IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA, Plaintiff, vs. DONALD JOHN TRUMP, et al., Defendant.	)	CASE NO.: 23SC188947

MARK R. MEADOWS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS BASED ON SUPREMACY CLAUSE IMMUNITY

COMES NOW, Mark R. Meadows, by and through undersigned counsel, and hereby files this reply in support of his Motion to Dismiss Based on Supremacy Clause Immunity, showing the Court as follows:

1. **The Federal Court Decisions on Removal Have No Legal Effect on Mr. Meadows' Supremacy Clause Immunity Defense.**

The State primarily argues that the federal courts have already foreclosed Mr. Meadows's immunity defense. That contention is flatly wrong.

As the Court is aware, Mr. Meadows has sought to remove his case to federal court. Mr. Meadows removed the case to federal court under 28 U.S.C. § 1442(a)(1); the District Court for the Northern District of Georgia remanded; a panel of the Eleventh Circuit affirmed the District Court's order; and Mr. Meadows' petition for a rehearing *en banc* was denied. The time for Mr. Meadows to file a petition for a *writ of certiorari* with the Supreme Court of the United States has not yet expired.[1]

[1] In removal proceedings where the district court conceded it "does not have a lot of case law out there for the Court to follow," a panel of the Eleventh Circuit nonetheless became the first "in the 190-year

The federal removal decisions have no precedential impact or preclusive effect on Mr. Meadows' motion to dismiss. First, Mr. Meadows entitlement to removal and his immunity from state prosecution are distinct issues, *see Caver v. Cent. Alabama Elec. Coop.*, 845 F.3d 1135 (11th Cir. 2017); one turns on interpretation of a federal statute, 28 U.S.C. § 1442(a), while the other turns on interpretation of the Supremacy Clause, U.S. CONST. art. VI, cl. 2. Second, even if the Eleventh Circuit decision stands, that threshold ruling on federal-court jurisdiction has no bearing on the merits of Mr. Meadows's immunity defense because the only federal ruling carrying precedential authority was the determination that the federal courts had no jurisdiction in the matter. Because there was no federal jurisdiction, neither lower federal court had the authority to opine, let alone rule, on the merits of Mr. Meadows's immunity defense. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–102 (1998). To do so would have been, "by very definition, for [the] court to act ultra vires." *Id.* at 103; *accord United States v. Amodeo*, 916 F.3d 967, 971 (11th Cir. 2019) (Pryor, J.) ("'[J]urisdiction is power to declare the law,' so when it does not exist, 'the only function remaining to the court is that of announcing the fact and dismissing the cause.'") (quoting *Steel Co.*, 523 U.S. at 94).

The State mentions the district court and Eleventh Circuit decisions 29 times in its 15-page brief; it claims that a ruling in Mr. Meadows' favor would require this

history of the federal officer removal statute," Op. 17, to hold that the statute provides no protection for *former* federal-office holders. And, the notion adopted by the Eleventh Circuit panel that a former White House Chief of Staff is not entitled to a federal forum to defend himself against criminal charges related to his work for the President of the United States is at odds with everything the federal-officer removal statute has long been understood to accomplish.

Court to "contradict those [federal] courts directly," Opp. 2. And, as if to suggest that on-going removal proceedings somehow operate as issue preclusion relating to the instant Supremacy Clause immunity motion, the State tells this Court it is required to take judicial notice of the earlier federal decisions, when published. Opp. 5 n.2. The State is dead wrong as to the authority of those opinions and invites error by this Court. The federal courts have resolved only a threshold jurisdictional question under a federal statute, 28 U.S.C. 1442(a), the Federal Officer Removal Statute. Neither the district court nor the Eleventh Circuit ever ruled on the merits of Mr. Meadows's Supremacy Clause immunity defense. The Eleventh Circuit decision has no binding preclusive effect here, and in any event, it never purported to resolve the immunity issue anyway.

2. The Motion to Dismiss Accurately States the Applicable Law.

The State is also wrong in its efforts to run away from applicable law.

