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, MISTY HAMPTON a/k/a EMILY MISTY HAYES Defendants.	CASE NO. 23SC188947

STATE'S RESPONSE TO DEFENDANT CHESEBRO'S MOTION TO EXCLUDE LEGAL MEMORANDA AND AFFILIATED CORRESPONDENCE UNDER O.C.G.A § 24-5-501

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 Exclude Legal Memoranda and Affiliated Correspondence Under O.C.G.A. § 24-5-501. Defendant has not made a showing that he has engaged in an attorney client relationship or that the memoranda and emails qualify for protection substantively. Further, any attorney-client privilege or work product protection has been waived by their dissemination outside any attorney-client relationship. Finally,

the crime-fraud exception applies as these memoranda were the basis for Defendant and his co-conspirators attempt to overturn the 2020 presidential election and in particular, to submit a scheme in which to create false electoral college documents to disrupt and delay the joint session of Congress on January 6, 2021.

1. **The memoranda and emails at issue assisted in forming the plan to create false electoral college documents in order to disrupt the January 6, 2021, joint session of Congress.**

Five documents are at issue. The **November 18 memorandum** was sent from Defendant to James Troupis, a lawyer for the Trump Campaign in Wisconsin. Exhibit A. The memorandum set out a plan to challenge the results of the presidential election in Wisconsin. It argued that January 6 was the "real deadline" to resolve election contests and that electors pledged to Donald J. Trump in Wisconsin should meet and cast electoral college votes on December 14, regardless of the fact that Trump appeared to have lost the election in Wisconsin. Trump Campaign members, including Justin Clark and Nick Trainer, later asked Defendant to share this memorandum with other states' electors, including co-defendant David Shafer and Georgia GOP officers including Carolyn Fisher. Exhibit B. Defendant similarly sent the second document at issue, his **December 9 memorandum**, to co-Defendant Shafer, Fisher, and others. The December 9 memorandum was an expansion of the strategy to create slates of Trump electors in six states where Trump had lost the election: Georgia, Arizona, Michigan, Nevada, Pennsylvania, and Wisconsin. Exhibit C. It included state specific instructions on how the fake electors should meet and vote, and it described the plan in Georgia as "somewhat dicey."

The third document, a **December 13 email** to co-defendants Giuliani and Eastman, expounded strategies for disrupting and delaying the joint session of Congress on January 6, 2021. It does not advance any litigation strategy or plan, instead providing a detailed political plan of

action designed to allow Vice President Pence to illegally take unilateral authority over the counting of electoral votes and resolution of any disputes.

The fourth document, a **January 1, 2021 email**, was sent to co-defendant Eastman and a Trump campaign lawyer, Boris Epshteyn. The email begins by stating that, "The state legislatures and the courts, including the Supreme Court, have failed to resolve, on the merits, serious contentions . . . so that the electoral votes sent in by the governors of those States are not legitimate." Like the December 13 email, it set out a plan for Vice President Pence to illegally take control over the joint session and resolve any disputes as he saw fit. The email also does not mention any plan for pending litigation but instead focuses on what the "core objective of Members of Congress" sympathetic to the Trump Campaign's goals should be: finding "a way to prevent the Biden camp from concluding the vote on Jan. 6."

Finally, the fifth document is a **December 6 memorandum** also outlining various possible scenarios for disrupting or delaying the January 6 joint session. The State has not yet obtained an authenticated copy of the December 6, 2020 memorandum and thus has not yet provided it to Defendant in discovery. At this time, the State asks the Court to defer ruling on this memorandum unless and until the State provides an authenticated copy of it to Defendant in discovery. If, however, Defendant stipulates to its authenticity, the State would be prepared to discuss its admissibility at that time.

Defendant bases his motion on attorney-client privilege and work product doctrine, which are distinct concepts that have considerable conceptual overlap. *Hickman v. Taylor*, 329 U.S. 495, 508-09 (1947). The Court must consider each of these privileges separately. *Moody v. Hill, Kertscher & Wharton, LLP*, 358 Ga. App. 771, 772 (2021) (explaining the different analyses for attorney-client privilege and work product). This response will discuss why neither of the

protections apply or why even if they did, the crime-fraud exception would eliminate any remaining claim of protection.

2. Attorney-client privilege does not apply because Defendant has not met his initial burden and has waived any ostensible privilege by not maintaining the communications in confidentiality.

Defendant has not satisfied his burden to claim attorney-client privilege, but even if he had, that privilege has been waived via dissemination to third parties. Attorney-client privilege in Georgia is codified at O.C.G.A. § 24-5-501(a)(2): "[t]here are certain admissions and communications excluded from evidence on grounds of public policy, including … [c]ommunications between attorney and client."[1] The privilege attaches "where (1) there is an attorney-client relationship; (2) the communications in question relate to the matters on which legal advice was sought; (3) the communications have been maintained in confidence; and (4) no exceptions to privilege are applicable." *McCalla Raymer, LLC v. Foxfire Acres, Inc.*, 356 Ga. App. 117, 128 (2020). "The privilege does not simply follow an attorney by virtue of his profession." *S. Guar. Ins. Co. v. Ash*, 192 Ga. App. 24, 28 (1989). "In Georgia, the privilege is narrowly construed, because its application operates to exclude evidence and thus to impede the search for the truth." *Hill, Kertscher & Wharton, LLP v. Moody*, 308 Ga. 74, 79 (2020).

"It is axiomatic that the privilege belongs to the client, not the attorney." *Moclaire v. State*, 215 Ga. App. 360, 363 (1994) (finding an attorney could not be held to testify when the client did not waive the privilege). The privilege can be waived when a third person is present for an attorney-client conversation. *Rogers v. State*, 290 Ga. 18, 20-21 (2011). The party asserting the privilege has the burden to establish it applies. *Zielinski v. Clorox Co.*, 270 Ga. 38, 40 (1998).

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[1] The Georgia Supreme Court has noted that the new Evidence Code simplified the language constituting the privilege but the rules governing the privilege generally remained the same. *St. Simons Waterfront, LLC*, 293 Ga. at 421 n.1.

First, Defendant has not made any showing that he maintained an attorney-client relationship, nor has he specified precisely who his client purportedly was. Defendant has not produced any retainer or employment agreement showing that he was retained by the Trump Campaign or anyone else. *See St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 293 Ga. 419, 429 (2013) (remanding for the trial court to review whether the privilege proponent met its initial burden). Defendant has failed to satisfy the first requirement of establishing attorney-client privilege and its protections. Additionally, the bounds of the claimed relationship must be known in order for the Court to determine by whom a document may be kept in confidence. Defendant must show that an attorney-client relationship existed, and with whom, for him to claim any privilege over the documents, for the State to meaningfully dispute his claims, and for this Court to resolve any disputes.

Additionally, Georgia law only protects attorney-client communications that provide *legal* advice and services, and Defendant's memoranda and emails were not created to give legal advice but instead to give *political* advice. *See S. Guar. Ins. Co. v. Ash*, 192 Ga. App. 24, 28 (1989) ("[T]he attorney-client privilege extends only to confidential communications made for the purpose of facilitating the rendition of *legal* services to the client. Thus, where the attorney acts merely . . . as a business adviser the privilege is inapplicable.") (citing *United States v. Horvath*, 731 F.2d 557, 561 (8th Cir. 1984) (emphasis original)). As one federal circuit court accustomed to reviewing cases involving political advice has observed, attorney-client privilege does not apply to such political strategies: "advice on political, strategic, or policy issues . . . would not be shielded from disclosure by the attorney-client privilege." *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998). Defendant's communications (particularly his December 13 and January 1 emails, discussing at length the advantages and disadvantages of certain courses of action related to the

January 6 joint session of Congress) cannot be privileged because they provide political, not legal, advice. As the District Court for the Central District of California has already found, "[t]he true animating force behind [the January 6 plan] was advancing a political strategy: to persuade Vice President Pence to take unilateral action on January 6." *Eastman v. Thompson*, 594 F. Supp. 3d 1156, 1183 (C.D. Cal. 2022).

Attorney-client privilege also does not apply to the documents at issue because the memoranda and emails were clearly not maintained in confidence. The privilege may be waived when a document is made for disclosure to a third party or is disclosed by the client. *McKesson Hboc v. Adler*, 254 Ga. App. 500, 502-03 (2002) ("To the extent a communication is made for the purpose of disclosure to a third party, it is not protected by the attorney-client privilege in Georgia."); *Mikart, Inc. v. Marquez*, 211 Ga. App. 209, 211 (1993) (privilege waived when a letter was disclosed by a client). The November 18 and December 9 memoranda were sent, at the Trump Campaign's request, to individuals outside of the campaign. *See* Exhibit B. The memoranda have also been published by the news media and publicly disclosed by the United States House Select Committee on the January 6 Attack after having been produced to the Committee in response to lawful subpoenas. *See McKesson Corp. v. Green*, 279 Ga. 95, 96 (2005) (holding that disclosure to an actual or potential adversary destroys privilege); *Marriott Corp. v. Am. Acad. of Psychotherapists, Inc.*, 157 Ga. App. 497, 505 (1981) (requiring that for attorney-client communications to attach to employee's communications, "the communication [can] not disseminated beyond those persons who, because of the corporate structure, need to know its contents."). Because co-defendants Eastman and Shafer,[2] as well as others, disclosed the

[2] Co-defendant Shafer disclosed the November 18 and December 9 memoranda to the State voluntarily and informed the State's investigators that he had done the same for the January 6 Committee.

memoranda and emails to investigate entities including the January 6 Committee and the State, these communications are no longer confidential.

