**IN THE SUPERIOR COURT OF FULTON COUNTY**
**STATE OF GEORGIA**

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| STATE OF GEORGIA<br>v.<br>KENNETH JOHN CHESEBRO, and<br>SIDNEY KATHERINE POWELL. | Indictment No.<br>23SC188947 |

**ORDER ON DEFENDANTS' MOTIONS TO DISMISS UNDER THE SUPREMACY CLAUSE AND FIRST AMENDMENT**

The Defendants seek dismissal of the indictment under the Supremacy Clause of the United States Constitution. (Chesebro Doc. 27).[1] The State responded (Chesebro Doc. 65), to which Defendant Chesebro replied (Chesebro Doc. 103), and the Court heard arguments on October 10, 2023. In a similar constitutional vein, the Defendants seek to dismiss the indictment, or alternatively only Count 1, based on as-applied First Amendment protections. (Chesebro Doc. 50;[2] Powell Doc. 35). Again, the Court benefited from the parties' extensive briefing (Chesebro Docs. 67, 79, 99, 120; Powell Docs. 83, 92) and heard arguments on these issues over the course of two hearings on October 10 & 11, 2023.

The Court finds that the Electoral Count Act ("ECA") does not preempt Georgia criminal prosecutions related to elections, that aspects of this argument are not appropriate subjects for a general demurrer, and that the First Amendment arguments are premature. After considering the briefs, the record, and the law, the Defendants' motions are DENIED.

[1] Adopted by Defendant Powell.

[2] Adopted by Defendant Powell.

***Chesebro's Motion to Dismiss Under the Supremacy Clause***

The Defendants argue that the ECA (codified as 3 U.S.C. §§ 5–7 and 15–18), which governs Congress' electoral vote counting process, preempts state action related to the 2020 presidential election after December 8, 2020,[3] because any related illegal activity would exclusively violate federal law. The preemption doctrine of the Supremacy Clause[4] may apply "(1) where there is direct conflict between state and federal regulation; (2) where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' [cit.], or (3) where Congress has 'occupied the field' in a given area so as to oust all state regulation." *Aman v. State*, 261 Ga. 669, 671 (1991) (quoting *Exxon Corp. v. Ga. Asso. of Petroleum Retailers*, 484 F. Supp. 1008, 1017 (N.D. Ga. 1979)). Preemption may be express or implied: express preemption occurs where the law is explicit in preempting state law whereas implied preemption, or "field" preemption, applies where a state law directly conflicts with federal law, or the reach of the law "indicates that Congress intended federal law to occupy a field exclusively." *Kansas v.*

[3] As the alleged events in the indictment predate the 2022 revision of the ECA, the prior version of the ECA is applicable. Under that version, a state's final determination of electors at least six days before the meeting of electors is conclusive on the counting of electoral votes as far as the state is concerned. 3 U.S.C. § 5 (amended 2022). Defendants submitted that this "Safe Harbor Deadline" in 2020 would have been December 8, 2020, and that subsequent to this deadline, any conduct relating to the electoral votes is governed exclusively by federal law under the Supremacy Clause. 3 U.S.C. § 7 (amended 2022).

[4] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. Const. Art. VI.

*Garcia*, 140 S. Ct. 791, 801 (2020); *Kurns v. R.R. Friction Prod. Corp.*, 565 U.S. 625, 630 (2012).[5]

Nothing in the ECA in its current or prior form expressly or implicitly preempts state law. *See* 3 U.S.C. §§ 5–7, 15–18. Likewise, Georgia criminal statutes prohibiting the alleged acts do not directly conflict with the ECA because the State's prosecution of alleged RICO/conspiracy violations does not impair congressional vote counting as prescribed by the ECA. *See Kansas v. Garcia*, 140 S. Ct. 791, 806 (2020). Although the Defendants argued that presidential elector nominees cannot comply with their duties under the ECA to send ballots to Congress if the State claims that doing so is a crime, the Defendants have not demonstrated that their actions alleged in the indictment can be construed under the ECA as a protected "duty." Rather, the cited section of the ECA alludes to a "case of more than one return or paper [slate of electoral ballots or ballot] purporting to be a return from a State if there shall have been no such determination of the question in the State," but contains no indication that more than one slate of electoral ballots is *required*. 3 U.S.C. § 15 (amended 2022).

In addition, the notion that Congress intended the ECA to preempt the entire field of criminal law relating to elections is unsupported. The U.S. Supreme Court has stated that in an implied preemption analysis there is a strong presumption that a state retains its traditional police powers "unless [preemption] was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citation omitted). For example, in *Hernandez v. State*, the Georgia Supreme Court denied a post-conviction argument that the identity fraud statute was preempted by federal immigration law because "[n]othing in the federal law explicitly overrides state law, and the two laws do not conflict in their operation or enforcement." 281 Ga. 559, 560-61 (2007);

[5] Notably, the Defendants do not raise the issue of federal officer immunity.

