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

STATE OF GEORGIA v. JOHN CHARLES EASTMAN, and SHAWN MICAH TRESHER STILL.	INDICTMENT NO. 23SC188947

ORDER ON DEFENDANTS' MOTIONS TO DISMISS UNDER THE SUPREMACY CLAUSE

The Defendants seek dismissal of the indictment under the Supremacy Clause of the United States Constitution.[1] U.S. Const. art. VI, cl. 2. They argue the indictment is preempted by federal statute, that presidential electors fall outside the State's Appointment Power and Police Power, and that state action is prohibited because the subject of the indictment is inseparably connected to the functioning of the national government.[2] The Court heard argument from counsel for several co-defendants (adopted by Eastman and Still) on December 1, 2023. After considering the briefing and

[1] On June 5, 2024, the Court of Appeals sua sponte issued a stay of all proceedings pending the outcome of an interlocutory appeal granted for nine co-defendants. *See* A24A1595 through A24A1603. In response to her direct request, the Court of Appeals also granted a stay for co-defendant Hampton on June 26, 2024. These orders did not apply to Defendants Eastman and Still, and both Defendants have informed this Court that they have not requested and do not currently desire a similar stay of proceedings.

[2] (Eastman Doc. 57, 1/8/24 (adopting in whole or in part "the several motions that address the Electoral Count Act")); (Eastman Doc. 72, 4/25/24 (adopting in whole or in part Smith Doc. 24, 9/11/23; Shafer Doc. 46, 9/27/23; Still Doc. 51, 10/2/23; and Trump Doc. 104, 1/8/24)); (Eastman Doc. 74, 5/17/24) (adopting supplemental briefing); (Still Doc. 51, 10/2/23 (adopting in part Shafer Doc. 46, 9/27/23)); (Still Doc. 73, 1/5/24) (adopting Smith Doc. 24, 9/11/23; Cheeley Doc. 48, 10/5/23; and Cheeley and Shafer supplemental briefing)); (Still Doc. 102, 4/18/24 (adopting Cheeley supplemental briefing)); (Still Doc. 107, 5/17/24) (adopting supplemental briefing)).

argument of counsel, the Court finds the indictment is not barred entirely. However, because the Court also finds that the United States Supreme Court's decision of *In re Loney*, 134 U.S. 372 (1890) preempts the State's ability to prosecute perjury and false filings in a federal district court, Counts 14, 15, and 27 must be quashed.[3]

1. *Federal Preemption*

The Defendants first argue that after December 8, 2020, any state action related to the 2020 presidential election was unconstitutional and the indicted offenses are preempted due to the Electoral Count Act ("ECA") (codified as 3 U.S.C. §§ 5-6, 15–18), which details Congress' electoral vote counting process. Because election-related litigation remained pending as of that date, the Defendants contend that only Congress — not a state prosecutor or grand jury — could determine the legal validity of presidential elector slates.

Georgia law presumes the constitutionality of its statutes, and the burden lies with the Defendants to prove a "clear and palpable" conflict before this Court should declare any law unconstitutional. *Dev. Auth. v. State*, 286 Ga. 36, 38 (2009) (citations omitted). The constitutionality of a statute may be challenged by a defendant in two primary ways: as-applied or facially. "An as-applied challenge addresses whether a statute is unconstitutional on the facts of a particular case or to a particular party." *Davis v. State*, 306 Ga. 140, 152 (2019) (citation omitted). A facial challenge, the more difficult to mount successfully, "requires one to establish that no set of circumstances exists under which the statute would be valid, i.e., that the law is unconstitutional

[3] Defendants further argue the indictment is improper under presidential and federal officer immunity. *See*, *e.g.*, (Still Doc. 51, 10/2/23) (adopting in part Shafer Doc. 46, 9/27/23)); (Still Doc. 77, 1/8/24) (adopting Trump Doc. 104, 1/8/24)). This Order does not reach these issues nor the United States Supreme Court's decision in *Trump v. United States*, 144 S. Ct. 2312 (2024) as they have not been fully briefed or argued by the parties.