Thus, attorney-client privilege does not attach to Defendant's memoranda or emails. Defendant must meet his burden there was an attorney-client relationship. Furthermore, his memoranda and communications advanced political strategies rather than legal strategies and were not maintained in confidence.

3. Defendant's memoranda and emails do not qualify for work-product protection because they were not prepared in anticipation of litigation, and any protection that may have arguably existed has been waived.

The documents at issue do not qualify for work product protection because they were not made in anticipation of litigation, nor was their confidentiality maintained. The work product doctrine protects only documents and tangible items prepared in anticipation of litigation. "Material is 'prepared in anticipation of litigation . . . if reasonable grounds exist to believe that litigation is probable.'" *Fulton DeKalb Hosp. Auth. v. Miller & Billips*, 293 Ga. App. 601, 603 (2008) (quoting *Dep't of Transp. v. Hardaway Co.*, 216 Ga. App. 262 (1995)). The protection shields an attorney's preparations from disclosure because there is a "higher value" to be served in protecting the thought processes of counsel. *McKinnon v. Smock*, 264 Ga. 375, 378 (1994) (citing *Occulto v. Adamar of New Jersey*, 125 F.R.D. 611 (D. N.J. 1989)). In Georgia, "a document created by an attorney belongs to the client who retained him." *Swift, Currie, McGhee & Hiers v. Henry*, 276 Ga. 571, 573 (2003). The party asserting work-product protection has the burden to prove it applies, and once such a showing is made, the burden is on the party asserting some *waiver* of work product protection to show that waiver has occurred. *McKesson Corp.*, 279 Ga. at 96; *Alta Refrigeration, Inc. v. AmeriCold Logistics, LLC*, 301 Ga. App. 738, 748 (2009).

As an initial matter, as argued above, Defendant has not shown that work product protection applies to his memoranda because he has not shown an attorney-client relationship existed between him and any specific client. Moreover, Defendant's memos do not qualify for work product protection because they were not made in anticipation of litigation. Again, these memoranda and emails served a political purpose, not a litigation purpose. Defendant's communications outlined a plan for creating fake slates of electors in states where the Trump Campaign had lost and described how those slates could be submitted to Congress, in advance of on January 6, 2021. As the District Court for the Central District of California has already found, potential or anticipated litigation does not animate Defendant's communications.[3] *Eastman*, 594 F.Supp. 3d at 1183. As a whole, when reviewing Defendant's documents, the animating concern was creating a political strategy to be used *in Congress*, not the judicial branch. In particular, the January 1 email begins with the premise that the judicial system has not allowed the Trump Campaign to accomplish its goals. The memo explicitly gives up on pursuing any judicial process in order to pursue a political strategy in Congress. As such, it could not have been prepared in anticipation of litigation.

Moreover, as discussed above, Defendant and the Trump Campaign shared documents with persons outside any purported attorney-client relationship. Defendant has not shown that the documents at issue were shared with persons who were actually necessary *to prepare for a case*,

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[3] In what he determined was a "close question," the *Eastman* court did find that Defendant's December 13 email specifically was made in anticipation of litigation, as it outlined scenarios resulting from different judicial outcomes. The email was therefore "created for both political and litigation purposes." *Eastman*, 594 F.Supp. 3d at 1184. The State disputes that the email served anything but a political purpose. However, as discussed below, the court also found that the memo represented a crucial step in an overall criminal scheme to obstruct the joint session of Congress on January 6 and that it directly advised violating the Electoral Count Act. As a result, the memo was subject to the crime-fraud exception and was ordered disclosed. *Id.* at 1196-97.

such as correspondence from an attorney to an expert witness containing work product. *McKinnon v. Smock*, 264 Ga. 375, 378 (1994). Defendant has not shown that those persons he has shared these documents with were similarly essential. In particular, Defendant shared the November 18 and December 9 memoranda with co-defendant Shafer and Carolyn Fisher; Shafer later disregarded any ostensible protections when he provided the memos directly to the State. By sharing the memoranda and emails with third parties, Defendant and the Trump campaign waived any claim of work product protection.

The memoranda are obviously now publicly available as well. While Georgia courts have not decided whether documents in the public domain can thereafter be considered privileged work product, the Central District of California found that the November 18 memo had been shared with the media as of February 2, 2022, thus expressly waiving any claim of work product protection applicable to it. *Eastman*, 594 F. Supp. 3d at 1187 ("Making work product public is the epitome of sharing with an adversary, thus waiving protection."). *See also Castano v. Am. Tobacco Co.*, 896 F. Supp. 590, 596 (E.D. La. 1995) (public disclosure relevant for determination of whether work product protections should apply). While the December 9 memo was not at issue in *Eastman*, it was also disclosed to the news media by at least February 2, 2022.[4]

Defendant thus cannot claim work product protection over these documents. He has not established an attorney-client relationship in the first place, the documents were not created in anticipation of litigation, and certain documents are subject to an express waiver of protection, with two of the subject memoranda having already been disclosed directly to the State.

4. Even if attorney-client privilege or work-product protection applies, the documents are subject to the crime-fraud exception.

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[4] "Read the Dec. 9 Memo on Alternate Trump Electors," NY TIMES, Feb. 2, 2022, available at https://www.nytimes.com/interactive/2022/02/02/us/trump-electors-memo-december.html.

The crime-fraud exception pierces both attorney-client privilege and the work product doctrine. *Hill, Kertscher & Wharton, LLP*, 308 Ga. at 78 (acknowledging the crime-fraud exception to attorney client privilege); *WellStar Health Sys. v. Kemp*, 324 Ga. App. 629, 638 n. 19 (2013) (recognizing that work product protection may be lost due to attorney's "unprofessional behavior", such as behavior in furtherance of a crime or fraud). The exception removes from protection communications made in furtherance of a crime or fraud. The crime-fraud exception excludes "communications which occur before perpetration of a fraud or commission of a crime and which relate thereto" from protection from disclosure. *Sullivan v. State*, 327 Ga. App. 815, 817 (2014) (quoting *In re Fulton County Grand Jury Proceedings*, 244 Ga. App. 380, 382 (2000)). "The privileged communication may be 'a shield of defense as to crimes already committed, but it cannot be used as a sword or weapon of offense to enable persons to carry out contemplated crimes against society, frauds or perjuries.'" *Id.* (quoting *In re Hall Cty. Grand Jury Proceedings*, 175 Ga. App. 349, 350, 333 S.E.2d 389 (1985)).

The "applicability [of the crime-fraud exception] depends upon whether a prima facie case has been made that the communication was made in furtherance of an illegal or fraudulent activity." *Rose v. Commercial Factors of Atlanta, Inc.*, 262 Ga. App. 528, 529, 586 S.E.2d 41 (2003) (citing *In re Hall Cty*, 175 Ga. App. at 352). Prima facie evidence is that which, on its face, is good and sufficient to establish a given fact, though it can ultimately be rebutted or contradicted. *Id.* at 529-30. The disputing party thus need not supply "proof of the existence of a crime or fraud to overcome the claim that a communication is privileged"; all that is required is prima facie evidence. *Id.* at 529. "[W]hen prima facie evidence is supplied [by the discovering party], the seal of secrecy is broken." *Id.* at 530 (quoting *Atlanta Coca-Cola Bottling Co. v. Goss*, 50 Ga. App. 637, 639 (1935)); *See also Cohen v. Rogers*, 338 Ga. App. 156, 164, 789 S.E.2d 352, 359 (2016)

(differentiating the prima facie standard of proof with the actual proof standard required for disqualification of an attorney).

Here, a prima facie case of the crime fraud exception exists because a grand jury has found by probable cause that each of the subject documents were overt acts in furtherance of a conspiracy under the Georgia RICO statute to overturn the results of the 2020 presidential election. Persuasive authority holds that in making a prima facie case for applying the crime-fraud exception, an "indictment provides a reasonable basis to believe that [a defendant] was engaged in criminal or fraudulent activity." *United States v. Stein*, No. 21-20321-CR-ALTONAGA/Torres, 2023 U.S. Dist. LEXIS 47808, at *13 (S.D. Fla. Mar. 21, 2023) (quoting *Gorski*, 807 F.3d 451, 461 (1st Cir. 1964)). As set out in the indictment, the legal memoranda were made in furtherance of a RICO conspiracy to overturn the results of Georgia's 2020 presidential election. *See Both v. Frantz*, 278 Ga. App. 556, 563 (2006) (attorney-client privilege does not apply to communications occurring in perpetration of a fraud or commission of a crime). Here, the indictment itself can lay out a reasonable basis that a prima facie case has been established.

