IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA v. RAY SMITH, III, et al., Defendants.	INDICTMENT NO. 23-SC-188947

DEFENDANT RAY SMITH'S SUPPLEMENTAL DEMURRER TO COUNT 15

In *Loney v. Thomas*, 134 S.Ct. 372 (1890), the Supreme Court cautioned that supervising proceedings in a judicial forum – especially through criminal prosecution – is jealously reserved for the forum in which the conduct occurred. Just as a federal judge will not interfere in a state court criminal proceeding (*Younger v. Harris* abstention), the state must defer to the federal forum to police its litigants and witnesses:

> ***But 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.*** 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 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. ***A witness who gives his testimony, pursuant to the constitution and laws of the United States, in a case pending in a court or other judicial tribunal of the United States, whether he testifies in the presence of that tribunal, or before any magistrate or officer (either of the nation or of the state) designated by act of***

> ***congress for the purpose, is accountable for the truth of his testimony to the United States only***; and perjury committed in so testifying 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 under the general provision of her statutes that 'if any person, to whom an oath is lawfully administered on any occasion, willfully swear falsely on such occasion touching any material matter or thing,' he shall be guilty of perjury. *Thomas v. Loney*, 134 U.S. 372, 375–76, 10 S.Ct. 584, 585–86 (1890).

This Court has previously rejected an erstwhile co-defendant's argument that OCGA §16-10-20.1 should be limited to defendants who file false liens and encumbrances against public officials. Order Denying General Demurrers of Kenneth Chesebro, October 17, 2023. Though the Court referenced Smith's Demurrer that had been filed prior to October (and adopted by Chesebro), the Court had not yet heard oral argument from Smith. Smith suggests that the Court should reconsider that prior decision, even if it does apply to him, in light of the United States Supreme Court decision in *Tomas v. Loney*, 134 S.Ct. 372 (1890), which this Court has invited the defendants to address.

Defendant, Ray Smith, is charged in Count 15 with conspiring to violate OCGA § 16-10-20.1. The indictment alleges that Smith, along with others,

> *[U]nlawfully conspired to knowingly file, enter, and record a document titled "CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM GEORGIA," in a court of the United States, having reason to know that said document contained the materially false statement, "WE, THE UNDERSIGNED, being the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Georgia, do hereby certify the following";*

The statute that Smith conspired to violate provides as follows:

> (b) … [I]t shall be unlawful for any person to:
> (1) Knowingly 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; or

The legislature then defined "document," a word that would require no definition, other than to limit its scope. And limiting its scope is precisely what the legislature accomplished:

> *[T]he term "document" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form and shall include, but shall not be limited to, liens, encumbrances, documents of title, instruments relating to a security interest in or title to real or personal property, or other records, statements, or representations of fact, law, right, or opinion.*

Thus, the legislature did not intend to include within the definition of "document" *any* document. If that was the purpose, there would be no need to define the term. Rather, the legislature sought to limit the definition of "document" to those records (either in writing or in digital electronic format) which related to a security interest in real or personal property. If the legislature sought to outlaw the filing of *any* false document (e.g., briefs, affidavits, leaves of absence, conflict notices, CV's of an expert witness), there would be no need to identify the example of what is a "document" in the definition (and certainly provide, by way of example, *only* items that relate to security interests). In fact, when §16-10-20.1 was amended in 2014, the Legislature expressly reiterated the purpose of the statute:

> Article 2 of Chapter 10 of Title 16 of the Official Code of Georgia Annotated, relating to obstruction of public administration and related offenses, is amended by revising Code Section 16–10–20.1, **relating to filing false liens or encumbrances against public employees, as follows: …**

This court's task is to determine what is meant by the term "document" in the statute and whether it is a word with no limitation whatsoever. That is the thrust of the prosecution's argument: anything and everything qualifies as a "document."

Yet, limiting the scope of criminal statute was precisely the project of statutory interpretation that the United States Supreme Court pursued in the *Yates* decision, which involved a remarkably similar statute: Congress sought to outlaw the destruction of any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States …" 18 U.S.C. § 1519.

