IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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

STATE'S RESPONSE TO DEFENDANT CHESEBRO'S MOTION TO DISMISS UNDER THE SUPREMACY CLAUSE

COMES NOW, the State of Georgia, by and through Fulton County District Attorney Fani T. Willis, and responds in opposition to Defendant Kenneth John Chesebro's Motion to Dismiss under the Supremacy Clause. The Defendant seeks a dismissal of the indictment issued against him by a Fulton County grand jury based on novel, flawed, and unsupported misapplications of federal and state law and the Supremacy Clause. The Defendant's argument for immunity is not immediately clear, nor the legal basis of his motion readily apparent, beyond that he asks the Court to dismiss the indictment against him and that he, in passing, refers to the Supremacy Clause of

the United States Constitution. The Defendant is unable to direct this Court's attention to even a single case in support of his position. He fails to set forth any relevant legal standards. He makes sweeping conclusions concerning the operation of the Electoral Count Act, improbably claiming that the State has the authority to prosecute acts committed by him only during certain arbitrary date ranges, and he cites to no case—nor even a general legal principle—that would permit the remedy he seeks. For the reasons set forth below, the Defendant's motion should be denied.

I. Dismissal of the indictment based on Supremacy Clause immunity is unavailable to Defendant, as he is not and has never been a federal officer.

The Defendant's motion asks the Court to dismiss the indictment against him "as a violation of the Supremacy Clause of Article VI of the U.S. Constitution." Def.'s Mot. at 1. If the Defendant seeks to have his case dismissed on grounds of Supremacy Clause immunity, he is clearly not entitled to such relief. "Supremacy Clause immunity is a 'seldom-litigated corner' of constitutional law." *Texas v. Kleinert*, 855 F.3d 305, 314 (5th Cir. 2017) (quoting *Wyoming v. Livingston*, 442 F.3d 1211, 1213 (10th Cir. 2006). "It applies only when a *federal officer* is 'held in a state court to answer' for (1) an act that federal law 'authorized' the officer to undertake, and (2) 'in doing that act, he did

no more than what was necessary and proper for him to do.'" *Id.* (emphasis added) (quoting *Cunningham v. Neagle*, 135 U.S. 1, 75 (1890)). "For conduct to be 'necessary and proper,' an officer must subjectively believe that his actions were appropriate to carry out his federal duties, and that belief must be objectively reasonable." *Id.*

Any inquiry as to whether the Defendant is entitled to Supremacy Clause immunity should end almost as soon as it begins: the Defendant is not, was not, and never has been a federal officer.

His motion does not allege that he is or ever was. Based on that alone, he is not entitled to Supremacy Clause immunity, and the Court should deny his motion.

II. Dismissal of the indictment based on federal preemption is unavailable to the Defendant as he points to no express or implied constitutional or statutory provision preempting states from prosecuting fraud committed by fake presidential electors.

The Supremacy Clause provides that the Constitution, federal statutes, and treaties constitute "the supreme Law of the Land." *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020) (quoting ART. VI, CL. 2.). In any case where state law is preempted by federal law, "federal restrictions or rights that are said to conflict with state law must stem from either the Constitution itself or a valid statute enacted by Congress. 'There is no federal preemption *in vacuo*' … ." *Id.* (quoting *Puerto Rico Dept. of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U.S. 495, 503 (1988)). Federal law can preempt state law both expressly and impliedly. *Id.* Here, the Defendant has not pointed to any constitutional or statutory provision that expressly preempts the State from prosecuting fraud committed by fake presidential electors, and there is none. For federal law to impliedly preempt state law, that preemption still "must be grounded 'in the text and structure of the statute at issue.'" *Id.* (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

Federal preemption can be implied "where Congress has legislated so comprehensively that it has left no room for supplementary state legislation." *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 140 (1986) (citations omitted). In order to determine whether Congress intended to preempt states from regulating in a particular field, courts "must first identify the field in which this is said to have occurred." *Kansas v. Garcia*, 140 S. Ct. at 804. If the field covered by the federal authority is not the same field as that regulated by the allegedly conflicting state law, then there is no preemption. *See Id.* at 805.

The Defendant seems to argue that because the Electoral Count Act provides the procedure to be used by Congress to count electoral college votes, it somehow preempts states from prosecuting fraud and other offenses committed in the course of submitting electoral college votes by anyone, whether they are legitimate or fake presidential electors: "Thus, any action taken after December 8, 2020, if actually illegal, would be in violation of *federal* law and subject to the Supremacy Clause; wherefore, a State's authority to determine who its valid Presidential Electors are reverts back to Congress after the Safe Harbor deadline." Def.'s Mot. at 6 (emphasis in original). The Defendant's logic here is difficult to follow and wholly unsupported. The federal statutes that direct how Congress counts electoral college votes are fundamentally unrelated to Georgia's criminal statutes that prohibit fraud and harmful lies to departments and agencies of state government, and they serve entirely different functions. *See Kansas v. Garcia*, 140 S. Ct. at 805 (2020). The Electoral Count Act provides no mechanism for prosecuting fraud, and Georgia's criminal laws provide no mechanism for counting the nation's electoral college votes. Where the federal and state laws at issue serve entirely different purposes and in no way affect the operation of each other, there is no implied preemption. *Id.*

