

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 GENERAL DEMURRER TO
THE INDICTMENT BASED ON FIRST AMENDMENT PROTECTIONS**

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 General Demurrer to the Indictment Based on First Amendment Protections. The Defendant asks this Court to dismiss the indictment against him because he claims that his actions, as alleged in the indictment, are protected by the First Amendment. The Defendant's arguments fail to recognize decades of federal and state law that repeatedly deny First Amendment protection in the manner asserted in his motion, and for the reasons set forth below, the Court should deny the motion.

I. INTRODUCTION

As a threshold matter, while the Defendant calls his pleading a demurrer, it challenges neither the sufficiency of the substance of the indictment nor the sufficiency of the form of the indictment. *See State v. Cohen*, 302 Ga. 616, 617 (2017). He has filed various other pleadings that do challenge the indictment in those ways, so it therefore appears that the pleading is not a demurrer, but instead a constitutional challenge to the criminal statutes that the Defendant is alleged to have violated based on the First Amendment to the United States Constitution. Indeed, “there is no magic in mere nomenclature, even in describing pleadings. Under our rules of pleading substance, not mere nomenclature, controls.” *Marshall v. State*, 229 Ga. 841, 841 (1972) (citing *Girtman v. Girtman*, 191 Ga. 173 (1940); *McDonald v. State*, 222 Ga. 596 (1966)) (internal quotation marks omitted). Accordingly, the State responds to the Defendant’s pleading here as if it were a special plea in bar challenging the constitutionality of O.C.G.A. §§ 16-9-1(b), 16-10-20, 16-10-20.1(b)(1), 16-10-23, and 16-14-4(c) and the manner in which those statutes have been applied in this case.

II. PROSECUTION OF THE DEFENDANT FOR OFFENSES INVOLVING FRAUD AND LIES TO THE GOVERNMENT DOES NOT OFFEND THE FIRST AMENDMENT

The Defendant is charged with seven offenses, including Conspiracy to Commit Impersonating a Public Officer, Conspiracy to Commit Forgery in the First Degree, Conspiracy to Commit False Statements and Writings, and Conspiracy to Commit Filing False Documents. Each of the applicable statutes for these crimes prohibit conduct involving fraud:

- 1) **O.C.G.A. § 16-10-23.** Impersonating a public officer or employee. “A person who falsely holds himself or herself out as a peace officer, officer of the court, or other

public officer or employee with *intent to mislead another* into believing that he or she is actually such officer commits the offense of impersonating an office”

- 2) **O.C.G.A. § 16-10-9(b).** Forgery. “A person commits the offense of forgery in the first degree when *with the intent to defraud* he or she knowingly makes, alters, or possesses any writing, other than a check, in a fictitious name or in such manner that the writing as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority and utters or delivers such writing.”
- 3) **O.C.G.A. § 16-10-20.** False statements and writings, concealment of facts, and fraudulent documents in matters within jurisdiction of state or political subdivisions. “A person who 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 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 of this state”
- 4) **O.C.G.A. § 16-10-20.1. Filing false documents.** “Knowingly file, enter, or record any document in a public record or court of this state or of the United States *knowing or having reason to know that such document is false or contains a materially false, fictitious, or fraudulent statement or representation*”

As alleged in the indictment, these charges are based on the December 14, 2020, meeting of 16 fake presidential electors at the Georgia State Capitol in Fulton County, Georgia. At that meeting, several of the Defendant’s co-conspirators executed multiple sets of fraudulent

certificates of vote, falsely claiming to be the duly elected and qualified presidential electors from Georgia, for the purpose of obstructing the joint session of Congress on January 6, 2021. The fraudulent certificates of vote were placed in the United States mail by one of the Defendant's co-conspirators to the President of the United States Senate, the Archivist of the United States, the Georgia Secretary of State, and the Chief Judge of the United States District Court for the Northern District of Georgia. One of the Defendant's co-conspirators also delivered fraudulent documents to Georgia Governor Brian Kemp purporting to notify him that four of Georgia's presidential electors failed to appear and cast electoral college votes and had been replaced by a voice vote with new presidential electors, all of which was false.