Mr. Meadows is immune from prosecution under the Supremacy Clause because his charged conduct has "'some nexus with furthering federal policy and can reasonably be characterized as complying with the full range of federal law.'" *Kordash v. United States*, 51 F.4th 1289, 1293 (11th Cir. 2022) (quoting *Denson v. United States*, 574 F.3d 1318, 1348 (11th Cir. 2009)).[2] As described in Mr. Meadows' motion

[2] The State's argument that the *Kordash* and *Denson* decisions are "inapplicable" "distractions," see Opp. 3-4, is silly. To start, the State recognizes the Supremacy Clause applies to both "local prosecution[s] or private suit[s] under state law." Opp. 3 (quoting *Texas v. Kleinert*, 855 F.3d 305, 314 (5th Cir. 2017). Next, the State argues that the holdings of *Kordash* and *Denson,* as they relate to applicable Supremacy Clause standards, should somehow not extend to this criminal case, because *Kordash* and *Denson* involved private lawsuits. In other words, without any authority (because there is none), the State argues that civil litigants are afforded greater protections under the Supremacy Clause than criminal defendants.

in detail, that lenient test is readily met here. Mr. Meadows was acting well within his federal role. And, as a matter of law, the contours of that role cannot be defined by any state authority, whether local prosecutor or state judge; instead, they are defined entirely by federal law, without reference to state law. *See Johnson v. Maryland*, 254 U.S. 51, 56–57 (1920) ("[E]ven the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States.").

The State nevertheless argues *ad nauseam* that Mr. Meadows could not have operated within his "federal role" because the allegations against him in the indictment amount to allegations Mr. Meadows acted in violation of federal law. On this point, the State nearly comes unglued.

The State cannot sidestep Mr. Meadow's immunity defense by invoking the Hatch Act, 5 U.S.C. § 7323 *et seq.*, for several independent reasons:

(1) The State is simply wrong that the Hatch Act has anything to do with limiting the scope of a federal official's role or authority for purposes of Supremacy Clause immunity. The Eleventh Circuit did agree with the State that the Hatch Act was relevant to determining what constitutes an "act under color of . . . office" within the meaning of 28 U.S.C. § 1442(a). That ruling was wrong, but it any event, it need not be and should not be extended to defining the outer perimeter of a federal official's duties for purposes of Supremacy Clause immunity. If anything, the fact that Mr. Meadows's actions allegedly implicated the Hatch Act proves that they were within

the outer perimeter of his duties; otherwise, the Hatch Act would not have applied at all because the aspect of the statute the State cites, Opp. 10, by its terms only applies where a federal official acts *under color of office*. See 5 U.S.C. § 7323(a)(1)("[U]se his *official authority or influence* for the purpose of interfering with or affecting the result of an election")(emphasis added).

(2) Even if the Court were to assume, for the sake of argument, that immunity does not extend to acts which violate the Hatch Act, the State would still bear the burden of proving—with *evidence*, not mere *allegations*—that Mr. Meadows violated the Hatch Act. The State has not introduced any evidence about Mr. Meadows's conduct, much less evidence that would establish such a federal violation. And if the State does come forward with evidence, Mr. Meadows has the right to rebut it.

(3) Finally, even if the Court were to conclude now that Mr. Meadows had transgressed some limit to his role arising from the Hatch Act, that still would not vitiate immunity; the Court would have to make the further finding (for which there is no evidentiary support) that Mr. Meadows transgressed that line willfully and maliciously.

The State knows that it cannot overcome this final hurdle. Over four separate footnotes totaling almost a page of single-spaced type, *see* Opp. 4-5 n.1, 11 n.6, and 12-13 n.7, the State nervously (and falsely) accuses Mr. Meadows of misstating the law, in explaining that an alleged violation of federal law will overcome Supremacy Clause immunity only if the violation was clear and willful. That is precisely the standard the Eleventh Circuit applied in *Baucom v. Martin*, 677 F.2d 1346 (11th Cir.

