes under Georgia law: conspiracy to commit election fraud, criminal solicitation to commit election fraud, and intentional interference with performance of election duties. Under Georgia law, findings from the investigation will be referred to the State Election Board, which then decides whether to drop the case, impose fines, or pass the case on to the office of the Georgia attorney general or the relevant district attorney.<sup>234</sup> (Public reporting has since indicated that Raffensperger’s investigation has apparently been paused pending the Fulton County criminal investigation.<sup>235</sup>)

Two days later—on February 10—Fulton County District Attorney Fani Willis opened a separate investigation into efforts to interfere with the 2020 presidential election in Georgia.<sup>236</sup> Willis is a seasoned prosecutor with a combined 24 years of experience as an attorney in both private practice and in the Fulton County DA’s office. One of her most high-profile prosecutorial

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<sup>233</sup> So, *supra* note 7; Citizens for Responsibility and Ethics in Washington filed an early complaint requesting that the Department of Justice and the Fulton County DA’s office investigate Trump’s potential criminal conduct during his call with Raffensperger. *See* Letter from CREW to Acting Attorney General Jeffrey Rosen and Fulton County District Attorney Fani T. Willis (Jan. 4, 2021), <https://www.citizensforethics.org/wp-content/uploads/2021/01/2021-1-4-Trump-overturning-election-DOJ-Fulton-County-DA.pdf>.

<sup>234</sup> Mark Niese, Georgia investigation opened into Trump’s call to overturn election, *THE ATLANTA JOURNAL-CONSTITUTION* (Feb. 8, 2021), <https://www.ajc.com/politics/georgia-investigation-opened-into-trumps-call-to-overturn-election/GQ3WSOLP7VENRG4PVCCRAPMOBI/>.

<sup>235</sup> Murray & Morris, *supra* note 11.

<sup>236</sup> There is no legal or jurisdictional conflict between Raffensperger’s and Willis’s investigations. Georgia’s Secretary of State bears responsibility for investigating potential law violations that take place in Georgia. For each of Georgia’s 50 judicial circuits, the district attorney in any given circuit is that circuit’s top prosecutorial officer for the state of Georgia, making Willis Georgia’s top prosecutor in Fulton County, which includes Atlanta, where the state’s government buildings are located and thus where Raffensperger spoke with Trump on January 2. Because Trump’s potential crimes took place within Fulton County, both Willis and Raffensperger reserve the right to investigate his conduct.



triumphs came in 2015 when she successfully used Georgia’s RICO statute to charge a group of educators with coordinating a massive test-cheating scandal.<sup>237</sup> She ousted a 6-term incumbent in 2020 along the way to becoming Fulton County’s district attorney on January 1, 2021. On January 4, she called the January 2 call between Trump and Raffensperger “disturbing” when asked about it by a reporter, saying in a statement that her team would “enforce the law without fear or favor” if the State Election Board referred the matter to her office.<sup>238</sup>

Willis kicked off her investigation by sending letters providing notice of her investigation to a slate of state officials who were in some way privy to election-reversal efforts by Trump and his principal allies.<sup>239</sup> Notable recipients included Raffensperger, Kemp, and Carr.<sup>240</sup> Willis’s correspondence stated: “This investigation includes, but is not limited to, potential violations of Georgia law prohibiting the solicitation of election fraud, the making of false statements to state and local governmental bodies, conspiracy, racketeering, violation of oath of office and any involvement in violence or threats related to the election’s administration.”<sup>241</sup> Willis explained that her office is the most logical home for the investigation into potentially criminal interference, as it “is the one agency with jurisdiction that is not a witness to the conduct that is the subject of the investigation.” Calling the nascent probe “a matter of high priority,” she urged the recipients of her letters to preserve documents related to the investigation and stated that her

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<sup>237</sup> Bill Rankin, Court upholds RICO conviction in Atlanta schools test-cheating case, *THE ATLANTA JOURNAL-CONSTITUTION* (June 21, 2021), <https://www.ajc.com/news/atlanta-news/court-upholds-rico-conviction-in-atlanta-schools-test-cheating-case/B2563PXHAVDPPEE5E34DT5WQVU/>.

<sup>238</sup> Quinn Scanlan, Devin Dwyer & Olivia Rubin, Georgia election officials formally launch investigation into Trump phone calls, *ABC NEWS* (Mar. 15, 2021), <https://abcnews.go.com/Politics/georgia-election-officials-formally-launch-investigation-trump-phone/story?id=75760557>.

<sup>239</sup> Fausset & Hakim, *supra* note 8.

<sup>240</sup> Amy Gardner, Georgia prosecutors open criminal investigation into Trump’s efforts to subvert election results, *THE WASHINGTON POST* (Mar. 12, 2021), [https://www.washingtonpost.com/politics/in-wake-of-trump-calls-to-state-officials-georgia-prosecutors-open-criminal-investigation-into-efforts-to-subvert-election-results/2021/02/10/17709bd0-6bb3-11eb-9f80-3d7646ce1bc0\\_story.html](https://www.washingtonpost.com/politics/in-wake-of-trump-calls-to-state-officials-georgia-prosecutors-open-criminal-investigation-into-efforts-to-subvert-election-results/2021/02/10/17709bd0-6bb3-11eb-9f80-3d7646ce1bc0_story.html).

<sup>241</sup> Fulton County DA, The Fulton County District Attorney’s Letter, *THE NEW YORK TIMES* (Feb. 10, 2021), <https://int.nyt.com/data/documenttools/letters-to-georgia-officials-from-fulton-district-attorney/70d7cbc8ba0ae1dd/full.pdf>.

office would “begin requesting grand jury subpoenas as necessary.”<sup>242</sup> The letters did not state whether Trump was the primary focus of Willis’s investigation.

On February 12, Willis confirmed that her investigation would encompass both Trump’s conduct and that of his allies. Her investigation includes Senator Graham’s irregular call to Raffensperger on November 13, Giuliani’s statements to committees of the Georgia Legislature, and Pak’s abrupt resignation as U.S. Attorney.<sup>243</sup> On the connection between these events and their relevance to her investigation, Willis stated: “[A]n investigation is like an onion. You never know. You pull something back, and then you find something else.” She continued: “Anything that is relevant to attempts to interfere with the Georgia election will be subject to review.”<sup>244</sup>

In March, investigators in Willis’s office appeared before a grand jury to secure subpoenas for relevant evidence and witness testimony.<sup>245</sup> That same month, Willis bolstered her investigative team. She recruited Atlanta-based attorney John E. Floyd, a noted racketeering expert who has written a national guide for prosecutors.<sup>246</sup> She also hired Michael Carlson, an expert on the rules of evidence, to join her team on a full-time basis.<sup>247</sup> Although neither Floyd nor Carlson was hired solely to work on the election-interference investigation, both brought highly relevant expertise.

By late April 2021, reports emerged that Willis’s investigators had grown frustrated with a purported lack of cooperation from Raffensperger’s staff. *CNN* reported that investigators were experiencing “difficulty” obtaining materials and records kept by the secretary of state’s office,

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<sup>242</sup> *Id.*

<sup>243</sup> Danny Hakim & Richard Fausset, In Georgia, a New District Attorney Starts Circling Trump and His Allies, *THE NEW YORK TIMES* (Feb. 13, 2021), <https://www.nytimes.com/2021/02/13/us/politics/fani-willis-trump.html>.

<sup>244</sup> *Id.*

<sup>245</sup> Christian Boone & Tamar Hallerman, Fulton DA’s investigation into Trump heads to grand jury, *THE ATLANTA JOURNAL-CONSTITUTION* (Mar. 1, 2021), <https://www.ajc.com/news/crime/fulton-das-investigation-into-trump-heads-to-grand-jury/GI6UQWVVLJGCPMCCBKDES5FJ4Y/>.

<sup>246</sup> So, *supra* note 26.

<sup>247</sup> *Id.*

and that Willis’s office was considering a more expansive slate of subpoenas than initially planned to obtain access to the evidence in question.<sup>248</sup> Raffensperger and staffers in his office disputed *CNN*’s reporting, but Kemp subsequently appointed a special counsel to represent the secretary of state’s office in its correspondence with the Fulton DA’s office.<sup>249</sup>

Reporting in July 2021 indicated that Willis and her staff faced headwinds in their efforts to devote adequate resources to the Trump-focused investigation. Pressing concerns in her district—including a surge in crime and a “historic backlog of 12,000 cases”—also represented an important priority for the utilization of her office’s resources. Some questioned the pace of the investigation, while others disputed that and pointed out progress.<sup>250</sup>

In early September, however, public reporting revealed that Willis and her team had interviewed at least four staff members in Raffensperger’s office. “They’ve asked us for documents, they’ve talked to some of our folks, and we’ll cooperate fully,”<sup>251</sup> Raffensperger told *The Daily Beast*. Ryan Germany, the general counsel in Raffensperger’s office who was on the January 2 call with Trump, and who pushed back against the former president’s false assertions about the election, was among those with whom investigators reportedly spoke.<sup>252</sup> A source close to the investigation also told *The Daily Beast* that Willis’s team appeared to have collected all the documents and conducted all the interviews it sought, suggesting that the investigation was

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<sup>248</sup> Sara Murray & Jason Morris, Fulton County DA has grown frustrated with Georgia Secretary of State's office cooperation in Trump probe, source says, *CNN* (Apr. 24, 2021), <https://www.cnn.com/2021/04/23/politics/georgia-trump-2020-election-probe-fulton-county/index.html>.

<sup>249</sup> *Id.*

<sup>250</sup> Camila DeChalus, Trouble is brewing for a Georgia county's criminal investigation into Donald Trump, *BUSINESS INSIDER* (July 23, 2021), <https://www.businessinsider.com/georgia-election-donald-trump-fulton-county-investigation-fani-willis-2021-7>; Daniel Chaitin, Rachel Maddow reports sign of life in Georgia criminal investigation of Trump 2020 election efforts, *WASHINGTON EXAMINER* (last updated Aug. 13, 2021, 10:00 PM), [https://www.washingtonexaminer.com/news/msnbc-rachel-maddow-georgia-criminal-investigation-trump-2020-election-efforts?utm\\_source=yahoo&utm\\_medium=referral&utm\\_campaign=yahoo\\_feed](https://www.washingtonexaminer.com/news/msnbc-rachel-maddow-georgia-criminal-investigation-trump-2020-election-efforts?utm_source=yahoo&utm_medium=referral&utm_campaign=yahoo_feed).

<sup>251</sup> Pagliery & Suebsaeng, *supra* note 11.

<sup>252</sup> *Id.*

progressing towards its conclusion. Other reporting, however, has noted that senior officials, including Raffensperger and Governor Brian Kemp, have yet to be interviewed, indicating that the investigation remains in its early stages.<sup>253</sup> Deputy District Attorney Jeff DiSantis would only offer that the probe is “ongoing.”<sup>254</sup> Willis echoed that description soon after.<sup>255</sup>

As of this writing in September 2021, Willis’s investigation continues apace—and may be complemented by ongoing Congressional probes of Trump’s post-election conduct, including the investigation by the House Select Committee on the January 6<sup>th</sup> Attack on the U.S. Capitol. Trump did not attempt to block several of his aides who testified before Congress about 2020 election matters<sup>256</sup> but has threatened to assert various privileges in an effort to prevent any additional testimony.<sup>257</sup> If Trump does take that step, he will face an uphill climb, not least because the Justice Department under President Biden has authorized former officials to give “unrestricted testimony” to Congressional committees investigating Trump’s efforts to subvert the 2020 presidential election.<sup>258</sup> We expect that Congressional investigators will be able to unearth substantially more information about Trump’s efforts to subvert the 2020 presidential election.<sup>259</sup>

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<sup>253</sup> Morris & Murray, *supra* note 31.

<sup>254</sup> Pagliery & Suebsaeng, *supra* note 11.

<sup>255</sup> Morris & Murray, *supra* note 31.

<sup>256</sup> Katie Benner, Trump says he will not try to stop former Justice Dept. officials from testifying to Congress, THE NEW YORK TIMES (last updated Aug. 7, 2021), <https://www.nytimes.com/2021/08/03/us/politics/trump-justice-dept-officials-testimony.html>.

<sup>257</sup> Zachary Cohen, Ryan Nobles, Annie Grayer, & Whitney Wild, Trump makes executive privilege threat as House committee seeks documents from agencies on January 6 attack, CNN (last updated Aug. 25, 2021, 10:02 PM), <https://www.cnn.com/2021/08/25/politics/january-6-house-documents-investigation/index.html>.

<sup>258</sup> Katie Benner, Trump officials can testify in inquiries into efforts to subvert election outcome and Jan. 6 riot, Justice Dept. says, THE NEW YORK TIMES (last updated July 31, 2021), <https://www.nytimes.com/2021/07/27/us/politics/trump-officials-jan-6-testify.html>.

<sup>259</sup> Norman Eisen, Trump's lies will lead us to the truth, CNN (Aug. 29, 2021), <https://www.cnn.com/2021/08/29/opinions/trump-election-lies-voting-rights-eisen/index.html>.

According to press reports, Willis has begun negotiations with the House Select Committee to obtain information relevant to her investigation.<sup>260</sup> That committee has reportedly requested from the National Archives documents pertaining to White House communications with many of the Georgia state officials relevant to Willis's investigation, including Raffensperger and Kemp.<sup>261</sup> When asked about the prospect of greater collaboration with congressional investigators, Willis told reporters, "Oh, I hope so. It is certainly information that my office needs to see."<sup>262</sup>

While the ongoing work of the House Select Committee demonstrates congressional commitment to investigating the full extent of Trump's election subversion campaign, as of this writing there is no indication that a similar effort is underway at the Department of Justice. Commentators disagree on whether Justice Department officials will eventually launch an investigation of their own as new information continues to come to light.<sup>263</sup> For now, the Fulton County investigation is the only known criminal inquiry into Trump's conduct with respect to the 2020 election.

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<sup>260</sup> Murphy, Bluestein, & Mitchell, *supra* note 27.

<sup>261</sup> Murray & Morris, *supra* note 11.

<sup>262</sup> *Id.*

<sup>263</sup> See Laurence H. Tribe, Barbara McQuade & Joyce White Vance, Here's a roadmap for the Justice Department to follow in investigating Trump, THE WASHINGTON POST (Aug. 5, 2021), <https://www.washingtonpost.com/opinions/2021/08/05/heres-roadmap-justice-department-follow-investigating-trump/>; Glenn Kirschner, DOJ officials thwarted Trump's coup. Next step: A criminal investigation, MSNBC (Aug. 12, 2021), <https://www.msnbc.com/opinion/doj-officials-thwarted-trump-s-coup-next-step-criminal-investigation-n1276610>; Jeffrey Toobin, Attorney General Merrick Garland, don't prosecute Donald Trump, CNN (Aug. 16, 2021), <https://www.cnn.com/2021/08/16/opinions/donald-trump-attorney-general-garland-toobin/index.html>; Renato Mariotti, The Clamor to Prosecute Trump for Election Interference Is Misguided, POLITICO (Aug. 31, 2021), <https://www.politico.com/news/magazine/2021/08/31/trump-election-interference-outrageous-prosecute-507644>.

### III. Potential Crimes.

In Section III, we survey the relevant state criminal statutes and analyze the possibility that Trump’s conduct constituted a crime or crimes. In Section III.A we focus on **potential election crimes** in the Georgia Code. Under Title 21 dealing with elections, there are three principal relevant criminal statutes: (1) solicitation to commit election fraud, Ga. Code Ann. § 21-2-604(a); (2) intentional interference with performance of election duties, Ga. Code Ann. § 21-2-597; and (3) conspiracy to commit election fraud, Ga. Code Ann. § 21-2-603.

