IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,	
v.	Case No.
JEFFREY B. CLARK, ET AL.,	23SC188947
Defendants	

JEFFREY B. CLARK'S SUPPLEMENTAL BRIEF ON *IN RE LONEY*

Comes Now Jeffrey Bossert Clark, and, at the invitation of the Court, submits this short supplemental brief on the significance of *In re Loney*, 134 U.S. 372 (1890), to this case.

While Mr. Clark is not charged in Counts 14, 15, or 27, the underlying principle of *In re Loney* applicable to those Counts is federal supremacy,[1] which is important not just to those Counts but to many others in the Indictment, including the Counts in which Mr. Clark is charged, being Counts 1 and 22. Intergovernmental immunity shields federal actors who are wrongly hauled into state court from prosecutions or civil liability, whereas *In re Loney* prevents States from even bringing into state court (on pain of being interrupted by a grant of the great writ of habeas corpus) those acting under federal auspices, whether testimonial or otherwise. This is the only difference between the two headings of doctrine and, in reality, they are but two paths to the same conclusion: The

[1] *See, e.g.*, *Braden v. 30th Jud. Cir. Ct. of Kentucky*, 410 U.S. 484, 508 (1973) (Rhenquist, J., dissenting) (characterizing *In re Loney* as involving "the lack of jurisdiction, under the Supremacy Clause, for the State to bring any criminal charges against the petitioner.").

States are entirely fenced out of interfering in the federal sphere by using state legal process.

Here, Mr. Clark stands accused of drafting a letter that never left the confines of the federal government's exclusive sanctums (specifically, the U.S. Justice Department's Robert F. Kennedy Building in the exclusive federal enclave of the District of Columbia, the seat of the federal government). His conduct is thus even less plausibly subjected to state criminal jurisdiction than the allegedly perjured testimony given to Congress at issue in *In re Loney*.

We might ask, by way of analogy: Could Wilson Loney have been prosecuted by the Commonwealth of Virginia merely for rehearsing questions and answers with his lawyer for presentation to Congress on the theory that he was attempting to commit perjury in Virginia? ***Obviously not.*** For surely, if Virginia criminal courts lacked jurisdiction over Mr. Loney for actually delivering testimony to a Virginia notary in connection with adjudication of a congressional election, then merely contemplating whether to deliver such congressional testimony via a Virginia notary would have fallen even further outside Virginia's power.

The point is that "[t]he courts of Virginia having no jurisdiction of the matter over which the charge on which the prisoner was arrested, and he being in custody, in violation of the constitution and laws of the United States, for an act done pursuant to

those laws [meant that] law and justice required that he should be discharged by the circuit court on writ of *habeas corpus*." *In re Loney*, 134 U.S. at 376-77.

In re Loney held that "the power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had." 134 U.S. at 375. In that case, the power belonged exclusively to the federal government because the matter was a congressional election contest being adjudicated by the House of Representatives under a direct grant of authority in the Constitution. *Id*. at 374-376. While the opinion in *Loney* does not use the phrase "federal supremacy," the rationale of the decision clearly rests on federal supremacy:

> The administration of justice in the national tribunals would be greatly embarrassed and impeded if a witness testifying before a court of the United States, or upon a contested election of a member of congress, were liable to prosecution and punishment in the courts 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. There is a near complete overlap between this rationale and that of cases such as *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819), ("no principle of [state power] … can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence."); *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 605 (1821) (a state court cannot issue a writ of mandamus to an officer of the United States because that officer's "conduct can only be controlled by the power that

created him"); *Ohio v. Thomas*, 173 U.S. 276, 284 (1899) (prohibiting state criminal prosecution of a federal officer for violating food regulations because "in the performance of that duty he was not subject to the direction or control of the legislature of Ohio"); *Johnson v. Maryland*, 254 U.S. 51, 57 (1920) ("immunity of the instruments of the United States from state control in the performance of their duties" prohibits prosecution of a post officer for violating a state license law).