*see also State v. Klinakis*, 206 Ga. App. 318, 321 (1992) ("Furthermore, in the area of enforcement of state criminal laws, the presumption is against federal preemption and, thus, favors an active exercise of criminal jurisdiction by the state.") (quotations omitted). The prevalence of Georgia law does not support the contention that federal law was intended to govern conduct related to state electors exclusively. *See* O.C.G.A. §§ 21-2-11 (meeting of Presidential electors), 21-2-13 (compensation of Presidential electors), 21-2-12 (filling vacancies of presidential electors), 21-2-502(e) (ascertainment of presidential electors).

To the extent that the Defendants seek the Court to dismiss the indictment against them on the grounds that their acts were lawful, such a determination is not suitable for a demurrer. *See, e.g. State v. Williams*, 306 Ga. 50 (2019) (reversing demurrer that relied on extrinsic facts found outside the four corners of the indictment). Each of these counts is alleged to involve a degree of criminal intent (intentionally, knowingly, willfully, or some combination). While Defendant Chesebro may argue that he believed he was acting lawfully under the ECA, this intent can only be examined by the Court after the factual record is established at trial. However, nothing in this Order should be understood to suggest that the Court has yet made any findings on the merit of the Defendant's substantive interpretations of the ECA or resulting defenses. The motion is DENIED.

***Defendants' Motions to Dismiss Under the First Amendment***

Next, the Defendants challenge the indictment on as-applied First Amendment grounds. As a general matter, the First Amendment forbids the restriction of expression "because of its message, its ideas, its subject matter, or its content." *United States v. Alvarez*, 567 U.S. 709, 716 (2012). Content-based restrictions on speech have been permitted, however, "for a few historic categories of speech, including incitement, obscenity, defamation, speech integral to criminal

conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent." *Id.* at 709. A general exception also exists for speech when it is "a knowing or reckless falsehood." *Id.*

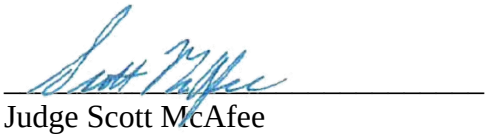
The question of ripeness of a constitutional challenge to a statute applies differently to facial and as-applied challenges. Because a facial challenge asserts that a statute "always operates unconstitutionally," and will only succeed if the statute "could never be applied in a constitutional manner," such a challenge "is presumptively ripe for judicial review because it does not require a developed factual record." *Harris v. Mexican Specialty Foods, Inc*., 564 F.3d 1301, 1308 (11th Cir. 2009) (citations omitted).

On the other hand, an as-applied challenge asserts that a statute cannot be constitutionally applied on the facts of a particular case or to a particular party; thus, "it necessarily requires the development of a factual record for the court to consider." *Id.* (cited in *Major v. State*, 301 Ga. 147, 152 (2017)); *see Jones v. State*, 307 Ga. 505, 509 (2019) (noting that an as-applied Equal Protection and Eighth Amendment post-conviction challenge requires addressing the particular facts of a case as shown by the record). Several decisions by the Supreme Court illustrate this procedural requirement. *See, e.g., Davis v. State*, 306 Ga. 140, 332–33 (2019) (finding an as-applied void-for-vagueness challenge brought after conviction involving the defendant's sentence to be "unavailing"); *Major v. State*, 301 Ga. at 152 (finding a factual issue related to the First Amendment and void-for-vagueness as-applied challenge was for the jury to resolve); *Hertz v. Bennett*, 294 Ga. 62, 66 (2013) (rejecting the plaintiff's argument that a firearms license statute was unconstitutional as applied because of prior felony convictions); *Hogan v. Atkins*, 224 Ga. 358, 359 (1968) ("In the absence of a transcript of the evidence from the appellant's

trial, it cannot be held that the statute in question is void for vagueness as applied to the evidence.").

Georgia precedent bars the consideration of an as-applied challenge here where the factual record, to the extent any yet exists, is incomplete and vigorously disputed. There have been no formal evidentiary hearings tested by cross-examination, and nothing is stipulated. While the indictment goes further than the average case by describing a number of overt acts pertaining to both Defendants, the Court has not located nor been provided with any authority that a charging document alone can substitute for a traditional evidentiary record. Thus, the caselaw and the circumstances of this case as it currently stands require a denial of the Defendants' request to consider an as-applied First Amendment challenge. *See State v. Grube*, 293 Ga. 257, 258 (2013) (a trial court lacks authority to find or rely upon facts not appearing on the face of the indictment). "Mere expediency does not warrant this Court reaching the merits of [as-applied unconstitutionality] claims in the absence of the necessary evidence by which to do so." *Siegel v. LePore*, 234 F.3d 1163, 1171 n.4 (11th Cir. 2000). The motions are DENIED.

**SO ORDERED**, this 18th day of October, 2023.



Judge Scott McAfee
Superior Court of Fulton County
Atlanta Judicial Circuit