In addition, Trump may have committed **other crimes outside of the election title**. These are analyzed in Section III.B and include a variety of possible offenses found in Title 16 of the Georgia Code, the general criminal title. Here too we look at three main possible charges: for making false statements (Ga. Code Ann. § 16-10-20), improperly influencing government officials (Ga. Code Ann. § 16-10-93), and criminal solicitation (Ga. Code Ann. § 16-4-7). The last requires one or more additional crimes to be solicited, and we analyze a number of possibilities, including solicitation of violation of oath by a public officer (Ga. Code Ann. § 16-10-1), false statements and writings (Ga. Code Ann. § 16-10-20), false official certificates (Ga. Code Ann. § 16-10-8), false swearing (Ga. Code Ann. § 16-10-71), and computer trespass (Ga. Code Ann. § 16-9-93(b)).

Finally, possible violations of one more major Title 16 crime, Georgia’s **Racketeer Influenced and Corrupt Organizations (RICO) Act**,<sup>264</sup> are the subject of Section III.C. The statute requires a “pattern” of misconduct,<sup>265</sup> as shown by violations of two or more crimes

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<sup>264</sup> Georgia’s Racketeer Influenced and Corrupt Organizations (RICO) Act, Ga. Code Ann. § 16-14-1 et. seq.

<sup>265</sup> Ga. Code Ann. § 16-14-4(a)–(c).

specified in the statute.<sup>266</sup> That includes a number of those such as false statements or improper influence analyzed in Section III.B.

**A. Possible Election Law Crimes.**

**1. Criminal Solicitation to Commit Election Fraud (Ga. Code Ann. § 212-604(a)).**

In 2011, Georgia amended its election laws to provide for the crime of solicitation of voter fraud.<sup>267</sup> The Georgia Election Code contemplates both first-degree and second-degree criminal solicitation. A person engages in first-degree criminal solicitation to commit election fraud “when, with intent that another person engage in conduct constituting a felony under this article, he or she solicits, requests, commands, importunes, or otherwise attempts to cause the other person to engage in such conduct.”<sup>268</sup> A conviction for this offense carries a sentence of one to three years in prison.<sup>269</sup> A person engages in second-degree criminal solicitation to commit election fraud “when, with intent that another person engage in conduct constituting a misdemeanor under this article, he or she solicits, requests, commands, importunes, or otherwise attempts to cause the other person to engage in such conduct.”<sup>270</sup> A person convicted of second-degree criminal solicitation “shall be punished as for a misdemeanor.”<sup>271</sup> The punishment for a misdemeanor in Georgia is either “a fine not to exceed \$1,000” or “confinement . . . not to exceed 12 months, or both[.]”<sup>272</sup>

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<sup>266</sup> Ga. Code Ann. § 16-14-3.

<sup>267</sup> Ga. Code Ann. § 21-2-604(a).

<sup>268</sup> Ga. Code Ann. § 21-2-604(a)(1).

<sup>269</sup> Ga. Code Ann. § 21-2-604(b)(1).

<sup>270</sup> Ga. Code Ann. § 21-2-604(a)(2).

<sup>271</sup> Ga. Code Ann. § 21-2-604(b)(2).

<sup>272</sup> Ga. Code Ann. § 17-10-3.

Georgia courts have not yet had occasion to definitively construe § 21-2-604. However, this provision is modeled nearly word-for-word on Georgia’s general criminal solicitation statute (Ga. Code Ann. § 16-4-7).<sup>273</sup> Because Georgia courts look to “similar statutes” to address questions of statutory interpretation, we draw guidance from cases addressing Ga. Code Ann. § 16-4-7.<sup>274</sup>

Starting with the plain text of the law, the offense of criminal solicitation under § 21-2-604 can be broken down into three elements:

- a. Solicitation: The defendant must solicit, request, command, importune, or otherwise attempt to cause another person to engage in conduct.
- b. Intent: The defendant must intend that the other person engage in that conduct.
- c. Crime: That conduct must constitute a felony (or misdemeanor) under Georgia law.

We will address each element in turn.

#### **a. Solicitation**

As to the element of solicitation, looking to the text of the statute, the key question here is whether Trump solicited, requested, commanded, importuned, or otherwise attempted to cause someone else to engage in particular conduct.

The Georgia Supreme Court has long held that the terms “solicits, requests, commands” and ‘importunes’ are all clearly understandable so that any person seeking to avoid violation of the law could do so.”<sup>275</sup> Solicit means “to approach with a request or plea.”<sup>276</sup> Request means “to

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<sup>273</sup> Compare Ga. Code Ann. § 16-4-7 (“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.”). In Section IV.D, we explore whether Trump’s conduct constitutes an independent violation of the general criminal solicitation statute.

<sup>274</sup> Premier Health Care Invs., LLC v. UHS of Anchor, L.P., 310 Ga. 32, 43 (2020).

<sup>275</sup> State v. Davis, 246 Ga. 761, 762 (1980).

<sup>276</sup> Merriam-Webster Dictionary (11th ed. 2003); see also New American Oxford Dictionary (3d ed. 2010) (solicit: to “ask for or try to obtain (something) from someone”); Cambridge Dictionary (4th ed. 2013) (solicit: “to ask for



ask for.”<sup>277</sup> Command means to “direct authoritatively” or “to order.”<sup>278</sup> Importune means “to request persistently, and sometimes irksomely.”<sup>279</sup> As for the catch-all phrase—“or otherwise attempts to cause”<sup>280</sup>—the Georgia Supreme Court has construed that language as referring to cases where one person “creates a clear and present danger” of another person engaging in conduct.<sup>281</sup> That standard is satisfied if the solicited “acts are both likely and imminent as a result of the speech” in question.<sup>282</sup> In applying this solicitation standard, courts focus on “the words and intent of the solicitor, as shown by the words, the context, and other circumstances.”<sup>283</sup>

Taken together, the statutory terms in § 21-2-604 refer to the full gamut of circumstances in which a person seeks to induce another person to do something. They cover asking, directing, urging, demanding, prompting, etc. These are broad and commonsensical (rather than technical) terms.

At several points between Election Day 2020 and the Joint Session of Congress on January 6, 2021, the evidence indicates that Trump engaged in conduct of this type. We will highlight three examples that merit particularly close attention and further investigation.

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something in a persuasive and determined way”); Black’s Law Dictionary (11th ed. 2019) (solicitation: “The criminal offense of urging, advising, commanding, or otherwise inciting another to commit a crime”).

<sup>277</sup> Merriam-Webster Dictionary (11th ed. 2003); see also New American Oxford Dictionary (3d ed. 2010) (request: to “politely or formally ask for”); Cambridge Dictionary (4th ed. 2013) (request: “to ask for something politely or officially”).

<sup>278</sup> Black’s Law Dictionary (11th ed. 2019); see also Merriam-Webster Dictionary (11th ed. 2003) (command: “to direct authoritatively”); New American Oxford Dictionary (3d ed. 2010) (command: to “give an authoritative order”); Cambridge Dictionary (4th ed 2013) (command: “to give someone an order”).

<sup>279</sup> Black’s Law Dictionary (11th ed. 2019); see also Merriam-Webster (11th ed. 2003) (importune: “to press or urge with troublesome persistence”); New American Oxford Dictionary (3d ed 2010) (importune: to “harass (someone) persistently for or to do something”); Cambridge Dictionary (4th ed. 2013) (importune: “to make repeated, forceful requests for something, usually in a way that is annoying or causing slight problems”).

<sup>280</sup> Ga. Code Ann. § 21-2-604(a).

<sup>281</sup> The “clear-and-present danger” gloss was designed to avoid potential First Amendment free speech violations. Davis, 246 Ga. at 762 (“we construe this language in conformity with the First Amendment and thereby give it a narrowing construction”).

<sup>282</sup> See, e.g., *Monroe v. State Ct. of Fulton Cty.*, 739 F.2d 568, 575 (11th Cir. 1984).

<sup>283</sup> *O’Kelly v. State*, 196 Ga. App. 860, 861 (1990); see *Rana v. State*, 304 Ga. App. 750 (2010) (citing *O’Kelly*).

First, Trump’s call to Secretary Raffensperger on January 2 plainly constituted solicitation. On that call, Trump asked—indeed, apparently demanded—that Raffensperger “find 11,780 votes.”<sup>284</sup> In so doing, Trump urged Raffensperger to “give [him] a break” because he “only need[ed] 11,000 votes,” and emphasized that “it really is important that [Raffensperger] meet tomorrow and work out on these numbers.”<sup>285</sup> When Raffensperger disagreed with Trump’s false claims about voter fraud in Georgia’s election, Trump threateningly warned that it would be “illegal” and “a big risk” if Raffensperger decided against “reporting” Trump’s false claims.<sup>286</sup> Trump also insisted that Raffensperger’s position on the absence of criminality in the election was “very dangerous.”<sup>287</sup> These statements—all of which were designed to pressure Raffensperger to “find” a very specific number of Trump votes—satisfy the first element of criminal solicitation under § 21-2-604.

Second, Trump’s call to Chief Investigator Watson on December 23 may well have constituted an act of solicitation and, if Watson was in Fulton County at the time of Trump’s call, the Fulton DA could pursue charges. When Trump called her, Watson was overseeing an active inquiry into the issue of alleged signature mismatches.<sup>288</sup> Trump cared deeply about that issue. It is implausible to believe he was calling just to see how things were going. The purpose of his call—confirmed by the publicly available recording<sup>289</sup>—was to urge and pressure Watson to engage in specific conduct in her handling of the inquiry.<sup>290</sup> Trump thus urged Watson to go

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<sup>284</sup> Gardner & Firozi, *supra* note 1.

<sup>285</sup> Tim Darnell, READ: Transcript of Trump’s phone call to Georgia secretary of state, THE ATLANTA JOURNAL-CONSTITUTION (Jan. 4, 2021), <https://www.ajc.com/news/nation-world/read-transcript-of-trumps-phone-call-to-georgia-secretary-of-state/IRLR3EXOMVFJFJIVYYUQ2C6QTM/>.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> McWhirter, *supra* note 156.

<sup>289</sup> Julia Jester, 'You'll be praised': Audio of Trump call with Georgia elections investigator offers new details, NBC NEWS (Mar. 15, 2021, 8:34 AM), <https://www.nbcnews.com/politics/elections/you-ll-be-praised-audio-trump-call-georgia-elections-investigator-n1261159>.

<sup>290</sup> McWhirter, *supra* note 156.

back “two years, as opposed to just checking you know one against the other.”<sup>291</sup> He also urged her to find “dishonesty” and “get to Fulton,” a heavily pro-Biden jurisdiction.<sup>292</sup> Finally, he solicited Watson to continue her investigation past Christmas but to conclude before January 6. While he made these requests, Trump told Watson how “important” she was and emphasized that she would be praised for reaching the “right answer.”<sup>293</sup> This course of conduct may have constituted solicitation of Watson to engage in particular conduct while overseeing the signature mismatch inquiry.

Finally, although publicly reported information about this event is sparse, Trump’s call to Attorney General Carr concerning the lawsuit filed by Texas at the United States Supreme Court may have included an act of solicitation and if, like Watson, Carr was in Fulton County when Trump called him, the Fulton DA would have jurisdiction over this possible crime as well. According to *The New York Times*, Carr described the Texas filing—which sought (among other things) decertification of Georgia’s election results—as “constitutionally, legally, and factually wrong.”<sup>294</sup> This statement by Carr “prompted a call from [Trump], who warned Mr. Carr not to interfere, an aide to the attorney general confirmed.”<sup>295</sup> Depending on exactly what Trump said to Carr on this call, he may have engaged in solicitation—for example, if he urged, requested, or demanded that Carr (in his capacity as attorney general) take or not take any specific action while handling Georgia’s defense against Texas’s lawsuit.

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<sup>291</sup> Davis, *supra* note 163.

<sup>292</sup> *Id.*; Election Night Reporting, Fulton County, Ga., President of The United States (last updated Nov. 20, 2020, 9:46:44 AM), <https://results.enr.clarityelections.com/GA/Fulton/105430/web.264614/#/detail/1>.

<sup>293</sup> Davis, *supra* note 163.

<sup>294</sup> Rutenberg et al., *supra* note 32.

<sup>295</sup> *Id.*

## **b. Intent**

If Trump engaged in solicitation, the next question is whether he did so with the intent that the person he solicited actually carry out the solicited conduct—whether Trump intended the person he solicited to do what he asked them to do. This is clear from the statutory text of § 21-2-604, which requires only that an individual harbor “intent that another person engage in conduct constituting a felony.”<sup>296</sup>

Under black letter Georgia law, intent “can be inferred” and the existence of intent is “a question of fact for the jury after considering all the circumstances surrounding the acts of which the accused is charged.”<sup>297</sup> In ascertaining intent for solicitation offenses, Georgia courts pay careful attention to the solicitor’s words, conduct, and surrounding context. For instance, a defendant who “importuned [an undercover officer] to get in the car to ‘ride around and do a [drug] deal’” had the requisite intent to be found guilty of criminal solicitation—even though he did not “set up the sale” or “negotiate the price.”<sup>298</sup> By contrast, where a defendant simply handed someone “a package that was purported to be drugs” without “asking [the third party] to engage in anything,” that was not sufficient to show the requisite intent to solicit drug trafficking.<sup>299</sup>

Here, the intent element is likely satisfied for all three acts of solicitation described above. There is no credible basis for concluding that Trump was joking or merely offering an abstract hypothetical suggestion about what might happen. This was a call from the President of the United States expressing a clear opinion to state officials about how they should (and should

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<sup>296</sup> *Id.* At least one court in Georgia has stated that solicitation requires intent for another “to commit a felony.” Eng. v. State, 290 Ga. App. 378, 380 (2008). But that case should not be read to heighten the intent requirement for criminal solicitation. In Eng, the solicited conduct was murder, and so there was (and could be) no reasonable dispute that the solicited conduct was a felony.

<sup>297</sup> Schlesselman v. State, 332 Ga. App. 453, 455 (2015).

<sup>298</sup> Forrester v. State, 255 Ga. App. 456, 458 (2002).

<sup>299</sup> Dimas v. State, 276 Ga. App. 245, 246 (2005).

not) exercise the powers and duties of their offices—accompanied by a request (and at some points a demand and a threat) that they do what he asked them to do. Trump plainly intended that they do what he asked.

On the Raffensperger call, for example, Trump reminded Raffensperger of his need to find “11,000” votes and urged Raffensperger to “meet tomorrow and work out on all these numbers.”<sup>300</sup> He stated that failing to do so would pose a “big risk” to Raffensperger and his staff, invoking the specter of criminal liability.<sup>301</sup> Coming directly from the president, the threat and the intent were unmistakable: Trump wanted Raffensperger to find enough votes to overturn the election results.

Similarly, Trump solicited Watson to thoroughly investigate pro-Biden strongholds in Georgia with an eye toward invalidating ballots based on, among other things, unfounded signature mismatches (using alternative procedures and timeframes that Trump described with specificity). These were not mere suggestions. Coming from the president and in the context of the call, it is apparent that Trump in fact intended that Watson conduct her investigation as he requested. That is why he provided so many details, it is why he told her she was so important, and it is why he emphasized that she would be praised if she reached the “right answer” in her investigation.

