IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA v. DAVID J. SHAFER, SHAWN STILL, and CATHLEEN LATHAM *et al*., Defendants.	Case No. 23SC188947

JOINT REPLY TO STATE'S SUPPLEMENTAL BRIEF REGARDING *IN RE LONEY*, 134 U.S. 372 (1890)

The State responds to the Court's request for briefing on *In re Loney*, 134 U.S. 372 (1890) (*Loney*) by ignoring the Presidential Elector Defendants' arguments and authorities and seeking to limit *Loney* to its specific facts and context. The State also claims, erroneously, that federal law does not directly preempt Georgia's filing false statements statute, O.C.G.A. § 16-10-20.1.

In reality, *Loney* not only establishes that the State has no jurisdiction to prosecute counts 14, 15 and 27 of the Indictment, but also that it lacks jurisdiction over all counts against the Presidential Elector Defendants. Because they acted pursuant to the Constitution and the Electoral Count Act ("ECA"), 3 U.S.C. §§ 1 *et seq*., and because presidential elector ballots and disputes are within Congress' exclusive jurisdiction after Election Day, the State has no jurisdiction to indict or prosecute the Presidential Elector Defendants.

ARGUMENT

I. *Loney*'s Holding Requires Dismissal of the Counts Against the Presidential Elector Defendants.

In *Loney,* the Supreme Court held that state courts have no jurisdiction to prosecute matters within the federal government's jurisdiction or acts done pursuant to the Constitution and federal law. Its holding bars the State's prosecution of the Presidential Elector Defendants.

A. The *Loney* Decision

Wilson Loney was arrested under Virginia's perjury laws after he testified as a witness in a federal congressional contest. *See In re Loney*, 38 F. 101, 101 (E.D. Va. 1889). A federal district court ordered that Loney be discharged because Virginia had no authority or jurisdiction over this exclusively federal matter. That order was appealed to the Supreme Court, who affirmed. *Id*. at 103; *see Loney*, 134 U.S. at 377.

The Supreme Court noted that the federal courts have exclusive jurisdiction over "'all crimes and offenses cognizable under the authority of the United States," 134 U.S. at 373. It observed that the House of Representative "is made by the constitution the judge of the elections, returns, and qualifications of its own members," *id*., and that "Congress has regulated by law . . . the time and manner in which depositions on oath of witnesses in such cases may be taken and returned . . . ." *Id*. at 373-374 (citations omitted). The Court noted that federal law provided for the oath and examination of witnesses in contested House elections and that Loney's testimony was to be sent to and considered by Congress in its exclusive authority to adjudicate such contests. *Id*.

Loney acknowledged that there were cases where the state and federal government would have concurrent jurisdiction over alleged criminal actions, 134 U.S. at 375, but found that it was essential that witnesses be able to testify freely before federal tribunals and courts "unrestrained by legislation of the state, or by fear of punishment in the state courts." *Id*. It held that a witness who gives testimony "pursuant to the constitution and laws of the United States" in a federal proceeding is accountable for the truth of that testimony to the United States only, and that such perjury "*is an offense against the public justice of the United States*, and within the exclusive jurisdiction of the courts of the United States; *and cannot, therefore, be punished in the courts of Virginia*." *id*. (Emphasis added). The Court concluded by holding that "[t]he courts of Virginia

having *no jurisdiction of the matter of 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 in pursuance of those laws*. . . law and justice required that he should be discharged from such custody." *Id.* at 376-377 (emphasis added) (citations omitted).