The Defendant created the templates for the fraudulent certificates of votes and other fraudulent electoral college documents that were used by his co-conspirators, both in Georgia and in other states. He distributed the templates, along with instructions for executing them and submitting them to Congress and other government entities, to political operatives in Georgia, Arizona, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin. He also prepared and distributed memoranda that advocated for his position that fake electors should meet in multiple states and cast fraudulent electoral college votes for Defendant Donald John Trump. As alleged in the indictment, by the Defendant's own admission, his primary role in the conspiracy was, "to run point on the plan to have all Trump-Pence electors in all six contested States meet and transmit their votes to Congress on Monday, Dec. 14," Indictment at 32, and he stated that "the purpose of having the electoral votes sent in to Congress is to provide the opportunity to debate the election irregularities in Congress, and to keep alive the possibility that the votes could be flipped to Trump." Indictment at 35.

A. Because O.C.G.A. §§ 16-10-23 and 16-9-1(b) prohibit fraud and Counts 9, 11, and 17 specifically allege intent to defraud, there is no First Amendment violation.

In support of his position, the Defendant correctly points out that the United States Supreme Court “has rejected as ‘startling and dangerous’ a ‘free-floating test for First Amendment coverage ... [based on] an ad hoc balancing of relative social costs and benefits.” *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010)). Notably, he omits the immediately following sentences from *Alvarez* that eviscerate his position: “Instead, content-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories [of expression] long familiar to the bar. Among these categories ... [is] **fraud**” *Id.* (citations omitted, emphasis added). This concept is not difficult or new. Indeed, courts for decades have upheld the government’s power to restrict certain categories of speech, including fraud, “the prevention and punishment of which have never been thought to raise any Constitutional problem.” *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942)); *see also United States v. Hansen*, 143 S. Ct. 1932, 1947 n.4 (2023) (holding that “fraudulent representations through speech for personal gain ... are not protected by the First Amendment”); *Illinois v. Telemarketing Assoc.*, 538 U.S. 600, 612 (2003) (holding that “the First Amendment does not shield fraud.”).

The Defendant disregards nearly 100 years of United States Supreme Court precedent in attempting to argue to this Court that his involvement in a conspiracy to commit multiple crimes involving fraud was somehow protected by the First Amendment. Count 9 alleges that the Defendant “unlawfully conspired to cause certain individuals to falsely hold themselves out as the duly elected and qualified presidential electors from the State of Georgia, public officers, *with intent to mislead* the President of the United States Senate, the Archivist of the United States, the Georgia Secretary of State, and the Chief Judge of the United States District Court for the Northern

District of Georgia ... ” in violation of O.C.G.A. § 16-10-23. Count 11 alleges that the Defendant “unlawfully conspired, *with intent to defraud*, to knowingly make a document titled ‘CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM GEORGIA,’ a writing other than a check, in such manner that the writing as made purports to have been made by the duly elected and qualified presidential electors from the State of Georgia ...” in violation of O.C.G.A. § 16-9-1(b). Count 17 alleges that the Defendant “unlawfully conspired, *with intent to defraud*, to knowingly make a document titled ‘RE: Notice of Filling of Electoral College Vacancy,’ a writing other than a check, in such manner that the writing as made purports to have been made by the authority of the duly elected and qualified presidential electors from the State of Georgia ...” in violation of O.C.G.A. § 16-9-1(b).

Each of these statutes prohibits conduct involving fraud, which has “never been thought to raise any Constitutional problem.” *Stevens*, 559 U.S. at 470. Likewise, the Defendant’s violations of them, as charged in the indictment, allege either intent to mislead or intent to defraud. Because the First Amendment does not shield fraud, the Defendant’s First Amendment challenge to Counts 9, 11, and 17, whether facial or as-applied, must fail, and the Court should deny his motion as to those counts.

B. Because O.C.G.A. §§ 16-10-20 and 16-10-20.1 prohibit lies that threaten to deceive and harm the government and Counts 13, 15, and 19 allege such conduct, there is no First Amendment violation.