Trump’s intent is only confirmed by reference to the broader circumstances of his calls to Raffensperger, Watson, and Carr. As described in detail above, Trump was dead set on overturning the certification of the election results in Georgia. His full course of conduct from December 23 through January 2—as well as his actions preceding and following that time period—demonstrates his consistent intent to solicit, pressure, and threaten government officials

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<sup>300</sup> Gardner & Firozi, *supra* note 1.

<sup>301</sup> *Id.*

to participate in schemes to reverse the election results. Trump has continued to make false statements about the Georgia election and malign Georgia officials up to the present time.<sup>302</sup>

Although many of these efforts failed, that only bolstered his resolve to keep trying, as evidenced by his recurring calls to Georgia officials and his actions directed at the U.S. Department of Justice (as well as his actions directed at officials in other swing states).<sup>303</sup>

Importantly, it is no defense under Georgia law for Trump to have genuinely believed that there was fraud. For purposes of criminal solicitation (and the other crimes discussed herein), it is legally irrelevant whether Trump thought he was the “true” winner: Winners and losers alike can run afoul of the criminal statutes we discuss. A loser who believes he is a winner has no special license under Georgia law to solicit state officials to engage in conduct constituting a crime. This issue is discussed further in Section IV.F of the defenses.

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<sup>302</sup> See, e.g., Morris & Murray, *supra* note 1; Gardner & Firozi, *supra* note 1. Trump’s comments at a September 25, 2021 Georgia rally regarding asking Gov. Kemp to call a ‘special election’ to decertify Biden’s win provide further evidence. Rally Speech Transcript, *supra* note 136. “[A]fter a crime has been committed, any attempt by a person who is subsequently accused of the crime to mislead the investigating officers is generally relevant and admissible, and any attempt by such person to obstruct an investigation of an issue is relevant on the trial of such issue.” Parker v. State, 181 Ga. App. 590 (1987) (quoting Moon v. State, 154 Ga. App. 312, 315(5), 268 S.E.2d 366 (1980)).

<sup>303</sup> Josh Dawsey & Rosalind S. Helderman, Trump has grown increasingly consumed with ballot audits as he pushes falsehood that election was stolen, THE WASHINGTON POST (June 2, 2021, 7:50 PM), [https://www.washingtonpost.com/politics/trump-2020-election-audits/2021/06/02/95fd3004-c2ec-11eb-8c34-f8095f2dc445\\_story.html](https://www.washingtonpost.com/politics/trump-2020-election-audits/2021/06/02/95fd3004-c2ec-11eb-8c34-f8095f2dc445_story.html).

### **c. Crime**

This leads to the final element of criminal solicitation under § 21-2-604: Whether the conduct that Trump solicited constituted a crime. In other words, if the people that Trump solicited did what he requested, would they have committed crimes? Here is where Georgia separates the degrees of the offense. If the solicited conduct constitutes a felony, the defendant has committed first-degree criminal solicitation; if the solicited conduct constitutes a misdemeanor, the defendant has committed second-degree criminal solicitation. For purposes of the criminal solicitation statute, the relevant offenses are those housed in Article XV of the Georgia Election Code.

Based on our preliminary analysis of Trump’s conduct and Georgia law, a diverse array of criminal statutes may cover the conduct that Trump solicited. We will first address potential misdemeanor crimes to establish second degree solicitation of election fraud. We will then consider felonies that would sustain a first-degree charge.

#### **i. Possible Misdemeanors**

a) **Failure of Public or Political Officer to Perform Duty (Ga. Code Ann. § 21-2-596):** Ga. Code Ann. § 21-2-596 provides as follows: “Any public officer or any officer of a political party or body on whom a duty is laid by this chapter [Title 21, Chapter 2] who willfully neglects or refuses to perform his or her duty shall be guilty of a misdemeanor.”

Under Title 21, Chapter 2, the secretary of state is entrusted with administering statewide elections and “shall perform” an enumerated list of duties—including “receiv[ing] from the superintendent the returns of primaries and election,” “canvass[ing] and comput[ing] the votes cast for candidates,” and “perform[ing] . . . other duties as may be prescribed by law.”<sup>304</sup> In light

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<sup>304</sup> Ga. Code Ann. § 21-2-50.

of this statutory language, it is clear that Raffensperger is an “officer . . . on whom a duty is laid by this chapter.” The critical question is therefore whether Raffensperger would have willfully neglected his duty—or failed to perform his duty—if he engaged in the conduct solicited by Trump.

The answer to that question is likely “yes.” Courts have held that a “willful neglect” of official duties must be “a flagrant act or omission, an intentional violation of a known rule or policy, or a continuous course of reprehensible conduct.”<sup>305</sup> If Raffensperger had engaged in the conduct that Trump solicited—namely, “finding” enough votes to flip the outcome of the election, publicly reporting unsubstantiated accusations of fraud to benefit Trump, and otherwise taking steps to undo or reverse the certification of the election results—that would surely have risen to the level of “willful neglect” of Raffensperger’s official duties. That includes his duties to “tabulate, compute, and canvass the votes cast for each slate of presidential electors,”<sup>306</sup> his duty to “certify the votes cast for all candidates,”<sup>307</sup> and his duties upon “receiving and computing the returns of presidential electors.”<sup>308</sup>

A similar analysis likely applies to Watson. Although an investigator in the office of the secretary of state does not have expressly enumerated statutory duties under Title 21, Chapter 2, a person who holds that position is likely bound to the same legal duties that govern the secretary of state, since investigators perform their job in furtherance of the duties and functions of that office. For reasons similar to those given above, the acts that Trump solicited Watson to perform may well constitute the misdemeanor offense of willful neglect in performance of public duty.

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<sup>305</sup> Terry v. Houston Cty. Bd. of Educ., 178 Ga. App. 296, 299 (1986) (construing Ga. Code Ann. § 20-2-940, which provides for termination or suspension of teachers for “willful neglect of duties”).

<sup>306</sup> Ga. Code Ann. § 21-2-499.

<sup>307</sup> *Id.*

<sup>308</sup> Ga. Code Ann. § 21-2-502.



As noted above, if the call was received in Fulton County, then the Fulton DA has jurisdiction to prosecute. Because Title 21, Chapter 2 does not impose any duties on the Attorney General relevant to this analysis, Trump’s call to Carr would not implicate Ga. Code Ann. § 21-2-596.

b) **Making a False Statement (Ga. Code Ann. § 21-2-560):** Under Ga. Code Ann. § 21-2-560, “any person who shall make a false statement under oath or affirmation regarding any material matter or thing relating to any subject being investigated, heard, determined, or acted upon by any public official, in accordance with this chapter, shall be guilty of a misdemeanor.”<sup>309</sup> This prohibition on false statements is likely concerned primarily with members of the general public who may find themselves embroiled in an election investigation. But its language sweeps more broadly, covering any false statement under oath “regarding any material matter or thing relating to any subject being . . . heard . . . or acted upon by any public official.”<sup>310</sup> Here, if the conduct that Trump solicited from Raffensperger and Watson would foreseeably have involved making a false statement under oath or affirmation in connection with the tabulation or certification of election results, it would have been criminal in nature.

c) **Destroying, Defacing or Removing Ballots (Ga. Code Ann. § 21-2-576):** Under Ga. Code Ann. § 21-2-576, it is a misdemeanor to “willfully destroy[] or deface[] any ballot or willfully delays the delivery of any ballots.”<sup>311</sup> Similarly, under Ga. Code Ann. § 21-2-577, it is a misdemeanor to “remov[e] ballots from any book of official ballots.”<sup>312</sup> If Trump’s requests to Raffensperger or Watson would have involved the destruction, defacement, or removal of ballots, it would have been criminal in nature.

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<sup>309</sup> Ga. Code Ann. § 21-2-560.

<sup>310</sup> *Id.*

<sup>311</sup> Ga. Code Ann. § 21-2-576.

<sup>312</sup> Ga. Code Ann. § 21-2-577.

**ii. Possible Felonies**

**a) Interference with Primaries and Elections (Ga. Code Ann. § 21-2-566):** Under the Georgia Election Code—specifically, Ga. Code Ann. § 21-2-566—it is a felony to interfere with elections by engaging in one of eight enumerated acts:

Any person who:

- (1) Willfully prevents or attempts to prevent any poll officer from holding any primary or election under this chapter;
- (2) Uses or threatens violence in a manner that would prevent a reasonable poll officer or actually prevents a poll officer from the execution of his or her duties or materially interrupts or improperly and materially interferes with the execution of a poll officer's duties;
- (3) Willfully blocks or attempts to block the avenue to the door of any polling place;
- (4) Uses or threatens violence in a manner that would prevent a reasonable elector from voting or actually prevents any elector from voting;
- (5) Willfully prepares or presents to any poll officer a fraudulent voter's certificate not signed by the elector whose certificate it purports to be;
- (6) Knowingly deposits fraudulent ballots in the ballot box;
- (7) Knowingly registers fraudulent votes upon any voting machine; or
- (8) Willfully tampers with any electors list, voter's certificate, numbered list of voters, ballot box, voting machine, direct recording electronic (DRE) equipment, electronic ballot marker, or tabulating machine

shall be guilty of a felony and, upon conviction thereof, shall be sentenced to imprisonment for not less than one nor more than ten years or to pay a fine not to exceed \$100,000.00, or both.

The acts that Trump solicited most directly evoke paragraph (8), which (as noted) applies where a person “willfully tampers with any electors list, voter’s certificate, numbered list of voters, ballot box, voting machine, direct recording electronic (DRE) equipment, electronic ballot marker, or tabulating machine.” Looking to the statutory text, the felony of willful tampering under § 21-2-566(8) has two elements: (i) tampering with the specified materials and (ii) willfulness. Although “tampering” is not defined in this provision, Georgia law elsewhere punishes tampering with evidence when a person (with the intent to obstruct justice) “knowingly destroys, alters, conceals, or disguises physical evidence or makes, devises, prepares, or plants false evidence.”<sup>313</sup> That same definition of “tampers” likely would be held to apply here. With respect to the requirement of willfulness, that term usually requires only that the person “intended to do the act prohibited by the statute”<sup>314</sup>—an interpretation of willfulness that Georgia courts have applied in the criminal context.<sup>315</sup> In some criminal cases, though, a requirement of willfulness has been interpreted as requiring actual knowledge of illegality, rather than mere intent to commit the prohibited act.<sup>316</sup>

Under these standards, the conduct that Trump solicited Raffensperger to undertake would likely qualify as felonious tampering. When Trump demanded that Raffensperger “find 11,780 votes”—and referenced “300,000 fake ballots” and 5,000 ballots cast by “dead people”—Trump clearly solicited Raffensperger to either “find” additional Trump votes or to discard

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<sup>313</sup> Ga. Code Ann. § 16-10-94. Courts have generally held that a person commits an act of evidence tampering when he destroys or alters evidence by (for instance) “wiping the passenger side of the victim’s vehicle” and “bleaching and washing [defendant’s] clothing,” *Brown v. State*, 288 Ga. 404, 405 (2010), or by throwing evidence in the trash, *Thornton v. State*, 331 Ga. App. 191, *aff’d*, 298 Ga. 709 (2016).

<sup>314</sup> *Cox v. Garvin*, 278 Ga. 903, 906 (2005).

<sup>315</sup> *Cawthorn v. State*, 350 Ga. App. 741, 748 n.30 (2019).

<sup>316</sup> *Kendall v. State*, 9 Ga. App. 794 (1911). See also *Terry v. Houston Cty. Bd. of Educ.*, 178 Ga. App. 296, 299 (1986) (interpreting “willful neglect of duty” as “an intentional violation of a known rule or policy, or a continuous course of reprehensible conduct”).

Biden votes on the pretext that they were “fake.”<sup>317</sup> His clear request was that Raffensperger alter the final vote tallies so that Trump would appear to have won the election. For Raffensperger to engage in this conduct, he would unquestionably have to alter actual voter data to “find” more Trump votes—whether by tampering with lists of voters, voting machines, ballot records, DRE equipment, tabulating machines, or voter/ballot data uploaded to the secretary of state website from tabulating machines and DRE equipment. This conduct likely would qualify as an act of tampering with the specified materials under § 21-2-566(8).

Moreover, this conduct likely would qualify as willful under any potentially applicable standard: Raffensperger surely would have intended to perform the specific acts in question, and as the chief elections officer in Georgia, he would have known that tampering with the election results in this manner was prohibited by law. Indeed, Raffensperger repeatedly expressed his view that Georgia had conducted “an accurate election”<sup>318</sup>—so any tampering by him intended to alter the vote tally and reverse the outcome would plainly have been willful.

It is possible that a similar analysis could apply to Trump’s acts of solicitation directed to Watson if she was in Fulton County at the time of his call. He requested that she invalidate ballots on improper grounds. To the extent her conduct in doing so would have involved willful tampering with any “electors list, voter’s certificate, numbered list of voters, ballot box, voting machine, direct recording electronic (DRE) equipment, electronic ballot marker, or tabulating machine,”<sup>319</sup> it would have been criminal.

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<sup>317</sup> Gardner & Firozi, *supra* note 1.

<sup>318</sup> *Id.*

<sup>319</sup> Ga. Code Ann. § 21-2-566(8).

By the same token, if performing the specific acts that Trump solicited from Raffensperger and Watson would foreseeably have involved “knowingly deposit[ing] fraudulent ballots in the ballot box” or “knowingly register[ing] fraudulent votes upon any voting machine,” those acts would have been criminal under paragraphs (6) and (7) of § 21-2-566.

**b) Counterfeit Ballots or Ballot Labels (Ga. Code Ann. § 21-2-575):** Under Ga. Code Ann. § 21-2-575, “[a]ny person who makes, constructs, or has in his or her possession any counterfeit of an official ballot or ballot label shall be guilty of a felony.”<sup>320</sup> If Trump’s request that Raffensperger “find” 11,780 votes would foreseeably have involved the creation of false ballots, it would have been criminal in nature.

**c) Fraudulent Entries; Unlawful Alteration or Destruction of Entries (Ga. Code Ann. § 21-2-562):** Under Ga. Code Ann. § 21-2-562, it is a felony to willfully “insert[] or permit[] to be inserted any . . . fraudulent entry in any . . . record or document authorized or required to be made, used, signed, returned, or preserved for any public purpose in connection with any primary or election[.]”<sup>321</sup> A person who “[a]lters materially or intentionally destroys any entry which has been lawfully made therein” also commits a felony.<sup>322</sup> If Trump’s request that Raffensperger “find” 11,780 votes would foreseeably have involved the falsification, alteration, or destruction of entries in covered records, it would have been criminal in nature. However, the “unlawful entries” referenced in § 21-2-562 are generally records made before ballots are even cast—and are used to keep track of voter information and registration—and for that reason this offense may be inapplicable to Trump’s conduct. With that we conclude the first of the three

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<sup>320</sup> Ga. Code Ann. § 21-2-575(a).

<sup>321</sup> Ga. Code Ann. § 21-2-562(a)(1).

<sup>322</sup> Ga. Code Ann. § 21-2-562(a)(2).

major potential election law crimes, and we turn now to the second and third of the possible Title 21 election-related offenses.