Including "any tangible object" in the statute would seem to expand the scope of the statute's coverage to virtually *anything*. In other words, altering, or destroying *anything* with intent to obstruct justice would violate the statute. But the United States Supreme Court rejected this expansive interpretation, explaining that the purpose of the statute was clear and the limitless "any tangible object" language would be confined to records and documents, and was not meant to include "any

object." Thus, the Court decided that a fish was not a tangible object. *Yates v. United States*, 574 U.S. 528 (2015).

In this case, the Court should conclude that the "Elector Certificate" is not a document. That is, it is not a "document" that is within the scope of OCGA § 16-10-20.1.

If the scope of § 16-10-20.1 is as broad as the prosecution suggests, any litigant or lawyer who filed an affidavit or a brief in federal court that had false content would be subject to state prosecution, regardless of the purpose of the affidavit or brief, or the relationship of the affidavit or brief to any legitimate state interest. In the midst of a dispute about the scope of a federal agency's jurisdiction, for example, a brief filed in federal court that contained any false statement would subject the lawyer or affiant to prosecution in state court, even though no state interest existed in the outcome of the litigation. The same with briefs or affidavits filed in connection with a challenge to the constitutionality of a federal statute that had no bearing on any state interest. In fact, the state's argument means that if a lawyer files a leave of absence in federal court in connection with a federal case and falsely adds a few extra days to the purpose for the leave this would subject the lawyer to prosecution in state court.

Accepting the prosecution's interpretation of the statute would result in the state having the authority to police the filing of documents of any kind in any federal

court proceeding. Ray Smith urges the court to reject this expansive, unprecedented interpretation of a state's authority to exercise jurisdiction over, and to monitor, federal court proceedings. Limiting the scope of the state statute, as the Supreme Court did with the federal statute in *Yates*, would avoid having to address either the constitutional issues raised by the state's usurpation of the police power over documents filed in federal court, or the exclusive jurisdiction of the federal government to oversee the electoral process after the "safe harbor" time has passed.

Even if this court were to wade into the issue of the statutory or constitutional power of the state to regulate the propriety of pleadings filed in federal court, the cautionary language quoted above in *Loney* leaves no room for the state to exercise any such power.

Ray Smith adopts the arguments of Co-Defendants Trump, Shafer, and Cheeley pertaining to the applicability of *Loney* to the charges in Count 15. As a matter of statutory construction, and to preserve the integrity of the separate judicial authority of the federal and state courts to supervise the filings in their respective courts, this Court should grant the Demurrer to Count 15.

This, the 25th day of April, 2024.

RESPECTFULLY SUBMITTED,

/s/ *Donald F. Samuel*
Donald F. Samuel
Ga. Bar No. 624475

/s/ *Amanda R. Clark Palmer*
Amanda R. Clark Palmer
Ga. Bar No. 130608

/s/ *Kristen W. Novay*
Kristen W. Novay
Ga. Bar No. 742762
Attorneys for Ray Smith

GARLAND, SAMUEL & LOEB
3151 Maple Drive, N.E.
Atlanta, Georgia 30305
Phone: (404) 262-2225
dfs@gsllaw.com
aclark@gsllaw.com
kwn@gsllaw.com

CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed this DEFENDANT RAY SMITH'S SUPPLEMENTAL DEMURRER TO COUNT 15 using the Court's e-filing system which will automatically send email notification of such filing to all attorneys and parties of record.

This, the 25th day of April, 2024.

GARLAND, SAMUEL & LOEB, P.C.

/s/ *Donald F. Samuel*
DONALD F. SAMUEL, ESQ.
Ga. Bar No. 624475
dfs@gsllaw.com

GARLAND, SAMUEL & LOEB
3151 Maple Drive, N.E.
Atlanta, Georgia 30305
Phone: (404) 262-2225
Fax: (404) 365-5041
E-mail: dfs@gsllaw.com