in all of its applications, or at least that the statute lacks a plainly legitimate sweep." *Bello v. State*, 300 Ga. 682, 685-86 (2017) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987) (citations omitted). A challenge may feature "characteristics of both." *Doe v. Reed*, 561 U.S. 186, 194 (2010); *McGuire v. Marshall*, 50 F.4th 986, 1003-04 (11th Cir. 2022) ("In a 'quasi-facial' challenge, the plaintiff contends that the law cannot be constitutionally applied to a defined subset of people the law covers, which includes herself. To prevail in a quasi-facial challenge, [s]he must satisfy the standard for a facial challenge to the extent that [her] claim reaches beyond her particular circumstances.") (citations omitted); *United States v. Supreme Court*, 839 F.3d 888, 908 (10th Cir. 2016) ("'facial' and 'as-applied' are not necessarily antipodal rubrics").

Although not discussed in detail through the parties' briefing, the Court views the Defendants' preemption argument as a mixed quasi-facial challenge appropriately raised pretrial. *See Simmons v. State*, 246 Ga. 390, 391 (1980) ("a criminal defendant may challenge, before trial, the constitutionality of the statute alleged in the indictment by demurrer, motion to quash, or plea in bar"). The claim is as-applied because it does not seek to strike the criminal statutes in every possible iteration, but only to the extent that they cover the Defendants. The argument is also facial in that it is not limited to this indictment, but challenges application of the statutes more broadly to all presidential electors. *See Doe*, 561 U.S. at 194. Defendants must "satisfy [the] standards for a facial challenge to the extent of that reach" of their claims. *Id.* Therefore, in asserting that the statutes cited in the indictment are preempted, Defendants must show that the challenged laws are preempted in all of their applications toward presidential electors, or those purporting to be presidential electors.

Procedural framework aside, the Supremacy Clause declares that state law must yield to federal law when the two conflict. U.S. Const. art. VI, cl. 2;[4] *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020). The resulting preemption doctrine therefore applies "(1) where there is direct conflict between state and federal regulation; (2) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress; or (3) where Congress has occupied the field in a given area so as to oust all state regulation." *Hernandez v. State*, 281 Ga. 559, 561 (2007) (quoting *Aman v. State*, 261 Ga. 669, 671 (1991)). Each of these three possibilities has been assigned a label: express preemption (1) applies where the law is explicit in preempting state law, whereas implied preemption, further classified as either "conflict preemption" (2) or "field preemption" (3), occurs where the reach of the federal law indicates that Congress intended to displace state law. *Garcia*, 140 S. Ct. at 805. Conflict preemption occurs either when compliance with both state and federal law is impossible, or when state law poses an obstacle to accomplishing the full purposes and objectives of Congress. *See Fla. Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 141–43 (1963). Field preemption, on the other hand, occurs "when the scope of a federal statute indicates that Congress intended federal law to occupy a field exclusively." *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 630 (2012) (cleaned up).

A. *Express Preemption*

Because it requires an explicit showing of intent, express preemption is the simplest of the three inquiries. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) ("when Congress has made its intent

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[4] U.S. Const art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

known through explicit statutory language, the courts' task is an easy one"). Here, the ECA both in its current and prior form before the 2022 amendment[5] does not expressly preempt state law. One cannot find language within the statute categorically foreclosing state law in any way. *See* 3 U.S.C. §§ 5–7, 15–18 (amended 2022). While Defendant Cheeley claims the ECA expressly preempts state law through its acknowledgement of alternate slates of electors, such a mere reference does not meet the standard for express preemption. Instead, a federal law must contain a provision that expressly preempts state law in some area, and the ECA plainly does not.[6]

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[5] Under the prior version in effect at the time of the events alleged in this indictment, a state's final determination made at least six days before the meeting of electors was conclusive on the counting of electoral votes as far as the state was concerned. 3 U.S.C. § 5. In the current version, the single certificate of ascertainment of appointment of electors submitted by a state's executive is conclusive unless one is required to be issued or revised by state or federal court order prior to the meeting of electors. 3 U.S.C. § 5(c). In addition, references to "more than one return or paper purporting to be a return from a State" were removed from the section governing Congress' procedure for counting electoral votes. 3 U.S.C. § 15. The amended ECA also provides for expedited judicial review of challenges to certificates of ascertainment of appointment of electors made by aggrieved candidates for President or Vice President. 3 U.S.C. § 5(d).