**2. Intentional Interference with Performance of Election Duties (Ga. Code Ann. § 21-2-597).**

Under Ga. Code Ann. § 21-2-597, “[a]ny person who intentionally interferes with, hinders, or delays or attempts to interfere with, hinder, or delay any other person in the performance of any act or duty authorized or imposed by this chapter shall be guilty of a misdemeanor.” As discussed just above in Section III.A.1.c.i.a with reference to Ga. Code Ann. § 21-2-596, Georgia law charged Raffensperger (and likely Watson) with the performance of acts or duties relating to the election. Section 21-2-597 thus raises the key question whether Trump intentionally acted to interfere with, hinder, or delay Raffensperger or Watson in the performance of their duties related to the lawful, regular administration of Georgia’s election laws. The answer to that question is likely “yes.” On his calls to Raffensperger and Watson, he threatened Raffensperger if he did not “find” enough votes to alter the outcome of the election and make false public statements incompatible with his statutory duties. Trump also pressured Watson to vary from prescribed audit procedures, to alter the timeline of her investigation, and to target pro-Biden electoral strongholds (including Fulton County).<sup>323</sup>

**3. Conspiracy to Commit Election Fraud (Ga. Code Ann. § 21-2-603).**

Under Ga. Code Ann. § 21-2-603, a person commits a conspiracy offense “when he or she conspires or agrees with another to commit a violation of this chapter.” The statute further provides that, “[t]he crime shall be complete when the conspiracy or agreement is effected and an overt act in furtherance thereof has been committed, regardless of whether the violation of this chapter is consummated.”

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<sup>323</sup> Jester, *supra* note 286.

This election-specific provision mirrors Georgia’s general conspiracy statute and is properly understood by reference to general conspiracy principles.<sup>324</sup> Thus, a conviction for conspiracy to commit election fraud requires proof of two fundamental elements: (1) an agreement to violate the election laws under Title 21, Chapter 2; and (2) an overt act in furtherance of that agreement. Importantly, “the type of agreement necessary to form a conspiracy is not the ‘meeting of the minds’ necessary to form a contract.”<sup>325</sup> Further, “[i]t is not necessary to prove an express agreement. The state need only prove that two or more persons tacitly came to a mutual understanding to accomplish or to pursue a criminal objective.”<sup>326</sup> “[C]onduct which discloses a common design, may give rise to an inference of a conspiracy.”<sup>327</sup> Agreements between conspirators can be proven by direct and circumstantial evidence. Conspirators’ words and deeds can convince a jury a conspiracy existed for criminal purposes.<sup>328</sup>

Based on the public record—though this would require substantial additional investigation and fact-finding—it is possible that Trump formed an agreement with others (potentially including Meadows and Giuliani) “to interfere with, hinder, or delay” Raffensperger and Watson “in the performance of” their statutory duties relating to the administration of the election.<sup>329</sup> Giuliani was actively engaged in Trump’s efforts targeting Georgia and appeared before the Georgia legislature twice in an effort to persuade them to nullify the election

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<sup>324</sup> “A person commits the offense of conspiracy to commit a crime when he together with one or more persons conspires to commit any crime and any one or more of such persons does any overt act to effect the object of the conspiracy.” Ga. Code Ann. § 16-4-8.

<sup>325</sup> *Kilgore v. State*, 251 Ga. 291, 299 (1983).

<sup>326</sup> *Duffy v. State*, 262 Ga. 249, 250 (1992).

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> See Ga. Code Ann. § 21-2-597. With respect to Meadows and other White House personnel, the possible information sharing by Congress with the DA discussed in Section II is important. The House January 6 Committee may be more well-situated to obtain records from the federal executive branch documenting the involvement, if any, of Meadows or other White House personnel. See Tom Hamburger & Jacqueline Alemany, Biden White House leans toward releasing information about Trump and Jan. 6 attack, setting off legal and political showdown, THE WASHINGTON POST (Sept. 23, 2021, 10:51 AM), [https://www.washingtonpost.com/politics/trump-executive-privilege-subpoenas/2021/09/23/1c163312-1ba7-11ec-8380-5fbadbc43ef8\\_story.html](https://www.washingtonpost.com/politics/trump-executive-privilege-subpoenas/2021/09/23/1c163312-1ba7-11ec-8380-5fbadbc43ef8_story.html).

results.<sup>330</sup> If he took that step in coordination with Trump and as part of an overarching plan to prevent or undo the certification of the election results, including by urging state officials to engage in *ultra vires* action, that may support the existence of a conspiratorial agreement. Meadows, in turn, obtained Watson’s contact information for Trump and later joined Trump on his January 2 call to Raffensperger.<sup>331</sup>

If Meadows engaged in this conduct as part of a broader agreement with Trump to interfere with, hinder, or delay Raffensperger and Watson in the performance of their duties relating to election administration, that may support the existence of a conspiratorial agreement. More broadly, if Trump formed agreements with others in the White House or beyond to overturn the Georgia election by any means possible, and if those agreements included an objective of improperly pressuring or threatening state officials, that could subject Trump to liability under § 21-2-603. Notably, Trump’s calls to Watson and Raffensperger would qualify as “overt acts,” so the only issue is whether he made those calls pursuant to an unlawful agreement with others in furtherance of objectives violative of Georgia law.<sup>332</sup>

## **B. Potential Crimes Violating Other Sections of Georgia’s Criminal Code.**

### **1. False Statements and Writings (Ga. Code Ann. § 16-10-20).**

In Georgia, the crime of false statements can be committed when a person 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

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<sup>330</sup> Evans, *supra* note 149.

<sup>331</sup> Davis, *supra* note 165.

<sup>332</sup> Based on the same facts, another theory of liability may come to mind—specifically, that Trump and his associates conspired to commit the crime of solicitation to commit election fraud under § 21-2-604. We note, however, that this theory may suffer from a threshold defect. Under Georgia law, “[t]here exists no lesser criminal offense” for the crime of solicitation, “such as attempt to solicit a felony.” Eng. v. State, 290 Ga. App. 378, 380 (2008). Because solicitation, conspiracy, and attempt are all considered inchoate, or incomplete, crimes in Georgia, 18 GA. JUR. 4, President Trump has a colorable argument that the crime of conspiracy to commit solicitation is not legally cognizable.



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.”<sup>333</sup>

This statute criminalizes *any* knowing and willful false statements in any matter within the jurisdiction of any state or local department or agency and has been extended to apply to cases of using false documents outside of police investigations<sup>334</sup> and encompasses those made to state agencies.<sup>335</sup> While it is most commonly charged when civilians provide false statements to public officials during criminal investigations (e.g., in witness statements<sup>336</sup> or police interviews<sup>337</sup>), in fact it has a much broader sweep.<sup>338</sup> “The test for determining whether a matter falls within the jurisdiction of a state or local department or agency is whether the department or agency has the power to exercise authority in a particular situation.”<sup>339</sup> “The statute was intended to discourage the making of affirmatively false statements”<sup>340</sup> that deceive and harm the government in an effort to save the government time and resources of having to determine the truth.<sup>341</sup>

Prosecutors must establish that the defendant intended to make the false statement and implicit in that intent is the knowledge of falsity.<sup>342</sup> Knowledge of falsity is a question for the jury and can be established even in cases where the defendant claims that the statements were

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<sup>333</sup> Ga. Code Ann. § 16-10-20. See also *Tesler v. State*, 295 Ga. App. 569 (2009).

<sup>334</sup> *Law v. State*, 349 Ga. App. 823 (2019).

<sup>335</sup> See *Grant v. State*, 226 Ga. App. 88 (1997) (holding that entities in the judicial branch as well as executive branch departments fall within the definition of the statute).

<sup>336</sup> *Towns v. State*, 357 Ga. App. 701 (2020).

<sup>337</sup> *Watkins v. State*, 191 Ga. App. 87 (1989).

<sup>338</sup> *Sneiderman v. State*, 336 Ga. App. 153 at. 162 (2016) (“The term “jurisdiction” is not given a narrow or technical meaning as used in O.C.G.A. §16-10-20 [and] ‘covers all matters confided to the authority of an agency or department . . . [and] mean[s] simply the power to act upon information when it is received.’” Quoting *Tesler v. State*, 295 Ga. App. 569, 577 (2009)) disapproved on other grounds.

<sup>339</sup> Robert E. Cleary, Jr., *Molnar’s Georgia Criminal Law: Crimes and Punishments* § 48-4 (2020-2021 ed.).

<sup>340</sup> *Watkins v. State*, 191 Ga. App. 87, 89 (1989).

<sup>341</sup> Cleary, *supra* note 339.

<sup>342</sup> *Byrd v. State*, 216 Ga. App. 316, (1995).

truthful.<sup>343</sup> Courts in Georgia have determined that repeated false statements to different individuals combined with asking another to also lie to officials is sufficient evidence to establish willfulness.<sup>344</sup> Where the false statements are conveyed to the state or local agency via telephone, venue lies in the county in which telephone calls were received, even when the defendant is in a different jurisdiction.<sup>345</sup>

Trump may have committed the crime of false statements when he repeatedly told Secretary Raffensperger that he won the state of Georgia, as well as when he listed numerous unfounded allegations of election fraud and wrongdoing. They included the assertion that there were “3,000 pounds” of shredded ballots; drop boxes “delivered late”; a particular “professional vote scammer and hustler” who purportedly destroyed no fewer than 18,000 of his votes; and “the other thing, dead people.”<sup>346</sup> Such claims about Georgia had been widely debunked.<sup>347</sup> Indeed, Trump’s claims about widespread fraud, including in Georgia, were rejected by Attorney General Barr,<sup>348</sup> others at DOJ investigating the matter,<sup>349</sup> and CISA Director Chris Krebs<sup>350</sup>—individuals who were part of the Trump administration—in the days and weeks prior to the January 2<sup>nd</sup> call.

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<sup>343</sup> See *Tidwell v. State*, 216 Ga. App. 8 (1994) (conviction upheld where jury found defendants intended to make false statements, despite defendants’ claims that statements were truthful).

<sup>344</sup> *Reeves v. State*, 346 Ga. App. 414 (2018).

<sup>345</sup> *Id.*

<sup>346</sup> Gardner & Firozi, *supra* note 1.

<sup>347</sup> See, e.g. Voter Protection Program, Myths and Facts of the 2020 Presidential Election, 5-10 (Georgia), <https://statesuniteddemocracy.org/wp-content/uploads/2021/01/000A-Myths-and-Facts-of-the-2020-Presidential-Election-20210113-FINAL.pdf>. That report alone debunks seven widely circulated myths about Georgia’s presidential election. Other public reporting has done the same.

<sup>348</sup> Balsamo, *supra* note 176.

<sup>349</sup> Jeremy Herb, Trump to DOJ last December: 'Just say that the election was corrupt + leave the rest to me', CNN (last updated July 31, 2021, 12:41 PM), <https://www.cnn.com/2021/07/30/politics/trump-election-justice/index.html>.

<sup>350</sup> Tim Reid, Former head of U.S. election security calls Trump team fraud allegations 'farcical', REUTERS (Nov. 27, 2020), <https://www.reuters.com/article/us-usa-election-krebs/former-head-of-u-s-election-security-calls-trump-team-fraud-allegations-farcical-idUSKBN28801G>.

Nor does it stop there. Depending on the evidence ultimately revealed by the Fulton County District Attorney’s Office, additional charges could be brought for any false statements potentially made by Trump during his December 5<sup>th</sup> call to Governor Kemp, by Rudy Giuliani during his appearance before the Georgia Senate and House on December 3 and December 10, and by Mark Meadows and Cleta Mitchell during the January 2, 2021, call with Secretary Raffensperger and his team at the secretary of state’s office.<sup>351</sup>

## **2. Influencing Witnesses (Ga. Code Ann. § 16-10-93).**

Another potential crime that Trump might be investigated for is Georgia’s influencing witnesses statute, which reaches behavior and intimidation exerted on individuals other than those called to testify in a court proceeding. O.C.G.A. § 16-10-93(b) makes it unlawful for any person knowingly to use intimidation, threats, or misleading conduct as a means to “cause or induce any person to”:

- (i) Withhold testimony or a record, document, or other object from an official proceeding;
- (ii) Alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding....<sup>352</sup>

“Official proceeding” includes one before “an agency of the executive, legislative, or judicial branches of government of this state or its political subdivisions or authorities.”<sup>353</sup> The official proceeding need not be pending at the time of the offense,<sup>354</sup> and the prosecutor does not need to prove the defendant knew the circumstance of the proceeding or the role of the state employee in it.<sup>355</sup>

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<sup>351</sup> While Trump and his associates repeatedly made false statements in the press and via Twitter, and undoubtedly these were seen and received by Georgia officials, only statements that were made to those officials directly would satisfy the elements of the charge of false statements.

<sup>352</sup> Ga. Code Ann. § 16-10-93(b).

<sup>353</sup> Ga. Code Ann. § 16-10-93(b)(3)(A).

<sup>354</sup> Ga. Code Ann. § 16-10-93(b)(3)(B).

<sup>355</sup> Ga. Code Ann. § 16-10-93(b)(3)(D).

Trump’s call with Raffensperger was replete with inaccuracies and falsehoods about the election. Especially in light of Trump’s insinuations that the secretary of state and his counsel were jeopardizing themselves by not uncovering the fraud, his claims that they were at “big risk” for insisting there was no criminality, and other aspects of the call, these falsehoods provide a sufficient basis to investigate misleading conduct and intimidation under the statute. Moreover, the call raises the question of whether it was designed to induce the state officials to withhold over 11,000 validly counted votes from being counted in the election—either withholding a record or altering one under the statute. The Fulton DA may also have jurisdiction to prosecute Trump for the false statements he reportedly made to Investigator Watson depending on whether she was located in Fulton County when she received the call.<sup>356</sup>

### **3. Criminal Solicitation (Ga. Code. Ann. § 16-4-7).**

In addition to the election-specific solicitation statute referenced in Section III.A.1 above, Georgia also maintains a general prohibition against criminal solicitation. Under Ga. Code. Ann. § 16-4-7, “[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.”<sup>357</sup> Georgia courts have construed this statute to reach “only a relatively overt statement or request intended to bring about action on the part of another person. . . .”<sup>358</sup> And to be covered, the statement at issue must “create[] a clear and present danger that a felony will be committed, [as] the phrase ‘or otherwise

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<sup>356</sup> If Watson was located at or near the Secretary of State’s Office in Fulton County when she received the call, the Fulton County District Attorney’s Office would have primary jurisdiction to pursue the offense. If Watson was in Cobb County at the site of the audit when she received the call, DA Willis would not be able to establish venue for a primary charge but could include the circumstances and content of the call as predicate facts if she opts to pursue a charge under Georgia’s Racketeer Influenced and Corrupt Organizations (RICO) Act. See Section III.C *infra*.

<sup>357</sup> Ga. Code. Ann. § 16-4-7.

<sup>358</sup> State of Ga. v. Davis, 246 Ga. 761, 762, 272 S.E.2d 721 (Ga. 1980).

attempts to cause such other person to engage in such conduct’ is construed as meaning ‘or otherwise creates a clear and present danger of such other person perpetrating a felony.’”<sup>359</sup>

As set forth above in Section III.A, there appear to be strong factual grounds to believe that Trump solicited conduct with an intent to change the election results in his favor. The applicability of the general criminal solicitation statute thus appears to turn on whether the acts that he solicited would have constituted felonies if performed by the person from whom he solicited them. For purposes of the general solicitation statute—unlike the election-specific solicitation statute—there is no requirement that the solicited offense be a felony under the Election Code. *Any* felony under Georgia law will suffice.

Here, we will discuss five potentially relevant felonies, with the understanding that further factual development may strengthen or weaken reliance on these offenses, may support others, or may alter the analysis below.

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<sup>359</sup> *State of Georgia v. Davis*, 246 Ga. 761, 762–763(2) (1980).