B. *Loney* Has Not Been Limited to Its Particular Facts or to the Contexts of Perjury and Habeas Corpus.

Because *Loney* fundamentally dismantles the State's indictment against the Presidential Elector Defendants, the State attempts to avoid it by trying to limit it to its facts, relegate it to the perjury and habeas contexts, or claim that its constitutional principles have not been adopted by other courts. S*ee* State's Supplemental Brief ("State's Brief"), pp. 1-3. This attempt to cabin or limit *Loney* simply does not hold water.[1]

Shortly after its decision in *Loney*, the Supreme Court cited it in a civil suit arising out of a stock transfer, stating that it would be "incongruous" for one sovereignty "to punish a person for an offense committed against the laws of another sovereignty.'" *Huntington v. Attrill*, 146 U.S. 657, 672 (1892). Subsequently, the Court discussed *Loney* in holding that a state court was competent to decide "[w]hether the offenses described in the indictments against Eno are offenses against the state of New York, and punishable under its laws, *or are made by existing statutes offenses also against the United States, and are exclusively cognizable by courts of the United States* [.]" *People of State of New York v. Eno*, 155 U.S. 89, 98 (1894) (emphasis added).

In *Ohio v. Thomas*, 173 U.S. 276, 281–85 (1899), the Court cited *Loney* in upholding the "paramount authority of the federal government" over state criminal law in the operation of a federal home located in Ohio**.** Justice Rehnquist's opinion in *Braden v. 30th Jud. Cir. Ct. of*

[1] According to Westlaw, *Loney* has been cited in 112 cases and 51 secondary sources, ranging in time from 1892 to 2022, belying any notion that it is the freakish outlier the State attempts to make it.

Kentucky, 410 U.S. 484, 508 (1973), in which he dissented on other grounds, cited *Loney* for the proposition that interference with state criminal prosecution is justified when the state lacks jurisdiction, under the Supremacy Clause, to bring any criminal charges. More recently, the Court has cited *Loney* for the proposition that "[e]ven if a State may make violation of federal law a crime in some instances, it cannot do so in a field… that has been occupied by federal law." *Arizona v. United States*, 567 U.S. 387, 402 (2012) (internal citations omitted).[2]

Loney and its core jurisdictional principles have been relied upon by other courts as well. *See, e.g., State v. Warren*, 24 Ariz. App. 380, 382 (1975) ("*We believe the rationale of Loney is sound in maintaining the concept of federalism by preserving the independence of the Federal judiciary*. [Cits.]. If there is to be any prosecution for the alleged wrongful acts set out in these counts, *such prosecution must come from Federal authorities*.") (citations omitted) (emphasis added); *People v. D.H. Blair & Co.*, No. 3282/2000, 2002 WL 766119, at *33 (N.Y. Sup. Ct. Jan. 29, 2002) (relying on *Loney* to find state did not have jurisdiction to prosecute defendant based upon alleged perjured testimony before the SEC); *United States v. Slawik*, 408 F. Supp. 190, 200–01 (D. Del. 1975), *aff'd sub nom. Slawik, Appeal of*, 564 F.2d 90 (3d Cir. 1977), and *aff'd*, 564 F.2d 90 (3d Cir. 1977) (relying on *Loney* to hold State of Delaware had "*absolutely no cognizable and independent interest in utilizing her existing criminal legislation to ensure the integrity of the*

[2] The State also ignores that other Supreme Court cases espouse the same important limiting jurisdictional principles of *Loney*. *See, e.g., Tennessee v. Davis*, 100 U.S. 257 (1879)("*[T]here can be no criminal prosecution initiated in any State court for that which is merely an offence against the general government*."); *id.* at 267 ("[T]he 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"); *Ex parte Siebold*, 100 U.S. 371, 388 (1879)[2] (holding violation of duty in election "*is an offence against the United States*, for which the offender is justly amenable to *that government*.") (emphasis added); *United States v. Gillock*, 445 U.S. 360, 370 (1980) ("[I]n those areas where the Constitution grants the Federal Government the power to act, the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power.")

