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.	:	

PRESIDENT TRUMP'S MOTION TO DISMISS ON DUE PROCESS GROUNDS AND MEMORANDUM IN SUPPORT

I. INTRODUCTION

Our country has a longstanding tradition of forceful political advocacy regarding widespread allegations of fraud and irregularities in a long list of Presidential elections throughout our history, therefore, President Trump lacked fair notice that his advocacy in the instance of the 2020 Presidential Election could be criminalized. President Trump, like all citizens, is entitled to have fair warning as to where the line is drawn which separates permissible activity from that which is allegedly criminal. *See United States v. Lanier*, 520 U.S. 259, 265 (1997) ("'No man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."). "Due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope…" *Id.* at 266 (internal

citations omitted). "[A] statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

Importantly, the alleged criminal conduct underlying this indictment consists entirely of core political speech at the zenith of First Amendment protections. Political expression is the primary object of First Amendment protection, s*ee, e.g., Mills v. Alabama*, 384 U.S. 214, 218 (1966), and is afforded the broadest protection to "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *see Roth v. United States*, 354 U.S. 476, 484 (1957).

The charges allege a "conspiracy to unlawfully change the outcome of [an] election," and accuse President Trump, in conjunction with others, with violating state laws related to Racketeering (O.C.G.A. § 16-14-1 *et seq.*), Solicitation (O.C.G.A. § 16-4-7(b), and Conspiracy (O.C.G.A. § 16-4-8), as well as Violation of Oath of a Public Officer (O.C.G.A. § 16-10-1), Impersonating a Public Officer (O.C.G.A. § 16-10-23), False Statements (O.C.G.A. § 16-10-20), Filing False Documents (O.C.G.A. § 16-10-20.1(b), and First-Degree Forgery (O.C.G.A. § 16-9-1(b). None of those statutes have, in the history of Georgia, ever been utilized in a way to address the conduct alleged. As a result, President Trump did not have fair

warning that his alleged conduct, pure political speech and expressive conduct challenging an election, could be criminalized, particularly since such actions have never before been prosecuted and no President has ever been criminally charged in the 234-year history of the United States of America.

II. DUE PROCESS

The indictment charges President Trump, and other defendants, with alleged crimes arising from activity constituting pure political advocacy on matters of public concern in the middle of a disputed presidential election. President Trump's actions were inspired by, and fully consistent with, examples from many similar contested election disputes in our Nation's history. There is a long history—dating back to 1800 and encompassing elections in 1800, 1824, 1876, 1960, 2000, 2004, and 2016, among many others—of disputing the outcome of close Presidential elections, including such actions as publicly alleging that election results were tainted by fraud, filing legal actions to challenge election results, lobbying Congress to certify disputed election results in one side's favor or the other, and organizing alternate, contingent slates of electors to assist in such efforts. In other words, all the chief alleged acts charged in the indictment have a long historical precedent in American electoral history, and they have always been decided in the political arena. President Trump is the first person to face criminal charges for such core political behavior, and he is charged under statutes that facially have nothing to do with his alleged

conduct. As a result, President Trump could not possibly have received fair notice that his conduct was allegedly criminal when he performed it, and the indictment must be dismissed for violation of the fair notice requirement of the Due Process Clause.

The Fourteenth Amendment to the U.S. Constitution provides that no State shall "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[1] Due process ensures that citizens understand the proverbial line which must be crossed before actions become criminal:

> [T]he principle that due process requires that criminal statutes give sufficient warning to enable individuals to conform their conduct to avoid that which is forbidden is one of the great bulwarks of constitutional liberty. This Court and the United States Supreme Court have consistently equated the "sufficient warning" of prohibited conduct required of criminal statutes to the provision of "fair notice" that by engaging in such conduct, one will be held criminally responsible.... [T]he Due Process Clause requires that the law give a person of ordinary intelligence fair warning that her specific contemplated conduct is forbidden, so that she may conduct herself accordingly. All persons are entitled to be informed as to what the State commands or forbids.

[1] When referencing the Constitution, President Trump references both the United States as well as the Georgia Constitution which includes provisions embodying the same due process protections. Ga. Const. Art. I, § I, Para. I ("No person shall be deprived of life, liberty, or property except by due process of law."); Ga. Const. Art. I, § I, Para. II ("Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."); Ga. Const. Art. I, § I, Para. VII ("All citizens of the United States, resident in this state, are hereby declared citizens of this state; and it be the duty of the General Assembly to enact such laws as will protect them in the full enjoyment of the rights, privileges, and immunities due to such citizenship.").

State v. Langlands, 276 Ga. 721, 724 (2003) (quoting *Hall v. State*, 268 Ga. 89, 92 (1997)); *see also e.g.*, *Bouie v. City of Columbia*, 378 U.S. 347, 350–51 (1964). "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss*, 347 U.S. 612, 617 (1954). The U.S. Supreme Court has compared the "fair warning" standard to the "clearly established" standard applied to civil cases under § 1983 or Bivens cases. *United States v. Lanier*, 520 U.S. 259, 271–72 (1997). To be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

The fair notice requirement of the Due Process Clause not only requires that fair warning be given to citizens, but it also serves as a mechanism to eliminate arbitrary and discriminatory enforcement. *Major v. State*, 301 Ga. 147 (2017); *Harriss*, 347 U.S. at 617; *Hall*, 268 Ga. at 92. "Vagueness invalidates criminal statutes that fail to provide clear warning to the average citizen of what conduct is criminally forbidden or fail to provide explicit standards for its enforcement to law enforcement officers. … [V]ague laws without clear enforcement criteria can result in unfair, discriminatory enforcement." *In the Interest of K. R. S.*, 284 Ga. 853, 854 (2009); *see also City of Chicago v. Morales*, 527 U. S. 41, 55 (1999). As Justice Gorsuch aptly described, "[v]ague laws invite arbitrary power. Before the

Revolution, the crime of treason in English law was so capaciously construed that the mere expression of disfavored opinions could invite transportation or death. The founders cited the crown's abuse of 'pretended' crimes like this as one of their reasons for revolution." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (citing Declaration of Independence ¶ 21).

