Fulton County Superior Court
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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

**DEFENDANTS SHAFER'S, STILL'S AND LATHAM'S JOINT SUPPLEMENTAL BRIEF REGARDING *IN RE LONEY*, 134 U.S. 372 (1890)**

Defendant David J. Shafer, Defendant Shawn Still and Defendant Cathleen Latham file this Supplemental Brief Regarding *In re Loney*, 134 U.S. 372 (1890), submitting this brief pursuant to the Court's request for briefing on the application of the United States Supreme Court's decision in *In re Loney*, 134 U.S. 372 (1890) to Counts 14, 15 and 27 in the Indictment against the defendants.

## I. Introduction

"When a[n alleged] crime is committed against the public justice of the United States, the party charged therewith is to be indicted and prosecuted therefor *in the courts of the United States, and not in the courts of the state*." *Ross v. State*, 55 Ga. 192, 194 (1875) (emphasis added)[1]; *In re Loney,* 134 U.S. 372, 376 (1890) (under the Supremacy Clause, any alleged crime committed in a matter exclusively within Congress' authority or jurisdiction is *only* an "offense against the public justice of the United States, and within the exclusive jurisdiction of the courts of the United States."); *see also*

[1] *See, e.g.,* Shafer Plea at Bar at pp. 4-24.

*Limitations on State Judicial Interference with Federal Activities*, 51 Colum. L. Rev. 84 (1951) ("Of course, insofar as their acts are authorized by valid federal law, they are not amenable to the civil or criminal law of the states, since, by virtue of the Supremacy Clause, state law is superseded *pro tanto*.") (citing *Ohio v. Thomas*, 173 U.S. 276 (1899) and *Ex parte Siebold*, 100 U.S. 371, 386-87 (1879));[2] Alexander Hamilton, FEDERALIST NO. 82 (explaining that when powers are granted exclusively to the federal government or when granting states concurrent authority over a matter is incompatible with federal sovereignty, states have no authority to act).[3] No criminal prosecution can be initiated in any State court for that which is merely an offense against the general government. *Tennessee v. Davis,* 100 U.S. 257, 258 (1879).

Here, Presidential Electors are created by the Constitution, and *all* of the actions that they must perform in their role as electors (including as contingent or purported electors). *See* Shafer Plea in Bar at pp. 4-24 (discussing the application of *Loney* and *Term Limits* as barring the prosecution of Mr. Shafer and the other Georgia Republican Presidential Elector Defendants because of exclusive federal jurisdiction under the Supremacy Clause and federal preemption); *see also* Shafer PowerPoint Presentation from Dec. 1, 2023 Hearing at Slide 23 (applying *Loney* to this case). The only power or authority given by the Constitution to the State Legislatures is that to set the method and manner of their *appointment*, which power is at an end on Election Day.[4]

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[2] *Ex parte Siebold* was abrogated on other grounds by *Jones v. Hendrix*, 599 U.S. 465, 485 (2023).

[3] Available at https://founders.archives.gov/documents/Hamilton/01-04-02-0245.

[4] Through the ECA, Congress *statutorily* delegated a small slice of its constitutional authority to State Legislatures to allow them a limited path to determine for themselves who their rightful Presidential Electors were in the case of a post-Election Day dispute. In the version of the ECA in effect in 2020, Congress permitted States the opportunity to

Furthermore, because Presidential Electors are created by the Constitution, the State has no original, reserved, or general police power over them and, therefore, cannot resort to or rely on those general powers as the source of its authority to prosecute Presidential Electors. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995) ("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*.") (emphasis added); *see also* Hamilton, FEDERALIST NO. 82 ("[T]his doctrine of concurrent jurisdiction is only clearly applicable to those descriptions of *causes of which the state courts have previous cognizance*. It is not equally evident in relation to cases which may grow out of, and be peculiar to, the Constitution to be established; *for not to allow the state courts a right of jurisdiction in such cases can hardly be considered as the abridgement of a pre-existing authority*.") (emphasis added).

In short, Presidential Electors (including contingent or purported Electors) are creatures of the Constitution and federal law. Any offense allegedly committed in carrying out their federal functions after Election Day, therefore, would be "exclusively against the public justice of the United States," *Ross*, 55 Ga. at 194. Their conduct, therefore, cannot be prosecuted by the State of Georgia or in a Georgia court. *See In re Loney*, 134 U.S. at 376; *see also In re Waite*, 81 F. 359, 372 (N.D. Iowa 1897) ("Being done within the general scope of the authority conferred by the laws of the United States, the

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resolve such disputes *if* they could do so through their adjudicative process (in Georgia, a judicial contest) by the Safe Harbor date (six days before federal law requires the Presidential Electors to meet and ballot – in 2020, December 8). If the State cannot or does not achieve this final adjudication by the Safe Harbor date, as Georgia did not in 2020, then the State's statutory window to decide such disputes is closed, and the dispute is then in Congress' sole and exclusive jurisdiction and control.

rightfulness or validity thereof cannot be tested by the provisions of the criminal statutes of the state"); *Ohio v. Thomas*, 172 U.S. 276, 283 (1899) (holding that the State of Ohio had no authority to apply its criminal laws to the director of a national soldiers' home in Ohio because he was acting on federal authority and *"[u]nder such circumstances the police power of the state has no application."*) (emphasis added). The counts in the indictment attempting to criminalize and prosecute such conduct, including Counts 14, 15, and 27,[5] must be dismissed.