"Pre-emption may also be found where state legislation would impede the purposes and objectives of Congress." *R.J. Reynolds Tobacco Co.*, 479 U.S. at 140. It is unimaginable that Georgia's criminal statutes that prohibit fraud could somehow impede the purposes and objectives of Congress in conducting an accurate count of electoral college votes. Indeed, the entire purpose of the Electoral Count Act is to provide for a lawful and orderly accounting of each state's electoral college votes to provide for a peaceful transition of power following each presidential election. Prosecuting those who seek to obstruct that process under state criminal laws is entirely consistent with the purposes and objectives of the Electoral Count Act.

Finally, there is no preemption where it is possible to comply both with the Electoral Count Act and the state criminal statutes under which the Defendant is charged. *See Kansas v. Garcia*, 140 S. Ct. at 806. Indeed, the actual duly elected and qualified electors from the State of Georgia did just that. Accordingly, to the extent that the Defendant argues federal preemption bars his prosecution, his motion to dismiss should be denied.

III. Insofar as Defendant seeks dismissal of the indictment based on a theory of double jeopardy, he is not entitled to it because the dual sovereignty doctrine allows for both state and federal prosecution of the same defendant based on the same conduct.

The Defendant argues in his motion that "[u]nder the Supremacy Clause, the State cannot prosecute or otherwise regulate conduct that was entirely within the ambit of federal authority." Def.'s Mot. at 6. Again, the Defendant's argument is obscure, but the State responds here to any assertion that double jeopardy prevents prosecution by the State for acts that can also be prosecuted under federal law. Such an argument must fail. For more than a century, the United States Supreme Court has held that both the federal government and states may concurrently prosecute the same conduct if it violates both state and federal law. *See United States v. Lanza*, 260 U.S. 377 (1922). "[T]wo sovereignties, deriving power from different sources, [are] capable of dealing with the same subject-matter within the same territory. ... Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." *Id.* at 382. The Supreme Court has regularly, and recently, applied the dual sovereignty doctrine. *See Gamble v. United States*, 139 S. Ct. 1960 (2019) (a defendant can be convicted of both federal felon in possession of a firearm statute and Alabama felon in possession of a firearm statute for the same act without violating double jeopardy); *Abbate v. United States*, 359 U.S. 187 (1959) (defendant can be convicted of both state and federal crimes for the same conspiracy to destroy telephone company facilities without violating double jeopardy).

Here, the same analysis applies. While it is true that the Defendant could potentially be indicted and convicted for several federal crimes, including Conspiracy to Defraud the United States in violation of 18 U.S.C. § 371, Conspiracy to Obstruct an Official Proceeding in violation of 18 U.S.C. § 1512(k), and Conspiracy Against Rights in violation of 18 U.S.C. § 241, arising out of the same acts alleged in this indictment, those concurrent prosecutions and any resulting convictions would not violate double jeopardy because the prosecuting sovereigns are independent of one another and derive their power to prosecute from different sources. Accordingly, to the extent that the Defendant argues that double jeopardy bars this prosecution, his motion to dismiss should be denied.[1]

IV. If the Defendant seeks dismissal of the indictment against him on any other ground, the Court should require him to further particularize his motion, citing to law in support of his positions, so that the State can properly respond.

Pursuant to this Court's Amended Standing Case Management Order for Criminal Cases in Judge Scott McAfee's Division, "[o]nly those motions sufficiently particularized as to provide legal notice to the opposing parties will be considered by the Court. … Motions must specify, with particularity, the item, statement, or event at issue and must be tailored to the facts of the case at hand." Order at 5. For that reason, should the Defendant's motion seek relief on any ground not addressed by the State in this response, the State respectfully requests that the Court order the Defendant to further particularize his motion to adequately give the State notice of any remaining issues before the Court.

[1] It should be noted that even a meritorious double jeopardy argument would not be ripe in any court until the Defendant is either convicted or acquitted in another court.

As set forth above, the Supremacy Clause to the United States Constitution does not prohibit the State's prosecution of the Defendant here, and the Court should deny his request to have the charges against him dismissed.

Respectfully submitted this 27th day of September 2023,

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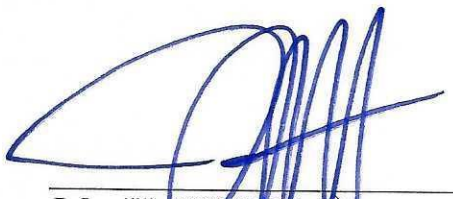
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of this STATE'S RESPONSE TO DEFENDANT CHESEBRO'S MOTION TO DISMISS UNDER THE SUPREMACY CLAUSE upon all counsel who have entered appearances as counsel of record in this matter via the Fulton County e-filing system.

This 27th day of September 2023,

FANI T. WILLIS
District Attorney
Atlanta Judicial Circuit



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