IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CASE NO. 23SC188947
	:	
DONALD JOHN TRUMP,	:	Judge: Scott McAfee
	:	
Defendant.	:	

POST-HEARING BRIEF IN SUPPORT OF PRESIDENT TRUMP'S ADOPTED DEMURRERS & MOTIONS RAISING FIRST AMENDMENT AS-APPLIED CHALLENGES[1]

President Trump notified this Court and the prosecution in his "Notice of Supplemental Authority on Ripeness of Pretrial First Amendment As-Applied Challenge" that *Hall v. State*, 268 Ga. 89 (1997), authorizes such a pretrial determination. In *Hall*, there was no disagreement among the Justices on the Georgia Supreme Court on the ripeness of pretrial constitutional as-applied challenges based on the "allegations of fact appearing in the indictment." *See id*. at 89 n.2, 100.

[1] This Court has previously recognized that President Trump adopted Cheeley Docs. 49 & 50 (and reply brief), and Smith Doc. 24. President Trump now adopts Cheeley's "Post-Hearing Brief In Support Of [His] Joint General and Special Demurrer, Plea In Bar, and Motion To Quash" to be filed December 18, 2023. Specifically, President Trump adopts Cheeley's First Amendment as-applied arguments in Section D re: counts 1, 9, 11, 13, 15, 17, and 19 because both are charged therein; count 26 because it applies to President Trump's counts 29 and 39; count 23 because it applies to President Trump's counts 5, 28 and 38; and count 15 because it applies to President Trump's count 27.

As stated at the hearing and for purposes of a First Amendment as-applied challenge only, the Court accepts all well-pleaded factual allegations in the indictment as true.[2] Those "facts" alleged against President Trump are found in **count 1**, which charges a RICO conspiracy - overt acts 1, 5, 7-9, 14, 17, 19, 22, 26-27, 28, 30-32, 40, 42-44, 75, 90, 93, 95, 97, 100-101, 106-108, 112-114, 123 (2d one – numbering mistake by prosecution, should be 125), 128, 130-133, 135, 138-140 and 156-157; and in **counts 5** (see overt act 42), **28** (see overt act 112) & **38** (see overt act 156), which charge solicitation of oath by public officer; **count 9**, which charges a conspiracy to commit impersonating a public officer; **counts 11** & **17**, which charge a conspiracy to commit forgery; **counts 13** & **19**, which charge a conspiracy to commit false statements and writings; **count 15**, which charges a conspiracy to commit filing false documents); **count 27** (see overt act 108), which charges filing false documents); and **counts 29** (see overt act 113) & **39** (see overt act 157), which charge false statements and writings. Overt acts 108, 113 & 157 are alleged to be acts of racketeering. All the alleged overt acts and counts, except acts 156-157 and counts 38-39, are claimed to have taken place during President Trump's term in office. Overt acts 156-157 and counts 38-39 are claimed to have occurred on September 17, 2021. Every single alleged overt act listed and count charged against

[2] The prosecution argued at the hearing that a defendant must "stipulate" to **all** the allegations in the indictment for this Court to apply a pretrial constitutional as-applied challenge. First, the word "stipulate" does not even appear in *Hall*. Second, the words "unlawfully," "willfully," and "knowingly" are simply not "allegations of fact."

President Trump seeks to criminalize content-based, core political speech and expressive conduct.[3]

The offenses alleged against President Trump involve five distinct areas: the Elector Certificates sent to Congress, the request made of the Georgia Speaker of the House to call a special session, the verification attached to a lawsuit challenging the presidential election, the call placed to Georgia Secretary of State Raffensperger on January 2, 2021, and a letter sent to Raffensperger on September 17, 2021. The RICO count alleges a broad conspiracy related to what the Fulton County prosecutors wrongfully deem an "unlawful" attempt to challenge the results of the presidential election.

I. Like Every American, the First Amendment[4] Protects President Trump's Speech.

[3] There are forty-one overt acts alleged against President Trump in count one. Twenty-one overt acts allege "tweets" attributed to President Trump. The remainder, except overt act 107, allege President Trump made statements and speeches or attended meetings related to the 2020 presidential election. Overt act 107 alleges President Trump received a memorandum related to the 2020 presidential election.