*federal grand jury process or to punish those who attempt to tamper with that process.***")** (emphasis added). In *In re Waite*, 81 F. 359 (N.D. Iowa 1897), *aff'd sub nom. Campbell v. Waite*, 88 F. 102 (8th Cir. 1898), the court discussed *Loney* as follows:

> *The point of the decision was that the statute of Virginia, under which the prisoner was held, was not applicable to the case, and therefore there was no jurisdiction in the state courts . . . the state statutes for the punishment of perjury do not apply, because these are matters outside of state control and jurisdiction, and within federal control.*

Id. at 362–73; *see also U. S. ex rel. Noia v. Fay*, 300 F.2d 345, 354 (2d Cir. 1962), *aff'd sub nom. Fay v. Noia*, 372 U.S. 391 (1963), *overruled on other grounds by Wainwright v. Sykes*, 433 U.S. 72, 85 (1977) (citing *Loney* in holding state court had no jurisdiction to entertain a state criminal action "so *inseparably connected with the functioning of the National Government*.") (Emphasis added).

In addition to these cases (and many others), the State ignores that *Loney* cited to *Ross v. Georgia*, a case in which the Georgia Supreme Court determined that the offense charged 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… had no jurisdiction to try it, and the court erred in not sustaining the defendant's motion to quash the indictment," 55 Ga. at 192 (emphasis added); *see also State v. Shelley*, 79 Tenn. 594, 599 (1883) (where defendant was charged and convicted of perjury in state court for testimony given before a U.S. Commissioner, the perjury was not a crime against the State, and the state proceedings were void).

In short, *Loney* has not been limited to its facts or its particular context, but instead has been cited for the propositions for which the Presidential Elector Defendants have said it stands.

C. The State's Brief Unintentionally Supports, Rather Than Rebuts, the Presidential Elector Defendant's Application of *Loney*.

In its attempt to dismiss *Loney* as limited to its "idiosyncratic" facts and as inapplicable as an "exceptional" habeas case, the State actually emphasizes *Loney*'s direct application in this case.

For example, the State noted that Virginia's prosecution of Loney involved "direct and intentional state interference" in a "Congressional inquiry where the *state's only arguable interest in the prosecution occurred by happenstance* – a state notary public *happened to administer Loney's federal oath, acting solely as a proxy for the federal government*," State Brief, p. 2 (emphasis added), and that it was "an obvious and *deliberate* attempt by a state to interfere with Congressional power." *Id.* (emphasis in the original).

As established in Mr. Shafer's numerous other filings and arguments on these issues,[3] this is *precisely* the situation that the State's indictment of the Presidential Electors presents to this Court. Here, the State is "directly and intentionally interfering" in a Congressional inquiry -- *Congress' adjudication* of a presidential elector dispute -- by criminalizing the preparation and submission of evidence (contingent or purported Republican presidential elector ballots) to Congress and to the federal district court as specifically required by the ECA be so submitted and that it said in the ECA (at least five times) that it will accept, receive, and evaluate in its adjudication. *See* 3 U.S.C. § 15. As in *Loney*, the State's only articulated "interest" in *this* prosecution also depends entirely on happenstance – like Loney, the Presidential Electors *happened* to perform their exclusive federal functions *in Fulton County, Georgia.*

But, of course, a state does not magically obtain an interest in or jurisdiction over matters solely within the jurisdiction of the federal government simply because those actions happen to take place within the geographic footprint of the state prosecutor's office. Geography has nothing to do with which sovereign has jurisdiction. Where, as here, it is exclusively the federal sovereign, the fact that some of the actions complained of happened to occur within the geographic boundaries

[3] *See, e.g.,* Shafer Plea at Bar; Shafer PowerPoint Presentation at December 1, 2023 Hearing; Transcript from December 1, 2023 Hearing; Shafer Supplemental Brief from December 1 Hearing; Presidential Elector Defendants' Supplemental Brief on *Loney.*

of a state makes no difference. *See, e.g., Thomas*, 173 U.S. at 281–85 ("*Whatever jurisdiction the state may have over the place or ground where the institution is located, it can have none to interfere with the provision made by congress* for furnishing food to the inmates of the home. . . . *Under such circumstances the police power of the state has no application*.") (emphasis added).