1982), where it explained that, "[e]ven if the officer makes an error in judgment in what the officer conceives to be his legal duty, that alone will not serve to create criminal responsibility in a federal officer." *Id.* at 1350 (citing *Clifton v. Cox*, 549 F.2d 722, 727 (9th Cir. 1977)). As the Eleventh Circuit previously recounted, the Ninth Circuit in *Clifton* had found that the agent involved had exceeded his federal authority and executed an invalid search warrant but nevertheless applied Supremacy Clause immunity because the agent "reasonably believed his actions to be [within the scope of his authority] at the time." *Id.* at 1349. The Sixth Circuit similarly cited *Clifton* for the proposition that, "even though an agent exceeds his express authority, he does not necessarily act outside of the authority conferred by the laws of the United States." *Com. of Ky. v. Long*, 837 F.2d 727, 745 (6th Cir. 1988). The key distinction lies between "an error of judgment," for which an official may still be immune even if the Court later determines that it was inconsistent with federal law, and "an act done wantonly and with criminal intent," for which there is no immunity, *id.—i.e.*, a clear and willful violation. The point is not that federal officials are free to violate federal law and claim immunity from state prosecution; it is that they are not held to a strict-liability standard in immunity cases. If a federal official reasonably believes that he is carrying out his official duties, he enjoys immunity even if a court later concludes in hindsight that he actually crossed the line.[3]

3. If the State Meets Its Initial Burden, Mr. Meadows Is Entitled to an Evidentiary Hearing.

[3] The rationale for this standard itself arises from the Supremacy Clause: no state in any of its functions, including law enforcement, is authorized to police the execution of the role of the federal officials. *See Marbury v. Madison*, 5 U.S. 137 (1803); *In Re Nagle*, 135 U.S. 1 (1890).

According to the State, the process this Court is to employ when deciding upon Mr. Meadows' immunity motion is as follows: "this Court must take the Indictment's allegations as true," *see* Opp. 12, and the State need only show a "'dispute' as to the facts in order to proceed to trial," *see* Opp. 14. That's not the process.

First, federal courts deciding upon Supremacy Clause immunity defenses hold that states cannot overcome an immunity defense by mere allegations. *See Kentucky v. Long*, 837 F.2d 727, 752 (6th Cir. 1988); *Wyoming v. Livingston*, 443 F.3d 1211, 1226 (10th Cir. 2006); and *New York v. Tanella*, 374 F.3d 141, 148 (2nd Cir. 2004).

Second, Georgia courts hold that immunity defenses are questions of law to be decided by the Court pretrial based upon an evidentiary hearing, *Lightning v. State*, 297 Ga. App. 54, 55-56 (2009); and that a defendant only needs to establish immunity by a preponderance of the evidence, *see State v. Brown*, 288 Ga. 20 (2010).[4]

* * * * *

For all the reasons described herein and within Mr. Meadows Motion to Dismiss Based on Supremacy Clause Immunity, if the State meets its initial burden,

[4] The State is also wrong that because the district court held a hearing in the removal action, that an "evidentiary record" is "already developed." *See* Opp. 8 and 14. If the State were correct, it would lose. The State did not introduce evidence at the federal removal hearing to substantiate its substantive allegations of Mr. Meadows's alleged predicate acts—much less to show that the were taken outside the scope of his official duties. The Court could therefore rule *in favor* of Mr. Meadows without taking further evidence. The State, however, means to suggest that the Court can rule *against* Mr. Meadows without a hearing. That is simply wrong. The State is fully aware of, and did not object to, Mr. Meadows' efforts to obtain his official records from NARA or the DOJ. These records, unavailable in the federal removal proceedings, relate directly to Mr. Meadows' Supremacy Clause immunity defense. Assuming the State comes forward with more than "mere allegations," Mr. Meadows has the right to compel witnesses and documents at an evidentiary hearing on his motion, regardless of earlier federal proceedings.

Mr. Meadows requests this Court to hold an evidentiary hearing, and to GRANT his motion.

Respectfully submitted on this 1st day of April, 2024.

GRIFFIN DURHAM TANNER & CLARKSON, LLC

By: */s/ James D. Durham*
James D. Durham
Georgia Bar No. 235515
jdurham@griffindurham.com
104 West State Street, Suite 200
Savannah, GA 31401

TERWILLIGER LAW PLLC

George J. Terwilliger III
VA Bar No. 99088
P.O. Box 74
Delaplane VA 20144
George@gjt3law.com

Attorneys for Defendant Mark Randall Meadows

CERTIFICATE OF SERVICE

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

This 1st day of April, 2024.

GRIFFIN DURHAM TANNER & CLARKSON

By: */s/ James D. Durham*
James D. Durham
Georgia Bar No. 235515
jdurham@griffindurham.com
104 West State Street, Suite 200
Savannah, GA 31401

Attorney for Defendant Mark Randall Meadows