Judicial findings in related litigation also support finding the crime-fraud exception applies here. In issuing a Certificate of Material Witness compelling Defendant to appear before a special purpose grand jury empaneled to investigate attempts to overturn the November 3, 2020, presidential election in Georgia, Fulton County Superior Court Judge Robert C. I. McBurney found:

> [The Defendant] was an attorney working with the Trump Campaign's legal efforts seeking to influence the results of the November 2020 election in Georgia and elsewhere. As part of those efforts, the [Defendant] worked with the leadership of the Georgia Republican Party, including Chairman David Shafer, in the weeks after the November 2020 election in Georgia, at the direction of the Trump Campaign. This work included the coordination and execution of plan to have 16 individuals meet at the Georgia State Capitol on December 14, 2020, to cast purported electoral college votes in favor of former President Donald Trump, even though none of

> those 16 individuals had been ascertained as Georgia's certified presidential electors by Georgia Governor Brian Kemp. *The [Defendant] drafted at least two memoranda in support of this plan, which were provided to the Georgia Republican Party,* and the [Defendant] provided template Microsoft Word documents to be used by the Georgia Republican Party at its meeting on December 14, 2020. *Further, the [Defendant] indicated in communications with the Georgia Republican Party that he had worked directly with Trump Campaign attorney Rudy Giuliani as part of the coordination and execution of the plan.*

(emphasis added) Certificate of Material Witness Pursuant to Uniform Act to Secure the Attendance of Witnesses From Without The State, Codified in the State of Georgia As O.C.G.A. 24-13-90 Et Seq., *In re: Special Purpose Grand Jury*, Case No. 2022-EX-000024 (Fulton Super. Ct., July 5, 2022). Additionally, the Central District of California set out how the crime fraud exception applied to co-Defendant Eastman's materials, which included communications with Defendant. In particular, that court determined that co-Defendants Eastman and Trump conspired to overturn the election by attempting to obstruct the joint session of Congress on January 6, 2021 in violation of 18 U.S.C. § 1512(c)(2) and conspired to defraud the United States under 18 U.S.C. § 371. *Eastman v. Thompson*, 594 F. Supp. 3d at 1189-95. Both of those federal crimes can serve as predicate offenses under the Georgia RICO Act as they are acts involving obstruction of justice. O.C.G.A. § 16-14-3(5)(B). Specifically, the court in *Eastman* held that Defendant's December 13 email constituted a "day-to-day plan of action" that "pushed a strategy that knowingly violated the Electoral Count Act" and clearly continued to influence Eastman's actions and decisions.[5] 594 F.Supp. 3d at 1196-97. Co-defendant Eastman later appealed the district court's order specifically for its application of the crime-fraud exception. The Ninth Circuit upheld the district court, and the Supreme Court declined to intervene, denying Eastman's writ of certiorari. *See Eastman v. Thompson*, 2023 U.S. LEXIS 3201, 2023 WL 6379015 (October 2, 2023). Here, multiple judicial

[5] The exact same could be said of the January 1 email, which provides another plan of action which simply restates or refines much of what is in the December 13 email.

entities have already found these documents were in used in furtherance of a criminal conspiracy, with the United States Supreme Court affirmatively *declining* to take the opportunity to hold otherwise.

Most fundamentally, a review of the documents at issue shows they were prepared in furtherance of the RICO conspiracy. The documents themselves outline how a plan was developed to submit the fake electoral college documents for the purpose of disrupting the joint session of Congress on January 6, 2021. And while it does not have the weight of a judicial opinion, the Final Report of the January 6 Committee concluded that "[t]he fake elector plan emerged from a series of legal memoranda written by an outside legal advisor to the Trump Campaign: Kenneth Chesebro." H.R. Rep. No. 117-663, Ch. 3.1, p. 343 (2022) ("Final Report J6 Committee"), available at https://www.govinfo.gov/app/details/GPO-J6-REPORT/GPO-J6-REPORT-1/context. The plan *at best* advised intentional violations of the Electoral Count Act and obstruction of a Congressional proceeding, and this is more than sufficient to demonstrate that prima facie evidence of Defendant's participation in a crime or fraud exists. As a result, there can be no doubt that the crime-fraud exception applies here. These documents lay out the fake elector plan as alleged in the indictment returned by a Fulton County grand jury. They show how Defendant created the fake elector plan, wrote the documents used by others to perpetrate alleged fraud, provided the guidance necessary to use them, and then laid out precisely how use them to obstruct the joint session of Congress on January 6, 2021. This exceeds the minimal prima facie showing required to apply the crime-fraud exception. Thus, the crime-fraud exception applies, as the subject documents were used in furtherance of the RICO conspiracy, and neither attorney-client privilege nor the work product doctrine apply.

Conclusion

For the reasons set forth above, Defendant's motion should be denied. The Defendant has not shown that attorney-client privilege or work product doctrine is applicable or that either has been properly maintained. His documents formed a basis for a criminal conspiracy that sought to unlawfully overturn the results of the 2020 presidential election and cannot receive the protections afforded to lawful attorney communications or documents.

Respectfully submitted this 9th day of October, 2023,

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Exhibit A

Privileged and Confidential

MEMORANDUM

TO: Judge James R. Troupis
FROM: Kenneth Chesebro
DATE: November 18, 2020
RE: **The Real Deadline for Settling a State's Electoral Votes**

You asked for a written summary of the legal analysis underlying my suggestion during our conference call that, in any judicial review of the canvassing/recounting in Wisconsin, we should emphasize that the presidential election timetable affords ample time for judicial proceedings, even if initial errors in the recount require a remand for further recounting.

Summary

There is a very strong argument, supported by historical precedent (in particular, the 1960 Kennedy-Nixon contest), that the real deadline for a finding by the Wisconsin courts (or, possibly, by its Legislature) in favor of the President and Vice President is not **December 8** (the "safe harbor" deadline under the Electoral Count Act), nor even **December 14** (the date on which electors must vote in their respective States), but **January 6** (the date the Senate and House meet for the counting of electoral votes).

Assuming the electors pledged to Trump and Pence end up meeting at the Wisconsin Capitol on December 14 to cast their votes, and then send their votes to the President of the Senate in time to be opened on January 6, a court decision (or, perhaps, a state legislative determination) rendered after December 14 in favor of the Trump-Pence slate of electors should be considered timely. On this view, the only real deadline during the next month is the December 14 deadline to cast electoral votes – so that any state judicial proceedings which extend past that date, working toward resolution of who has won Wisconsin's electoral votes, are entirely compatible with federal law provided that they are completed by January 6.

1. The January 6 Hard Deadline

The date which has "ultimate significance" under federal law, as Justice Ginsburg aptly noted, is "the sixth day of January," the date set by 3 U.S.C. § 15 on which the Senate and House determine "the validity of electoral votes." Bush v. Gore, 531 U.S. 98, 144 (2000) (Ginsburg, J., dissenting). That is the first date on which any electoral votes are actually counted. On that date, the Twelfth Amendment directs, "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."

2. What Must Happen on December 14

The other date of particular federal significance is the date that the ten Wisconsin electors pledged, respectively, to Trump-Pence and Biden-Harris, must meet in Madison to actually cast their electoral votes, if those votes are later to be eligible to be counted in Congress on January 6. Art. II, § 1, cl. 4, gives Congress the power to specify the date "on which [the electors] shall give their Votes, which Day shall be the same throughout the United States." Exercising that power, Congress has mandated that the electors "shall meet and give their votes on the first Monday after the second Wednesday in December" – this year, December 14 – "at such place in each State as the legislature of such State shall direct." 3 U.S.C. § 7.

In accord with § 7, the Wisconsin Legislature has directed that "[t]he electors for president and vice president shall meet at the state capitol" at noon on December 14. Wis. Stat. § 7.75(1).

Prudence dictates that the ten electors pledged to Trump and Pence meet and cast their votes on December 14 (unless by then the race has been conceded). It is highly uncertain, given the language in Art. II requiring that all electors throughout the United States vote on the same day, whether Congress could validly count electoral votes cast on a later date.[1]

It may seem odd that the electors pledged to Trump and Pence might meet and cast their votes on December 14 even if, at that juncture, the Trump-Pence ticket is behind in the vote count, and no certificate of election has been issued in favor of Trump and Pence. However, a fair reading of the federal statutes suggests that this is a reasonable course of action.

The basic responsibility of the electors is to "make and sign six certificates of the votes given by them" for President and Vice President, 3 U.S.C. § 9; "seal up the certificates so made by them," id., § 10; and forward them by registered mail to the President of the Senate and to other officials. Id., § 11. These actions are carried out without any involvement by state officials.

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[1] In 1857, Congress spent two days debating whether it would count electoral votes from Wisconsin which were cast one day late due to a blizzard in Madison. The result of the presidential election did not turn on the question, and it was left unresolved. Cong. Globe, 34th Cong., 3rd Sess., 644-60, 662-68 (1857).

It also seems clear that if, before the electors cast their votes, the candidates for whom they are voting have been issued certificates of election, it is the duty of the governor to deliver the certificates to the electors "on or before the day" they are required to meet, id. at § 6, and the electors are then to attach the certificates to the electoral votes they transmit to the President of the Senate. Id., § 9.

But nothing in federal law requires States to resolve controversies over electoral votes prior to the meeting of the electors. Indeed, there is no set deadline for a State to transmit to Congress a certification of which slate of electors has been determined to be the valid one. The duty of a state governor is merely to transmit the certification "as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment . . . ." Id., § 6.