[6] For example, while manifested in different ways, express preemption typically specifies which state actions or laws are overridden by federal legislation. *See, e.g.,* 49 U.S.C. § 24301(i) ("Preemption related to employee work requirements. — A State may not adopt or continue in force a law, rule, regulation, order, or standard requiring Amtrak to employ a specified number of individuals to perform a particular task, function, or operation."); 49 U.S.C. § 41713(b)(1) ("Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart."); 7 U.S.C. § 136v(b) ("Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act."); 46 U.S.C. § 4306 ("Unless permitted by the Secretary under section 4305 of this title . . . a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . .").

B. *Conflict Preemption*

A state action or law may encounter conflict preemption where compliance is impossible or the purposes and objectives of Congress are hindered. As to the first consideration — the impossibility of compliance — the statutory violations alleged in the indictment do not create such a scenario. Compliance with the ECA does not, by necessity, imply a violation of Georgia criminal law. Although this case may present the first documented instance of purported alternate electors in Georgia's history, there is no indication that presidential electors in Georgia have done anything other than comply with both the ECA and state law since the ECA's inception in 1887. Nor does compliance with Georgia criminal law imply non-compliance with the ECA. The Defendants have not demonstrated that they were required to send an alternate slate of electors. Rather, the cited section of the ECA only contemplates such a possibility by alluding to a "case of more than one return or paper [slate of electoral ballots or ballot] purporting to be a return from a State[] if there shall have been no such determination of the question in the State[.]" 3 U.S.C. § 15 (amended 2022). It does not contain any indication that a slate of electoral ballots submitted would be free from criminal consequences incurred by actions taken during the creation or submission of the alternate slates.

Second, the indictment does not frustrate the purposes and objectives of the ECA. Congress' purpose is the "ultimate touchstone" of this analysis. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). To identify that purpose, a court must analyze the statutory text and framework. *See id.* at

486, 490–91.[7] The text of the statute demonstrates that Congress intended to provide a vote counting process wherein Congress only determined the legality of multiple returns for the purpose of counting electoral votes. The prior ECA contemplates receipt of "more than one return or paper purporting to be a return from a State" and provides bicameral procedures for resolving discrepancies and determining which returns were "cast by lawful electors appointed in accordance with the laws of the State" that should be counted. 3 U.S.C. § 15 (amended 2022). Nothing in the statute creates criminal consequences for an unlawfully submitted return. If Congress had intended to offer immunity to those who submitted multiple returns it would have manifested such intent somewhere within the statute.[8]

The statutory framework further reveals a procedural schema wherein each state ascertains its slate of electors, the slate of electors is sent to the federal archivist, the electors vote, and votes are

[7] The Supreme Court has also examined the legislative history of a statute to further its conflict preemption analysis. *See, e.g., id.* at 490–91 (discussing the congressional record, committee reports, and hearings in determining the purpose of the statute). Such an assessment is unnecessary here as the ECA's structure and text suffice.

[8] By way of example, the Volunteer Protection Act of 1997 provides civil immunity and preempts state action with respect to a class of individuals that Congress wishes to protect. *See, e.g.*, 42 U.S.C. §§ 14501–05 (ensuring protection from civil liability for volunteers in nonprofit organizations and governmental entities and preempting state law inconsistent with that protection in the absence of state legislation explicitly electing out of such preemption).

sent to Congress to be counted — all to determine the outcome of a presidential election.[9] Structurally, the statute's purpose is to detail the process of congressional vote counting for the electoral college. Likewise, the 2022 amendments to the ECA do not reveal any alternative purpose. Absent any indication to the contrary, the Court finds the text and framework of the statute demonstrate that the purpose of the ECA is to mandate a congressional process for counting electoral votes and nothing more.