The Georgia Supreme Court has acknowledged that “[i]t is debatable whether a false statement, standing alone, lacks any First Amendment protection” *Haley v. State*, 289 Ga. 515, 528 (2011). But it is well settled that a false statement knowingly and willfully made to the government or in a matter within its jurisdiction is not protected speech:

“[A] knowingly and willfully false statement that is made knowingly and willfully in a matter within a government agency’s jurisdiction is a lie that threatens to

deceive and thereby harm the government, if only because the government may need to expend time and resources to determine the truth. ... [T]he State may lawfully punish such a course of potentially deceptive and injurious conduct. [I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”

Id. (citations omitted). Accordingly, the Court unequivocally upheld the constitutionality of O.C.G.A. § 16-10-20 because the First Amendment affords no protection to lies that threaten to harm the government. *Id.*

Count 13 alleges that the Defendant “unlawfully conspired to knowingly and willfully make and use a false document titled, ‘CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM GEORGIA,’ with knowledge that said document contained the false statement, ‘WE, THE UNDERSIGNED, being the duly elected and qualified Electors for President and Vice President of the United States from the State of Georgia, do hereby certify the following,’” in violation of O.C.G.A. § 16-10-20. Count 15 alleges that the Defendant “unlawfully conspired to knowingly file, enter, and record a document titled ‘CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM GEORGIA,’ in a court of the United States, having reason to know that said document contained the materially false statement, ‘WE, THE UNDERSIGNED, being the duly elected and qualified Electors for President and Vice President of the United States from the State of Georgia, do hereby certify the following,’ in violation of O.C.G.A. § 16-10-20.1. Count 19 alleges that the Defendant “unlawfully conspired to knowingly and willfully make and use a false document titled, ‘RE: Notice of Filling Electoral College Vacancy,’ with knowledge that said document contained the false statements that DAVID JAMES SHAFER was Chairman of the 2020 Georgia Electoral College Meeting and SHAWN MICAH TRESHER STILL was Secretary of the 2020 Georgia Electoral College Meeting,” in violation of O.C.G.A. § 16-10-20.

Each of these statutes prohibits conduct involving lying to the government, and “the State may lawfully punish such a course of potentially deceptive and injurious conduct.” *Haley*, 289 Ga. at 528. Likewise, the Defendant’s violations of them, as charged in the indictment, allege that he made such harmful lies to the government. Because the First Amendment does not protect such conduct, the Defendant’s First Amendment challenge to Counts 13, 15, and 19, whether facial or as-applied, must fail, and the Court should deny his motion as to those counts.

III. PROSECUTION OF THE DEFENDANT UNDER THE GEORGIA RICO ACT DOES NOT OFFEND THE FIRST AMENDMENT

Turning to the RICO count, the Defendant broadly claims that the First Amendment protects all of the overt acts alleged in the indictment as having been committed by him in furtherance of the RICO conspiracy. As an initial matter, Count 1 charges the Defendant with unlawfully conspiring and endeavoring to conduct and participate in a criminal enterprise, directly and indirectly, through a pattern of racketeering activity, at a time when he was associated with that enterprise. The overt acts he or any other defendant is alleged to have committed are not themselves essential elements of that crime but instead are required to be pled in the indictment “to demonstrate that the conspiracy was actually ‘at work.’” *Nordahl v. State*, 306 Ga. 15, 26 n.22 (2019) (quoting *Carlson v. United States*, 187 F.2d 366, 370 (10th Cir. 1951)). “It is not necessary that an overt act be the substantive crime charged in the indictment as the object of the conspiracy. Nor, indeed, need such an act, taken by itself, even be criminal in character.” *Yates v. United States*, 354 U.S. 298, 334 (1957) (overruled on other grounds by *Burks v. United States*, 437 U.S. 1 (1978)). Additionally, there can be sufficient evidence to convict a defendant of participating in a criminal conspiracy without violating the First Amendment even when the only overt acts proved against him were constitutionally protected speech. *See Yates*, 354 U.S. at 341.

Here, none of the overt acts the defendant committed in furtherance of the RICO conspiracy, as alleged in the indictment, enjoy First Amendment protection. As set forth above, most of the acts charged against the defendant either involved fraud or “lie[s] that threaten[] to deceive and thereby harm the government,” which are afforded no constitutional protection. *See Stevens*, 559 U.S. at 468; *Haley*, 289 Ga. at 528. The remaining acts are “speech integral to criminal conduct,” the restriction of which also has “never been thought to raise any Constitutional problem.” *Stevens*, 559 U.S. at 468 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942)). Even if some—or all—of the overt acts alleged against the Defendant were constitutionally protected speech, a jury could be authorized to convict him of participating in the RICO conspiracy without violating the First Amendment. *See Yates*, 354 U.S. at 341.