3. Hawaii's Electoral Votes in the 1960 Kennedy-Nixon Contest

The reasonableness of the above statutory analysis, and the prudence of the Trump-Pence electors meeting in Madison on December 14 to cast their votes and transmit them to Congress, regardless of the status of the electoral contest in Wisconsin at that juncture, is illustrated by how the Democratic Party handled the uncertainty over Hawaii's electoral votes in the 1960 presidential election between John F. Kennedy and Richard M. Nixon.[2]

Remarkably, Hawaii's electoral votes were counted in favor of Kennedy and Johnson when the votes were opened in Congress on January 6 even though:

(1) they did not arrive in Congress until that very morning;

(2) on the date the Electoral College met, December 19, 1960, Nixon's electors had in hand a certificate from the Hawaii governor certifying that Nixon had won the state (by 141 votes);

(3) the Kennedy electors nonetheless also met and voted on that day, to preserve the possibility that their votes would eventually be certified as the valid ones;

(4) on the same day, a Hawaii court ordered a recount of the entire state;

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[2] The following summary is adapted from Michael L. Rosin & Jason Harrow, "How to Decide a Very Close Election for Presidential Electors: Part 2," Take Care Blog, Oct. 23, 2020 (https://takecareblog.com/blog/how-to-decide-a-very-close-election-for- presidential-electors-part-2) (visited Nov. 17, 2020).

(5) only on December 28 did the Hawaii courts issue a final decision finding that Kennedy had, in fact, won the state (by 105 votes); and

(6) because the Kennedy electors had taken care to vote on the proper day, and the governor signed an amended certificate of election which was then rushed to Washington, in time to be counted in Congress, the electoral votes were awarded to Kennedy (although, it should be noted, the votes were counted only after Vice President Nixon, in his capacity as President of the Senate, suggested without objection that the votes be counted in favor of Kennedy "[i]n order not to delay the further count of the electoral vote," and "without the intent of establishing a precedent").

The last-minute counting of the Hawaii electoral votes in favor of Kennedy in 1960 buttresses the conclusion of constitutional law scholar Laurence Tribe that, absent some indication by a State to the contrary, the only real deadline for a state to complete its recount of a presidential election is "before Congress starts to count the votes on January 6."[3]

4. Nothing in Wisconsin Law Is Inconsistent With the Trump-Pence Electors Casting Their Votes on December 14, as the Kennedy-Johnson Electors Did in 1960

The Biden camp might well seek to create a sense of urgency, and try to artificially truncate the post-election process of recounting and adjudication, by claiming that Wisconsin has an important interest in having all controversies regarding the election resolved by December 8, in order to gain the benefit of the "safe harbor" provision of the Electoral Count Act, which purportedly mandates that a final result reached in a State by the safe-harbor date "shall be conclusive" when votes are counted in Congress. 3 U.S.C. § 5.[4] The U.S. Supreme Court's view that

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[3] Laurence H. Tribe, "Comment: eroG .v hsuB and Its Disguises: Freeing Bush v. Gore From Its Hall of Mirrors," 115 Harv. L. Rev. 170, 265-66 (2001).

[4] One must use the caveat "purportedly," because there are substantial reasons to doubt that the Electoral Count Act, enacted by the 50th Congress in 1877, can have any binding effect on the 117th Congress which will convene on January 3, regarding its authority and obligation to count electoral votes as it sees fit. In particular, there is a very strong argument that the Senate which convenes in January has the inherent power to set whatever rules it wishes for deciding challenges to the electoral votes cast in this election. To view the Electoral Count Act as tying the Senate's hands, unless amended, would mean that the Senate would need the permission of both the House and the President (absent a veto-proof

Florida had a strong interest in qualifying under this safe-harbor provision was a key factor in its decision to halt the ongoing Florida recount in the 2000 presidential election. Bush v. Gore, 531 U.S. 98, 110-11 (2000) (per curiam).

However, nowhere has the Wisconsin Legislature placed any priority on ensuring that post-election procedures in presidential contests are completed by the safe-harbor date. Far from mandating that certificates of election must be issued by this date, the Legislature has, with regard to all elections, affirmatively banned certificates of election from being issued unless and until all timely brought recounts, and subsequent judicial proceedings, have been exhausted:

> When a valid petition for recount is filed . . . the governor or commission may not issue a certificate of election until the recount has been completed and the time allowed for filing an appeal has passed, or if appeal until the appeal is decided.

Wis. Stat. § 7.70(5)(a).[5]

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voting margin) to change the rules governing its deliberations, a result which cannot be squared with Art. I, § 5, providing that "[e]ach House may determine the Rules of its Proceedings . . . ." As Professor Tribe has noted, "[t]here is no constitutionally prescribed method by which one Congress may require a future Congress to interpret or discharge a constitutional responsibility in any particular way." Tribe, supra note 3, at 267 n.388 (citing Laurence H. Tribe, 1 American Constitutional Law, § 2-3, at 125-26 n.1 (3d ed. 2000)). See also Chris Land & David Schultz, On the Unenforceability of the Electoral Count Act, 13 Rutgers J. of Law & Pub. Pol'y 340, 368-77, 385-87 (2016); Vasan Kesavan, Is the Electoral Count Act Unconstitutional?, 80 N. Car. L. Rev. 1654, 1729-59, 1779-93 (2002).

[5] To be sure, in accord with ordinary practice, under which the winner of the electoral votes in Wisconsin will typically be known well in advance of the date when electors cast their votes, the Legislature has provided that in presidential elections, the govenor "shall prepare a certificate showing the determination of the results of the canvass and the names of the persons elected," and send six duplicate originals to one of the electors on or before the date electoral votes are cast. Wis. Stat. § 7.70(b). Obviously this ministerial duty exists only when a certificate of election has already issued under § 7.70(a), after all post-election recounts and related legal proceedings have reached finality. There is nothing in § 7.70(b) that purports to affect the timetable for resolving post-election proceedings.

Conclusion

The position taken by the Trump-Pence campaign regarding the outside deadline for resolving post-election challenges could conceivably end up proving critical to the result of this election. If so, it would not be the first time: the failure of the Gore team in 2000 to focus on the real deadline early enough was a clear mistake. Thus, the issue of the real deadline should be examined carefully in the near future, so that the campaign presents a clear and united front concerning it.

Reflecting on the failure of the Gore challenge to Bush's victory in Florida, Ron Klain observed in a 2002 essay that "time was our enemy" – to an extent that "cannot be underestimated."[6] Klain's early mistake was to overlook the possibility that January 6 might be the real deadline for resolving the matter of who had won Florida's electoral votes. As Klain recounted, when he went on CNN shortly after the election (on November 10), he "rather offhandedly noted that there was plenty of time for a full and fair counting of the people's votes, given that the electoral votes were not scheduled to be counted until December 18 . . . ."[7]

The timetable for Gore to win the recount was further truncated by Gore attorney David Boies who, "during the first argument to the Florida Supreme Court," on November 20, "had said that the election would be over on December 12, because of an obscure provision of federal law."[8] Journalist and lawyer David Kaplan vividly describes Boies's fateful decision in answering the justices' question regarding the outside deadline for resolving the controversy over the recount:[9]

> The deadline [Boies] repeatedly cited was December 12, six days before the Electoral College met and twenty-two days hence – a veritable eternity in the day-to-day, minute-to-minute struggle. This was the date mandated by the Electoral Count Act by which states had to get their acts together, in order to prevent Congress from possibly rejecting a slate of presidential electors. December 12 was a so-called

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[6] Ronald A. Klain & Jeremy B. Bash, "The Labor of Sisyphus: The Gore Recount Perspective," in Overtime!: The Election 2000 Thriller (2002) (Larry B. Sabato, ed.), at 161.

[7] Id.

[8] Jeffrey Toobin, Too Close to Call: The Third-Six-Day Battle to Decide the 2000 Election 195 (2001).

[9] David A. Kaplan, The Accidental President: How 413 Lawyers, 9 Supreme Court Justices, and 5,963,110 (Give or Take a Few) Floridians Landed George W. Bush in the White House 142-43 (2001).

safe harbor, but it was not a requirement ordained by either the U.S. Constitution, the Florida constitution, or even Congress itself. It was only in the nature of a benefit offered, with no penalty other than the absence of the benefit – sort of a no-risk offer. Any electoral slate determined thereafter simply would not be immune from congressional examination in a close election. That might seem like a big deal in theory, but did anyone really believe that in practice the electoral votes of one of the most populous states in the Union might go uncounted altogether? The distinction between a safe harbor as a freebie or absolute requirement was vital, but Boies didn't make it. Boies figured: Why should he? If his client got the time to count, Gore would overtake Bush and hand him the witch's hourglass

Wells pressed Boies on whether he agreed that December 12 represented the outer bounds.

"I do, Your Honor." He said this despite there being no state law or executive pronouncement to that effect.

Boies's concession of the date as a constitutional line over which no recount could cross would come back to haunt him in two weeks at the U.S. Supreme Court. It walled him in from ever offering such dates as December 18 (when the Electoral College convened), January 6 (when Congress met in joint session to count the electoral votes), or even January 20 (Inauguration Day). Indeed, January 20 was the only date mandated by the federal Constitution (in the Twentieth Amendment) – the other dates were mere statutory creations, which could be changed.

But to the extent the justices were going to come up with a new timetable, thinking about December 12 was critical. Any certification of the election – whether it included all, some, or none of the results from manual recounts – had to happen in time for the contest phase of Florida law to play out. A contest lawsuit needed time for trial and appeals. That had to be completed by December 12, according to Boies's answer.

If Boies had instead taken the position that January 6 was the real deadline for resolving the contest over Florida's electoral vote, citing the Hawaii 1960 example, Gore might ultimately have prevailed. So the issue of what is the real deadline is an issue that warrants close examination.

K.C.