Defendants argue that by removing any reference to alternate slates of electors, the 2022 amendments show that alternate slates were authorized by the prior ECA. *See* 3 U.S.C. § 15. It may be true that "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995). But the "real and substantial effect" of these amendments to 3 U.S.C. § 15 would be on Congress' process of counting electoral votes. These amendments do not imply that the previous version of the ECA contained any requirement to send alternate slates of electors or any offer of immunity for those who did. Additionally, the amendments were made in 2022 — over 135 years after the initial passage of the ECA. As the Supreme Court has also stated, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," and here there is not a compelling reason to find

[9] *See* 3 U.S.C. § 5 ("Determination of controversy as to appointment of electors") (amended 2022) (defining conditions where a slate of electors would be presumptively conclusive); 3 U.S.C. § 6 ("Credentials of electors; transmission to Archivist of the United States and to Congress; public inspection") (amended 2022) (providing requirements for states when sending the certificate of ascertainment to the Office of the Archivist); 3 U.S.C. § 7 ("Meeting and vote of electors") (amended 2022) (dictating the manner and date for electors to cast their votes for the office of President and Vice President); 3 U.S.C. § 15 ("Counting electoral votes in Congress") (amended 2022); 3 U.S.C. § 16 ("Same; seats for officers and Members of two Houses in joint meeting") (amended 2022); 3 U.S.C. § 17 ("Same; limit of debate in each House") (amended 2022); 3 U.S.C. § 18 ("Same; parliamentary procedure at joint session") (amended 2022).

that these amendments were meant to counter a previous congressional intent that cannot otherwise be shown through the language or structure of the statute. *Cipollone v. Liggett Grp.*, 505 U.S. 504, 520 (1992) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). The 2022 amendments do not change the basic purpose evident in the text or structure of the ECA.

Still, the Defendants raise two hypotheticals they argue could frustrate this congressional purpose. First, Defendants contend that if Congress had hypothetically accepted the slate of ballots sent by the Defendants, the indictment would interfere with Congress' determination under the ECA. Perhaps. But this is not the scenario alleged to have occurred in this indictment, and for the purposes of a quasi-facial challenge, the Court need not reach this hypothetical.[10] Congress only accepted and counted the electoral votes certified by Governor Kemp and not the alternate slate of electors. Second, Defendants contend there is a conflict because after the "safe harbor" date, the determination of valid electors is an exclusively federal issue under the ECA.[11] The Defendants argue that since litigation remained pending on the 2020 "safe harbor" date,[12] Georgia's certified slate of electors was not conclusive under the ECA, so any actions relating to an alternate slate of

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[10] *See* NAT'L ARCHIVES, GEORGIA CERTIFICATE OF ASCERTAINMENT 2020; 176 CONG. REC. 95 (2021). While this hypothetical is relevant to a quasi-facial challenge, such a challenge fails as well after the determination that the lower as-applied bar has not been cleared. *See Smallwood v. State*, 310 Ga. 445, 448 (2020) ("for a court to reach a facial challenge, a challenger must be able to successfully bring an as-applied challenge").

[11] The safe harbor date refers to the reference in 3 U.S.C. § 5 that, with respect to a state's ascertainment of electors, if the determination was "made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors," the determination "shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution." 3 U.S.C. § 5.

[12] As judicially noticed by this Court without objection from any party through this Order and during argument on December 1, 2023.

electors cannot be the subject of an indictment. In this way, the Defendants assert the indictment could be seen to frustrate Congress' purpose in creating the "safe harbor" date. The State's indictment, however, is not attempting to determine which slate would be conclusive for federal vote counting under the ECA, and the indictment has no effect on congressional vote counting per the ECA. Whether the "safe harbor" date was satisfied is not conclusive.

In short, the function of the ECA is to prescribe Congress' process of counting electoral votes, and this indictment does not impact how electoral votes were or will be counted by Congress. Thus, the Court concludes that the State's prosecution is not barred by conflict preemption because it does not impair congressional vote counting as prescribed by the ECA or conflict in any other way with the ECA.