## II. ***In re Loney* Establishes The Lack Of State Jurisdiction Over Acts Authorized and Governed by the United States Constitution and Federal Law.**

Over 130 years ago, Wilson Loney, a regular citizen, testified before the United States House of Representatives as a witness in a contest for a House seat, following which a state officer arrested Loney on a charge of perjury based upon his testimony before the House. *See In re Loney*, 38 F. 101, 101 (E.D. Va. 1889). A federal district court ordered the state officer to discharge Loney. *Id*. at 103. An appeal was taken to the United States Supreme Court, which affirmed the district court's order. *See In re Loney*, 134 U.S. at 377. In affirming the order of the district court based upon the Supremacy Clause, the Supreme Court held that:

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[5] Counts 14, 15, and 27 present particularly stark intrusions by the State into the federal government's exclusive realm, as they charge exclusively federal conduct directed *only* at federal actors. *See* Count 14 (charging presidential electors with placing a federal certificate of the presidential electors' contingent, or in the language of the ECA, "purported" ballots, in the U.S. mail directed to a federal judge at a federal courthouse); Count 15 (charging other codefendants with conspiring to send such certificates to a federal court through U.S. Mail); Count 27 (charging other codefendants with filing a false petition in federal court). But while Counts 14, 15, and 27 are more blatant and overt in charging of only federal conduct, they do not diminish the fact that *all* of the counts in the Indictment against the Presidential Electors charge the Electors for post-Election Day conduct that they undertook in their capacity of federal Presidential Electors.

> The 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*, by testifying in the case of a contested election of a member of congress, law and justice required that he should be discharged from such custody…

*Id*. at 376-377 (emphasis added) (citing Rev. St. §§ 751, 761; *Ex parte Royall*, 117 U.S. 241 (1886)).

The Supreme Court's recognition in *Loney* that the Supremacy Clause deprives state courts of jurisdiction over charges for acts done pursuant to the Constitution or federal law was consistent with the Court's earlier holding that "there can be no criminal prosecution initiated in any State court for that which is merely an offence against the general government." *Tennessee v. Davis*, 100 U.S. 257, 262 (1879). That same rule was recognized by the Georgia Supreme Court even before *Loney* in *Ross*, 55 Ga. at 192, where the defendant was tried and convicted in state court for perjury for taking a false oath before a United States Commissioner in the investigation of a violation of federal law, *id*, at 193. The defendant appealed and the Georgia Supreme Court held that:

> [T]he 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… 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 (emphasis added). The U.S. Supreme Court in *Loney* cited the Georgia Supreme Court's decision in *Ross* with approval. *See Loney*, 134 U.S. at 376 (citing *Ross*, 55 Ga. 192).

Both prior to[6] and following *Loney* and *Davis*, other courts dismissed state criminal charges against defendants for alleged conduct which constituted an offense against the federal government, as opposed to the state. In *State v. Shelley*, 79 Tenn. 594, 598-599 (1883), the defendant was indicted for perjury under state law for swearing falsely in a case before a United States Commissioner, and the Tennessee Supreme Court found that "the false swearing was an offense against the public justice of that government, was subject to be punished under its law, but was in no way an offense against the law of Tennessee...," *id.* at 598-599.[7] *See also People v. Arvio*, 321 N.Y.S.2d 382, 384, 388 (Just. Ct. 1971) (dismissing criminal informations and discharging the defendants for alleged violations of a New York penal law arising from the defendants' disruption of a local Selective Service Board office); *Appeal of Allen*, 119 Pa. 192, 199 (1888) (finding that an indictment for embezzlement against the defendant, a cashier for a national bank, would not lie under Pennsylvania law, observing, "We held then, and we hold now, to the broader position that *our statutes have no application*. The national banks... are the creatures of another sov[ereignty]") (emphasis added).

## III. The Court Lacks Jurisdiction Over Alleged Offenses Relating to Voting and Sending of Votes Under the Constitution and the Federal Electoral Count Act.

In the counts of the Indictment cited by the Court (Counts 14, 15, and 27), the State purports to charge particular defendants with alleged conspiracy to file, and attempting

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[6] *See People v. Lynch*, 11 Johns. 549 (N.Y. 1814) ("[T]he facts charged against the prisoners [ ] amount to treason against the United States, they do not constitute the offence of treason against the people of the state of New-York, as charged in the indictment.").