Exhibit B

Gmail

David Shafer [redacted]

URGENT -- National Trump-Pence campaign asked me to contact you to coordinate Dec. 14 voting by Georgia electors

Kenneth Chesebro <kenchesebro@msn.com> Thu, Dec 10, 2020 at 11:44 PM
To: [redacted]
Cc: "treasurer@gagop.com" <treasurer@gagop.com>, "carolynfishergop@gmail.com" <carolynfishergop@gmail.com>, "assistanttreasurer@gagop.com" <assistanttreasurer@gagop.com>

Mr. Shafer,

This follows up on my e-mail of earlier today, with an update, and with draft documents that may be of use.

I spoke this evening with Mayor Guiliani, who is focused on doing everything possible to ensure that that all the Trump-Pence electors vote on Dec. 14. He is hopeful that the Georgia electors will go along with this strategy.

As background, I attach **my Nov. 18 memo** sketching the upside of this strategy, and, **my Dec. 9 memo** on the practical logistics, including the issues raised by state-law provisions regarding the Electoral College.

Also attached is a draft of the Certificate that might be used on Dec. 14, along with forms to use in filling vacancies, if any might arise. I drafted these documents based in part on the Electoral College documents filed by Georgia in 2016 (copy here).

Also attached is a draft memo that could be mailed with the Certificates.

In terms of logistics, what's key is for the electors to assemble at the appointed time, and each personally sign the six (6) duplicate originals, and enclose each of them in an internal envelope, which will be tightly sealed, and labeled outside something like:

"ELECTORAL VOTES OF THE STATE OF GEORGIA
FOR PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES."

This is the envelope that will then be opened only by the President of the Senate on January 6.

Then, the four mailing envelopes would be addressed with the addresses I've listed in the memo.

Pretty simple!

Note: the items I've listed on the memo as sent by Registered Mail need to be sent by **REGISTERED** (not certified) mail, which is required by the statute. Certified mail didn't exist in the 1940s when the relevant statute was enacted. The Bush team almost messed up on this in 2000!

Please don't hesitate to contact me, 24/7, at [redacted], if I can be of any help.

Ken

P.S.: I am copying on this e-mail two more electors who are GA GOP officers, as I realize you must be juggling a great deal, and might not be able to personally respond within a short timeframe.

From: Kenneth Chesebro
Sent: Thursday, December 10, 2020 5:55 PM
To: [redacted]
Cc: treasurer@gagop.com <treasurer@gagop.com>
Subject: URGENT -- National Trump-Pence campaign asked me to contact you to coordinate Dec. 14 voting by Georgia electors

Mr. Shafer,

I'm one of the lawyers handling the state-court litigation in Wisconsin where, as you may have heard, we plan to have the Trump-Pence electors cast their votes on Monday, Dec. 14.

Confidentially, so you can understand how we're messaging it, below is a draft press release, which would be released only after we file papers in the WI Supreme Court (following an expected loss in the lower court), which we expect to do Saturday.

Several people with the Trump campaign, including Justin Clark and Nick Trainer, supplied your contact info and **asked me to help coordinate with the other 5 contested States**, to help with logistics of the electors in other States hopefully joining in casting their votes on Monday.

I'd appreciate if you or someone else on your Georgia team could get in touch with me as soon as possible. I have two memos explaining the rationale for the electors voting on Monday, and I am preparing drafts of the documents that the electors in Georgia could sign to effect their votes, in case that would be helpful as a start.

Call or write anytime, night or day.

Sincerely,

Ken Chesebro
[redacted]

Kenneth Chesebro
[redacted]
kenchesebro@msn.com
(Admitted in CA, FL, IL, MA, NJ, NY, and TX)

https://www.linkedin.com/in/ken-chesebro

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Proposed Jim Troupis Statement on Electors' Meeting

As the legal proceedings arising from the November 3 presidential election continue to work their way through the Wisconsin court system, I have advised the Republican Party of Wisconsin to convene a separate Republican electors' meeting and have the Trump-Pence electors cast their votes at the Wisconsin State Capitol on December 14.

Of course, there is precedent for such a meeting. Democrat electors pledged to John F. Kennedy convened in Hawaii in 1960, at the same time as Republicans, even though the Governor had certified Richard Nixon

as the winner. In the end, the State's electoral votes were awarded to President Kennedy, even though he did not win the state until 11 days after his electors cast their votes.

The legitimacy and good sense of two sets of electors meeting on December 14 to cast competing votes for President and Vice President, with the conflict to be later sorted out by the courts and Congress, was pointed out by prominent Democrat activists Larry Lessig and Van Jones in an essay published last month on CNN.com.

Given that the results in Wisconsin are still in doubt, with legal arguments that have yet to be decided, just as the Democrat electors met in Hawaii in 1960 while awaiting a final resolution of that State's vote, so too the Republican electors should meet this year on December 14 as we await a final resolution in Wisconsin.

4 attachments

2020-11-18 Chesebro memo on real deadline -- streamlined dec 10.pdf
81K

2020-12-09 Chesebro memo on Dec 14 requirements for electoral votes.pdf
76K

GA -- Dec 10 -- draft of certificate of Georgia Trump-Pence electors.docx
19K

GA -- Dec 10 draft of cover memo to be enclosed with certificates.docx
15K

Exhibit C

MEMORANDUM

TO: James R. Troupis
FROM: Kenneth Chesebro
DATE: December 9, 2020
RE: **Statutory Requirements for December 14 Electoral Votes**

Here is a summary of the requirements under federal law, and under the law of the six States in controversy, concerning what is required for presidential electors to validly cast and transmit their votes. Obviously, there are party leaders and/or officials in each State who are familiar with the relevant details who would deal with the logistics, most of whom have handled such details in past elections. This memo merely supplies a general overview.

It appears that even though none of the Trump-Pence electors are currently certified as having been elected by the voters of their State, most of the electors (with the possible exception of the Nevada electors) will be able to take the essential steps needed to validly cast and transmit their votes, so that the votes might be eligible to be counted if later recognized (by a court, the state legislature, or Congress) as the valid ones that actually count in the presidential election. (On why this could work, see here and here.) And, they can do so without any involvement by the governor or any other state official (except, in some States, where access to the Capitol Building is or might be needed, or where the Governor must approve a substitute elector or, in Nevada, where the Secretary of State is involved).

It is important that the Trump-Pence Campaign focus carefully on these details, as soon as possible, if the aim is to ensure that all 79 electoral votes are properly cast and transmitted – each electoral vote being potentially important if the election ultimately extends to, and perhaps past, January 6 in Congress. The National Archives has a very helpful checklist, here.

I. FEDERAL LAW

The federal-law requirements for the December 14 electors' meeting are set out in 3 U.S.C. §§ 6-11 (copy here).

- Under federal law, the Trump-Pence electors must all meet, together, on December 14, "at such place in each State as the legislature of such State shall direct." 3 U.S.C. § 7.

- In most States there is no requirement that they meet in public. It might be preferable for them to meet in private, if possible, to thwart the ability of protesters to disrupt the event. Witness, via this video, what happened when the Trump-Pence electors met in public in Wisconsin in 2016, even though the Trump-Pence victory had not been contested. Even if held in private, perhaps print and even TV journalists would be invited to attend to cover the event.

• Preferably all electors who were on the ballot in the particular State would be in attendance. But if some are unwilling (due to intimidation) or unable to make it, at least four of the States permit the electors who do attend to fill the empty slots with alternates. However, it is vital that any party stalwarts who are on hand to fill in if necessary be constitutionally eligible to serve – i.e., per Art. II, § 1, cl. 2, not a federal official or federal employee (not even having reserve status in the military).

• The electors would then all vote for Trump for President, and Pence for Vice President, separately. 3 U.S.C. § 8.

• The electors would then prepare and sign six identical sets of papers – "certificates" – listing under separate headings their votes, indicating that each of them has voted for Trump for President, and Pence for Vice President. 3 U.S.C. § 9. (For examples, see here the 2016 certificate signed in Wisconsin by its ten electors; images of the certificates submitted in 2016 are archived here).

• The only thing ordinarily contemplated by § 9 that the Trump-Pence electors would not be able to do is include with their certificates the certificate of ascertainment that the governor is directed to give the winning electors pursuant to 3 U.S.C. § 6. But, as the Hawaii 1960 example shows (see here and here), this is hardly fatal; proof that the Trump-Pence electors are the validly appointed ones can be furnished to Congress before it meets on January 6.

• Next, the electors would place each certificate in a separate envelope, seal up the envelopes, and indicate on the outside of the envelopes that they contain the votes of the State for President and Vice President. 3 U.S.C. § 10.

• Finally, the electors would transmit the six envelopes containing identical originals of their votes as follows:

–1 to the President of the Senate, by registered mail, on the same day ("forthwith").

–2 to the Secretary of State of the State, one to be held in reserve for the President of the Senate, and the other to be preserved as a public record.

–2 to the National Archives, one to be held in reserve for the President of the Senate, and the other to be preserved as a public record, also by registered mail ("[o]n the day thereafter").

–1 to the federal district court where the electors meet.

II. STATE LAW

A. Arizona: 11 electors

The most straightforward State is Arizona, whose statutory provision regarding presidential elections lists no additional requirements beyond the federal-law requirements set out above. **Ariz. Rev. Stats. § 16-212** (here).

Assuming it is confirmed that there are no additional requirements (check carefully; perhaps there are regulations, for example, issued by the Secretary of State), the Trump-Pence electors presumably could meet and cast their votes anywhere in Arizona, anytime on December 14.