C. *Field Preemption*

Finally, the Court cannot find any support for the idea that Congress intended the ECA to preempt the entire field of state criminal law relating to federal elections. Field preemption occurs when the "scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *See*, *e.g.*, *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). An implied preemption analysis carries a strong presumption that states retain their traditional police powers "unless [preemption] was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citation omitted). For example, in *Hernandez v. State*, the Georgia Supreme Court denied a post-conviction argument that the identity fraud statute was preempted by federal immigration law because

"[n]othing in the federal law explicitly overrides state law, and the two laws do not conflict in their operation or enforcement." 281 Ga. 559, 560-61 (2007); *see also State v. Klinakis*, 206 Ga. App. 318, 321 (1992) ("Furthermore, in the area of enforcement of state criminal laws, the presumption is against federal preemption and, thus, favors an active exercise of criminal jurisdiction by the state.") (quotations omitted). Notably, Georgia law does not recognize that federal law was intended to exclusively govern conduct related to state electors. *See* O.C.G.A. §§ 21-2-11 (meeting of Presidential electors); 21-2-13 (compensation of Presidential electors); 21-2-12 (filling vacancies of presidential electors); 21-2-502(e) (ascertainment of presidential electors). And federally, although Congress may have had the final word on competing slates under the ECA, that does not imply that a state loses all power to prosecute any wrongdoing that takes place during the prescribed process.

Moreover, the United States Supreme Court's treatment of presidential electors does not support the contention that state actions against electors are impliedly preempted by the ECA. For example, in *Chiafalo v. Washington*, the Court found that a state could punish a duly elected presidential elector for "faithless" voting. 591 U.S. 578, 589 (2020). And in *In re Green*, the Court held that the state's power over electors was vast and encompassed prosecuting fraud in voting for electors. 134 U.S. 377, 380 (1890) ("Congress has never undertaken to interfere with the manner of appointing electors, or, where (according to the new general usage) the mode of appointment prescribed by the law of the State is election by the people, to regulate the conduct of such election, or to punish any fraud in voting for electors; but has left these matters to the control of the States."). This recognition of state powers undermines the idea that Congress created a legal scheme for presidential electors so pervasive that it left no room for state action. Under the federal

Constitution, the election of the president is a mechanism wherein the states and the federal government both have significant power.

In summary, the Court finds that the State's indictment is not preempted by the ECA because (1) the ECA does not expressly preempt state law, (2) the indictment does not create an impossibility of compliance with both state and federal law, (3) the indictment does not obstruct the fulfilment of Congress' purpose in enacting the ECA, and (4) the ECA does not exclusively occupy the relevant field. And to the extent that the Defendants seek the Court to dismiss the indictment against them on the grounds that their acts were lawful under the ECA, such a determination is not suitable for a demurrer or other pretrial motion. *See, e.g.,* S*tate v. Williams,* 306 Ga. 50 (2019) (reversing demurrer that relied on extrinsic facts found outside the four corners of the indictment). Each of these alleged counts involves a degree of criminal intent (intentionally, knowingly, willfully, or some combination). While the Defendants may have believed themselves to be acting lawfully under the ECA, this intent cannot be examined pretrial and this Order does not reach the merits of possible defenses at trial.

2. *The Appointment Power*

Outside the traditional preemption context, the Defendants also argue the indictment of unelected federal electors lies beyond the State's constitutional grant of power to appoint electors found in Article II, Section 1, Clause 2[13] — also known as the Appointment Power. The argument relies in part on *U.S. Term Limits v. Thornton*, where the Supreme Court explained that the Article

[13] *See* U.S. Const. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.").