In *Tennessee v. Davis*, 100 U.S. 257 (1880) the Supreme Court explained the elementary point that when the national government was formed, the States ceded a portion of their sovereignty to the federal government:

> Now the execution and enforcement of the laws of the United States, and the judicial determination of questions arising under them, are confided to another sovereign, and to that extent the sovereignty of the state is restricted.

In re Loney thus reinforces the venerable and unassailable principle that the assertion of law enforcement authority by States against activities provided for or authorized by federal law would negate the constitutional supremacy of the federal government:

> As was said in *Martin v. Hunter*, 1 Wheat. 363, "The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents, and they must act within the states. If, when thus acting and within the scope of their authority, those officers can be arrested and brought to trial in a state court for an alleged offense against the law of the state, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection—if their protection must be left to the action of the state court—the operations of the general government may at any time be arrested at the will of one of its members.

Id. at 262-263.

This Court, in denying Defendant Latham's motion to strike Act 160 based on *In re Loney*, held *In re Loney* was not applicable because Latham had not been charged with perjury. But neither *Loney* nor the doctrine of federal supremacy animating the decision can be so limited in their scope and application. *McCullough v. Maryland* held that: "***[N]o principle of [state power]*** … can be admissible, which would defeat the legitimate operations of a supreme government." Thus, federal supremacy barred a state tax on the Second Bank of the United States. The breadth of the principle is textually explicit in the Supremacy Clause, U.S. Const. Art. VI, cl. 2, and is reinforced by the sweeping language of *McCullough* invaliding the state tax in question. The breadth and strength of federal supremacy is borne out by many other decisions in which federal supremacy precluded enforcement of state laws ranging from the trivial—an Ohio statute prohibiting the serving of oleomargarine without posting a sign not less than 1.5 inches square with the words "Oleomargarine Sold and Used Here" in *Ohio v. Thomas*, 173 U.S. 276, 284 (1899)—to matters of the utmost gravity—state laws against murder in *Tennessee v. Davis*, 100 U.S. 257 (1880), and *Cunningham v. Neagle*, 135 U.S. 1, 76 (1890). Federal supremacy was applied in a context closely analogous to Counts 14, 15, and 27 in *People v. Hassan*, 168 Cal. App. 4th 1306 (2008), in which the State of California was held to lack jurisdiction to enforce its false filings law with respect to false immigration documents that had been produced solely pursuant to the laws of the United States.

Georgia adheres, ***as it must***, to this rule. In *Ross v. State*, 55 Ga. 192 (1875)—handed down even before *Loney*—the defendant was charged under state law for perjury before a U.S. commissioner in the investigation of an alleged violation of federal law. The Georgia Supreme Court held there was no jurisdiction in the Georgia courts:

> In our judgment, the offense charged in the indictment contained in the record was an offense against the public justice of the United States, and not an offense against the public justice of this state, and therefore the superior court of Randolph county had no jurisdiction to try it, and the court erred in not sustaining the defendant's motion to quash the indictment and proceedings had thereon, and to discharge the defendant therefrom.

Id. at 194.

Federal supremacy prohibits the State's prosecution of Counts 14, 15, and 27 against Trump, Shafer, Still, Latham, and Cheeley, just as it prohibits the prosecution of Mr. Clark under Counts 1 and 22, and accordingly they should all be dismissed. The U.S. Department of Justice makes its views known to the States and local governments all the time. This is a basic aspect of intergovernmental relations, which many cabinet agencies of the federal government have even created established organs to run. It is not a feature of the federal government that state governments may invade. At the U.S. Supreme Court level, this set of cases—*In re Loney*, *McCulloch, Thomas, Johnson, Davis, Martin, Neagle*—are all of a piece. And those federal cases, as well as California's *Hassan,* and this State's *Ross*, all require the dismissal of the indictment against Mr. Clark.

Respectfully submitted, this 25th day of April, 20244.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 20244, I electronically lodged the within and foregoing ***Jeffrey B. Clark's Supplemental Brief on In Re Loney*** with the Clerk of Court using the Odyssey eFile/GA system which will provide automatic notification to counsel of record for the State of Georgia, including:

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