Remarkably, the State *concedes* that *Loney* applies to bar state prosecutions where "a state has no legitimate interest in the circumstances," and where "a federal statute directly conflicts with the state statute or manages to otherwise 'occupy the field.'" *See* State Brief at 2. The State further admits that "[e]ven if a State may make violation of federal law a crime in some instances, it cannot do so in a field (like the field of alien registration) that has been occupied by federal law." *Id.* at 3-4 (quoting *Arizona v. United States*, 567 U.S. 387, 402 (2012)). But the State seems utterly oblivious to the fact that this is *exactly* such a case. As established, both the Constitution and the ECA *directly and fully preempt the State's prosecution* of the Presidential Electors structurally, under *both types* of conflict preemption, and under *both types* of field preemption. *See, e.g.,* Shafer Plea at Bar at 15-22; Shafer PowerPoint Presentation at Dec. 1, 2023 Hearing; Transcript of Dec. 1, 2023. While the State consistently ignores these arguments and authorities, they nonetheless exist and apply here. Indeed, a clearer and more direct case of federal preemption is difficult to conceive.

D. The State Has No Legally Cognizable Interest In the Actions of Presidential Electors After Election Day.

As has been exhaustively briefed by Mr. Shafer at this point, the only power given to States by the Constitution with regard to presidential electors is the authority of the state legislature to select the method and manner for *appointing* them; the state has *no role* in how presidential electors perform their federal functions or how Congress, in its sole authority, adjudicates presidential elector disputes. *See, e.g.,* Shafer Plea at Bar at 21. A state's "interest" in presidential electors is

cabined to the scope of the constitutionally granted appointment power, and that power is at an *end* on *Election Day*. *See Term* Limits, 514 U.S. at 805; Amend. IX; 3 U.S.C. §§ 5, 6, 15,

As the Supreme Court has emphasized, after Election Day, presidential electors exercise exclusively federal functions under the Constitution and federal law. *See Ray v. Blair*, 343 U.S. 154, 225 (1952) (citations omitted); *Burroughs v. United States*, 290 U.S. 534, 545 (1934) (citing *In re Green*, at 379)).[4] And under Article II and Amendment XII of the Constitution, after Election Day, Congress has *exclusive* authority over presidential electors and their ballots and purported ballots: it is the *sole adjudicator* of presidential elector disputes after Election Day.[5]

Because the State's constitutional authority and interest in presidential electors and presidential elector disputes ends on Election Day, and presidential electors exercise only federal authority after that date, the State does not and cannot have any legally cognizable interest in the conduct of presidential electors *at all* after that date, including (but not limited to) their alleged transmission of certificates of votes to a federal court judge.

E. The State Ignores Supreme Court Precedent Establishing That It Has No Historic or Reserved Powers Over Presidential Electors.

In trying to avoid that the State's indictment with regard to the Presidential Electors has impermissibly intruded into exclusive federal territory and is wholly preempted by the Supremacy Clause and the ECA, the State once again falls back on the "the historic police powers reserved to the States." *See* State Brief, p. 4. In making this argument, the State does not even acknowledge,

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[4] Georgia law also specifically recognizes that the duties of presidential electors are set forth by the Constitution and federal law. *See* O.C.G.A. § 21-2-11; O.C.G.A. § 21-2-12.