**a. False Certification (Ga. Code Ann. § 16-10-8).**

Under Ga. Code Ann. § 16-10-8, “An officer or employee of the state . . . authorized by law to make or give a certificate or other writing who knowingly makes and delivers such a certificate or writing containing any statement which he knows to be false shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years.” While this statute is general and not confined to election-related matters, the secretary of state is, as discussed in Section III.A.1.c.i.a, authorized by law to issue writings and certificates respecting the results of a presidential election. If Trump’s request that Raffensperger “find” 11,780 votes and certify the election in his favor (or issue a recertification or other writing undoing or disputing the prior certification) would foreseeably have involved the creation of a certificate or a writing containing a statement known by Raffensperger to be false, that conduct by Raffensperger would have been criminal in nature.

**b. Violation of Oath by a Public Officer (Ga. Code Ann. § 16-10-1).**

Under Ga. Code Ann. § 16-10-1, “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.” Georgia law requires public officials to take an oath to “support the Constitution of the United States and of this state[.]”<sup>360</sup> To prove the crime of violation of oath of office, “the State must prove that the defendant was actually administered an oath, that the oath was ‘prescribed by law,’ and that the officer violated the terms of that oath.”<sup>361</sup> Public officials have been indicted for violation of oath of office for a variety of reasons, some as tangentially related to the function of the office as

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<sup>360</sup> Ga. Code Ann. § 45-3-1.

<sup>361</sup> Reynolds v. State, 334 Ga. App. 496, 499 (2015).

charging personal expenses to state-supplied credit cards.<sup>362</sup> Other indictments have included a coroner’s failure to investigate deaths while receiving payment for his work,<sup>363</sup> and an officer’s acts of abuse against prison inmates.<sup>364</sup> The conduct that Trump solicited—the alteration of the results of a free and fair election—likely constitutes a violation of the oath that Raffensperger swore. His calls to Watson and Carr may also implicate this rule (assuming Watson swore an oath); with respect to Carr, Trump requested that Georgia’s top lawyer engage in dereliction of duty—and a betrayal of his obligations to the people of Georgia—by willfully refusing to defend the lawful certification of the state’s electoral outcome at the United States Supreme Court.

**c. False Statements and Writings (Ga. Code Ann. § 16-10-20).**

Trump not only made potentially false statements to officials himself, as noted above in Section III.B.1. He also may have solicited others to do so in contravention of the elements of that statute set forth above. For example, he requested Raffensperger and Germany to say that they found corrupt ballots and were recalculating the results.<sup>365</sup> Trump also asked Raffensperger to “work . . . on these numbers,” which could be construed as a request that Raffensperger falsely report certain results. Indeed, Trump was aware that Georgia officials were ultimately responsible for reporting and certifying the results; it thus follows that Trump was soliciting false statements if he was asking others with official responsibility to report and certify his victory against the evidence that he did not prevail.

Taken in context, these facts could help support a theory that Trump’s statements constituted a request to make willful, known, and material false statements regarding election-

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<sup>362</sup> United States v. Stevens, No. 1:18-CR-160-SCJ-JKL, 2018 WL 6596457 (N.D. Ga. Aug. 28, 2018), report and recommendation adopted, No. 1:18-CR-160-SCJ, 2018 WL 6190676 (N.D. Ga. Nov. 28, 2018).

<sup>363</sup> Fortner v. State, 350 Ga. App. 226 (2019).

<sup>364</sup> State v. O’Neal, 352 Ga. App. 228 (2019), *cert. denied* (Apr. 20, 2020).

<sup>365</sup> Michael D. Shear & Stephanie Saul, Trump, in Taped Call, Pressured Georgia Official to ‘Find’ Votes to Overturn Election, THE NEW YORK TIMES (last updated May 26, 2021), <https://www.nytimes.com/2021/01/03/us/politics/trump-raffensperger-call-georgia.html>.

related matters within the jurisdiction of the office of the secretary of state, as established under Ga. Code Ann. § 16-10-71. If the elements of the false statements statute are satisfied by the evidence the prosecution develops, the conduct Trump requested is criminal in nature for purposes of Trump's overarching solicitation liability

**d. False Swearing (Ga. Code Ann. § 16-10-71).**

In addition to looking at the possible solicitation of Raffensperger and Germany to make false statements, prosecutors could investigate a charge of solicitation of false swearing against Trump for requesting that the officials execute documents to overturn the election results based on those false statements. The Georgia Code states:

A person to whom a lawful oath or affirmation has been administered or who executes a document knowing that it purports to be an acknowledgment of a lawful oath or affirmation commits the offense of false swearing when, in any matter or thing other than a judicial proceeding, he knowingly and willfully makes a false statement.<sup>366</sup>

Punishment includes up to a \$1000 fine, one to five years in prison, or both.<sup>367</sup> The crime is broader than perjury in three ways: 1) it applies to false statements made in situations other than judicial proceedings; 2) the false statement need not be material;<sup>368</sup> and 3) the crime does not require the administration of an oath, only that the execution of the document purports to be an acknowledgement of a lawful oath or affirmation.<sup>369</sup>

Trump's January 2 phone call contained repeated requests and thinly veiled attempts to intimidate Raffensperger and Germany in an effort to get them to knowingly and willfully make a false statement claiming that fraud and wrongdoing existed during the election when it, in fact, did not. Trump pressed them to "give him a break" and "find 11,780 votes" that he needed to win

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<sup>366</sup> Ga. Code Ann. §16-10-71(b).

<sup>367</sup> *Id.*

<sup>368</sup> *Plummer v. State*, 90 Ga. App. 773 (1954).

<sup>369</sup> *Holland v. State*, 172 Ga. App. 444 (1984); *Finch v. State*, 326 Ga. App. 141 (2014).



the election instead of Biden. By the time of this call, Raffensperger had already certified the election results 43 days earlier on November 20, 2020.<sup>370</sup> In fact, the call happened only four days before Congress was scheduled to certify the election results in a joint session.

One way for Raffensperger to accommodate Trump’s request would have been for him to execute a document containing false information about the vote count to overturn the November 20 certification and the December 7 recertification. While Raffensperger and Germany took an oath upon assuming their respective positions in the secretary of state’s office, those oaths would not be material to establishing this charge. “[T]he offense of false swearing is defined to include signing documents that purport to be an acknowledgment of a lawful oath, regardless of whether an oath had actually been administered by an official. Under this broad[ ] definition, one who executed a document with knowledge that his mere execution would ‘purport’ to be or would evince his ‘acknowledgment’ that the statements contained therein were being made under lawful oath or affirmation could be held accountable for false swearing.”<sup>371</sup> If Raffensperger had executed sworn election documentation based on the erroneous vote counts described by Trump, he would have been guilty of false swearing because the document would have constituted his acknowledgement that the statements in the document were made under oath or affirmation. And because “only a relatively overt statement or request intended to bring about action on the part of another person will bring a defendant within the statute,” Trump’s repeated requests of Raffensperger allow investigation of the crime of solicitation of false swearing.<sup>372</sup>

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<sup>370</sup> Office of Brad Raffensperger, November 2020 General Election Results, <https://results.enr.clarityelections.com/GA/107231/web.264614/#/summary>; Brumback, *supra* note 18.

<sup>371</sup> *Finch v. State*, 326 Ga. App. 141 (2014) (quoting *Holland v. State*, 172 Ga. App. 444 (1984)).

<sup>372</sup> *State of Georgia v. Davis*, 246 Ga. 761, 762–763(2), 272 S.E.2d 721 (1980). Determination of whether this offense may apply requires interviewing personnel in the secretary’s office and possibly outside experts and reviewing all of the possible documentation which would have been required.

**e. Computer Trespass (Ga. Code Ann. § 16-9-93(b)).**

Depending on what evidence comes to light during the investigation, it may also emerge that Trump solicited Raffensperger or Watson to engage in conduct that foreseeably would have involved a criminal computer trespass (e.g., to delete or remove accurate voting data, or to otherwise obstruct or interfere with such data), in violation of Georgia law. Indeed, it is hard to understand how the instruction to “find 11,780 votes” could not, if implemented, involve tampering with digital records. That said, a determination as to whether computer trespass was solicited and so should be charged requires considerably more development. That includes deriving additional proof (beyond what is currently in the public record) about Trump’s knowledge of Georgia voting systems and of how he intended his instructions, if followed, to be implemented. The prosecution may, for example, develop evidence that some of those who met with the former president discussed such matters and that he intended computers or records to be altered. Or that proof may emerge in other investigations, such as that of the House January 6 Committee, and be shared with the prosecution. With that caveat, we here briefly outline the possible offense.

Computer Trespass is codified in O.C.G.A 16-9-93(b). That provision prohibits the use of “a computer or computer network with knowledge that such use is without authority and with the intention of: (1) Deleting or in any way removing either temporarily or permanently, any computer program or data from a computer or computer network; (2) Obstructing, interrupting, or in any way interfering with the use of a computer program or data; or (3) Altering, damaging, or in any way causing the malfunction of a computer, computer network, or computer program,

regardless of how long the alteration, damage, or malfunction persists.”<sup>373</sup> Even as Georgia switched to paper ballots in 2020 as a means to back up the computer tabulations in elections,<sup>374</sup> the integrity of data contained on the voting and other machines was central to Trump’s unfounded insistence that he won the election. As Georgia courts have made clear, the alteration of important government records is a paradigm case—unauthorized use of a computer network can support a criminal prosecution.<sup>375</sup>

As we have noted, a possible prosecution theory would be that Trump’s repeated requests for Raffensperger to toss out thousands of votes would have meant that Raffensperger, or a member of his team, would have had to access the computers used during the election to “delete or remove” the existing information. By requesting these alterations, Trump was, in effect, asking Raffensperger to “interfere with the use of a computer program or data” surrounding the election results. Trump may not be a sophisticated computer expert, but surely he knew that and was intentionally soliciting it—or so the argument would go. But as we have noted, a prosecution along these or similar lines would need to be bolstered by additional evidence of his intent.<sup>376</sup>

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<sup>373</sup> O.C.G.A. § 16-9-93(b); *see also* *Kinslow v. State*, 860 S.E.2d 444, 448-51 (Ga. 2021) (holding that “‘obstruct’ often means to stop or block the passage of something” including by “stop[ping] the flow of data altogether”; that “‘[i]nterrupt’ can mean to inflict more of a temporary stoppage,” including a temporary or intermittent stoppage of data; and that “‘interfering’ with the use of data requires proof that a person engaged in a level of interference that hindered the use of data”).

<sup>374</sup> Jason Braverman, ‘Election security is our top priority’: Georgia to get new verified paper ballot system, 11 ALIVE (July 29, 2019), <https://www.11alive.com/article/news/local/elections-is-our-top-priority-georgia-to-get-new-verified-paper-ballot-system/85-ec7ae4b2-78da-4e02-b6e1-869529495a30>.

<sup>375</sup> Cf. *Countryman v. State*, 355 Ga. App. 573, 586 (2020) (subdivision (a) of computer crime statute, which prohibits unauthorized use of computers to appropriate another’s property, was violated when National Guard employee altered her own grades in the government’s computer system in order to render her eligible for certain financial assistance).

<sup>376</sup> Another possible statute that may merit investigation and that is akin to Computer Trespass is Computer Forgery. It is found in Ga. Code Ann. § 16-9-93(d) and is based on and incorporates statutes criminalizing traditional forgery. Under Georgia law, a person commits ordinary forgery in the first degree when, “with the intent to defraud, [one] knowingly makes, alters, or possesses any writing...in a fictitious name or in such manner that the writing...purports to have been made by another person, at another time, with different provisions, or by authority of

We turn now to another possible Title 16 crime—one that incorporates some of the foregoing offenses but has unique features of its own that merit separate treatment.

**C. Georgia’s Racketeer Influenced and Corrupt Organizations (RICO) Act (Ga. Code Ann. § 16-14-1 et. seq.).**

When people think of RICO—the acronym for the Racketeer Influenced and Corrupt Organization Act—they conjure an image of a Mafia boss overseeing a vast organized crime ring.<sup>377</sup> To be sure, RICO statutes were enacted with organized crime in mind, but over the past half century, federal and state RICO laws have been used more broadly to target criminal enterprises engaged in patterns of criminal conduct. As we described above, Trump’s multifaceted and sustained effort to subvert the count and certification of the election in Georgia may include a host of distinct state crimes. As such, prosecution under Georgia’s RICO law may be available and appropriate. Indeed, it is difficult *not* to draw parallels between Trump’s threats and intimidation and more classic targets of RICO charges.

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one who did not give such authority.” Forgery in the second-degree requires the same showing, except that the government need not show that the defendant “utter[ed] or deliver[ed]” the writing. Georgia law criminalizes such conduct if the forgery occurs digitally: “any person who creates, alters, or deletes any data contained in any computer or computer network, who, if such person had created, altered, or deleted a tangible document or instrument would have committed forgery...shall be guilty of the crime of computer forgery.” As a commonsense matter, a ballot or digital vote record qualifies as a “writing” because it is a “method of recording information.” Again, the applicability of the theory would depend on the development of the evidence and of the ex-president’s intent. See O.C.G.A § 16-9 for the full statute.

<sup>377</sup> So, *supra* note 26.

Georgia’s General Assembly enacted the state’s RICO law in 1980 after determining “that a severe problem is posed in this state by the increasing sophistication of various criminal elements and the increasing extent to which the state and its citizens are harmed as a result of the activities of these elements.”<sup>378</sup> The statute makes it a crime to engage in a pattern of racketeering activity to acquire or maintain an enterprise or property, or to participate in an enterprise through a pattern of racketeering activity.<sup>379</sup> It also makes it a crime to conspire to do either.<sup>380</sup>

At its heart, the statute requires the existence of an “enterprise” and a “pattern of racketeering activity.” An “enterprise” is not limited to a purely criminal organization; in Georgia, it has been used to hold defendants accountable for a host of different criminal schemes, including attempts by candidates to seek or maintain elected office<sup>381</sup> and, famously in Georgia, a scheme by officials to facilitate cheating on standardized tests.<sup>382</sup> In the context of a public office, the prosecution must show “an interrelated pattern of activity by and through the [public] office.”<sup>383</sup>

The “pattern of racketeering activity” element is defined by a list of conduct—predicate state crimes—that can qualify together as a pattern.<sup>384</sup> The statute is broader than its federal counterpart. It lists over 40 predicate crimes or acts under state and federal law that constitute

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<sup>378</sup> Ga. Code Ann. §16-14-2.

<sup>379</sup> Ga. Code Ann. § 16-14-4(a)–(b).

<sup>380</sup> Ga. Code Ann. § 16-14-4(c).

<sup>381</sup> See *Dorsey v. State*, 615 S.E.2d 512 (Ga. 2005).

<sup>382</sup> Chelsea J. Carter, Grand jury indicts 35 in Georgia school cheating scandal, CNN (Mar. 29, 2013, 10:55 PM), <https://www.cnn.com/2013/03/29/us/georgia-cheating-scandal/index.html>.

<sup>383</sup> *Dorsey*, *supra* note 378.

<sup>384</sup> “‘Racketeering activity’ means to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit any crime which is chargeable by indictment” under certain specified categories of laws. O.C.G.A. § 16-14-3(9)(A)(i) through (xxxviii). These are the qualifying crimes, known as predicate offenses.” *Dorsey v. State*, 615 S.E.2d 512 (Ga. 2005).