[4] When referencing the "First Amendment," President Trump is also referencing the Georgia Constitution, which provides First Amendment protections beyond those of the U.S. Constitution. *State v. Fielden*, 280 Ga. 444, 445 (2006). *See* Ga. Const. Art. I, § I, Para. V ("No law shall be passed to curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty."); Ga. Const. Art. I, § I, Para. IX ("The people have the right to assemble peaceably for their common good and to apply by petition or remonstrance to those vested with the powers of government for redress of grievances.");Ga. Const. Art. I, § I, Para. XII ("No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state.").

If there is any constant in our democratic system of governance, it is that the marketplace of ideas—not the mandates of government functionaries or partisan prosecutors—determines the scope of public debate. The First Amendment affords the broadest protection to political expression to "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). In fact, political speech is the primary object of First Amendment protection. *See, e.g., Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). The Founders sought to protect the right to engage in political speech, which includes "free discussion of governmental affairs," because a self-governing people depends upon the free exchange of political information. *Mills* at 218; *see also Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("Speech concerning public affairs is . . . the essence of self-government"). The First Amendment's Freedom of Speech clause "embodies 'our profound national commitment to the free exchange of ideas.'" *United States v. Trump*, CR 23-257, 2023 WL 8359833, at *15 (D.D.C. Dec. 1, 2023) (quoting *Ashcroft v. Am. C.L. Union*, 535 U.S. 564, 573 (2002)). The First Amendment, in affording the broadest protection to political speech and discussion regarding governmental affairs, not only embraces but encourages exactly the kind of behavior under attack in this Indictment.

The First Amendment was crafted to protect certain core areas believed to be instrumental in guarding against governmental oppression: the free exercise of religion, freedom of speech and press, the right to assemble peaceably, and the right to petition government for redress of grievances. The free marketplace of ideas is central to its purpose:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

Terminiello v. City of Chicago, 337 U.S. 1, 4–5 (1949) (citation omitted). As such, speech may not be regulated because of its content, nor can the government parse out speech it determines is "good" versus "bad." *See United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010) (highlighting the commonly held democratic value in freedom from governmental intrusion which would prohibit any test restricting some forms of speech as being "not worth it" to protect, the court specifically rejected a balancing test which weighed the value of speech against societal costs because such

a "free-floating" test was "startling and dangerous"). As the Supreme Court held in *Texas v. Johnson*, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (citing 14 cases for this proposition). "[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (quoting *FCC v. Pacifica Foundation*, 438 U.S. 726, 745-46 (1978)).

President Trump enjoys the same robust First Amendment rights as every other American. The indictment here does not merely criminalize conduct with an incidental impact on protected speech; instead, it *directly targets* core protected political speech and activity. For this reason, it is categorically invalid under the First Amendment. "Clearly, government has no power to restrict such activity because of its message." *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972).

It is beyond dispute that President Trump's speech about the outcome of the 2020 presidential election is core political speech and that it addressed matters of public concern.

II. No Exception to the First Amendment Applies Here.

The "speech integral to criminal conduct" exception to the First Amendment does not apply here because *all* the charged conduct constitutes First Amendment-

protected speech. To fall within this exception, the speech in question must be "integral to" some criminal "conduct" that *is not itself a form of First Amendment-protected speech or expression*. *See Giboney v. Empire Storage & Ice Co*., 336 U.S. 490, 498 (1949) (holding that speech that was integral to organizing an unlawful picket designed to implement a restraint on trade was not protected by the First Amendment). Protected speech that is "integral to" other protected speech, or other protected activities like lobbying Members of Congress based on government-disfavored viewpoints, remains protected speech. *See, e.g., United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012) (upholding the federal cyberstalking statute on the ground that it "is directed toward 'courses of conduct,' not speech, and the conduct it proscribes is not 'necessarily associated with speech'"); *United States v. Ackell*, 2017 WL 2913452, at *10 (D.N.H. July 7, 2017), *aff'd*, 907 F.3d 67 (1st Cir. 2018) (recognizing that a "course of conduct" that was "comprised purely of protected speech" would be protected by the First Amendment). Otherwise, the exception would swallow the rule entirely.

For example, in *Afro-American Police League v. Fraternal Order of Police*, the court considered a civil rights conspiracy claim where the acts underlying the conspiracy—such as acts of pamphleteering by one union against another union—were plainly protected under the First Amendment. *Afro-Am. Police League v. Fraternal Ord. of Police, Chicago Lodge No. 7*, 553 F. Supp. 664, 674 (N.D. Ill.