"The language of a criminal ordinance cannot be so ambiguous as to allow the determination of whether a law has been broken to depend upon the subjective opinions of complaining citizens and police officials." *Santos v State*, 284 Ga. 514, 516-17 (2008). "In that sense, the doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Sessions v. Dimaya*, 138 S. Ct. at 1212 ("Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions."). "[I]f the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for the legislative department." *Kolander v. Lawson*, 461 U.S. 352, 358 (1983) (internal quotation marks omitted); *Sessions*, 138 S. Ct. at 1223-1224.

Finally, the fair notice requirement cannot be satisfied by post-conduct interpretation or expansion of statutes that otherwise have never been utilized to cover certain conduct. "If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' … or to 'guess at (the statute's) meaning and differ as to its application,' … the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question." *Bouie*, 378 U.S. at 352 (citations omitted). "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id.*; *Karem v. Trump*, 960 F.3d 656, 666 (D.C. Cir. 2020) ("Although courts routinely 'clarify the law and apply that clarification to past behavior,' 'the principle of fair warning requires that novel standards announced in adjudications must not be given retroactive effect ... where they are unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue[.]'") (alterations and citations omitted).

For those reasons, "[w]here the language in a criminal statute is ambiguous, it must be construed in favor of the defendant." *Langlands*, 276 Ga. at 724. "[A] criminal statute must be construed strictly against criminal liability and, if it is

susceptible to more than one reasonable interpretation, the interpretation most favorable to the party facing criminal liability must be adopted." *Prophitt v. State*, 336 Ga. App. 262, 269 (2016) (citing *Vines*, 269 Ga. at 438-439) (citation and punctuation omitted).

> Courts, therefore, must avoid interpreting criminal statutes so broadly that they create vagueness concerns that would not exist if the statute were interpreted narrowly. Second, an overly-expansive interpretation of a criminal statute poses the possibility that the judicial branch will extend a particular Code section to encompass conduct that the legislature did not intend to punish thereunder. A narrow construction of criminal statutes, therefore, allows us to avoid extending the operation of those statutes "by application of subtle and forced interpretations." Construing a statute narrowly, in turn, requires that we read the Code provision in question "according to the natural and obvious import of [its] language."

Id. (quoting *Perkins v. State*, 277 Ga. 323, 326 (2003)).

In *Botts v. State*, 278 Ga. 538 (2004), the absence of context was a determining factor for the Supreme Court when it struck down Georgia's hate crime penalty statute. When persons of ordinary intelligence must necessarily "guess at" a statute's meaning or "differ as to its applications," it violates due process. *Id*. at 539; *see also Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). The question is whether the statute furnishes a test based on normal criteria which persons of ordinary intelligence may use with reasonable safety in determining what it prohibits. *Id*. (quoting *Simmons v. State*, 262 Ga. 674 (1993)). The statute at issue in *Botts* enhanced sentences when a defendant intentionally selected his victim because of "bias or prejudice." While persons of ordinary intelligence may

understand those words, "because of the broad signification of these words and the absence of any specific context in which a person's bias or prejudice may apply in order to narrow the construction of these concepts," the statute failed to provide fair warning of the conduct it prohibits. *Id*. at 540. The *Botts* Court held:

> the broad language in OCGA § 17-10-17, by enhancing all offenses where the victim or his property was selected because of any bias or prejudice, encompasses every possible partiality or preference. A rabid sports fan convicted of uttering terroristic threats to a victim selected for wearing a competing team's baseball cap; a campaign worker convicted of trespassing for defacing a political opponent's yard signs; a performance car fanatic convicted of stealing a Ferrari — any "bias or prejudice" for or against the selected victim or property, no matter how obscure, whimsical or unrelated to the victim it may be, but for which proof beyond a reasonable doubt might exist, can serve to enhance a sentence. Absent some qualification on "bias or prejudice," OCGA § 17-10-17 is left "'so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.'"

Id. Reiterating the concern for arbitrary or discriminatory enforcement of the statute on a subjective basis, the Court held the statute was invalid because its language "leaves open … the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *Id.* (quoting *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 89 (1921)); *see Foster v. State*, 273 Ga. 555 (2001) (citing *Goldrush II v. City of Marietta*, 267 Ga. 683 (1997)).

The principle of fair notice has special force here, where the lack of fair notice directly implicates First Amendment rights and when none of the statutes in question

have ever been used to criminalize the type of pure political advocacy at issue here, particularly by a President of the United States. "The general test of vagueness applies with particular force in review of laws dealing with speech. Stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech…." *Hynes v. Mayor & Council of Borough of Oradell*, 425 U.S. 610, 620 (1976) (modifications omitted); *see also, e.g.*, *Smith v. Goguen*, 415 U.S. 566, 572-573 (1974) ("Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts."); *Buckley v. Valeo*, 424 U.S. 1, 77 (1976) ("Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal…. Where First Amendment rights are involved, an even 'greater degree of specificity' is required."); *NAACP v. Button*, 371 U.S. 415, 432 (1963) ("[S]tandards of permissible statutory vagueness are strict in the area of free expression.").

