IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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

DEFENDANT CHESEBRO'S REPLY BRIEF IN SUPPORT OF HIS MOTION TO DISMISS THE INDICTMENT BASED ON FIRST AMENDMENT PROTECTIONS

COMES NOW Kenneth Chesebro, by and through undersigned counsel, and submits this reply in support of his Motion to Dismiss Based on First Amendment Protections. The State construes Mr. Chesebro's motion as a special plea in bar. Mr. Chesebro does not object to that construction. However, Mr. Chesebro asserts that his motion challenges the constitutionality of his charges as they apply to his alleged conduct. Because this motion may be case dispositive, Mr. Chesebro respectfully requests this Honorable Court schedule a hearing on this motion. In support thereof, Mr. Chesebro shows this Honorable Court as follows:

I. Mr. Chesebro's Conduct Is Protected Speech

The State claims that Mr. Chesebro is attempting to argue that "his involvement in a conspiracy to commit multiple crimes involving fraud was somehow protected by the First Amendment." Here, Mr. Chesebro's involvement in these alleged conspiracies consisted *solely* of his interpretation of the Electoral Count Act ("ECA") and his legal advice to his client about what conduct is permissible under the ECA in line with his interpretation.

The State does not appear to dispute the fact that all of Mr. Chesebro's alleged conduct was expressive conduct and thus speech. However, it asserts that his speech constitutes either fraud, harmful lies that threaten to deceive the government, or speech integral to criminal conduct, and thus that Mr. Chesebro's speech would not be protected under the First Amendment. Mr. Chesebro agrees that those categories of speech are not protected by the First Amendment. However, despite the State's blanket assertion, Mr. Chesebro's speech does not fall into those categories or any other category of unprotected speech.

For the State's and this Court's convenience, Mr. Chesebro lists in his motion all of his conduct alleged in the indictment.[1] The State's response brief claims that most of Mr. Chesebro's acts involve either fraud or lies that threaten to deceive and harm the government, and that his remaining acts are speech integral to criminal conduct. Yet, the State does not identify which of the enumerated acts are allegedly fraud, which are harmful lies to the government, or which are integral to criminal conduct. Moreover, the State does not even bother to explain why any of Mr. Chesebro's actions would fall into one of these categories. Instead, the State just makes a blanket legal conclusion that his conduct is unprotected speech.

Yet all of Mr. Chesebro's speech was his own opinion or analysis; it was thus not fictitious or purported to have been made by someone else. He did not sign his name as anyone else, and he did not send anyone any documents purporting to be signed by

[1] The indictment alleges that Mr. Chesebro sent emails to Campaign and Republican Party actors, received emails from these individuals, wrote a legal memo for a client, and met with a Wisconsin Republican Party official *about Wisconsin*.

anyone else. Mr. Chesebro did not lie, and he did not make any statements to the government. Rather, Mr. Chesebro's speech was his interpretation of a 130-year-old law that had seldom been litigated. Accordingly, his speech is protected by the First Amendment.

II. The Charges Are Unconstitutional as Applied to Mr. Chesebro's Protected Speech

All of the crimes for which it has charged Mr. Chesebro are conspiracies. To prove a conspiracy, the State must show that two or more persons tacitly came to a mutual understanding to pursue a particular criminal objective. *Wilson v. State*, 315 Ga. 728, 731 (2023). Federal courts clarify that this must be proof that the conspirators had specific knowledge of the conspiracy's unlawful object. *United States v. Duenas*, 891 F.3d 1330, 1334 (11th Cir. 2018). An inference of this mutual understanding to commit a crime can be drawn from (1) the nature of the acts done, (2) the relation of the parties, (3) the interest of the alleged conspirators, and (4) other circumstances. *O'Neal v. State*, 316 Ga. 264, 269 (2023). But inference of knowing participation from a defendant's mere presence and association with conspirators alone is insufficient to convict for conspiracy. *United States v. Ryan*, 289 F.3d 1339, 1347 (11th Cir. 2002).

The State's sole basis for alleging and proving that Mr. Chesebro was part of any of the conspiracies charged is his legal analysis and advice. Mr. Chesebro has a right to advocate for legal positions, even if they are not universally accepted. His speech is integral to the advocacy of a novel legal position. As alleged in Overt Act 58, Mr. Chesebro explicitly stated that "the purpose of having the electoral votes sent 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." *See* Indictment at 35. Mr. Chesebro's statement shows that his speech was not integral to any sort of *criminal* conduct. Having Congress debate election irregularities is ***not*** a violation of any law. Rather, his speech was integral to pursuing a lawful challenge as the purpose of the contingent elector slate was to preserve the ***possibility*** of Congress certifying the votes for Trump; Congress would be free to reject or accept those votes. It does not matter whether the legal challenge was weak or strong. To criminalize speech integral to pursuing weak legal challenges would place nearly all plaintiff's attorneys in jeopardy of being prosecuted.