“racketeering activity” and so could trigger its application.<sup>385</sup> One of the ways the Georgia statute is more expansive than the federal RICO provisions is that attempt, solicitation, coercion, and intimidation of another to commit one of the predicate offenses can be included as predicate acts of racketeering activity.<sup>386</sup> This is true even when such crimes are not able to be indicted separately.<sup>387</sup>

Winning a RICO case requires establishing at least two related predicate acts, and that the defendant intended to commit the predicate acts. To be sure, acts that do not directly facilitate the RICO charge can still be considered related and included in the averment,<sup>388</sup> and the State need not prove every predicate act charged as long as the defendant is found to have committed at least two predicates enumerated in the indictment.<sup>389</sup> Defendants may receive separate sentences for both the RICO violation and the underlying predicate crimes—that is, prosecutors can charge both the individual crimes and the RICO scheme as a whole.<sup>390</sup> The criminal penalties upon conviction may include up to twenty years in prison and a fine.

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<sup>385</sup> Ga. Code Ann. § 16-14-3.

<sup>386</sup> Ga. Code Ann. § 16-14-3(9)(A).

<sup>387</sup> Dorsey, *supra* note 378.

<sup>388</sup> *Id.* at 519.

<sup>389</sup> *Id.* at 518. *See also* Redford v State, 710 S.E.2d 197 at 200 (Ga. App. 2011).

<sup>390</sup> Dorsey, 615 S.E.2d at 535; Drewry v. State, 201 Ga. App. 674, 675–676(3) (1991).

Based on our assessment, we conclude that Trump’s multiple reported acts directed at Georgia could subject him to prosecution under the state’s RICO statute, subject of course to the further development of the case by Fulton County. Above, we have extensively discussed a number of Georgia state crimes for which Trump may be liable. A number of them are enumerated as available predicate offenses under the RICO statute: (1) false statements and writings; (2) solicitation of false statements and writings; (3) solicitation of false swearing; (4) influencing witnesses; and (5) solicitation of computer trespass (as a crime included in the Georgia Computer Systems Crime Act).<sup>391</sup> Therefore, proving at least two of them could meet the element of a pattern of racketeering activity.

Further investigation of these potential predicate acts is warranted given the publicly available facts. As explained above in Section III.B, Trump may have committed the crime of false statements when, for instance, he knowingly made repeated misrepresentations to Georgia election officials regarding his alleged victory in the 2020 election—a fact that was demonstrably untrue.<sup>392</sup> Moreover, Trump’s statements to Raffensperger and his counsel on that January 2 call—particularly his claims that they faced “big risk” if they did not find criminality as he wished—may also expose him to criminal liability for influencing witnesses.<sup>393</sup> Returning to solicitation, in addition to potentially committing that crime himself, Trump may have also

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<sup>391</sup> These predicate “racketeering activities” are all enumerated in O.C.G.A. § 16-14-3(9)(A). Under O.C.G.A. § 16-14-3(9)(B), the publicly known facts also could invoke the use of predicate crimes enumerated in federal law. However, including federal predicate acts may give Trump grounds to seek to have the charges removed to federal court under 28 U.S.C. 1441(b), which establishes removal jurisdiction for “any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States.” See *Ayres v. Gen. Motors Corp.*, 234 F.3d 514 (11th Cir. 2000) (allowing removal). Of course, the “mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction.” *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 813, 106 S.Ct. 3229, 3234, 92 L.Ed.2d 650 (1986). But given the likelihood of attempted removal on other grounds as discussed in Section IV.C, the more prudent course may be to avoid federal crimes as predicate acts if prosecutors prefer to try their case in state court.

<sup>392</sup> See *supra* Section III.B.1; Ga. Code Ann. § 16-10-20.

<sup>393</sup> See *supra* Section III.B.2; Ga. Code Ann. § 16-10-93.

solicited *others* (including Secretary Raffensperger and Germany) to make false and unsubstantiated statements, including that the election was corrupt and that ballots were being recalculated.<sup>394</sup> Relatedly, and based on the same conduct, Trump may have solicited others to engage in the crime of false swearing, particularly since his statements during the January 2 call could reasonably be viewed as a request or demand to execute new (albeit inaccurate) election documentation declaring him the winner.<sup>395</sup> And because Trump’s repeated requests to Georgia election officials to change the election results would foreseeably have involved their use of computers to delete or alter voting data, he may have committed solicitation of computer trespass.<sup>396</sup>

Moreover, this would not be the first RICO prosecution involving public officials, predicate acts like these, or both combined. The Georgia Supreme Court upheld the RICO conviction of former state Labor Department head Sam Caldwell and expressly rejected the idea that RICO “was not intended to apply . . . to an elective office holder seeking reelection.”<sup>397</sup> Rather, a RICO prosecution based on predicate acts like “false statements” and “false swearing,” by a public official seeking reelection—similar to crimes that Trump could well have engaged in or solicited—validly formed the basis of a RICO prosecution.<sup>398</sup> Nor would it matter if any, or even all, of the relevant predicate acts were misdemeanors, as the Georgia courts have expressly upheld RICO convictions based exclusively or in part on misdemeanor predicate acts.<sup>399</sup> In sum, because the “list of offenses incorporated into Georgia RICO is extensive,”<sup>400</sup> that powerful

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<sup>394</sup> See *supra* Section III.B.3.c.

<sup>395</sup> See *supra* Section III.B.3.d; Ga. Code Ann. § 16-10-71.

<sup>396</sup> See *supra* Section III.B.3.e & f; Ga. Code Ann. § 16-9-93(b) & (d).

<sup>397</sup> *Caldwell v. State*, 253 Ga. 400, 402 (1984).

<sup>398</sup> *Id.* at 401; see also *Dorsey*, 615 S.E.2d at 540 (upholding RICO conviction of elected sheriff, including where predicate acts included solicitation).

<sup>399</sup> *Glenn v. State*, 282 Ga. 27, 28 n.2 (2007) (upholding RICO conviction based exclusively on repeated commission of misdemeanor crime of making illegal payday loans).

<sup>400</sup> John E. Floyd, *RICO State by State: A Guide to Litigation Under the State Racketeering Statutes* 7 (2<sup>nd</sup> ed. 2011).



statute has been a commonly used tool for Georgia prosecutors. Several of the potential crimes we have enumerated could form the basis for such a prosecution.

There are two potential “enterprises” here for purposes of the RICO statute: the Trump campaign and the presidency itself. Under § 16-14-4(b), using either or both of those positions to engage in a pattern of racketeering activity could sustain a RICO charge.<sup>401</sup> Likewise, engaging in a pattern of racketeering activity to *gain* the presidency (or, more precisely here, to secure his slate of Georgia presidential electors), would run afoul of Section 16-14-4(a). Finally, as the facts emerge to show that others worked in concert with Trump to effectuate his scheme, a RICO conspiracy charge under Section 16-14-4(c) may also be available.

Finally, we believe that a RICO charge presents a unique mechanism by which Georgia prosecutors can hold Trump accountable for his entire scheme. While the Fulton DA will have a great deal of discretion in deciding which crimes, or combination thereof, to include as predicate acts, under the RICO statute the state is free to offer other facts and potential crimes even if they are not charged as part of the indictment. Thus, whether the state opts to “keep it simple” by including only the most direct violations of the law, the full scheme might be charged to include acts and events outside of Georgia, such as the termination of a senior Homeland Security Official and pressure brought to bear on the Department of Justice.<sup>402</sup>

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<sup>401</sup> We have elsewhere noted that the Trump campaign had additional knowledge of the falsity of some of Trump’s claims, and that a legitimate line of inquiry is whether that knowledge was shared by Trump. For the discussion of that issue on page 28 of Section I. See also, Feuer, *supra* note 126.

<sup>402</sup> Benner, *supra* note 180.

#### **IV. Defenses.**

In the event that Trump were to face state law criminal charges in Georgia, he would undoubtedly raise federal constitutional defenses to liability. Those defenses likely would include assertions of immunity by virtue of his status as a former president; claims that his conduct was protected by the First Amendment; accusations of selective or retaliatory prosecution; and an insistence that his conduct is shielded from liability because he truly believed his own claims of widespread election fraud. Based on our review of the public record concerning Trump’s conduct—and our understanding of relevant constitutional principles—we believe that these constitutional defenses would be meritless.

##### **A. Trump Does Not Enjoy Categorical Immunity from Prosecution Based on His Conduct While President.**

The Justice Department’s Office of Legal Counsel has long opined that presidents are categorically immune from criminal prosecution during their tenure in office.<sup>403</sup> Trump may seek to extend this principle by asserting that his status as a former president renders him wholly immune from criminal prosecution based on acts he committed during his tenure in office.

Any such argument would be mistaken. Indeed, Trump himself admitted as much while serving in office. As the Second Circuit noted in *Trump v. Vance*: “The President concedes that his immunity lasts only so long as he holds office and that he could therefore be prosecuted after leaving office.”<sup>404</sup> The Supreme Court also noted this concession by Trump in reviewing (and affirming) the Second Circuit’s decision: “[T]he President is not seeking immunity from the diversion occasioned by the prospect of future criminal *liability*. Instead, he concedes—

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<sup>403</sup> See A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222 (Oct. 16, 2000); Memorandum from Robert G. Dixon, Jr., Assistant Att’y Gen., Office of Legal Counsel, Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office (Sept. 24, 1973).

<sup>404</sup> *Trump v. Vance*, 941 F.3d 631, 644 (2d Cir.), *aff’d*, 140 S. Ct. 2412 (2020).

consistent with the position of the Department of Justice—that state grand juries are free to investigate a sitting President with an eye toward charging him after the completion of his term.”<sup>405</sup>

Trump’s concession was appropriate. By providing that presidents removed from office through impeachment “shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law,” the Constitution *expressly* contemplates the criminal prosecution of former presidents for misconduct in office.<sup>406</sup> This was consistent with the Framers’ design. Alexander Hamilton thus affirmed in Federalist 69 that a president who had been removed would “be liable to prosecution and punishment in the ordinary course of law.”<sup>407</sup> Gouverneur Morris similarly maintained that a president could face a criminal trial “after the trial of the impeachment.”<sup>408</sup>

More recent sources support the same conclusion. In 2000, when OLC restated its view that sitting presidents are not subject to criminal prosecution, it emphasized that “an immunity from prosecution for a sitting President would not preclude such prosecution once the President’s term is over or [the President] is otherwise removed from office by resignation or impeachment.”<sup>409</sup> This analysis was consistent with modern presidential conduct. In 1974, for instance, President Gerald Ford pardoned President Richard Nixon “for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974.”<sup>410</sup> That pardon would not

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<sup>405</sup> Trump v. Vance, 140 S. Ct. 2412, 2426–27 (2020).

<sup>406</sup> U.S. Const. art. I, § 3, cl. 7.

<sup>407</sup> The Federalist No. 69 (Alexander Hamilton); see also The Federalist No. 77 (Alexander Hamilton) (A President is “at all times liable to impeachment, trial, dismissal from office . . . and to the forfeiture of life and estate by subsequent prosecution in the common course of law.”).

<sup>408</sup> 2 Records of the Federal Convention of 1787, at 500 (Max Farrand ed., 1974).

<sup>409</sup> A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222 (Oct. 16, 2000).

<sup>410</sup> Proclamation No. 4311, 88 Stat. 2502 (Sept. 8, 1974).

have been necessary if Nixon could not be prosecuted after leaving office for misconduct committed while in office. Decades later, President Bill Clinton entered into an agreement with a special prosecutor where Clinton accepted a five-year suspension of his law license and paid a \$25,000 fine to avoid potential criminal prosecution after he left office.<sup>411</sup> This agreement, too, presumed that Clinton could face criminal prosecution as a former president for acts committed while in office. As Senate Minority Leader Mitch McConnell stated after voting to acquit Trump during the second impeachment trial, “We have a criminal justice system in this country. We have civil litigation. And former presidents are not immune from being held accountable by either one.”<sup>412</sup>

Judicial precedent further supports this conclusion. In *United v. Nixon* and in *Vance v. Trump*, the Court held that presidents can be subject to criminal subpoenas even during their tenure in office.<sup>413</sup> It follows from the historical, constitutional, and public policy considerations discussed in these opinions that *former* presidents (who do not face a press of official business) can likewise be subject to criminal process.

### **B. Trump’s Conduct Targeting the Georgia Election Is Not Shielded from Criminal Prosecution by Any Constitutional Immunity Doctrine.**

If Georgia prosecutors file charges against Trump, he will surely argue that he is immune from prosecution because he was in office while the challenged conduct occurred. To that end, he may cite *Nixon v. Fitzgerald*, which held that presidents (including former presidents) are

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<sup>411</sup> David Stout, Clinton Reaches Deal to Avoid Indictment and to Give Up Law License, THE NEW YORK TIMES (Jan. 19, 2001), <https://www.nytimes.com/2001/01/19/politics/clinton-reaches-deal-to-avoid-indictment-and-to-give-up-law-license.html>.

<sup>412</sup> See U.S. News Staff, READ: McConnell Speech After Trump's Impeachment Trial Acquittal, U.S. NEWS (Feb. 14, 2021, 11:36 AM), <https://www.usnews.com/news/politics/articles/2021-02-14/read-mcconnell-speech-after-trumps-impeachment-trial-acquittal>.

<sup>413</sup> *United States v. Nixon*, 418 U.S. 683 (1974) (federal authority); *Trump v. Vance*, 140 S. Ct. 2412 (2020) (state authority).

absolutely immune from civil liability for acts committed while in office.<sup>414</sup> He may also cite *In re Neagle*, which invoked the Supremacy Clause to confer immunity from state criminal prosecution where a federal marshal killed an unarmed man whom the marshal thought was about to attack a Supreme Court Justice.<sup>415</sup>

But neither of these cases would assist Trump. Absolute immunity under *Nixon* does not extend to conduct beyond the “outer perimeter” of the president’s “official responsibility.”<sup>416</sup> As we analyze below, Trump’s actions fall well outside of that perimeter. Moreover, *Nixon*’s reasoning plainly suggests that former presidents enjoy *less* protection against criminal liability, since “there is a lesser public interest in actions for civil damages than . . . in criminal prosecutions.”<sup>417</sup> Turning to *Neagle*, the so-called “Supremacy Clause” immunity upheld in that case is carefully bounded: A federal official is not immune from state criminal prosecution “simply because of his office and his purpose.”<sup>418</sup> Instead, *Neagle* immunity has two conditions: (1) the federal official must have been engaged in conduct authorized by federal law or the Constitution; and (2) the official must have done no “more than what was necessary and proper” to effectuate his federal duty.<sup>419</sup> Thus, an official who acts out of “any personal interest, malice, actual criminal intent, or for any other reason than to do his duty” lacks *Neagle* immunity.<sup>420</sup>

Trump’s conduct targeting the Georgia election lands him far past the ambit of any known immunity doctrine. Simply put, the president has no role to play in counting or tabulating ballots—or certifying results—in presidential elections. The Constitution assigns primary responsibility in this field to the states: Article II provides that “Each State shall appoint, in such

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<sup>414</sup> *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

<sup>415</sup> *In re Neagle*, 135 U.S. 1 (1890).

<sup>416</sup> *Nixon*, 457 U.S. at 756.

<sup>417</sup> *Id.* at 754, n. 37.

<sup>418</sup> *Baucom v. Martin*, 677 F.2d 1346, 1350 (11th Cir. 1982).

<sup>419</sup> *Id.* at 1350.