The extensive history of disputing elections in our Nation further demonstrates that none of these statutes provide fair notice that the alleged conduct is criminal. The types of public statements and claims made regarding the 2020 Election have been a staple of American political discourse for decades. As one commentator quipped, "If questioning the results of a presidential election were a

crime, as many have asserted in the wake of the controversial 2020 election and its aftermath, then much of the Democratic Party and media establishment should have been indicted for their behavior following the 2016 election. In fact, the last time Democrats fully accepted the legitimacy of a presidential election they lost was in 1988." MOLLIE HEMINGWAY, RIGGED: HOW THE MEDIA, BIG TECH, AND THE DEMOCRATS SEIZED OUR ELECTIONS (Regnery 2021), at vii.[2] Democratic members of Congress voted to refuse to certify electors after the elections of 2004 and 2016,

[2] *See also e.g.*, Ari Berman, *Hillary Clinton on Trump's Election: "There Are Lots of Questions about Its Legitimacy"*, Mother Jones (Nov. 17, 2017), *at* https://www.motherjones.com/politics/2017/11/hillary-clinton-on-trumps-election-there-are-lots-of-questions-about-its-legitimacy/ ("A year after her defeat by Donald Trump in the 2016 presidential election, Hillary Clinton says 'there are lots of questions about its legitimacy'…"); *"I Would Be Your President": Clinton Blames Russia, FBI Chief for 2016 Election Loss*, National Post (May 2, 2017), *at* https://nationalpost.com/news/world/i-would-be-your-president-clinton-blames-russia-fbi-chief-for-2016-election-loss (noting Clinton "declaring herself 'part of the resistance' to Donald Trump's presidency" as an "activist citizen"); Dan Mangan, *Democratic Party Files Suit Alleging Russia, the Trump Campaign, and WikiLeaks Conspired to Disrupt the 2016 Election*, CNBC (Apr. 20, 2018), *at* https://www.cnbc.com/2018/04/20/democratic-party-files-suit-alleging-russia-the-trump-campaign-and-wikileaks-conspired-to-disrupt-the-2016-election-report.html ("The Democratic Party on Friday sued President Donald Trump's presidential campaign, the Russian government and the Wikileaks group, claiming a broad illegal conspiracy to help Trump win the 2016 election."); Rachael Revesz, *Computer Scientists Say They Have Strong Evidence Election Was Rigged against Clinton in Three Key States*, Independent (Nov. 23, 2016), *at* https://www.independent.co.uk/news/world/americas/wisconsin-michigan-pennsylvania-election-hillary-clinton-hacked-manipulated-donald-trump-swing-states-scientists-lawyers-a7433091.html ("A group of renowned computer scientists and lawyers have urged Hillary Clinton to challenge the election results in three key states after they gathered 'evidence' to suggest the election results were potentially manipulated."); *see also* Dan Merica, *Clinton Opens Door to Questioning Legitimacy of 2016 Election*, CNN.com (Sept. 18, 2017), *at* https://www.cnn.com/2017/09/18/politics/hillary-clinton-russia-2016-election/index.html; Sean Davis, *Nearly Half of Democrats Think the 2016 Election Was "Rigged"*, The Federalist (Nov. 18, 2016), *at* https://thefederalist.com/2016/11/18/nearly-half-democrats-think-election-rigged/.

and there have been extensive attempts to submit alternate electors and dispute the outcome of Republican Presidential victories in recent decades.[3]

Extensive historic precedent in close and contested elections supports the lawfulness of the actions alleged in the indictment. For example, in the disputed elections of both 1876 and 1960, competing slates of electors were sent to Congress. William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 156-57, 166 (1996); *see also* 146 Cong. Rec. E2180 (daily ed. Dec. 13, 2000) (statement of Rep. Mink) ("Based on the earlier certified results [in Hawaii in 1960],

[3] Bob Franken, *Democrats Challenge Certification of Florida Bush-Gore Election Results*, CNN.com (Nov. 16, 2000), *at* http://www.cnn.com/2000/LAW/11/16/certification.update.02.pol/index.html (noting "Florida Democrats and Al Gore presidential campaign…challenging the certification of election results in the tightly contested state); Jill Zuckman, et al., *Black Caucus Can't Block the Final Tally*, Chicago Tribune (Jan. 7, 2001), *at* https://www.chicagotribune.com/news/ct-xpm-2001-01-07-0101070449-story.html ("members of the Congressional Black Caucus on Saturday tried to stop the formal recording of the Electoral College tally during a joint session of Congress… lawmakers who supported [Democrat Al Gore] for president objected vociferously to the proceedings. One after another, the representatives rose to prevent the electoral votes from Florida from being counted."); Ted Barrett, *Democrats Challenge Ohio Electoral Votes*, CNN.com (Jan. 6, 2005), *at* https://www.cnn.com/2005/ALLPOLITICS/01/06/electoral.vote.1718/ ("Alleging widespread 'irregularities' on Election Day, a group of Democrats in Congress objected Thursday to the counting of Ohio's 20 electoral votes, delaying the official certification of the 2004 presidential election results."); Brenna Williams, *11 Times VP Biden Was Interrupted during Trump's Electoral Vote Certification*, CNN.com (Jan. 6, 2017), *at* https://www.cnn.com/2017/01/06/politics/electoral-college-vote-count-objections/index.html ("During the course of the certification, House Democrats tried to object to electoral votes from multiples states" claiming, *inter alia*, "electors were not lawfully certified"); Rachael Revesz, *Computer Scientists Say They Have Strong Evidence Election Was Rigged against Clinton in Three Key States*, Independent (Nov. 23, 2016), *at* https://www.independent.co.uk/news/world/americas/wisconsin-michigan-pennsylvania-election-hillary-clinton-hacked-manipulated-donald-trump-swing-states-scientists-lawyers-a7433091.html ("So far, six electoral college voters said they would not vote for Mr Trump. Meanwhile more than 4.5 million people have signed a petition for more electoral college delegates to defy the instructions given to them in their state.").