[7] The Court in *Shelley* also relied upon the Georgia Supreme Court's decision in *Ross*. *See State v. Shelley*, 79 Tenn. at 599 (citing *Ross*, 55 Ga. 192).

to file, false documents under O.C.G.A. § 16-10-20.1(b)(1). *See* Indictment, pp. 79, 86. Under that code section, it is unlawful for any person to "[k]nowingly file, enter, or record any document in a public record or court of this state or of the United States knowing or having reason to know that such document is false or contains a materially false, fictitious, or fraudulent statement or representation." O.C.G.A. § 16-10-20.1(b)(1). Concerning Mr. Shafer, Mr. Still, and Ms. Latham (the "Elector Defendants"), the State alleges in Count 14 that on December 14, 2020, the Elector Defendants allegedly attempted to place in the United States mail a document entitled "Certificate of the Votes of the 2020 Electors from Georgia," addressed to the Chief Judge of the United States District Court for the Northern District of Georgia.[8] *See* Indictment, p. 79.

Because under *Loney* and *Ross* state courts have no jurisdiction over a criminal charge for "an act done in pursuance of" the constitution and laws of the United States, the Court lacks jurisdiction over the prosecution's charge in Count 14 of the Indictment (as well as Counts 1, 8, 10, 12, 14, 16, 18 and 40 of the Indictment against Mr. Shafer, Mr. Still, and Ms. Latham) because all of the acts alleged were governed by the Constitution of the United States and the federal Electoral Count Act ("ECA"), 3 U.S.C. §§ 1 *et seq*. *See also Ex parte Gounis*, 304 Mo. 428, 438 (1924) ("State courts cannot take cognizance of criminal offenses committed against the authority of the United States…"). Specifically, Article II, Section 1, Clause 3 of the Constitution requires electors for the office of President of the United States to meet and vote by ballot for President, to sign a certify a list of persons voted for and to transmit the list sealed to the President of the United States Senate. *See* U.S. Const. Art. II § 1, cl. 3. The ECA sets the time and place for the meeting

[8] The Indictment also alleges that Mr. Shafer is a co-conspirator for such conduct in Count 15.

of presidential electors, *see* 3 U.S.C. § 7; directs that electors vote for President "in the manner directed by the Constitution," 3 U.S.C. § 8; provides that the electors are to make and sign six certificates of the votes given by them, 3 U.S.C. § 9; requires that the electors seal and certify the certificates of votes made by them, *see* 3 U.S.C. § 10; and dictates when electors must transmit their certificates, and to whom, including the judge of the district in which the electors have assembled, *see* 3 U.S.C. § 11. Moreover, Georgia law explicitly directs that:

> [P]residential electors chosen pursuant to [O.C.G.A. §] 21-2-10 shall assemble at the seat of government of this state at 12:00 Noon of the day which is, or may be, directed by the Congress of the United States and shall then and there *perform the duties required of them by the Constitution and laws of the United States*.

O.C.G.A. § 21-2-11 (emphasis added); *see also* O.C.G.A. § 21-2-12.

As demonstrated by the foregoing authorities, the Elector Defendants' alleged preparation of the certificates of the Electors' votes and the alleged transmission of those certificates to the Chief Judge of the U.S. District Court were governed entirely by the U.S. Constitution and the ECA. As such, the Court lacks jurisdiction over the Elector Defendants' actions under the Supreme Court's holding in *In re Loney*, regardless of any contention by the State that the Elector Defendants' actions allegedly violated state laws. Stated alternatively, "the acts cannot be regarded as having been done under the sanction of the laws of this State, so as to subject the parties to punishment under those laws." *State v. Pike*, 15 N.H. 83, 91 (1844) (state prosecution for perjury in a federal bankruptcy proceeding).

Under Georgia law, "'when a court has no jurisdiction over a matter, it has no power to hear that matter.'" *Rodericus v. State*, 269 Ga. App. 665, 666 (2004) (quoting *Foskey v. State*, 232 Ga. App. 303, 304 (1998)). It likewise possesses no power to render

a binding judgment in the case. *See Boca Petroco, Inc. v. Petroleum Realty II, LLC*, 292 Ga. App. 833, 838 (2008) (quoting *Williams v. Fuller*, 244 Ga. 846, 849 (1979)). A court possesses a duty to inquire as to whether it possesses jurisdiction over a matter. *See Gutierrez v. State*, 290 Ga. 643, 644 (2012) (emphasis added) (quoting *State v. Watson*, 239 Ga. App. 482, 483–484 (1999)). Whether jurisdiction exists is a question of law. *See Smith v. Millsap*, 364 Ga. App. 162, 163 (2022) (citing *In re Estate of Cornett*, 357 Ga. App. 310, 313 (2020)). The prosecution furthermore cannot relax jurisdictional rules in order to permit the Court to hear this case. *Rodericus*, at 666 (quoting *Foskey*, at 304).

In *In re Loney*, Virginia was found to have no jurisdiction over Loney *even though his Congressional testimony was before a Virginia notary public*. Here, the Court does not possess jurisdiction over the alleged acts of the Elector Defendants done "in pursuance of" the Constitution and the ECA, irrespective of the state criminal statutes which the State alleges that the Elector Defendants' alleged conduct violated. *See In re Loney*, 134 U.S. at 376-377. Any and all charges in the prosecution's Indictment based upon the voting of the 2020 Georgia Republican Presidential Electors or the preparation, signing, and transmittal of the Electors' certificates, including Counts 14 and 15, should properly be dismissed.

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**CERTIFICATE OF SERVICE**

The undersigned certify that they have this 25th day of April, 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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