

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,

Case No. 23SC188947

v.

ROBERT DAVID CHEELEY, ET AL.,

Defendants.

**DEFENDANT ROBERT DAVID CHEELEY'S
SUPPLEMENTAL BRIEF
REGARDING THE APPLICATION OF *IN RE LONEY***

The Indictment presents an extraordinary and novel instance in Georgia and American legal history. The State is prosecuting Defendants for their actions or speech regarding a matter consigned exclusively to Congress by U.S. Constitution Art. II, § II and the Electoral Count Act (“ECA”)—namely issues related to the counting of presidential electors in the 2020 Presidential Election. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995); *accord McCullough v. State*, 17 U.S. 316, 217 (1819). The Court asked for additional briefing specifically on the impact of *Thomas v. Loney*, 134 U.S. 584 (1890) on Counts 14, 15 and 27 of the Indictment.¹ The short answer (and incorporating all of Defendants’ prior briefing and arguments) is that *Loney* bars those Counts completely.

¹ In summary, U.S. Constitution Art. II, § 1 allows state legislatures to proscribe the manner of appointing Presidential Electors. Georgia proscribed the manner of appointing its Presidential Electors through popular vote of its citizens. *See* O.C.G.A. § 21-2-10. Here, that vote occurred on November 4, 2020. In the Electoral Count Act of 1887, Congress narrowly ceded to the states a brief window to resolve certain disputes regarding elector appointment known as the “safe harbor clause.” *See* 3 U.S.C. § 5. It is undisputed that in

Counts 14, 15, and 27 of the Indictment allege that certain Defendants violated Georgia law by submitting (or conspiring to submit) allegedly “false filings” made in the U.S. District Court for the Northern District of Georgia related to the 2020 presidential electoral contest.²

In particular, Count 14 charges Defendants David Shafer, and Shawn Micha Tresher Still with violating O.C.G.A. §§ 16-4-1 and 16-10-20.1(b)(1) by mailing a document entitled “Certificate of the Votes of the 2020 Electors from Georgia” to the Chief Judge for the United States District Court for the Northern District of Georgia, which purportedly contained a materially false statement. *See* Indictment at 79. Count 15 charges Defendants President Donald J. Trump, Rudolph William Louis Giuliani, John Eastman, Kenneth Chesebro,³ Ray Stallings Smith III, Robert David Cheeley, and Michael A. Roman with violating O.C.G.A. §§ 16-4-8 and 16-10-20.1(b)(1) by filing a document entitled “Certificate of the Votes of the 2020 Electors from Georgia” in the United States District

2020 presidential election, Georgia did not timely act under the safe harbor clause, which ended on December 8, 2020 (six days before the Presidential Electors were required to vote). *See* 3 U.S.C. § 5. Because Georgia failed to timely act under the safe harbor clause, the counting of Georgia’s 2020 Presidential Electors fell exclusively to Congress. *See* 2 U.S.C. §§ 6, 15; *Bush v. Gore*, 531 U.S. 98, 130-31 (Souter J., dissenting). After the safe harbor date, on December 14, 2020, the Presidential Electors for President Biden met and certified their votes for President Biden. On the same date, the alternate Presidential Electors for President Trump similarly met to preserve their right to challenge the election before Congress, as they were required to do pursuant the ECA. *See* 3 U.S.C. § 5; *Bush*, 531 U.S. at 127 and n.5 (Stevens, J., dissenting).

² Defendants reiterate that the scope of O.C.G.A. § 16-10-20.1 on its face does not reach the filings at issue, as that statute penalizes only false filings related to liens and similar filings that are not at issue here.

³ Chesebro is no longer a Defendant.

Court for the Northern District of Georgia, which purportedly contained a materially false statement. *See* Indictment at 79. And Count 27 charges Defendants President Trump and Eastman with violating O.C.G.A. § 16-10-20.1(b)(1) by filing a civil lawsuit contesting issues related to the 2020 Presidential election in the United States District Court for the Northern District of Georgia that purportedly contains false allegations of fact. *See* Indictment at 86.