[5] As has been covered extensively, Congress has delegated a small piece of its constitutional authority to states through the ECA's Safe Harbor provisions. That statutory delegation is not relevant in this case, however, because Georgia did not avail itself of the ECA's Safe Harbor provisions in the 2020 presidential election. As such, that limited post-Election Day statutory authority given to states by the ECA does not authorize and cannot be used as basis for state jurisdiction here.

much less attempt to reconcile, its claim with the Supreme Court's decision in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), briefed and argued by Mr. Shafer and the other Presidential Elector Defendants numerous times, in which the Court made clear that states *have no historic or reserved police powers* over Presidential Electors because they are created by the Constitution. Instead, as *Term Limits* made plain, any state authority to regulate these constitutionally-created entities "had to be *delegated to, rather than reserved by*, the States," and that the Tenth Amendment "could only 'reserve' that which existed before the Constitution," and '*the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government,* which *the constitution does not delegate to them*. No state can say that it has reserved *what it never possessed*.'" *Id.* at 805 (quoting 1 Story § 627) (emphasis added).

Despite the now extensive briefing and argument on *Loney, Term Limits*, and other applicable authority, the State has *no answer* for them. It has not mentioned *Term Limits* even once. It does not mention the ECA at all in its Supplemental Brief to this Court. And although *Term Limits* says that it must, the State has wholly failed to articulate *any* authority that the Constitution gives it that would authorize its prosecution of Presidential Electors for actions taken after Election Day. The reason for these glaring omissions is straightforward – *Loney*, *Term Limits,* and the ECA cannot be avoided or distinguished, and there simply *is no grant* in the Constitution to the State over Presidential Electors after Election Day. Under *Loney, Term Limits*, and the ECA, the state has no jurisdiction or authority to prosecute the Presidential Elector Defendants.

II. ***Loney*** **Bars The Prosecution of the Presidential Electors Regardless of Whether 18 U.S.C. § 1001 or 18 U.S.C. § 1521 Preempt O.C.G.A. § 16-10-20.1**

Ignoring *Loney, Term Limits*, the ECA, the State instead devolves into an extended discussion of why, in its view, O.C.G.A. § 16-10-20.1 is not preempted by 18 U.S.C. § 1001 and 18 U.S.C. § 1521. *See* State Brief, pp.4-5. But whether these federal statutes preempt the Georgia statute is not the point here – under *Loney* and *Term Limits*, the State has impermissibly invaded,

through use of its general criminal laws, an arena that belongs *only* to the federal government. What the federal government chooses to do (or not do) in its own exclusive sphere is entirely up to the federal government: it can regulate conduct through statutes like 18 U.S.C. § 1001 and 18 U.S.C. § 1521, which it has, or it can choose *not* to criminally regulate the conduct at all. *Regardless* of what laws the federal government chooses to pass or not pass in this context, under *Loney* (and other cases), a state simply cannot insert itself into this exclusively federal arena or criminalize actions that are authorized by the Constitution and federal law.

And while it spends three-and-a half pages dickering over 18 U.S.C. § 1001 and 18 U.S.C. § 1521, the State does not once even *mention* the ECA, which is the federal statute that, along with the Constitution, fully ousters the State from any role, authority, jurisdiction, or interest here. The point of *Loney* and *Term Limits* (and the other cases cited in these many briefings) is that these matters belong entirely and *only* to the federal government, and the State, therefore, has *no* legally cognizable interest or right to intrude, through the attempted application of its own criminal laws (or any other manner), upon the federal government's exclusive business.

CONCLUSION

As in *Loney* where Virginia had no legally cognizable interest in Loney's testimony before Congress, Georgia has no interest in or jurisdiction over the Presidential Elector Defendants' casting electoral votes (or purported electoral votes) or transmitting those votes to Congress or a federal court as directed by the express provisions of ECA. Counts 14, 15, and 27 in its Indictment — like *all* its counts against the Presidential Elector Defendants — should be dismissed.

Respectfully submitted, this 16th day of May, 2024.

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CERTIFICATE OF SERVICE

The undersigned certify that they have this 16th day of May, 2024, filed the foregoing filing with the Court using the Court's Odyssey eFileGa system, electronically serving copies of the filing on all counsel of record in this action, and furthermore that a copy of the filing has been sent to the parties and the Court.

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