<sup>420</sup> *Id.*

Manner as the Legislature thereof may direct, a Number of Electors” who will vote on the president.<sup>421</sup> In its limited provisions empowering the federal government to play a role in presidential elections, the Constitution entrusts only Congress, *not* the president, with the power to count electoral ballots under the Twelfth Amendment. In a similar vein, the main federal statute in this field—the Electoral Count Act of 1887—does not contemplate any role for the president in counting or tabulating ballots or certifying election results.<sup>422</sup>

Because neither the Constitution nor applicable federal statutes vest the president with any official responsibility here, Trump’s repeated interference with the administration of the Georgia election took him far beyond the outer perimeter of his office (and past the scope of authorized official acts). There are good, self-evident reasons why our legal system does not give the sitting president a role in counting, tabulating, or certifying in the election for his successor—an election in which he may be a candidate. Any claim that Trump threatened Raffensperger or solicited Watson in furtherance of official federal business, rather than in pursuit of personal political gain, offends the Constitution’s structural safeguards against electoral self-dealing.

To be sure, Trump may assert that his power to “take Care that the Laws be faithfully executed” required him (as the Nation’s chief law enforcement officer) to ensure the integrity of the presidential election. But that argument would fail. First, it conflicts with the design of the Constitution, which plainly and prudently denies the president a role in the counting, tabulation, and certification processes that Trump targeted. Second, it reflects a blatant misapplication of the statutes and constitutional provisions that the president is charged with enforcing, none of which support interventions of the kind that Trump undertook. Third, it misses the fact that Trump was acting not only as the president, but also as a candidate for the very office on which he fixated.

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<sup>421</sup> U.S. Const. art. II, § 1, cl. 2.

<sup>422</sup> Electoral Count Act of 1887, 24 Stat. 373, 3 U. S. C. §§ 5, 6, and 15.

Finally, it ignores the reported facts surrounding his calls to Kemp, Raffensperger, Watson, and others, all of which powerfully establish a decidedly personal motivation for his interference.

At bottom, Trump was not acting within the scope of his official duties when he targeted the Georgia election, including his call to the secretary of state in Georgia, soliciting him to “find” the exact number of votes necessary for Trump to win the election, and threatening him if he failed to do so.<sup>423</sup> This conclusion is supported by DOJ’s recent filing in *Swalwell v. Trump*. There, the plaintiffs have sued Trump, Rep. Mo Brooks, and others for damages in connection with the January 6, 2021 insurrection at the U.S. Capitol.<sup>424</sup> In an effort to avoid individual liability, Brooks petitioned DOJ to certify under the Westfall Act that he was acting within the scope of his employment when he engaged in conduct relating to the January 6 rally. But DOJ rejected this request, distinguishing official federal duties from “electioneering or campaign activities” performed in an official’s personal capacity.<sup>425</sup> In drawing that line, DOJ was guided by “the basic principle that government funds should not be spent to help incumbents gain reelection,”<sup>426</sup> and by cases distinguishing between official acts and acts taken in the “capacity as an individual candidate [seeking] re-election.”<sup>427</sup> Similar principles should apply here and should lead courts to conclude that Trump was acting well beyond any conceivably relevant federal duties in seeking to subvert Georgia’s presidential election outcome for his own electoral benefit.

### **C. The Possibility of Removal to Federal Court Is No Obstacle to Prosecution.**

In the event that Trump faces criminal charges in Fulton County, he likely will attempt to remove the prosecution to federal court. It is highly unusual for a state criminal prosecution to

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<sup>423</sup> Gardner & Firozi, *supra* note 1.

<sup>424</sup> *Common Cause v. Bolger*, 574 F. Supp. 672, 683 (D.D.C. 1982), *aff’d per curiam*, 461 U.S. 911 (1983).

<sup>425</sup> *Id.*

<sup>426</sup> Response to Order of the Court, *Swalwell v. Trump*, Civil Action No. 1:21-cv-00586 (D.D.C. July 27, 2021) (quoting *Common Cause v. Bolger*, 574 F. Supp. 672, 683 (D.D.C. 1982)), <https://www.courtlistener.com/docket/59707490/33/swalwell-v-trump/>.

<sup>427</sup> *Id.* at 13 (citing *Anderson v. City of Inkster*, 2014 WL 3747545, at 2 (Mich Ct. App. July 29, 2014)).

face the prospect of removal. But under Section 1442(a), “any officer . . . of the United States” may remove to federal court a criminal action brought against them in state court if the prosecution is “for or relating to any act under color of such office.”<sup>428</sup> This law is “designed to provide federal officials with a federal forum in which to raise defenses arising from their official duties.”<sup>429</sup> To remove a case, the federal official must file a notice of removal in the federal district court, which has jurisdiction over the removal question.<sup>430</sup> After removal occurs, the state authorities who filed the case have the option of filing a motion to remand. Here, prosecutors could seek a remand.

Under Section 1442(a), removal is authorized if the defendant is an “officer of the United States” and has “raised a colorable federal defense.” The requirement of a “colorable federal defense” has been given a “broad reading” and does not require the defendant to prove the “ultimate validity” of his defense “at the time of removal.”<sup>431</sup> Trump’s main “colorable federal defense” would likely be the immunity issues discussed above. So, if prosecutors were to file a motion to remand the case to state court, they would address those issues at the outset of the litigation, prior to discovery, and with a standard asking only whether Trump’s contentions are “colorable.”

For the many reasons we have already discussed, there are good reasons to think that Trump’s position should fail even that forgiving standard. And the Supreme Court made clear in *Mesa v. California* that not all removal efforts under Section 1442(a) are meritorious.<sup>432</sup> If prosecutors seek a remand, however, they have two arguments available to them. The first and

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<sup>428</sup> 28 U.S.C. § 1442(a).

<sup>429</sup> *Caver v. Cent. Ala. Elec. Coop.*, 845 F.3d 1135, 1142 (11th Cir. 2017) (quoting *Florida v. Cohen*, 887 F.2d 1451, 1453 (11th Cir. 1989)).

<sup>430</sup> 28 U.S.C. § 1446(b).

<sup>431</sup> *Caver v. Cent. Alabama Elec. Coop.*, 845 F.3d 1135, 1145 (11th Cir. 2017).

<sup>432</sup> *Mesa v. California*, 489 U.S. 121 (1989).



strongest, which we have already discussed at length, is that Trump’s conduct does not implicate any colorable defense. But there is a second possibility that merits further exploration. It is that the statutory text does not expressly cover the President as an “officer . . . of the United States” for purposes of removal. The phrase “officer [] of the United States” is a term of art with constitutional foundation: Under the Appointments Clause, the president is vested with authority to appoint “all . . . Officers of the United States,” and the Constitution elsewhere refers separately to the president as distinct from the “Officers” he appoints.<sup>433</sup> Invoking this distinction, prosecutors could argue on textualist grounds that Section 1442(a) does not cover Trump, even though that outcome may seem counterintuitive from a policy perspective (since the major purpose of this statute is to afford a federal forum for the resolution of federal defenses implicating federal interests). This approach merits further analysis.

**D. Prosecuting President Trump Would Not Violate the First Amendment.**

President Trump may contend that prosecuting him for statements he made to Raffensperger, Watson, Kemp, and other Georgia officials violates his free speech rights under the First Amendment. Any such contentions would be meritless, for two core reasons.

*First*, it is black letter law that “speech integral to criminal conduct, such as fighting words, threats, and solicitations, remains categorically outside” the protection of the First Amendment.<sup>434</sup> The Supreme Court influentially articulated this principle in *Giboney v. Empire Storage & Ice Company* and has reaffirmed it many times since then.<sup>435</sup> On that basis, courts have repeatedly upheld laws criminalizing solicitation, conspiracy, and the like—the very types

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<sup>433</sup> See *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021); *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 497–98 (2010).

<sup>434</sup> *United States v. Williams*, 553 U.S. 285, 297 (2008).

<sup>435</sup> *Giboney v. Empire Storage & Ice Company*, 336 U.S. 490, 498 (1949); *United States v. Williams*, 553 U.S. 285, 297 (2008); *United States v. Stevens*, 559 U.S. 460, 468–69 (2010).

of offenses that Trump could be potentially be charged with under Georgia’s criminal code.<sup>436</sup> Indeed, the Georgia Supreme Court has previously considered and rejected a First Amendment challenge to the state’s general criminal solicitation statute (and properly narrowed the law in so doing).<sup>437</sup>

*Second*, Trump was not engaged in core political speech. He was engaged in furtive, post-election phone calls with senior state officials whose purpose was to solicit and threaten these officials in their counting and tabulation of votes (and in their certification of the election results). Under these circumstances, the application of Georgia’s criminal laws should pass muster under any level of scrutiny. Georgia has compelling interests in upholding the integrity of its electoral process, protecting its citizens’ right to vote, thwarting fraud and corruption, prohibiting false statements and witness tampering, and requiring its officials to uphold their oaths of office. Applying Georgia’s criminal and election codes to Trump’s conduct would be properly tailored to advance those interests, which would be fatally undermined if candidates and current officeholders could freely engage in the solicitation and threats witnessed here.

**E. Prosecuting President Trump Would Not Amount to Retaliatory or Selective Prosecution.**

President Trump may seek to evade criminal liability by asserting that he has been unfairly singled out. As a matter of constitutional law, any such argument would fail.<sup>438</sup>

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<sup>436</sup> See, e.g., *United States v. Petrovic*, 701 F.3d 849, 855 (8th Cir. 2012); *United States v. Coss*, 677 F.3d 278, 289 (6th Cir. 2012); *United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010); *United States v. Bly*, 510 F.3d 453, 458 (4th Cir. 2007).

<sup>437</sup> *State v. Davis*, 246 Ga. 761, 761-62 (1980).

<sup>438</sup> At the outset, we note that there is an open question as to the proper remedy for a retaliatory or selective prosecution claim. In particular, it is unclear whether it is appropriate to raise an allegation of retaliatory or selective prosecution as a basis for dismissal in a criminal case, or instead, whether such claims must be pursued civil claims under 42 U.S.C. § 1983. See, e.g., *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019) (claim brought by defendants in criminal prosecution for alleged First Amendment violation); *Reichle v. Howards*, 566 U.S. 658, 666 (2012) (plaintiff brought retaliatory arrest claim under § 1983). We do not delve into that complex question here because, regardless of the remedy, President Trump’s claims would fail on the merits.

## Selective Prosecution

To prove selective prosecution based on political affiliation, Trump would have to demonstrate “a credible showing of different treatment of similarly situated persons.”<sup>439</sup> But he will not be able to do so. To begin, there are no similarly situated persons. Courts have held that, for the purposes of selective prosecution claims, “similarly situated” means “similarly situated in all material respects.”<sup>440</sup> But no one is similarly situated in all material respects with the outgoing President of the United States. He wields enormous power and influence by dint of his office. As such, the only appropriate comparator here would be another president who has sought to influence the outcome of an election in Georgia. To our knowledge, no other president has done so.

Trump may try to argue that the Georgia Supreme Court has, at least for the purposes of some issues in criminal trials, considered individuals “similarly situated . . . if they are charged with the same crime or crimes.”<sup>441</sup> As explained above, that is not the governing standard for selective prosecution claims under the Equal Protection Clause. Yet even if it were, Trump still could not show the requisite differential treatment: His crimes involved a magnitude and severity of wrongdoing that make productive comparison all but impossible.

In February 2021, the Georgia secretary of state’s office issued a statement mentioning the fourteen “most noteworthy” cases of election fraud cases “bound for prosecution.”<sup>442</sup> Of these, three cases were about violations that went beyond an individual vote (many of the

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<sup>439</sup> *United States v. Armstrong*, 517 U.S. 456, 470 (1996). *Armstrong* was a case about selective prosecution on the basis of race, but criminal defendants have also alleged selective prosecution under the Fifth and Fourteenth Amendments on the basis of political affiliation. See *Walker v. United States*, No. CV109-036, 2012 WL 902797 (S.D. Ga. Mar. 5, 2012) (applying *Armstrong* standard); *United States v. Scrusby*, No. 2:05CR119-MEF, 2012 WL 139259 (M.D. Ala. Jan. 18, 2012) (same).

<sup>440</sup> *Lewis v. City of Union City, Georgia*, 918 F.3d 1213, 1231 (11th Cir. 2019).

<sup>441</sup> *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 274 (2008).

<sup>442</sup> *State Election Board Refers Voter Fraud Cases for Prosecution*, Georgia Secretary of State (Feb. 2021) [https://sos.ga.gov/index.php/elections/state\\_election\\_board\\_refers\\_voter\\_fraud\\_cases\\_for\\_prosecution](https://sos.ga.gov/index.php/elections/state_election_board_refers_voter_fraud_cases_for_prosecution).

violators were felons who allegedly voted despite their not being eligible to vote under Georgia law).<sup>443</sup> One of these cases involved the New Georgia Project, an organization committed to registering voters of color and advancing civil rights, perhaps most notably making an open commitment to “reproductive justice.”<sup>444</sup> Another involved a canvasser for the Coalition for the People’s Agenda, “an umbrella organization of human rights, civil rights, labor, women’s, youth, and peace and justice groups” that advocates for criminal justice reform and voting rights, among other causes.<sup>445</sup> At least two of the three cited prosecutions involving larger-scale voter fraud were for organizations at the opposite end of the ideological spectrum from President Trump. Based on this evidence, Trump would not be able to prove that he has been unconstitutionally targeted for selective prosecution.

### **Retaliatory Prosecution**

To establish a retaliatory prosecution claim, Trump would have to “plead and prove the absence of probable cause for the underlying criminal charge.”<sup>446</sup> A final determination of probable cause must come after the charging decision is made and (if charges are filed) the state’s evidence is in the public record. Still, we already have the tape of the Raffensperger conversation and much more. Trump’s publicly reported conduct already appears well on the way to clearing the threshold of probable cause for prosecution, and we have explained why at considerable length. It is worth noting that we have seen no public evidence whatsoever suggesting that any charges against him would be in retaliation for his political viewpoints. Indeed, the District Attorney’s Office should not initiate charges against President Trump unless

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<sup>443</sup> *Id.*

<sup>444</sup> See The New Georgia Project, About, THE NEW GEORGIA PROJECT, <https://newgeorgiaproject.org/about>.

<sup>445</sup> The Georgia Coalition for the People’s Agenda, Mission & History, THE PEOPLE’S AGENDA, <https://thepeoplesagenda.org/about-us>.

<sup>446</sup> *Nieves*, 139 S. Ct. at 1723 (2019); see *Hartman v. Moore*, 547 U.S. 250 (2006); *DeMartini v. Town of Gulf Stream*, 942 F.3d 1277 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 660 (2020).

it independently concludes (after a thorough and fair investigation of the facts and law) that there is probable cause to indict him for each crime.

**F. Trump’s Potential Claim That He Honestly Believed He Won the Election in Georgia Will Not Negate His Intent.**

As discussed earlier in Section III.A.1, Trump may argue that he did not have the requisite criminal intent to be convicted because he honestly believed that he had won the election in Georgia, so he could not have had intended to solicit election fraud or any related crime. Instead, he was merely intending for state officials to use their authority over tabulating votes and certifying vote totals to ensure that the “true” result would emerge. As we explain, that defense is implausible and, in any event, would be insufficient to defeat his prosecution.

Looking to the full context and circumstances of Trump’s interactions with Kemp, Raffensperger, Watson, Carr, and others—as well as to his broader pattern of conduct throughout the relevant time period—it seems clear that Trump intended that Georgia officials engage in conduct that would alter the vote count, undo the certification of the election, and produce a new certification in Trump’s favor. Even if Trump acted in what he considered good faith, the conduct that he solicited, demanded, urged, and threatened was itself criminal—and for that reason, Trump can be held liable.