the Republican electors met and cast their three votes for Nixon. The Democratic electors also met and cast their votes for Kennedy *even though they did not have a certificate of election from the State*.") (emphasis added). In 1800, Vice President Jefferson unilaterally made the decision to accept questionable electoral votes from Georgia that favored him. Bruce Ackerman and David Fontana, *How Jefferson Counted Himself In*, THE ATLANTIC (Mar. 2004), *at* https://www.theatlantic.com/magazine/archive/2004/03/how-jefferson-counted-himself-in/302888/. In 1824, when his disputed election with Andrew Jackson was decided in the House of Representatives, President John Quincy Adams successfully lobbied the House to decide the election in his favor—even though Jackson far exceeded his totals in both the popular vote and electoral college—so successfully, in fact, that Jackson's supporters accused him of striking a "corrupt bargain" with House Speaker Henry Clay, whom Adams soon appointed Secretary of State. And in 1960, Vice President Nixon—himself a candidate—decided which competing slate of electors to accept from Hawaii. Herb Jackson, *What Happens When a State Can't Decide on its Electors*, ROLL CALL (Oct. 26, 2020), *at* https://rollcall.com/2020/10/26/we-the-people-what-happens-when-a-state-cant-decide-on-its-electors/; *see also* 146 Cong. Rec. E2180 (daily ed. Dec. 13, 2000) (statement of Rep. Mink) ("Vice President Nixon, sitting as the presiding officer of the joint convention of the two Houses, suggested that the electors named in the

certificate of the Governor dated January 4, 1961 be considered the lawful electors from Hawaii. There was no objection to the Vice President's suggestion . . .").

In the 2000 election contest between President George W. Bush and Vice President Al Gore, three Supreme Court justices pointed to the Hawaii situation in 1960 to emphasize that competing slates of electors could be submitted to Congress and that Congress could make the decision on which slate to accept:

> But, as I have already noted, those provisions [of the Electoral Count Act] merely provide rules of decision *for Congress to follow when selecting among conflicting slates of electors*. They do not prohibit a State from counting what the majority concedes to be legal votes until a bona fide winner is determined. Indeed, in 1960, *Hawaii appointed two slates of electors and Congress chose to count* the one appointed on January 4, 1961, well after the Title 3 deadlines.

Bush v. Gore, 531 U.S. 98, 127 (2000) (Stevens, J., dissenting, joined by Justices Ginsburg and Breyer) (internal citations omitted) (emphasis added). In addition, the actions charged in the indictment against President Trump were consistent with the provisions of the then-current version of the Electoral Count Act, as it provided before its recent revisions. 3 U.S.C. § 15 (2020). Indeed, the very fact that Congress decided to amend the Electoral Count Act afterward demonstrates that it did not prohibit (let alone criminalize) mechanisms such as organizing alternate electors or lobbying the Vice President, all of which further proves that this criminal prosecution violates the fair notice provisions of the Due Process Clause.

Therefore, at the time of the allegations in the indictment, the only relevant judicial precedent, from the 2000 Presidential Election, treated post-election

challenges as lawful and included a dissent arguing that competing elector slates could be submitted to Congress in order for Congress to decide which to accept. Furthermore, the conduct outlined in the indictment had taken place in 1800, 1824, 1876, and 1960, among others, without any suggestion it was criminal. Scores of people have been involved in similar conduct throughout American history, and none have faced criminal prosecution. There does not appear to be any legal scholar, attorney, or jurist who has suggested that this conduct would be impermissible. On these facts, neither President Trump nor any other reasonable person would have had any reason to believe that his actions were or could be considered unlawful, no credible lawyer would ever advise a client that these activities were anything but precedented and lawful, and, at most, "men of common intelligence must necessarily guess" if President Trump's conduct violated the statute, and the charges thus violate due process. *Hynes*, 425 U.S. at 620 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

III. THE ALLEGATIONS

President Trump has been charged with alleged crimes involving five distinct acts: the Elector Certificates sent to Congress, the request made of the then Georgia Speaker of the House to call a special session, the verification attached to the lawsuit challenging the election, the call placed to Georgia Secretary of State Raffensperger on January 2, 2021, and a letter sent to Raffensperger on September 17, 2021.

Finally, the RICO Count alleges a broad conspiracy related to what the State deems an "unlawful" attempt to challenge the results of a presidential election. It is important to keep in mind that where the co-defendant(s) who allegedly committed an act addressed herein are found to be immune on due process grounds from prosecution for violating each of the statutes discussed below, as they should be, President Trump's prosecution is also prohibited.

A. Count 1: RICO

The Georgia RICO statute was enacted in 1980 after the General Assembly found that Georgia faced a "severe problem" related to the increased sophistication of criminal elements and increased harm to the community. O.C.G.A. § 16-14-1, *et. al*. The Georgia legislature, in providing this sweeping law enforcement tool to prosecutors, was specific in declaring the purpose of the statute and the compelling government interest it sought to protect.[4] *Id*.

Due process is violated when applying this statute to the facts of this case. Neither President Trump nor any person of common intelligence could have understood that the RICO statute would sweep within its ambit the protected political

[4] O.C.G.A. § 16-14-2: (b) The General Assembly declares that the intent of this chapter is to impose sanctions against those who violate this chapter and to provide compensation to persons injured or aggrieved by such violations. It is **not the intent of the General Assembly that isolated incidents of misdemeanor conduct or acts of civil disobedience** be prosecuted under this chapter. It is the intent of the General Assembly, however, that this chapter apply to an **interrelated pattern of criminal activity motivated by or the effect of which is pecuniary gain or economic or physical threat or injury**. This chapter shall be liberally construed **to effectuate the remedial purposes embodied in its operative provisions**. (emphasis added).

speech and actions undertaken to challenge a presidential election. A person of ordinary intelligence would not understand that the statute could be used to arrest and jail a group of law-abiding citizens, connected only by affiliation to a particular political party or candidate, who publicly challenged an election -– actions which were neither motivated by pecuniary gain nor created physical or economic injury. This is particularly true since the conduct was undertaken via the channels created by the Founders to resolve such disputes and the behavior was not criminal on its face, even to those in the law enforcement and legal communities.