Additionally, because the Defendant is charged in Count 1 with participation in a RICO conspiracy, the State is not required to allege that he committed any acts of racketeering activity or overt acts in furtherance of the conspiracy himself. “[E]ach actor in a [RICO] conspiracy is responsible for the overt actions undertaken by all the other co-conspirators in furtherance of the conspiracy. ... [T]here is no requirement in a [RICO] conspiracy case that the State prove that [a defendant] personally committed the underlying predicate offenses.” *Pasha v. State*, 273 Ga. App. 788, 790 (2005).

Finally, in other challenges to RICO actions based on the First Amendment, the United States Supreme Court has held that such actions do not “offend the First Amendment” unless either “it was conduct with a significant expressive element that drew the legal remedy in the first place” or “where a statute based on nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity” *Alexander v. United States*, 509 U.S. 544, 557 (1993). In *Alexander*, the defendant was convicted of violating obscenity laws and was ordered to forfeit

certain assets that were directly related to his racketeering activity. He challenged the forfeiture on grounds that it violated the First Amendment by shutting down his adult entertainment business and preventing his future expression of free speech. The Court rejected his arguments, holding that while certain obscenity violations may be expressive, decades of cases have “clearly [held] that ‘obscenity’ can be regulated or actually proscribed consistent with the First Amendment” *Id.*

Similarly, here, prosecution of the Defendant under the Georgia RICO Act does not offend the First Amendment. The Georgia RICO Act neither has as its primary purpose the restriction of expressive activity, nor does it have the inevitable effect of singling out those engaged in expressive activity. Indeed, of the more than 43 categories of Georgia offenses designated as racketeering activity under O.C.G.A. § 16-14-3(5)(A), the only arguably “expressive” activities proscribed by the Georgia RICO Act involve fraud, perjury, or other harmful lies to the government.¹ Like in *Alexander*, the Defendant’s criminal conduct at issue in this case involves restriction of one or more categories of speech—fraud, attempts to deceive the government, and speech integral to criminal conduct—that “can be regulated or actually proscribed consistent with the First Amendment” *Alexander*, 509 U.S. at 557.

Accordingly, prosecution of the Defendant for his acts committed in furtherance of the RICO conspiracy, all of which involve fraud, harmful lies to the government, and other speech integral to criminal conduct, cannot offend the First Amendment, and any facial or as-applied constitutional challenge to the prosecution here should fail.

¹ These 43 categories of Georgia offenses are not the only acts designated as “racketeering activity” under O.C.G.A. § 16-14-3. The term also includes many other offenses, and acts or threats involving other offenses, under federal and state law, very few of which can be classified as “expressive” activity.

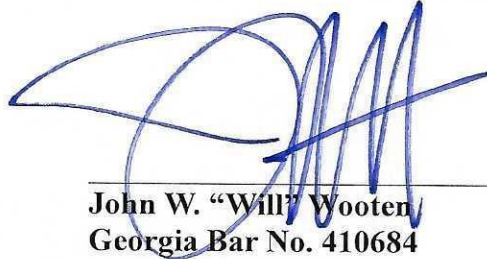
IV. CONCLUSION

As set forth above, the crimes charged against the Defendant are not protected by the First Amendment, and the Court should deny his request to have the charges against him dismissed on those grounds.

Respectfully submitted this 27th day of September 2023,

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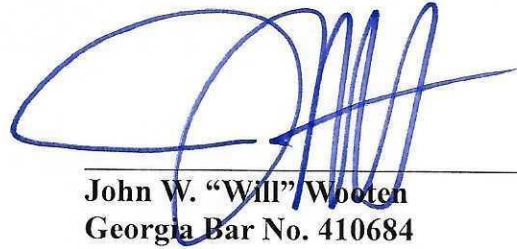
23SC188947

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of this STATE'S RESPONSE TO DEFENDANT CHESEBRO'S GENERAL DEMURRER TO THE INDICTMENT BASED ON FIRST AMENDMENT PROTECTIONS 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,

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