One concern: if one or more electors are absent from the meeting, **is there a procedure under Arizona law for filling vacancies?** The other five States make provision for that contingency. In the absence of any guidance, the electors present should simply vote to fill any vacancy.

B. Georgia: 16 electors

Georgia has two statutory provisions:

Ga. Code Ann. § 21-2-11 (here) requires that the electors "assemble at the seat of government of this state at 12:00 Noon" on December 14. But what does "seat of government" mean? See here. At minimum, they must meet somewhere in Atlanta – must they meet in the Capitol Building?

Ga. Code Ann. § 21-2-12 (here) supplies a mechanism for replacing one or more of the 16 electors if someone dies or fails to attend. In that event, the electors in attendance "shall proceed to choose by voice vote a person of the same political party . . . to fill the vacancy . . . ."

However, there's a wrinkle. Unlike in other States, where that choice is automatically effective, in Georgia a choice must be ratified: "immediately after such choice the name of the person so chosen shall be transmitted by the presiding officer of the college to the Governor, who shall immediately cause notice of his or her election in writing to be given to such person."

Could the Governor, in the current situation, refuse to ratify the choice, on the ground that this slate of electors is not the one the voters elected on Nov. 3 (according to the official canvass)? Given this statutory provision, **it seems imperative that every effort be made to secure the participation of all 16 electors, and to avoid making a substitution if at all possible.**

C. Michigan: 16 electors

The relevant provisions of Michigan law are **Mich. Comp. Laws §§ 168.41 & 168.47** (here).

Michigan is much more specific about the location in which electors must meet, which could be a bit awkward.

Under § 168.47, the electors "shall convene in the senate chamber at the capitol of the state at 2 p.m., eastern standard time . . . ." However, there is no requirement that they convene on the senate floor where, presumably, the Biden-Harris electors will convene. Presumably they could convene in the senate gallery.

Replacement of any absent elector is much easier than in Georgia: the electors who show up "shall proceed to fill such vacancy by ballot, by a plurality of votes."

However, the qualifications for such replacement are more stringent than the federal requirements: under § 168.41, a Michigan elector must have been a U.S. citizen for at least 10 years, and a resident of Michigan for at least a year prior to Nov. 3.

D. Nevada: 6 electors

Nevada is an extremely problematic State, because it requires the meeting of the electors to be overseen by the Secretary of State, who is only supposed to permit electoral votes for the winner of the popular vote in Nevada. **Nev. Rev. Stats. §§ 298.065, 298.075** (see here).

These provisions are designed to thwart the "faithless elector." They make no sense when applied to this situation, in which we are trying to have an alternate slate vote, in hopes that its legitimacy will be validated before January 6. Therefore, perhaps arguably the Nevada electors could simply meet and cast their votes, without the involvement of the Secretary of State. After all if, as in the Hawaii example in 1960, an alternate slate can meet and vote without the Governor's certificate in hand, and the votes can later be deemed valid, then why should it matter that the alternate slate in Arizona, when voting on December 14, did not have the Secretary of State overseeing their voting?

It bears notice that in any scenario in which Trump and Pence might have a possibility of winning Nevada's electoral votes, the failure to have the Secretary of State oversee the vote would hardly seem like a significant hurdle. If there were a vote in Congress to take Nevada away from Biden and Harris, presumably along with it would come a vote to overlook this procedural detail.

E. Pennsylvania: 20 electors

The statutory provisions in Pennsylvania parallel those in Georgia.

25 Pa. Stats. § 3192 (here) states that the electors "shall assemble at the seat of government of this Commonwealth, at 12 o'clock noon of" December 14. Again, does "seat of government" mean somewhere in Harrisburg, or does it instead mean the Capitol Building, specifically?

25 Pa. Stats. § 3194 (here) supplies a mechanism for replacing one or more of the 20 electors if someone dies or fails to attend. In that event, the electors in attendance "shall proceed to choose viva voce a person of the same political party . . . to fill the vacancy . . . ."

However, just as in Georgia, there is a wrinkle: the choice must be ratified: "immediately after such choice the name of the person so chosen shall be transmitted by the presiding officer of the college to the Governor, who shall forthwith cause notice in writing to be given to such person of his election . . . ." Given this statutory provision, **it seems imperative that every effort be made to secure the participation of all 20 electors, and to avoid making a substitution if at all possible**.

F. Wisconsin: 10 electors

Under Wisconsin law, the electors "shall meet at the state capitol," which presumably means the Capitol Building ("state capitol" being a term more specific than "seat of government"), "at 12:00 noon." Wis. Stat. § 7.75(1) (here).

Any absent elector may readily be replaced. Id. ("if there is a vacancy in the office of an elector due to death, refusal to act, failure to attend or other cause, the electors present shall immediately proceed to fill by ballot, by a plurality of votes, the electoral college vacancy.").

* * *

In conclusion, it appears that voting by an alternate slate of electors is unproblematic in Arizona and Wisconsin; slightly problematic in Michigan (requiring access to the senate chamber); somewhat dicey in Georgia and Pennsylvania in the event that one or more electors don't attend (require gubernatorial ratification of alternates); and very problematic in Nevada (given the role accorded to the Secretary of State).

K.C.

Exhibit D

From: Kenneth Chesebro [redacted]
Sent: Monday, January 04, 2021 8:51 PM MST
To: Eastman, John <[redacted]>
Subject: Fwd: Draft 2, with edits
Attachment(s): "2020-11-18 Chesebro memo on real deadline.pdf"

Here's the dec 13 email with 12A at end

Get Outlook for iOS

From: Kenneth Chesebro [redacted]
Sent: Saturday, January 2, 2021 7:43:30 PM
To: Eastman, John <[redacted]>
Subject: Fw: Draft 2, with edits

Oh, I did do a very rough e-mail on Dec. 13, which Boris requested on behalf of the Mayor.

A lot of it is irrelevant at this point. The end discusses the originalist view of the 12th Amendment.

Ken

xxxxxxxxxxxxxxxxxxxxx

From: Kenneth Chesebro
Sent: Sunday, December 13, 2020 9:48 PM
To: Rudy Giuliani [redacted]
Subject: PRIVILEGED AND CONFIDENTIAL -- Brief notes on "President of the Senate" strategy

PRIVILEGED AND CONFIDENTIAL

Dear Mayor,

Unfortunately, as mentioned in my text, I lost the several-page memo I had nearly finished due to a reboot on the hotel computer.

Rather than rewrite it now, and further delay, here are some quick notes on strategy.

I have not delved into the historical record (Vice President Pence's counsel has, and seems totally up on this, and I'm sure there are many other lawyers who can add a great deal, John Yoo in particular), and am writing this with reference 3 law review articles I happen to have taken with me, which I attach as references: Kesavan, 80 N.C. L. Rev. 1653 (2002); Nagle, 104 N.C. L. Rev. 1732 (2004); and Foley, 51 Loyola U. Chi. L.J. 309 (2019).

The bottom line is I think having the President of the Senate firmly take the position that he, and he alone, is charged with the constitutional responsibility not just to **open** the votes, but to **count** them -- including making judgments about what to do if there are conflicting votes -- represents the best way to ensure:

(1) that the mass media and social media platforms, and therefore the public, will focus intently on the evidence of abuses in the election and canvassing; and

(2) that there will be additional scrutiny in the courts and/or state legislatures, with an eye toward determining which electoral slates are the valid ones.

And it think this strategy can be carried out with surrogates of the President and Vice President, with them standing mostly above the fray, urging only that there be real scrutiny of what happened in this election, and that they're willing to live with the result as long as there is a serious look, especially by the state legislatures, at what happened there, to ensure it will never happen again.

I think having the President of the Senate use the defensible claim that he is in charge of counting the votes as leverage to obtain that needed scrutiny would be worthwhile even if it couldn't ultimately prevent the election of Biden and Harris. The Republicans used this argument in 1877 as leverage, and with it managed to get an election commission created which elected Hayes. Republicans should use it again.

Here is a chronology of how things could play out, if there is a serious effort to employ the argument that the President of the Senate counts the votes.

Jan 3-5, and perhaps before then

Committees of the Senate hold hearings detailing widespread violations of law, and fraud, in the election in the states at issue. (Apparently Ron Johnson already has one planned for this week.) Idea would be to buttress the substantive basis for the President of the Senate later refusing to count votes from those States, absent more needed scrutiny.

Also, there is a hearing in the Senate Judiciary Committee exploring the constitutional question of how the votes must be counted, with at least two highly qualified legal scholars concluding that the President of the Senate is solely responsible for counting the votes, and that the Electoral Count Act is unconstitutional in dictating limits on debate and dictating who wins electoral votes when there are 2 competing slates and the House and Senate disagree.

Jan. 6. The House and Senate assemble for the opening and counting of the votes.

The theme that the counting of the votes will proceed on **a strict textual**, **originalist basis** proceeds when Vice President Pence steps up to the podium, to cause the first break with the procedures set out in the Electoral Count Act.

The Electoral Count Act states that House and Senate shall meet in the House on Jan. 6 at 1 p.m., "and the President of the Senate **shall** be their presiding officer."

The Vice President announces that he will **not** serve as presiding officer, for two reasons. First, Congress cannot, by statute, impose duties on either the President or Vice President beyond those set out in the Constitution. For example, Congress could not by statute require the President to throw out the first ball on opening day of the baseball season. Likewise, the Vice President's duties are precisely set out in the Constitution, and Congress may not add to them. See Kesavan at 1700-01, note 213.