The signing of certificates creating an alternate slate of electors, actions which have taken place throughout history and are authorized by federal law, calling elected officials and asking them to redress grievances within the purview of their official duties, and reporting fraud in the election to government officials – none of these alleged acts constitute the type of organized, sophisticated, and economically destructive criminal activity which a common citizen of Georgia understands is regulated via the RICO statute. Furthermore, none of the alleged acts fit neatly into a criminal statute designed to regulate such conduct. Most importantly, however, no reasonable person would believe the actions were criminal at all.

Applying the RICO statute to this conduct requires the "novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope…" *Lanier*, 520 U.S. at 266 (internal

citations omitted). Rather than clearly establishing such use, the existing precedent does not present a single example of RICO being used against an alleged "organization" which is comprised along political lines and political efforts. Nor has RICO ever covered actions challenging an election, petitioning the government, or other core political speech. In fact, a brief review of Georgia election challenges demonstrates that persons banding together to challenge elections are not prosecuted for such conduct, especially under RICO.[5] Any attempt by the State to somehow suggest that those cases were not prosecuted because the allegations were "legitimate, " Stacey Abrams' allegations challenge the very core of that assertion, or based upon sworn affidavits or expert opinions it deems "credible" reveals the unconstitutional foundation upon which this prosecution is premised. A subjective determination within the context of hotly contested political disputes about which affidavits or expert opinions are "true" versus "false" is precisely the arbitrary and discriminatory enforcement due process guards against.

B. Count 9: Conspiracy to Commit Impersonating a Public Officer

[5] By way of example, it is widely known that Stacey Abrams and her organization, Fair Fight Action, along with other similar organizations, have at various times banded together along with individual citizens to challenge the results of elections. Furthermore, just in the Northern District of Georgia over the past five years, the Secretary of State has faced numerous lawsuits, but only one set of actions, those undertaken by President Trump, have been prosecuted. *See generally, Fair Fight Action v. Raffensperger*, Civil Action No. 1:18-cv-5391-SCJ (2019); *Curling v. Raffensperger*, Civil Action No. 1:17-CV-2989-AT (2019); *Common Cause v. Raffensperger*, Civil Action No. 1:22-cv-00090-SCJ (2022) (consolidated with NAACP v. Raffensperger); *New Georgia Project v. Raffensperger*, Civil Action No. 1:20-cv-01986-ELR (2020).

OCGA § 16-10-23 makes it a felony for a person to "falsely hold themselves out as a peace officer, officer of the court, or other public officer or employee with intent to mislead another into believing that he or she is actually such officer." According to the Supreme Court, the statute protects the people of this State "from intimidation and other potential abuses and dangers at the hands of an individual misrepresenting himself or herself as one cloaked with the authority and power which may attend public office or employment." *Kennedy v. Carlton*, 294 Ga. 576, 578 (2014) ("The circumstances of this case, involving the welfare of minor children, well illustrate the potential perils of permitting one to *falsely represent employment by a government agency* to further a personal agenda.") (emphasis added). This statute is most frequently utilized in cases where a defendant impersonates a police officer, and it has also been applied to a defendant claiming to be an employee of DFCS who was investigating a child's welfare. *See id.*

1. Presidential Electors are not Public Officers under State Law

The indictment avers that the "public officer" being impersonated is the "duly elected and qualified presidential electors from the State of Georgia." Presidential electors vote for the President and Vice President of the United States by sending certificates to Congress for purposes of tallying the votes in a federal election. They are not employed by the State of Georgia, and their role relates to a federal political process - the tallying of votes on behalf of the populous. Apart from this singular

task which takes place on a singular day once every four years, they serve no other role or government function. They are bestowed no durable powers or duties to be performed on behalf of the government, nor are they compensated beyond a $50 stipend.

More importantly, on December 8, 2020, the Electors who would eventually be accused of "impersonating public officers" were informed by Fulton County Superior Court Judge Emily Richardson that presidential electors were "neither 'federal, state, county, or municipal' officers."[6] *Boland v. Raffensperger*, 2020 Ga. Super. LEXIS 1897 (2020) (holding that plaintiffs could not bring a claim under Georgia's election contest statute since presidential electors are neither "federal, state, county, or municipal" officers). In coming to that conclusion, the Judge Richardson needed to look no further than the Biden Electors themselves (those "officers" the State alleges were "impersonated"), who persuasively explained their role was *not* that of an officer:

> A presidential elector is obviously not a municipal or county officer, as they serve no local role and are selected on a statewide basis. Further, federal presidential electors are not state officers—they are appointed pursuant to the U.S. Constitution. *See* U.S. Const. art. II, § 1, cl. 2 ("Each State shall appoint … a Number of Electors,"); *see also id*. amend. XII; 3 U.S.C. § 3 (setting forth the number of Electors by state). Rather than serving as state officers, the U.S. Supreme Court has found that "[t]he presidential electors exercise a federal function in balloting for President and Vice-President." *Ray v. Blair*, 343 U.S. 214, 224 (1952). The Supreme Court went on to clarify that electors are also not federal officers or agents.

[6] Defendant Still, Treasurer of the party, moved to intervene as a Republican Elector.