In sum, the actions charged in Counts 14, 15, and 27 deal specifically with: (1) issues that are in the exclusive jurisdiction of Congress pursuant to Art. II, § II and the ECA; and (2) materials that were filed in federal court. Per the U.S. Supreme Court’s *Loney* decision, those Counts are thus expressly preempted and barred here.⁴

Loney dealt with Congress’s exclusive power and jurisdiction under U.S. Const. Art. I, § 5 over the “elections, returns, and qualifications of its own members.” 134 U.S. at 373. In exercising that exclusive power, Congress statutorily provided it would accept depositions and oaths of any witnesses (be they made in a state or federal forum) regarding the “elections, returns, and qualifications” of its members, when that was in dispute. *Id.* William Loney gave a notarized state deposition in Virginia regarding a contested election of one of Congresses’ members that it was considering. *Id.* Thereafter, Loney was arrested and detained by Virginia officials who claimed he committed perjury in his notarized

⁴*Loney* and the ECA bar all the claims in the Indictment. The rationale in *Loney* and its progeny applies equally the remaining Indictment counts. Because the Court asked for briefing only on Counts 14, 15, and 27, we limit this brief to those Counts. Defendants are happy to supplement their prior briefing and arguments on the broader application of *Loney* issue if the Court desires.

deposition. *Id.* It was true that perjury in a Virginia notarized deposition was a crime under Virginia law. *Id.* But the sole purpose of the contested deposition was to resolve a matter that was exclusively in Congress’s domain. *Id.*

In affirming the dismissal of the conviction and release of Loney from state custody, the Supreme Court noted that Congress regulated by law the manner and means by which a federal election can be contested. *Id.* Further, Congress enacted federal law under which a person who willfully testifies falsely in a federal court or proceeding in which a law of the United States authorizes the testimony to be taken under oath can be prosecuted for such perjury. *Id.* at 374. Therefore, such testimony, taken in a federal election contest under federal constitutional and statutory law governing the election contest, even if before a state notary, “stands upon the same ground as testimony taken before any judge or officer of the United States, and perjury in giving such testimony is punishable in the courts of the United States.” *Id.* at 374-75. The fact that a state notary administered the oath that was allegedly violated did not confer jurisdiction on a court of that state because the deposition and oath were performed pursuant to *Congress’s* constitutional and statutory power and, so, the notary “performs this function, not under any authority derived from the state, but solely under the authority conferred upon him by congress, and in a matter concerning the government of the United States.” *Id.* at 374.⁵ Thus, the Supreme Court said, Virginia could

⁵ Specifically, the Supreme Court said:

Testimony taken, with the single object of being returned to and considered by the house of representatives of the United States exercising the judicial power vested in it by the constitution, of judging of the elections of its members and taken before an officer

not interfere with Congress's jurisdiction by arresting and prosecuting Loney for the alleged violation of Virginia's perjury statute. *Id.* at 375-76.

The Supreme Court, in explaining its decision, said:

[T]he power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had. It is essential to the impartial and efficient administration of justice in the tribunals of the nation, that witnesses should be able to testify freely before them, unrestrained by legislation of the state, or by fear of punishment in the state courts. The administration of justice in the national tribunals would be greatly embarrassed and impeded if a witness testimony before the court of the United States, or upon a contested election of a member of congress, were liable to prosecution in the court of the state upon a charge of perjury, preferred by a disappointed suitor or contestant, or instigated by local passion or prejudice.

Id. at 375. Thus Congress, or the courts of the United States, have the sole and exclusive jurisdiction regarding a criminal offense arising from the prescribed election contest.⁶

designated by congress [including a state officer] as competent for this purpose and deriving his authority to do this from no other source, stands upon the same ground as testimony before any judge or officer of the United States, and perjury in giving such testimony is punishable in the courts of the United States [not the courts of any of the several states].

Loney, 134 U.S. at 375-76.

⁶ *Loney* emphasized the importance of protecting Congress's jurisdiction and federal jurisdiction against the retaliation of "disappointed suitor[s] or contestant[s], or instigated by local passion or prejudice." *Id.* at 375. Local passions and prejudices that threaten to (or do) punish citizens for speaking to or providing evidence Congress or the federal courts, would markedly suppress the exchange of information that Congress or federal courts need to exercise their functions. And this exercise of state authority over those federal matters is precisely what *Loney* (and the U.S. Constitution) say is improper.

The Supreme Court's *Loney* decision favorably cited *Ross v. State*, 55 Ga. 192 (1874), and decisions of other states courts that were in accord. In *Ross*, the Georgia Supreme Court reversed the state perjury conviction of Ross for testifying falsely before a United States commissioner under investigation of alleged violations of federal law. *Id.* at 193. The Georgia Supreme Court held that the charged conduct, alleged perjury given in a federal court, was "an offense against the public justice of the United States" and, as such, federal courts have exclusive jurisdiction over the alleged offense, despite Georgia having a criminal perjury statute and the testimony having been taken in a Georgia county. *Id.* at 193-94. The same is true here.