Two, even if Congress can mandate that a Vice President, in general, must preside over the electoral count, Pence takes the position that he should not, and cannot, in this instance, preside, because he has a conflict of interest, as one of the candidates for election. See id. at 1698-99. Thus, one of the Senators or Representatives should be selected to serve as the presiding officer Id. at 1700.

Note that Pence so far has **only** indicated that **he will not serve as presiding officer**, based on a constitutional objection to Congress imposing extra duties on the Vice President.

It is a **separate** matter whether he will have a role in the joint session itself. Because the Vice President clearly serves as the President of the Senate, and the Twelfth Amendment states that in the joint session, "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."

So by the constitutional test, he **should** perform that role, unless he has a constitutionally valid reason not to.

After a presiding officer is selected, he or she will then ask Vice President Pence to open the envelopes, starting with Alabama.

At this point, the Vice President will **recuse** himself, on the basis that as a candidate for election himself, and given that there is dispute about the electoral votes of some of the States, and especially given that it might well be the responsibility of the President of the Senate to actually **count** the votes, he has a conflict of interest, and he feels he cannot participate in the proceeding -- just as Vice President Humphrey recused himself in the January, 1969, electoral vote count. See Kesavan at 1702 n.219. And just as the Vice President, who presides during impeachment trials, does not preside during an impeachment trial of the President.

At this point, the Vice President will have emphasized the need for focus on plain language and adherence to the Constitution, by rejecting the role of presiding officer imposed by the Electoral Count Act. He will also have made clear that he and the President are not going to be involved in counting the votes concerning their own election, which is why he feels bound to recuse himself on conflict-of-interest grounds, just as a Democrat did previously.

Of course, politically this will insulate him and the President from what will happen next. For it is much easier for someone acting as President of the Senate to defend the prerogatives of the office if he has no conflict of interest (other than, of course, a patisan interest, which is unavoidable).

In the absence of the Vice President, the president pro tempore acts as the President of the Senate, and thus is the one with the sole power and responsibility to play that role in the joint session. So regardless of whether it is Chuck Grassley or another senior Republican who agrees to take on the role of defending the constitutional prerogatives of the President of the Senate, whoever it is then proceeds to open and count first Alabama, and then Alaska, at which point Trump and Pence are leading 12-0.

He then opens the two envelopes from Arizona, and announces that he cannot and will not, at least as of that date, count any electoral votes from Arizona because there are two slates of votes, and it is clear that the Arizona courts did not give a full and fair opportunity for review of election irregularities, in violation of due process.

Jack Wilenchik has filed an excellent cert. petition to that effect, pointing out that the Arizona courts simply rubber stamped

the election results in their rush to meet the Dec. 8 "safe harbor" date which, in this context, is irrelevant, and which is contained in an unconstitutional statute. So we are lucky that Arizona will be the first contested state in the electoral count.

Unless by then the Supreme Court has taken that case and rejected it on the merits, the President of the Senate can make his own judgment that the Arizona proceedings violated due process, so he won't count the votes in Biden's column.

But, reprising the theme of modesty, and making clear that he is not using the power of his position to throw the election to Trump and Pence, he refuses to count Arizona in the Trump-Pence column. He says that if Arizona wants to be represented in the electoral count, either it has to rerun the election, or engage in adequate judicial review, or have its legislature appoint electors.

After Jan. 6

Lots of lawyers and political strategists connected to the campaign can wargame much better than me what would then happen, but if the President of the Senate stuck to his guns, absent him being impeached and removed from office, the fact that he is the only one permitted to even OPEN the votes could give him enormous leverage. He would of course make clear that if the Supreme Court rules that he is not the one with the power to count the votes (whether or not the Electoral Count Act is constitutional) he would of course comply with whatever the Court orders.

What the Supreme Court would do is anyone's guess, but I would not bet on a majority of the Court siding with the President of the Senate, even though a majority might well agree with that the Constitution is correctly construed, from an originalist perspective, in exactly that manner. More likely, to bring an end to a huge political crisis, the Court would find some way to rule in Biden's favor or, at minimum, find the controversy nonjusticiable (as with the Texas case) on some basis, such as the "political question" doctrine, thus insulating its legitimacy from partisan conflict.

If Biden were to win in the Court, much will still have been accomplished, in riveting public attention on election abuses, and building momentum to prevent similar abuses in the future.

If the Court were to dodge, then we would have a situation similar to 1877, in which the parties would realize that if they remained at loggerheads, with the President of the Senate perhaps refusing to open the votes of the contested states as long as his authority to count the votes was being challenged, and Pelosi refusing to hold an election for president in the House, and with January 20 looming, political leaders would face a choice. Either Pelosi would become acting president on January 20 (after resigning as Speaker) or the Senate would reelect Pence as Vice President, who would then become acting president on Jan. 20.

In this situation, which would seem messy and unpalatable to many,with renewed attention on the election abuses, and with several states controlled by Republican legislators faced with perhaps not being counted in the Electoral College, it doesn't seem fanciful to think that Trump and Pence would end up winning the vote after some legislatures appoint electors, or else that there might be a negotiated solution in which the Senate elects Pence Vice President, and Trump agrees to drop his bid to be elected in the House, so that Biden and Harris are defeated, even though Trump isn't reelected.

Any of the outcomes sketched above seems preferable to allowing the Electoral Count Act to operate by its terms, with Vice President Pence being forced to preside over a charade in which Biden and Harris are declared the winner of an election in which none of the serious abuses that occurred were ever examined with due deliberation.

Again, it's very difficult to predict how things work out, but it does seem clear that a forceful assertion by the President of the Senate that he is in charge of counting the votes would at minimum focus attention on election abuses and help in the efforts to prevent such abuses in the future. It's difficult to think of anything else that could supply anything like that sort of leverage in the situation, although obviously for the President of the Senate to take these steps would be hugely controversial.

The originalist argument re the 12th Amendment

Finally, as to the constitutional argument that the President of the Senate would rely on, some brief notes.

Historical era

In analyzing the original meaning of the 12th Amendment, we have to forget about our current political climate, and remember the world in which the Framers wrote and ratified this language.

Today, it would be unimaginable that we would write a Constitution that would give either the Vice President, or the most senior member of the majority in the Senate, sole power to decide contested results for the presidential election. However, Art. II, Sect. 1, cl. 3 was enacted in 1787, before political parties, when the Framers didn't imagine that disputes over the electoral count would arise, as Justice Story noted in the 1830s. See Foley at 325 & n.34.

Recall that the Framers thought that the Electoral College would operate with the state legislatures selecting wise men in their state, who would know the most reputable figures nationally; that they'd deliberate and send in electoral votes to

Congress; and that usually there would be no one with a majority, and then the House would elect a president from the top names. The Framers did not anticipate political parties putting up uniform slates of electors. They didn't even bother to have electors vote separately for president and vice president, leading to the crises of the 1800 election, and the need for the Twelfth Amendment.

Further, during this era there was an emphasis on honorable behavior and circumspection. Leaders were greatly concerned about their reputation, about whether they were perceived as honorable, both during their lives and afterwards. So there was much less concern that someone in a national legislature entrusted with power to count votes would abuse it.

Text

Consider next the text. The Twelfth Amendment, identical to Art. II, Sect. 1, cl. 3, except for punctuation, states that "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."

Of course, as many have noted, the passive language is ambiguous; the text doesn't specify who counts the votes. Nagle at 1737 & n.22.

But notice that the only person or entity doing anything here is the President of the Senate. All that is required of the Senate and House is their "presence." As Prof. Foley notes, at 325, it seems that their job is to watch the votes being opened and counted -- this ensures transparency.

And, as Foley asks, how, exactly could they do anything? The Senators and Representatives are sitting there. They are not part of a body that can vote on anything, because the House and Senate can only act separately, as distinct legislative chambers.

And how would they even have time to do anything? The Twelfth Amendment was written to minimize the chances for conspiracy and cabal. After the votes are counted, if no presidential candidate has a majority, the House is to "immediately" choose from the top three. There is nothing in the Twelfth Amendment that suggests the joint meeting is to be suspended if there is a dispute over a state's votes, with the House and Senate separately deliberating.

As Foley also observes, the power to make an ultimate decision on the electoral votes of a state "must be lodged ultimately in some singular authority of the federal government." Because if it were lodged in two authorities -- such as the House and Congress -- then one could have a stalemate, with one authority disgreeing with the other. That's exactly what happened in 1877.

So it seems entirely sensible to read this language as granting sole power to count the votes to the President of the Senate, with the Members of Congress having no power to influence the result. At the time this language was enacted, this scheme made sense. Maybe it makes less sense now, but if that's the case, then the Constitution can be amended to make more sense. But as long as this language can be reasonably read to grant the President of the Senate sole power to count the votes, whoever holds that post at a particular time should assert that prerogative, just as our Presidents assert executive privilege not only for their own sake (sometimes they personally would prefer, for partisan reasons, to release privileged material), but to defend the prerogatives of the office.

Historical indications that this is what was intended

Examples of how a constitutional provision was understood and carried out during the Framers' generation can help buttress one's conclusion about the plain meaning of an enactment, and here there seems like some very helpful material.

"The Framers clearly thought that the counting function was vested in the President of the Senate alone," as evidenced by the action of the First Congress of electing John Langdon as President of the Senate "for the pose purpose of opening and counting the votes for President of the United States." Kesavan at 1706.

The President of the Senate was permitted to count the votes even though in two early instances, that power was arguably abused.