See id., Motion to Intervene as Defendants, Fulton Superior Court, File No. 2020CV343018 (2020). The Fulton County District Attorney's Office is prohibited from charging the Electors with impersonating a public officer when the Fulton Superior Court, just days before the charged conduct, declared that they were "neither 'federal, state, county, or municipal' officers." Certainly, President Trump could not be said to have fair notice that the alternative Electors were somehow impersonating "public officers" when a Fulton County, Georgia Superior Court Judge how found to the contrary.

2. The Electors Did Not Have Fair Notice

In addition to the judicial declaration which proves fatal to this count, a person of common intelligence would not believe the conduct undertaken by the Electors would fall within the ambit of this statute, especially given the heightened specificity required in this First Amendment context. Given the relative breadth and vagueness of its terms, its common purpose and use, and the lack of precedent applying the statute in this manner, the Electors were left to "guess" as to whether they would be considered public officers. *Botts*, 278 Ga. at 539 (when persons of common intelligence must necessarily guess at a statute's meaning or differ as to its applications, it violates due process); *Bouie*, 378 U.S. at 352 (same). Based upon the District Attorney's difference of opinion from that of a Fulton County Superior

Court Judge, it is clear that persons of common intelligence are likely to "differ" as to its application. *Id*.

Furthermore, a person of common intelligence would not understand that signing their own name to a certificate stating that they are the duly elected and qualified electors, following their nomination and election by their political party to undertake that very role, would put them in the crosshairs of a statute which is almost exclusively reserved for criminalizing the impersonation of a police officer. The same conclusion flows from examining its other known application – to that of a DFCS worker – as that act involves the impersonation of a single person, actively employed by the government. The statute has never been applied to Presidential Electors, and an overwhelming majority of legal experts, commentators, jurists, and attorneys who had addressed this conduct throughout history indicated that having both slates of Presidential Electors cast ballots in a close, contested election was permissible.

C. Counts 11 and 17: Conspiracy to Commit Forgery in the First Degree

The defendants have been charged in Count 11 and Count 17 with conspiracy to commit forgery based upon sending the Elector Certificate and the Notice of Vacancy to the governmental bodies responsible for receiving such certificates, which were aware of the widely publicized, publicly filed challenges to the election.

A person of ordinary intelligence understands that the forgery statute criminalizes fraud upon the unknowing individual or entity via the use of an altered or forged instrument whose authenticity appears legitimate. Citizens do not have fair notice that the statute would encompass submitting formal legal documents drafted pursuant to a widely publicized legal challenge to the governmental authority vested with adjudicating that dispute and determining which authority to grant. Put differently, a person of common intelligence understands it is criminal to try to trick another by a forged or altered document; but they do not understand it is criminal to utilize a document to initiate a legal challenge before a government agency which is aware of the document's authenticity. Furthermore, because there have been prior instances of alternate slates of electors, and the ECA specifically contemplates such a circumstance, a person of ordinary intelligence could not be said to have fair warning that submitting an alternate slate, when you are in fact the alternate slate, and have publicly declared your efforts to be just that, would be a crime. Never before has the forgery statute been used in a such overreaching way to target advocacy.

D. Counts 5, 28, 38: Solicitation of Violation of Oath of Officer

Due process requires that existing precedent provide fair warning to citizens, but the existing precedent underlying these statutes has never before related to pure political speech or advocacy of any kind, nor has it ever been applied to a situation

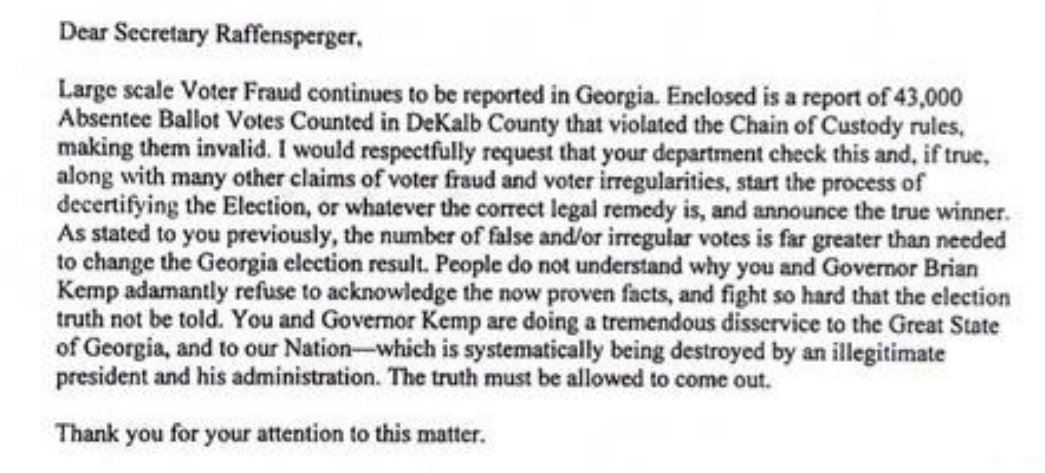
where a citizen was exercising his or her First Amendment right to petition their government for redress of grievances. By applying the solicitation statute to the violation of oath of office statute, the State attempts to criminalize "requests" made of a government official which involve matters within the purview of their official position, but the person of common intelligence understands that such requests are core First Amendment-protected activity. Furthermore, the charges rest upon the theory that the defendant knows that such "requests" would violate the oath that elected official swore to uphold. Such an analysis involves comparing what the current state of the law is to what is being requested, while applying that to the oath the official took, is necessarily incompatible with the notion of fair notice.

A person of common intelligence cannot both understand that they have the unalienable right to speak, influence, and petition their government for change, but that their right to do so stops at the subjective beliefs of a prosecutor who might allege their request was "unconstitutional" or "unlawful" under the current state of the law. Due process protects citizens from being placed in that situation when exercising their First Amendment freedoms, particularly in the criminal context. *See Buckley v. Valeo*, 424 U.S. at 77 (Where First Amendment rights are involved, an even 'greater degree of specificity' is required."); *Thelen v. State*, 272 Ga. 81, 82 (2000) (there is "greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe").