The present case is no different than *Loney* and *Ross*. Per U.S. Constitution Art. II, § 1 (like U.S. Const. Art. I, § 5) and the ECA, Congress has the exclusive authority not only in adjudicating election challenges regarding its own members, but so too has that exclusive jurisdiction regarding contests of Presidential Electors. And federal courts, not state courts, have the authority to deal with false filings and perjury allegedly committed there.

Here, the charged conduct in Counts 14, 15 and 27 was all undertaken pursuant to a presidential election challenge in accordance with the provisions of the Art. II, § 1 and the ECA. And as in *Loney*, the authority over the federal officers (in *Loney* congress members and here the counting and qualifications presidential electors) falls to Congress. While any verifications or oaths taken in mailing, preparing or filing the pertinent documents to or with the United States District

Court for the Northern District of Georgia may have been made in Georgia, this does not confer jurisdiction to Georgia courts to adjudicate the veracity of those filings. To do otherwise would be to interfere with Congress's jurisdiction and the jurisdiction of the federal courts.

The two documents at issue in Counts 14, 15 and 27, the "Certificate of the Votes of the 2020 Electors from Georgia" and the civil complaint, as described in the Indictment, were submitted and filed in a federal court as part of the federal election contest. The conduct underlying Counts 14, 15 and 27 is therefore solely a purported offense against the public justice of the United States, which it is equipped to handle. Congress or federal courts have exclusive jurisdiction over any purported false statements or allegations submitted as part of the contest of the 2020 Presidential election and/or submitted to the United States District Court for the Northern District of Georgia. As both *Loney* and *Ross* held, Georgia has no jurisdiction to prosecute state criminal charges for this conduct. Any alleged offenses lie within the exclusive jurisdiction of the district courts of the United States.

The Court should dismiss Counts 14, 15 and 27, thereby preventing the Fulton County District Attorney from adversely affecting the "impartial and efficient administration of justice in the tribunals of the nation" by bringing these charges which are motivated by "local passion or prejudice." *See Loney*, 134 U.S. at 375. Simply stated, the United States does not need the District Attorney of Fulton County to protect the integrity of its tribunals' proceedings, no matter what the

District Attorney's motivation may be, and federal law precludes any attempt by the District Attorney to do so.

Respectfully submitted, April 24, 2024.

/s/ Christopher S. Anulewicz

Christopher S. Anulewicz

Georgia Bar No. 020914

Jonathan R. DeLuca

Georgia Bar No. 228413

Wayne R. Beckermann

Georgia Bar No. 747995

BRADLEY ARANT

BOULT CUMMINGS LLP

Promenade Tower

1230 Peachtree Street NE

Atlanta, GA 30309

E-mail: canulewicz@bradley.com

Telephone: (404) 868-2030

Facsimile: (404) 868-2010

/s/ Richard A. Rice, Jr.

Richard A. Rice, Jr.

Georgia Bar No. 603203

THE RICE LAW FIRM, LLC

3151 Maple Drive, NE

Atlanta, Georgia 30305

Email: richard.rice@trlfirm.com

Telephone: 404-835-0783

Facsimile: 404-481-3057

Attorneys for Defendant Robert David Cheeley

Ashleigh B. Merchant

Georgia Bar No. 040474

John B. Merchant, III

Georgia Bar No. 533511

THE MERCHANT LAW FIRM, P.C.

701 Whitlock Ave., S.W., Ste. J-43

Marietta, Georgia 30064

Email: ashleigh@merchantlawfirm.pc.com

john@merchantlawfirmpc.com
Telephone: (404) 510-9936

*Counsel for Defendant-Appellant Michael
Roman*

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,

Case No. 23SC188947

v.

ROBERT DAVID CHEELEY, ET AL.,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that I have, this 24th day of April 2024, served a true and correct copy of the within and foregoing DEFENDANT ROBERT DAVID CHEELEY'S SUPPLEMENTAL BRIEF REGARDING THE APPLICATION OF *IN RE LONEY* via electronic filing.

/s/ Christopher S. Anulewicz

Christopher S. Anulewicz

Georgia Bar No. 020914

**BRADLEY ARANT BOULT CUMMINGS
LLP**

Promenade Tower

1230 Peachtree Street NE

Atlanta, GA 30309

E-mail: canulewicz@bradley.com

Telephone: (404) 868-2030

Facsimile: (404) 868-2010

Attorney for Defendant Robert David Cheeley