In 1797, Vice President John Adams, overseeing his own election for President, purportedly counted improper votes from Vermont, and in 1801, Vice President Thomas Jefferson purportedly did the same for votes from Georgia. Id. at 1706-07 & n.230.

Notwithstanding such early claimed abuses, the substantively identical language was reenacted in the Twelfth Amendment, in 1804. The Framers were concerned enough about a repeat of the tied election of 1800 that they felt the process for electing the president had to be changed to require separate ballots -- but they were not concerned about the practice of the President of the Senate counting the votes, and in so doing resolving disputes about the votes (as Adams and Jefferson did), and thus they left the counting language undisturbed.

Bottom line

Many more points would need to be analyzed in making a complete argument that the President of the Senate possesses the sole power to count electoral votes, and anything to the contrary in the Electoral Count Act is unconstitutional. But at minimum this seems a defensible interpretation of the Twelfth Amendment, and one that ought to be asserted, vigorously, by whoever has the role of President of the Senate.

And, in terms of Republicans having leverage on Jan. 6 to force closer reexamination of what happened in this election, a defensible interpretation may be all that's needed, because the Supreme Court might decline to reverse, based on the "political question" doctrine, and even if it did reverse, that would come only after a number of additional days of delay, which itself would ensure closer attention to the voluminous evidence of electoral abuses.

I hope this very rough, incomplete sketch is of some use Thank you for seeking my further input on this possible strategy. It's an honor and privilege to be involved with you in this fight!

Sincerely,

Ken Chesebro

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https://www.linkedin.com/in/ken-chesebro

From: Kenneth Chesebro <kenchesebro@msn.com>
Sent: Saturday, January 2, 2021 3:11 PM
To: Eastman, John <[redacted]>
Subject: Re: Draft 2, with edits

Was going to do one on VP powers, but then we did WI cert pet. But footnote 4 here might be of some use.

Get Outlook for iOS

From: Eastman, John <[redacted]>
Sent: Saturday, January 2, 2021 12:19:09 PM
To: Kenneth Chesebro <kenchesebro@msn.com>
Subject: RE: Draft 2, with edits

Ken,

Did you do a memo on the Jan 6 authority that includes the competing scholarship on the topics? If so, can you send it to me? I might have it in my inbox, but can't find it at the moment.

John

From: Kenneth Chesebro <kenchesebro@msn.com>
Sent: Wednesday, December 23, 2020 9:36 AM
To: Eastman, John <jeastman@chapman.edu>
Subject: Draft 2, with edits

Really awesome.

Exhibit E

From: Kenneth Chesebro [redacted]
Sent: Friday, January 01, 2021 8:25 PM MST
To: Eastman, John <jeastman@chapman.edu>; Boris Epshteyn <bepshteyn@donaldtrump.com>
Subject: Filibuster talking points

External Message

Here is a rough draft. Hope it's a good starting point, although I know it's a bit long!

1. The state legislatures and the courts, including the Supreme Court, have failed to resolve, on the merits, serious contentions, backed by substantial evidence, that in at least 4 States -- AZ, GA, PA , and WI -- illegal votes were cast & counted in numbers much more than enough to have tipped the balance in favor of Biden & Harris, so that the electoral votes sent in by the governors of those States are not legitimate.

2. The core objective of Members of Congress who believe it's wrong to count any electoral votes from these States unless and until those contentions are decided on the merits, either by the Supreme Court or by state legislatures, should be to find a way to prevent the Biden camp from concluding the vote on Jan. 6, before there is time for further scrutiny of these contentions. Even if this effort ultimately proves unsuccessful in blocking Biden's election, it would at minimum focus public attention on the serious abuses by Democrats in this election, and make clear Biden was not legitimately elected.

3. The strategy of the Biden camp to have Biden annointed President in Congress on Jan. 6, when the electoral votes are to be opened and counted, without ever having this evidence scrutinized, is predicated entirely on the Electoral Count Act of 1887, which sets draconian limits on debating objections to the electoral votes of any particular State -- 2 hours max, in each house of Congress, with no Member of Congress speaking for more than 5 minutes. The Democrats mean to use this antiquated act to suppress information regarding the illegalities.

4. One way around the Act is for the VP to take the approach of Thomas Jefferson in 1801, and take the position that as President of the Senate, it is his responsibility to count the votes and, in so doing, resolve any disputes concerning them. If he did this, he would not necessarily count the contested States in favor of him and Trump -- he might merely say that none of these States can be counted until either the Supreme Court or state legislatures act on pending objections. This would pressure the Supreme Court and state legislatures to act, particularly if he refused even to open the envelopes containing the electoral votes until there was further action on the objections (under the 12th Amendment, only the President of the Senate may open the envelopes.)

5. Another way to create delay and pressure for further action would be for the VP to allow the objection & debate process to generally go forward within the framework of the Electoral Count Act, but for Senators objecting to particular states to engage in filibusters to prevent a final vote on the states unless and until there was further action by the Supreme Court or state legislatures.

6. Under the Act, the electoral votes of the states are to be opened in alphabetical order. So the VP opens the envelopes for Arizona, notes that there are two competing slates of electoral votes, and hears objections from a House and Senate member to each, and then the houses break to debate.

7. In the House, the debate proceeds under the Electoral Count Act, for 2 hours, with no Representative speaking for more than 5 minutes.

8. But in the Senate, the VP, presiding over the Senate proceedings, recognizes Sen. Hawley or some other Senator who objects, who then proceeds to speak much longer than 5 minutes. When an objection is raised, the VP rules it out of order, given that Senate rules allow for unlimited debate on a question, subject only to a cloture vote. So only a vote by 60 Senators, including about a dozen Republicans, could bring a debate over Arizona to an end; and it might be politically painful for a Republican to vote to cut off debate and thereby appear complicit in preventing evidence about election abuses from coming to public light. This could be repeated with all the other States in question. It could take hours of debate on each state before a filibuster is overcome.

9. The rationale for the VP taking this position would be that the Electoral Count Act, enacted more than 130 years ago by the 50th Congress, cannot constitutionally bind the current Senate. There is strong scholarly consensus on this point, including a 2001 article in the Harvard Law Review by Prof. Laurence Tribe on Bush v. Gore.

10. There is one key problem with executing this strategy. Perhaps mindful of the principle that a past Congress can't bind the current Congress, **the House and the Senate have a practice of adopting, before the Jan. 6 count, by concurrent resolution, the terms of the Act**, which is routinely adopted by unanimous consent. See pages S6-S7 of the Jan. 3, 2017, Congressional Record, here.

11. Presumably the same Concurrent Resolution will be presented for approval this January 3. If it is not blocked, then the current Senate will have modified the normal filibuster rules to adopt the 2-hour limit on debate for each state's contested electoral votes. There would no longer be a constitutional problem with the 2-hour limit. In that event, it would appear the VP could not permit a filibuster on the vote of any state.

12. Fortunately, there is a solution. A senator, for example, Senator Hawley, could on January 3 object to Concurrent Resolution. Once recognized, he could give a lengthy speech, perhaps lasting hours, explaining why the Senate should not limit debate to 2 hours on objections to particular states, given the large amount of evidence of serious illegalities in the vote in various states. This would provide a forum for exposing some of the flaws in the election to public attention. In other words, the Senator would filibuster the Concurrent Resolution in order to prevent it from being adopted, so as to permit later filibusters regarding individual states. The Concurrent Resolution could only be adopted if the Biden camp won a cloture vote to cut off debate on the Concurrent Resolution, which again would take about a dozen defecting Republican senators.

13. One advantage of this strategy is that we could know before Jan. 6 whether filibusters of individual states are viable. If the Concurrent Resolution can be blocked, then the VP would know that he could permit the count to go forward under the Act, knowing that doing so would not allow the Biden camp to easily rush through the electoral returns and claim victory. Biden could only win if he could fight his way through filibusters on multiple states, during which time the public would grow increasingly aware of the illegalities which plagues this election, and the pressure on the Supreme Court and state legislatures to act would grow. This strategy could offer a serious chance of success, or at least of showing the illegitimacy of Biden's election, without requiring controversial action by the VP.

14. The two approaches are not necessarily incompatible. The VP could, before allowing a break for the houses to debate Arizona, say that he is not conceding that the 2 houses of Congress have any role in actually counting the electoral votes, but that he recommends a debate because a debate is useful, regardless of who ultimately is responsible for the counting of votes. Perhaps he could let all 7 states be filibustered and voted on by the 2 houses before addressing whether he, or instead the 2 houses, are responsible for counting the votes. If he and Trump ended up winning through the filibuster strategy (e.g., to resolve the continuing delay, the Supreme Court and/or state legislatures act to award Trump & Pence enough electoral votes to win), the VP could avoid ever having to claim the authority to count the votes.

END

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, MISTY HAMPTON a/k/a EMILY MISTY HAYES Defendants.	CASE NO. 23SC188947

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **STATE'S RESPONSE TO DEFENDANT CHESEBRO'S MOTION TO EXCLUDE LEGAL MEMORANDA AND AFFILIATED CORRESPONDENCE UNDER O.C.G.A § 24-5-501**, upon all counsel who have entered appearances as counsel of record in this matter via the Fulton County e-filing system.

This 9th day of October, 2023,

FANI T. WILLIS
District Attorney
Atlanta Judicial Circuit

/s/ Alex Bernick
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Georgia Bar No. 730234
Assistant District Attorney
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