"To withstand constitutional attack, a statute or ordinance which prohibits speech 'must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression.'" *Gooding v. Wilson*, 405 U.S. 518, 522 (1972). Even speech advocating law violation, which is not the case here, is protected "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Known as the "clear and present danger" test, the question is "whether the words used are used in *such circumstances* and of *such a nature* as to create a clear and present danger that they will bring about the *substantive evils* that Congress has a right to prevent." *Schenck v. United States*, 249 U.S. 47, 52 (1919) (emphasis added); *see State v. Davis*, 246 Ga. 761 (1980) (solicitation statute) ("only a relatively overt statement or request intended to bring about an action" can bring a defendant within the statute; the phrase "or otherwise attempts to cause" means "or otherwise creates a clear and present danger of such other person perpetrating a felony.").

Count 38 alleges that, by sending a letter (which he publicly published) to the Secretary of State and asking him to decertify the election close to a year after the election had been certified, President Trump solicited the Secretary of State to violate his oath of office by unlawfully "decertifying the Election, or whatever the

correct legal remedy is, and announce the true winner." The parties do not dispute the contents of the letter, which reads:



Dear Secretary Raffensperger,

Large scale Voter Fraud continues to be reported in Georgia. Enclosed is a report of 43,000 Absentee Ballot Votes Counted in DeKalb County that violated the Chain of Custody rules, making them invalid. I would respectfully request that your department check this and, if true, along with many other claims of voter fraud and voter irregularities, start the process of decertifying the Election, or whatever the correct legal remedy is, and announce the true winner. As stated to you previously, the number of false and/or irregular votes is far greater than needed to change the Georgia election result. People do not understand why you and Governor Brian Kemp adamantly refuse to acknowledge the now proven facts, and fight so hard that the election truth not be told. You and Governor Kemp are doing a tremendous disservice to the Great State of Georgia, and to our Nation—which is systematically being destroyed by an illegitimate president and his administration. The truth must be allowed to come out.

Thank you for your attention to this matter.

After reporting allegations of potential fraud, President Trump "respectfully requests" that the Secretary of State investigate and, "*if true*," take action. Because the solicitation is predicated upon a finding that the allegations of fraud are "true," there is per se no solicitation given the conditional nature of the request. It also cannot be said that it created a clear and present danger of a felony being committed or that the statement is likely to cause *imminent* lawless action. It contemplates an investigation *prior to* whatever action is taken, and the request itself provides alternative options which, by their plain language, command that any action taken be "legal." Stated simply, how could President Trump be on fair notice, based on these undisputed facts, that the solicitation statute might possibly apply here? Answer: he could not.

Count 5 relates to a call made to the then-Speaker of the House, David Ralston, asking him to call a special session of the legislature. The legislature is designed as a vehicle for citizens to influence their government and requests made by citizens to their legislators to take action, even actions which under the current state of the law may be claimed to be "unlawful" by some, is core protected activity. This is the government body vested with the authority to determine what the law should be and asking them to call a special session to change the law, or to take other action, cannot constitute a crime. To determine oppositely would chill core protected speech and eradicate the principals of self-governance the United States was founded upon. If that were the case, every lobbyist seeking change may be swept within the statute's ambit. As such, according to the State's interpretation, the statute does not provide fair notice since it sweeps within its ambit the innumerable requests made of the legislature to change the law or to take action contrary to its current state.

Nor can it be said that the language alleged in the indictment creates a clear and present danger of Speaker Ralston committing a felony.[7] According to the State, asking the Speaker to call a special session became a crime because it determined

[7] Notably, the Speaker is unable to call a special session – only the Governor or three-fifths of the legislature can. A request to call a special session is in essence a request for the Speaker to use his own political power to influence members of the legislature. Such a request made of a politician, as a matter of law, cannot be a crime, no matter the alleged purpose, which in this instance was fully legal.

the request would require the legislature to do something "unlawful." But calling a special session, even for an allegedly "unlawful purpose," is not a crime and, therefore, any request to do so does not create a clear and present danger of a felony being committed.

Count 28 alleges that President Trump unlawfully solicited the Secretary of State to violate his oath of office by requesting that he unlawfully alter, adjust and influence the certified returns for presidential electors during the January 2, 2021 phone call. The alleged statements on the call were not "relatively overt requests" nor did they create a clear and present danger of the election results being "unlawfully altered." Once again, neither President Trump nor any other reasonable person, including his lawyers who participated in the call, had fair notice that the solicitation statute would apply under these circumstances.

The requirement that a request be "relatively overt" exists, in part, so that a person understands "where the line is drawn which separates permissible activity from that which is criminal," *Lanier*, 520 U.S. at 265, and it also prevents arbitrary enforcement by a biased prosecutor. The facts surrounding the call are undisputed. There was no fair notice to President Trump that his hour-long call, made in the middle of the day from the White House, with many lawyers on the line, complaining of widespread fraud in the election, could result in criminal prosecution.

E. Counts 15 and 27: False Documents OCGA § 16-10-20.1

The false documents statute was enacted to address the filing of false liens and encumbrances against public employees. It was amended in 2014, and both the synopsis and the enacting clause relate only to the filing of *false liens*.[8] The State, through its indictment, interprets the amendment as an expansion of the statute beyond that of false liens. Even assuming the State is correct, which it is not, the statute as amended fails to provide adequate warning of the conduct it proscribes.