But there is powerful evidence that Trump was not acting in good faith, or at least that he acted with reckless indifference to the truth: He appeared to want to retain power by any means necessary, and willing to do whatever it took to make that happen, regardless of how the people of Georgia voted. The record here is uniquely free of any evidence that would support a reasonable person in the belief that Trump actually won the 2020 presidential election in Georgia. To the contrary, there is an extraordinary absence of any evidence suggestive of

irregularity in any respect in the Georgia process.<sup>447</sup> The fact that the existing outcome was arrived at and consistently reaffirmed in a process overseen by Republican officeholders, in a series of acts against interest,<sup>448</sup> is a powerful refutation of any such argument Trump might offer.<sup>449</sup> And the categorical rejection of a whole range of allegations offered in lawsuits as some semblance of evidence for Trump's claims, by courts again having no interest but to apply the law fairly, also weighs heavily against any such argument.<sup>450</sup> So, while no one can be sure that Trump would fail to seduce a jury with his claim that he really thought he had won and thus was just trying to secure a fair result, there is no plausible argument that such beliefs can have any substantial factual basis.

Thus, there is nothing unfair or anomalous about holding Trump liable. He was the President of the United States. He is expected to understand, to know, and to follow the law. His calls to senior Georgia officials were not boundary cases. They leapt miles past the line that any reasonable official would recognize as implicating serious potential criminal liability. Trump had no warrant to engage in this conduct. Like every other state, Georgia maintains robust procedures to ensure the accuracy and fairness of its elections. Trump was free to raise objections through the appropriate channels. He was not free to unilaterally decide he had won and then break the law based on that belief. The criminal code is not written only for electoral losers. It applies equally to all candidates.

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<sup>447</sup> Press Release, Office of Georgia Secretary of State Brad Raffensperger, Historic First Statewide Audit of Paper Ballots Upholds Result of Presidential Race (Nov. 19, 2020), [https://sos.ga.gov/index.php/elections/historic\\_first\\_statewide\\_audit\\_of\\_paper\\_ballots\\_upholds\\_result\\_of\\_presidential\\_race](https://sos.ga.gov/index.php/elections/historic_first_statewide_audit_of_paper_ballots_upholds_result_of_presidential_race).

<sup>448</sup> Fowler, *supra* note 52.

<sup>449</sup> Siders & King, *supra* note 53.

<sup>450</sup> Reuters Staff, *supra* note 54.

Although we have not discovered any reported charges under Georgia’s election laws for altering the vote count, cases involving vote-count alteration from around the country prove the point. Perhaps the highest-profile recent prosecution arose from a mid-2010s scheme in Philadelphia involving ballot-stuffing and false vote total certifications in local primary elections. A former Judge of Elections pleaded guilty in May 2020 to federal crimes resulting from this scheme, and additional conspiracy charges remain pending.<sup>451</sup> The indictment does not allege that altering the vote totals changed the result of any race, because that is not relevant to either the overt criminal act or the necessary state of mind. What is relevant is simply that the defendants conspired to illegally alter vote totals.<sup>452</sup> So too here, so long as Trump intended that Raffensperger manipulate the vote totals (or that other senior officials violate the law in their own right), he can properly be charged.

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<sup>451</sup> Press Release, U.S. Department of Justice, Office of Public Affairs, Former Philadelphia Judge of Elections Convicted of Conspiring to Violate Civil Rights and Bribery (May 21, 2020), <https://www.justice.gov/opa/pr/former-philadelphia-judge-elections-convicted-conspiring-violate-civil-rights-and-bribery>; United States v. Myers, Criminal Case No. 2:20-cr-00210-PD (E.D. Pa. July 21, 2020), <https://www.justice.gov/opa/press-release/file/1296896/download>.

<sup>452</sup> A review of four other reported cases since 2013 of people convicted of altering the vote count reveals the principle applies broadly. See The Heritage Foundation, Election Fraud Cases, THE HERITAGE FOUNDATION, [https://www.heritage.org/voterfraud/search?combine=&state=All&year=&case\\_type=All&fraud\\_type=24511](https://www.heritage.org/voterfraud/search?combine=&state=All&year=&case_type=All&fraud_type=24511).

## Conclusion

President Trump lost the 2020 election in Georgia by a margin of nearly 12,000 votes, and that outcome was confirmed and certified by the duly designated election officials in the state, with Republican Secretary of State Raffensperger and Republican Governor Kemp at the top of the process.<sup>453</sup> Those officials formally certified the result 17 days after the election following a hand recount of all ballots cast, which altered the original count by only a few hundred votes. That result was recertified by Raffensperger on December 7.<sup>454</sup>

Notwithstanding the absence of any facts suggesting irregularity or any reason to question the result thus certified, the Georgia electoral process and vote count was subjected to sustained assault by the ex-president and his supporters. Trump led that effort as part of his repeated insistence that the conclusion of an overall Biden victory was “a fraud on the American public.”<sup>455</sup> This drumbeat of lies about the electoral outcome began on election day—indeed it preceded it, as Trump hinted starting in the summer of 2020 that he could only lose if the election were fraudulent and withheld any commitment to recognize any electoral result that went against him.<sup>456</sup> While his claims of fraud applied to the nation as a whole and were quite specific in the context of several other states that Trump had also hoped to carry, his efforts to change the certified result in Georgia were unusually intense and recurring, and involved Trump personally in acts that have been documented to a substantial extent.

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<sup>453</sup> Weigel & Tierney, *supra* note 67.

<sup>454</sup> Scanlan, *supra* note 82.

<sup>455</sup> Dale, *supra* note 15.

<sup>456</sup> Sonmez, *supra* note 93.



Trump's attack specifically directed at the Georgia outcome was multi-faceted and began even as the vote count was still underway. It was echoed by several U.S. Senators,<sup>457</sup> and by his lead lawyer, Rudy Giuliani.<sup>458</sup> It also became the grist for a barrage of lawsuits brought by Trump lawyers or by allies, which over time trafficked in bizarre conspiracy theories which were discredited by the courts in which they were filed. At the center of this effort were Trump's personal attempts to overturn the Georgia result by altering the conduct of state officials charged with the ultimate responsibility to honestly oversee the administration and certification of the election.

As recounted at length in Section I, evidence indicates that the actions that he took personally included various telephone and in-person conversations, all after the results had already been certified, in which he:

- On December 5, urged Governor Kemp to help change the outcome through several actions and attacked Kemp that same day at a rally for his failure to act;<sup>459</sup>
- Urged Georgia's Republican Attorney General Chris Carr not to oppose a lawsuit filed December 7 by the State of Texas in the U.S. Supreme Court, seeking to change the electoral outcome in certain states;<sup>460</sup>
- On December 23, urged the chief investigator in Raffensperger's office, Frances Watson, to find dishonesty in connection with electoral complaints her office was then investigating;<sup>461</sup>

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<sup>457</sup> Amy Gardner, Tom Hamburger & Josh Dawsey, Graham's post-election call with Raffensperger will be scrutinized in Georgia probe, person familiar with inquiry says, *The Washington Post* (Feb. 12, 2021), [https://www.washingtonpost.com/politics/lindsey-graham-georgia-investigation/2021/02/12/f12faa82-6d6b-11eb-9f80-3d7646ce1bc0\\_story.html](https://www.washingtonpost.com/politics/lindsey-graham-georgia-investigation/2021/02/12/f12faa82-6d6b-11eb-9f80-3d7646ce1bc0_story.html).

<sup>458</sup> Evans, *supra* note 149.

<sup>459</sup> Gardner, Itkowitz, & Dawsey, *supra* note 136.

<sup>460</sup> Cohen, Morris, & Hickey, *supra* note 19.

<sup>461</sup> Morris & Murray, *supra* note 31.

- Engaged in various communications with officials of the U.S. Department of Justice in an unsuccessful effort to induce the Department to intervene to influence a change in the result as certified in Georgia;<sup>462</sup>
- On January 2, during an hour-long call with Secretary of State Raffensperger, urged him to “find 11,780 votes which is one more than we have because we won the state,” and observed that it was “a big risk to you” and “very dangerous” to insist that there was “no criminality” in the administration of the Georgia election.<sup>463</sup>

It is an extraordinary tribute to the integrity of the Georgia state officials, whom Trump forcefully implored to abandon their public trust, that none of them—not a single one—succumbed to Trump’s efforts to change the outcome of the election. But that fact—which was critical in achieving the ultimate certification of the election by the Senate on January 6—does not alter the nature of the conduct that Trump personally engaged in. Nor does it alter the nature or importance of Georgia’s interest in policing and punishing conduct such as his.

In our federal system of government which the Founders put in place, the states are assigned a singular role in the conduct of elections, including those for senators, congresspersons, and the president. While the federal government has an after-the-fact role in policing violations of fair and honest voting procedures, it has long been clear that the actual administration and counting of votes, for federal as well as state offices, is the responsibility of the states. Thus, the state interest in conducting a fair election, and in making sure that the votes are tallied fairly in accord with established rules, is the preeminent interest at stake, even where an election of the president is concerned.

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<sup>462</sup> Benner, *supra* note 182.

<sup>463</sup> Gardner & Firozi, *supra* note 1.

It is therefore not at all surprising or odd that, in the face of conduct like that addressed in this report, the primary investigative and enforcement effort presently underway is being pursued at the state level—here by the District Attorney of Fulton County, the locale whose vote tally would have been most substantially corrupted by the actions that Trump and his allies forcefully urged. Given the primacy of state responsibility, it is also not surprising that the State of Georgia has an array of statutes that seem well-tailored to address the conduct at issue.

As discussed in Section III, the statutes that can be brought to bear (depending, of course, on the evidence) include several specifically focused on efforts to disrupt the state's performance of its responsibilities to conduct elections. They are: solicitation of conduct by officials that would amount to election fraud; intentional interference with an election official's performance of election-related duties; and conspiracy, meaning an agreement among multiple people, to engage in electoral fraud. Other possible statutory violations include an array of general prohibitions not limited to conduct impacting on elections, but rather focused on more broadly applicable duties encompassing election misconduct of the kind here alleged, such as false statements in connections with official matters, attempts to influence government officials in improper ways, solicitation of action violative of public officer oaths, and several other provisions. Finally, it is possible, as mentioned in a public statement by the Fulton County District Attorney, that consideration might be given to action under the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act, since violation of a number of the statutes referenced above constitute predicate acts that are the essential building blocks in developing a prosecution under that statute.

In addition to the affirmative evidence of a remarkable, concerted campaign, including intense and direct activities by Trump himself to alter the outcome of the Georgia presidential election, any possible criminal action must of course be assessed in light of counterarguments and legal defenses that Trump might offer. We discuss those issues in Section IV above. We explained that the legal centerpiece of the defense is likely to be the claim that Trump cannot be second-guessed in court for things he did as president. But substantial authority establishes that this broad-based immunity from liability at most extends to actions taken by the president that falls somewhere within the scope of his lawful duties. The facts and law are clear—given the responsibility of the State of Georgia to oversee and certify the election, and the absence of any presidential responsibility in determining that outcome—that Trump’s efforts to twist the arms of various state officials to change the outcome in his favor were well outside the scope of his responsibilities.

In addition to the immunity issues that will surely anchor the legal response to any charges, Section IV also addresses other likely defenses. They include claims that Trump’s conduct was protected by the First Amendment; accusations of selective or retaliatory prosecution; and an insistence that Trump’s conduct was innocent because he truly believed his own claims of widespread election fraud. Based on our review of the public record concerning Trump’s conduct—and our understanding of relevant constitutional and legal principles—we explain that these defenses would be meritless.

Beyond analyzing the publicly available facts and the law, it is not our purpose to say what will or should happen as a result of the Fulton County investigation now underway. The public trust of prosecutors, like that of election officials, is a key element of our system of government, and to advance that trust, those officials are charged with unique powers of

investigation, as well as the ultimate judgment whether, in light of all the evidence and circumstances, a criminal prosecution is warranted by the law and the facts. Among other considerations limiting the certainty of any conclusions one might draw from this report is the fact that criminal investigations are conducted in secret, for the benefit of all concerned. Thus, we are not privy to the evidence that may have been unearthed by the state investigators, beyond the information in the public record, which is the entire basis of the discussion offered here. We therefore do not make a conclusive judgment or prediction of the outcome of the investigation or the actions the DA should take.

One core value that prosecutors should elevate—indeed, a foundational principle of our American rule of law system to be protected at all times—is the notion that our laws apply equally to everyone and that no person is above them.<sup>464</sup> If the kind of conduct alleged against the president—substantial wrongdoing to secure personal political advantage—would result in the investigation and prosecution of others, then the former holder of our nation’s highest office should not get a pass. Neither should those associated with him who were embroiled in the same alleged misconduct.

Of course, in making her charging decisions, the DA cannot ignore the fact that Trump was a political candidate of another political party than her own. He and others will surely argue, and loudly so, that a prosecution (if any) is an act of political revenge. That is undoubtedly part of the reason that, with respect to possible federal charges against Trump,<sup>465</sup> President Biden has

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<sup>464</sup> This paragraph and the ones that follow are adapted from another report by some of the authors analyzing the former president’s criminal liability for other acts in another jurisdiction. Norman Eisen, Donald Ayer, E. Danya Perry, & John R. Cuti, *New York State’s Trump Investigation: An analysis of the reported facts and applicable law*, GOVERNANCE STUDIES AT BROOKINGS (June 28, 2021), <https://www.brookings.edu/research/new-york-states-trump-investigation-an-analysis-of-the-reported-facts-and-applicable-law/>.

<sup>465</sup> Tribe, McQuade, & Vance, *supra* note 263; Donald Ayer & Norman Eisen, *Trump's conduct needs a federal investigation*, CNN (last updated Aug. 20, 2021), <https://www.cnn.com/2021/08/20/opinions/trump-conduct-needs-federal-investigation-ayer-eisen/index.html>.

left the matter to Attorney General Merrick Garland and the Department of Justice.<sup>466</sup> The Fulton County DA is even further removed because she was not Trump’s direct opponent. While some will claim political retaliation no matter the circumstances of a prosecution of an ex-president, a state prosecutor may be the best suited to pursue such a case because they do not serve at the pleasure of the sitting president. She and her colleagues in the DA’s office oversee the jurisdiction where Trump made perhaps his most egregious—and most well-documented—assault upon the 2020 election. On their shoulders falls the responsibility for protecting the integrity of our rule of law, our Constitutional republic, and the election system on which its legitimacy rests. It is a powerful advantage of the American system of federalism that state authorities are available to address the unusual and indeed unique circumstances of this case.

There can be no doubt that prosecutors should take extra care and deliberation when considering charges against former public officials and those associated with them. But if they were somehow exempt, or ultimately subject to different and lower standards of liability, that would betray the core ideas of American justice. DA Willis forcefully articulated this principle when she recently stated that “As a district attorney, I do not have the right to look the other way on any crime that may have happened in my jurisdiction.”<sup>467</sup> Justice Kavanaugh put it more succinctly in *Trump v. Vance*: “No one is above the law.”<sup>468</sup> For that reason, the Fulton County investigation of Donald Trump and his associates is well-founded. We, and the nation, await its outcome.

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<sup>466</sup> Andrew Solender, White House Says ‘Independent’ DOJ Will Decide On Criminally Prosecuting Trump, FORBES (Feb. 10, 2021), <https://www.forbes.com/sites/andrewsolender/2021/02/16/white-house-says-independent-doj-will-decide-on-criminally-prosecuting-trump/?sh=1feffe926509>.

<sup>467</sup> Murray & Morris, *supra* note 11.

<sup>468</sup> *Vance*, 140 S. Ct. at 2432 (Kavanaugh, J., concurring in the judgment); see *Id.* at 2420 (“Since the earliest days of the Republic, ‘every man’ has included the President of the United States.”).

## About the Authors

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