1982). The latter union "attempt[ed] to attach culpability to [the first union's] act of pamphleteering" by arguing—just as the prosecution does here—that "any act in furtherance of the object of the conspiracy, even if that act is not unlawful, is actionable." *Id.* The court rejected this argument because the entire alleged "conspiracy" rested on acts protected by the First Amendment:

> [N]o act has been committed by AAPL which would take their conduct outside the protection of the First Amendment…. The act of pamphleteering is one of the few modes of mass communication economically available to minority groups, and the activity is clearly protected by the First Amendment. A "conspiracy to exercise free speech" is an obvious oxymoron.

Id.

The Fulton County prosecutors have not identified any non-speech or non-advocacy conduct in the allegations against President Trump. An examination of the indictment reveals why: none of the allegations relate to any *non-speech* or *non-advocacy* conduct. Every charge and overt act alleged against President Trump rests on core acts of political speech and advocacy that lie at the heart of the First Amendment. Likewise, all the factual allegations in the indictment pivot on the indictment's core, faulty, theory—that President Trump supposedly engaged in "fraud," "false statement," and "obstruction" by repeatedly contending, in public and to government officials, that the 2020 presidential election was deeply tainted by fraud.

The same logic of the *Afro-American Police League* decision applies here. "No act has been committed by [President Trump] which would take [his] conduct outside the protection of the First Amendment," *Afro-Am. Police League*, 553 F. Supp. at 674, so the entire "conspiracy" charge is unconstitutional. In short, the indictment charges a "conspiracy to exercise free speech," which "is an obvious oxymoron." *Id.* This is "turtles all the way down." *Rapanos v. United States*, 547 U.S. 715, 754 (2006).

III. The Fulton County Prosecutors are Wrong in Concluding that Claims of Fraud in the 2020 Election Are Not Protected Speech.

President Trump's claims of fraud in the 2020 election constitute First Amendment-protected speech. The decision in *United States v. Alvarez*, 567 U.S. 709 (2012), reflects the Supreme Court's unanimous consensus that the government may not criminalize supposedly "false statements about philosophy, religion, history, the social sciences, the arts, and *other matters of public concern*." *Id.* at 751-52 (Alito, J., dissenting) (emphasis added); *see also id.* at 731-32 (Breyer, J., concurring in the judgment) (same). In these areas, "it is perilous to permit the state to be the arbiter of truth," for "the potential for abuse of power in these areas is simply too great." *Id.* at 752 (Alito, J., dissenting). "In the political arena," when disputes arise about politically charged topics—which typically involve claims that are not "easily verifiable"—the threat of "criminal prosecution is particularly

dangerous … and consequently can more easily result in censorship of speakers and their ideas." *Id.* at 734, 738 (Breyer, J., concurring in the judgment). "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *Id.* at 723 (plurality op. of Kennedy, J.) (citing GEORGE ORWELL, NINETEEN EIGHTY–FOUR (1949) (Centennial ed. 2003)).

Alvarez produced multiple opinions, but on one key point, all nine Justices were unanimous: Under the First Amendment, the Government may not prohibit or criminalize speech on disputed social, political, and historical issues simply because the Government determines that some views are "true" and others are "false." *Id*. at 718. In fact, Justice Kennedy held that "counter-speech" was a sufficient solution because "only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication." *Id.* at 729.

The fact that the prosecution alleges the speech was "false" does not change that conclusion, particularly within the political context. *Id.* In fact, Justice Alito's three-Justice dissent in *Alvarez*—the opinion *least* protective of speech in that case—affirmed this principle:

> there are broad areas in which any attempt by the state to penalize purportedly false speech would present a ***grave and unacceptable danger*** of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and ***other matters of public concern*** would present such a threat. The point is not that there is no such thing as truth

> or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is ***perilous to permit the state to be the arbiter of truth***.