In short, Mr. Chesebro's speech was protected speech. And, because the First Amendment also guarantees individuals the freedom of association, Mr. Chesebro was free to make that speech to whoever he so chose. To be clear, Mr. Chesebro is not challenging the constitutionality of the offense statutes on their face. Rather, he is challenging the constitutionality of those statutes as they apply to his protected conduct. The State spends much of its response addressing the constitutionality of O.C.G.A. §§ 16-9-1, 16-10-20, 16-10-20.1, 16-10-23, and the Georgia RICO Act solely on their face before making a blanket conclusion that both a facial and as-applied challenge to those statutes fail. But the State does not actually address any as-applied argument to these Counts.

Moreover, the State squanders half its response citing cases for completely wrong propositions. First, the State cites *Nordahl v. State*, 306 Ga. 15, 26 n.22 (2019), for the proposition that overt acts alleged in the indictment are not essential elements of a conspiracy. But the State cherry-picks wording from a footnote to support its wholly

incorrect claim. In fact, the very case it cites makes clear that the existence of an overt act ***is*** an essential element of a conspiracy. *Id.* at 26.[2]

Citing *Yates v. United States*, 354 U.S. 298, 341 (1957), the State then claims that it does not violate the First Amendment to convict a defendant of a conspiracy even when all of the defendant's overt acts were constitutionally protected speech. The State could not be more wrong here. First, the State cites Justice Black's dissent rather than the actual opinion of the Court. *See Yates*, 354 U.S. at 339–44 (Black, J., dissenting in part). Second, the *Yates* Court reversed all of the convictions in this case. *Id.* at 303. The Court further directed that acquittals be entered for the defendants for whom the only evidence against them was their participation in ***lawful*** activities. *Id.* at 330–31 (noting that "none of them has engaged in or been associated with any but what appear to have been wholly lawful activities").

Citing *Alexander v. United States*, 509 U.S. 544, 557 (1993), the State alleges that the U.S. Supreme Court holds that "RICO 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." The State is again incorrect about what the Supreme Court cases mean. In *Alexander*, the Court reiterated that "criminal or civil ***sanctions*** [that] hav[e] some incidental effect on First Amendment activities are [only] subject to First Amendment scrutiny" in one of the two enumerated

[2] As an essential element, the State is required to prove an overt act beyond a reasonable doubt; however, it may prove at trial different overt acts than the ones alleged in the indictment. *Id.*

situations. 509 U.S. at 557 (emphasis added).[3] Only certain legal sanctions are subject to First Amendment scrutiny because *all* legal sanctions have *some* incidental effect on First Amendment activities. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986).[4] Thus, the Court was not talking about RICO *charges*, but about sanctions or punishment that follow a civil or criminal verdict. Additionally, the Court holds that sanctions that *precede* a verdict are violative of the First Amendment. *See Alexander*, 509 U.S. at 552 (citing *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 66 (1989)).

III. Conclusion

WHEREFORE, Mr. Chesebro respectfully requests this Court schedule a hearing on his motion to dismiss the indictment based on First Amendment protections and thereafter grant his motion and dismiss the indictment.

Respectfully submitted, this 6th day of October, 2023.

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[3] For example, a statute that imposes criminal sanctions on a person who destroys a draft card is subject to First Amendment scrutiny where the defendant destroyed the draft card in order to send a message about the defendant's opposition to the draft. *See Arcara v. Cloud Books, Inc.*, 478 U.S. at 702–03 (1986) (summarizing *United States v. O'Brien*, 391 U.S. 367 (1968)). The conduct that "drew the legal remedy"—i.e., destroying the draft card—is expressive in this scenario. Thus, courts would apply First Amendment scrutiny to the sanction statute to determine whether the sanction is constitutional. *Id.* at 703. As another example, suppose a tax is imposed on the sale of large quantalities of newsprint. *Id.* at 704 (summarizing *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983)). The tax has the effect of singling out newspapers to shoulder its burden. *Id.* Even though the tax was imposed upon a nonexpressive activity (the sale of newsprint), the burden of the tax inevitably falls disproportionately upon newspapers exercising the freedom of the press. *Id.*

[4] For example, one liable for civil damages has less money to spend on paid political announcements or to contribute to political causes. *Id.*

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing *Reply Brief in Support of Motion to Dismiss the Indictment Based on First Amendment Protections* upon counsel for the State of Georgia via the e-filing system.

ON THIS, the 6th day of October, 2023.

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