Both the caption ("expands the protection against the filing of false liens to all citizens") and the synopsis ("is amended by revising Code Section 16-10-20.1, relating to filing false liens or encumbrances against public employees") references only the filing of false liens. Furthermore, the "main object" of the legislation and the "title" only relate to false liens, and nothing about the amendment indicated an intent to extend the statute beyond that. Instead, the language made clear it was amending the statute related to false liens to "expand the protection against the filing of *false liens to all citizens*," rather than simply public employees, as the statute originally contemplated.

[8] The synopsis read: "Relates to obstruction of public administration and related offenses; amends provisions relating to filing false liens or encumbrances against public employees; expands the protection against the filing of false liens to all citizens; provides for filing and recording as a public record and exceptions; provides for related matters; repeals conflicting laws." 2014 Ga. ALS 626, 2014 Ga. Laws 626, 2014 Ga. Act 626, 2013 Ga. HB 985. The enacting clause read: "Article 2 of Chapter 10 of Title 16 of the Official Code of Georgia Annotated, relating to obstruction of public administration and related offenses, is amended by revising Code Section 16-10-20.1, relating to filing false liens or encumbrances against public employees, as follows."

The fair notice doctrine of the Due Process Clause is violated by interpreting the statute in a way which is inconsistent with the plain language of the amendment and the notice thereby given to citizens of what the statute is being expanded to cover. Citizens cannot be left to "guess at" a statute's meaning or "differ as to its applications," and where a statute is ambiguous, either on its face or through its interpretation, it must be construed in favor of the defendant. *Botts*, 278 Ga at 539; *Langlands*, 276 Ga. at 724. Here, too, any ambiguity must be construed in favor of the defendant and against an overly expansive reading of the statute despite what appears to be the clear language of the statute. *Id.* Moreover, in 2019, Judge Adams of the Fulton County Superior Court held that O.C.G.A. §16-10-20.1 "applies solely to liens, encumbrances, documents of title and instruments relating to a security interest in title, real or personal property." *Harned v. Piedmont Healthcare Found*., 2019 Ga. Super. LEXIS 5250 (2019). If judges may "differ as to its application," the average citizen certainly does, and the statute therefore violates due process when applied to the alleged facts in those counts.

F. Counts 13, 19, 29, 39: False Statement OCGA § 16-10-20

The acts underlying the False Statement counts involved the Elector Certificates, the September 17, 2021 letter sent to the Secretary of State, and the January 2 2021 phone call.

Precedent makes clear to a person of common intelligence that this conduct could *not* come within the ambit of this statute. As the Court in *Sneiderman* noted:

> OCGA § 16-10-20 is modeled on the longstanding federal false statements statute, 18 USC § 1001, which criminalizes affirmative false statements and concealment of material facts designed to deceive and harm lawful governmental functions. *Haley v. State*, 289 Ga. 515, 523-528 (2011). Accordingly, "as properly construed, [OCGA] § 16-10-20 may only be applied to conduct that persons of common intelligence would know was wrongful because it could result in harm to the government." *Id.* at 528.

Sneiderman v. State, 336 Ga. App. 153, 160-163 (2016) (disapproved of on other grounds by *Quiller v. State*, 338 Ga. App. 206 (2016). But the Elector Certificate, the letter, and the call did not create or pose any additional harm to the government. The investigations were already completed or ongoing, the complaints had been filed, and the lawsuits were pending. Furthermore, hundreds of other people reported these concerns to the Secretary of State and the State Election Board. As such, there was simply no way for a person of common intelligence to "know the conduct was wrongful because it could result in harm to the government" as is required to be brought within the ambit of this statute.

Even without those facts, a person of ordinary intelligence does not "know" that challenging an election via the courts, the legislature, and petitioning government officials is "wrongful because it could result in harm to the government." To the contrary, such actions benefit society since the accuracy of an election is of paramount importance to all citizens and dispelling "false" claims is

part of the necessary process of ensuring faith in the results. Citizens who wish to file a complaint but have no way of verifying their concerns are left to "guess" at the statute's potential application to their conduct and fear whether the government may later charge them with a crime based upon disliking the viewpoint of their complaint.

This is especially dangerous when it is the government who has the power (and duty) to investigate allegations, and it is impossible for an ordinary citizen to investigate or verify such facts. That situation stands in stark contrast to the governmental interest the statute was designed to protect. Prohibiting allegedly false statements, which in this instance did not exist, knowingly made about matters within the personal knowledge of the individual, particularly when in response to government investigations or pursuant to obtaining government authorization or funds, is plainly a legitimate government interest. Clearly, a person understands they cannot lie to the police in a murder investigation or falsely claim payment for services which were never rendered to Medicare patients. It is clear that the crime of false statements was intended to guard against statements made about objectively verifiable facts within the personal knowledge of the speaker which the listener believes the speaker knows for certain and is stating as such. If the language of the statute can be stretched beyond the legislative purpose to criminalize a citizen's right to speak on matters of public concern and to seek redress from the courts and their elected officials, particularly when the information provided is identified as being

based upon third party reports, it is plainly unconstitutional and sweeps within its ambit wide swaths of protected speech. Furthermore, it cannot be said that citizens have fair warning that such activity would cross the proverbial line into a criminal act.

IV. CONCLUSION

While the statutes underlying this indictment have been in existence for many years, the novel construction the State seeks to now employ violates all notions of due process, particularly since the indictment directly targets pure political speech. As previously argued, the statutes fail under an as-applied First Amendment challenge. But the statutes also violate due process since they have never before been applied to this alleged conduct or to remotely similar conduct, or to any form of political advocacy for that matter. Specifically, President Trump was not on fair notice that his conduct alleged in the indictment could possibly cross the proverbial line, particularly since it has taken place throughout history. As such, the indictment must be dismissed.

Respectfully submitted,

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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 8th day of January, 2024.

/s/ Steven H. Sadow
STEVEN H. SADOW