Alvarez, 567 U.S. at 751–52 (Alito, J., dissenting) (emphasis added). "Even where there is a wide scholarly consensus concerning a particular matter, the truth is served by allowing that consensus to be challenged without fear of reprisal." *Id.* at 752. "And in these contexts, 'even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *Id.* (quoting *Sullivan*, 376 U.S. at 279 n.19). Justice Breyer further emphasized that criminalizing supposedly "false" statements on such not "easily verifiable," politically controversial topics "provides a weapon to a government broadly empowered to prosecute falsity without more. And those who are unpopular may fear that the government will use that weapon selectively…." *Id.* at 734; *see also id.* at 736 (emphasizing that "in political contexts, … the risk of censorious selectivity by prosecutors is … high"). Thus, claims about widely disputed political questions are protected regardless of the Government's view on supposed "truth" or "falsity." In fact, such claims are protected by the First Amendment *especially* when the Government deems them "false." *Id.* at 752 (Alito, J., dissenting) ("it is perilous to permit the state to be the arbiter of truth").

Any attempt by the Fulton County prosecutors to distinguish the applicability of the *Alvarez* decision to President Trump's core political speech by pointing to the

number of opinions or attempting to cabin the *Alvarez* holding to a concern that a federal law "prohibited only false statements and *only because of their falsity*" is simply ineffectual. Why? Because the indictment does not, and the prosecution cannot identify any non-speech or non-advocacy conduct by President Trump. This convincingly demonstrates that the prosecution of President Trump is truly for political speech and advocacy conduct that the prosecution alleges is false.

Alvarez strongly supports President Trump's position. The prosecution may argue that *Alvarez*'s plurality stated that "laws that 'protect the integrity of Government processes, quite apart from restricting false speech'" remain valid. *Id.* (quoting *Alvarez*, 567 U.S. at 721 (plurality op.)). In fact, *Alvarez* was referring to two specific kinds of "laws," *i.e.*, "[s]tatutes that prohibit falsely representing that one is speaking on behalf of the Government," and "that prohibit impersonating a Government officer." *Id.* The conduct alleged against President Trump in the indictment bears no resemblance to those actions, precisely because they involve trickery and deceit, not ordinary political advocacy. Moreover, *Alvarez* emphasized that such conduct can be prohibited because those prohibitions "protect the integrity of Government processes, *quite apart from merely restricting false speech*." *Id.* (emphasis added). Thus, the indictment does not seek to punish President Trump's conduct "quite apart from merely restricting false speech," *id.*; it does the exact opposite. It punishes *only* First Amendment protected speech, including both public

speech and protected advocacy to public officials. This is impermissible under the reasoning of *Alvarez* as well.

Any argument by the prosecution that "falsity is not a viewpoint" is equally unavailing. Whatever the merits of this claim in other contexts, this prosecutorial position is obviously inapplicable to disputes about the outcome of the 2020 presidential election. A law that criminalized speech questioning the outcome of the election, while permitting speech defending the outcome of that election, would involve obvious, blatantly unconstitutional viewpoint discrimination. *See, e.g., Matal v. Tam*, 582 U.S. 218, 243-44 (2017). Criminalizing President Trump's speech and advocacy disputing the outcome of the election—while speech *endorsing* the election's outcome is viewed as unimpeachable—is thus blatant viewpoint discrimination.

President Trump's position is further buttressed by *McDonald v. Smith*, 472 U.S. 479 (1985). *McDonald* held that claims about a judicial nominee's fitness made in a letter of advocacy to public officials were subject to the exact same standards of First Amendment protection that apply to the same statements made in a public forum. 472 U.S. at 485. The right to speak and the right to petition the government "are inseparable, and there is no sound basis for granting greater," or lesser, "constitutional protection to statements made in a petition to" a government official "than other First Amendment expression." *Id.* Because the claim that the 2020

election was rigged and stolen is protected by First Amendment when it is made in a public speech, it is equally protected by the First Amendment when it is made to government officials in an act of petitioning or advocacy. *Id.*

The expansive interpretation of criminal law *vis-a-vis* the guarantees of the First Amendment by the prosecution is "inconsistent with both text and precedent" and "raise[s] significant constitutional concerns." *McDonnell v. United States*, 579 U.S. 550, 574–75 (2016). Under this reasoning, any interaction between an elected official and his or her constituent where the constituent makes disputed claims on politically charged issues is the potential basis for federal and state investigation and prosecution, provided that the government alleges that the claim was knowingly "false." The over-criminalization that would result from this interpretation is astonishing, and it is just what the Supreme Court rejected in *McDonnell*:

> But conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time. The basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns…. The Government's position could cast a pall of potential prosecution over these relationships …. Officials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse.

Id. at 575. The same reasoning applies here. "[T]he Government's legal interpretation is not confined to cases involving" the facts alleged here, "and we

cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *Id.* at 576 (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)). The courts cannot "rely on the Government's discretion to protect against overzealous prosecutions," and thus "a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *Id.* (citations and quotation marks omitted).

IV. Conclusion.

The core political speech and expressive conduct alleged in this indictment against President Trump are protected from government regulation and thus criminal prosecution by the State. That fact becomes even more clear when considering the context within which the speech was uttered— while challenging a presidential election—political speech was directed towards the state legislatures, state officials tasked with conducting investigations, and within lawsuits against those same officials. The speech sought action by the government, the very body responsible for educating itself before exercising its governmental functions on behalf of the people. It was directed at the bodies responsible for conducting government business, the bodies with the information in their possession, the bodies undertaking the investigations, and the bodies vested with the authority of adjudicating such complaints. The speech was directed at the governmental bodies the Founders believed should *always be* challenged, and the bodies that *must be* capable of being

challenged in a democracy where citizens are capable of guarding against governmental oppression.

As applied here, the prosecution seeks to use statutes to charge President Trump that were never intended to criminalize core political speech. Instructive is the case of *United States v. Popa*, where the statute relating to harassing phone calls was held invalid because it did not create an exception for speech directed at public or political discourse. 187 F.3d 672 (D.C. Cir. 1999). The statute was not sufficiently tailored because it swept within its ambit First Amendment-protected calls to public officials where the caller has "an intent to verbally 'abuse' a public official for voting a particular way on a public bill, 'annoy' him into changing a course of public action, or 'harass' him until he addresses problems previously left unaddressed." *Id.* at 677-78. The court held:

> In sum, we agree with Popa that the statute could have been drawn more narrowly, without any loss of utility to the Government, by excluding from its scope those who intend to engage in public or political discourse. . . Under the statute as written, and as the jury in this case was instructed, no protection whatsoever is given to the political speech of one who intends both to communicate his political message and to annoy his auditor—an auditor who might be his elected representative or, as here, an Officer of the United States appointed by the President with the advice and consent of the Senate—from whom the speaker seeks redress."

Id. at 678.

Although *Popa* was a facial challenge to the statute, the same principle pertains here to President Trump's as-applied challenge, because the statutes at issue must be restrictively interpreted to protect against the criminalization of core political speech and expressive conduct. The speech Fulton County prosecutors seek to criminalize is precisely the kind of core political speech the Founders envisioned when carefully crafting those freedoms to ensure that, for the rest of time, U.S. citizens would not fall prey to mass repression and the manipulation or suppression of information as a means of control. The speech and expressive conduct took place inside the coveted halls the Founders created for resolving citizen complaints and exercising those rights: the courts, the legislatures, and via state officials. Regulating such speech falls along the slippery slope of governmental intrusion that the First Amendment was intended to protect against.

The First Amendment prohibits the State from weaponizing its powers to silence disfavored viewpoints or prevent people from advocating such viewpoints to government officials. *See, e.g., United States v. Eichman*, 731 F. Supp. 1123, 1131 (D.D.C.), *aff'd*, 496 U.S. 310 (1990) ("However compelling the government may see its interests, they cannot justify restrictions on speech which shake the very cornerstone of the First Amendment."). As *Alvarez* emphasized: "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society.

The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth." 567 U.S. at 727.

This Court should hold that the First Amendment's guarantee of freedom of speech, when applied to the core political speech and expressive conduct alleged in the indictment against a President of the United States, demands a pretrial remedy, and that remedy is dismissal of the indictment.

Respectfully submitted,

Steven H. Sadow
STEVEN H. SADOW
Georgia Bar No. 622075
Lead Counsel for Defendant

260 Peachtree Street, N.W.
Suite 2502
Atlanta, Georgia 30303
404-577-1400
stevesadow@gmail.com

Jennifer L. Little
Jennifer L. Little
Georgia Bar No. 141596
Counsel for Defendant

400 Galleria Pkwy
Suite 1920
Atlanta, Georgia 30339
404-947-7778
jlittle@jllaw.com

CERTIFICATE OF SERVICE

I hereby certify I electronically filed the foregoing document with the Clerk of Court using Odyssey Efile Georgia electronic filing system that will send notification of such filing to all parties of record.

This 18th day of December, 2023.

/s/ Steven H. Sadow
STEVEN H. SADOW