I, Section 4 duty of states to prescribe the time, place, and manner of elections for members of Congress as well as the Article II, Section 1 power to appoint presidential electors *delegated* powers to the states, while the Tenth Amendment *reserved* previously existing powers to the states. 514 U.S. 779, 805 (1995). Any additional exercise of power within that framework, such as the addition of qualifications for members of Congress in *U.S. Term Limits*, must be delegated to the states by the Constitution itself. *Id.* This argument of federal control in presidential elections is seemingly supported by dicta in *Oregon v. Mitchell* which, in finding that Congress had the power to enfranchise 18-year-olds in federal elections, stated that "Congress has the final authority over federal elections." 400 U.S. 112, 125 (1970). Thus, the question raised is whether the scope of the State's delegated power over electors includes the power to indict persons who allegedly impersonate an elector.

After consulting *In re Green* and *Chiafalo* again, the Court concludes this indictment is within the State's power. *In re Green* holds that a state may prosecute a person for fraudulently voting for electors in the electoral college. 134 U.S. at 380 ("Congress has never undertaken to interfere with the manner of appointing electors, or . . . to regulate the conduct of such election, or to punish any fraud in voting for electors; but has left these matters to the control of the States."). In *Chiafalo*, the Court found that a state could impose a fine on electors who failed to cast their ballots for the winner of the state's popular vote per their required pledge. 591 U.S. at 585–86, 589. The Court further explained that the constitutional Appointment Power "gives the States far-reaching authority over presidential electors, absent some other constitutional constraint." *Id. at* 588–89. In combination, these cases demonstrate that states may criminally punish fraudulent conduct related to presidential electors and that the Appointment Power covers a broad scope of enforcement

related to the state's determined manner of appointing electors. If a state can punish an elector for violating the terms of his appointment, it follows that a state may indict someone for allegedly committing fraud by holding himself out as an elector when he had not in fact been appointed.

Defendants contend that *Chiafalo* supports the argument that the State's power over electors ends on Election Day because a condition on elector appointment is still derived from the appointment power. But if the power ended on Election Day, states would not have the power to enforce such a pledge as the State of Washington did in *Chiafalo*. *Id.* at 589 ("So long as nothing else in the Constitution poses an obstacle—a State can add, as Washington did, an associated condition of appointment: It can demand that the elector actually live up to his pledge, on pain of penalty. Which is to say that the State's appointment power, barring some outside constraint, enables the enforcement of a pledge like Washington's."). In *Chiafalo*, the mechanism of appointment was violated by electors breaking a pledge to vote for the winner of the popular election in the state. *Id.* This indicates that beyond Election Day, each state may enforce its mechanism of appointment, and in this case, the State alleges the mechanism of appointment was violated by contingent electors fraudulently claiming to be the duly elected and qualified electors within Georgia's power of appointment.

Defendants further argue that only a state legislature may enforce the appointment power. This concept is again at odds with *In Re Green* and *Chiafalo*. In both cases, courts of the affected state enforced the appointment power determined by the state legislatures. *See Chiafalo*, 591 U.S. at 586 (noting how the enforcement proceeded through the state courts upholding the fine imposed); *In re Green*, 134 U.S. at 380 (describing the petitioner's indictment for illegal voting).

Some Defendants additionally claim that the indictment is improper because the Twelfth Amendment gives Congress the sole authority to determine the outcome of disputes between sets of electors after election day. But *Chiafalo* described the Twelfth Amendment as mandating a procedure for electoral vote sending and counting and found that a state's power to enforce its mode of appointment fell within it. 591 U.S. at 590, 597. Again, as noted on the issue of preemption, this indictment does not impair electoral vote counting in Congress as described in either the Twelfth Amendment or the ECA.

3. *Inseparable Connection to the Functioning of the National Government*

Finally, the Defendants argue that because the election of the President of the United States is inseparably connected to the functioning of the national government, the Supremacy Clause bars the State's criminal indictment. The Defendants primarily rely on *In re Loney*, which prohibits a state prosecution for perjury related to statements a defendant made while testifying in a federal tribunal.[14] 134 U.S. 372, 376 (1890); *see also Ross v. State*, 55 Ga. 192 (1875). *Loney* holds that when a witness is testifying under oath authorized by the United States, the witness provides his testimony "in obedience to those laws, and not in the performance of any duty which he owes to the state in which his testimony is taken." *Id.* at 374. The underlying policy endorsed by the Court

[14] *Loney* itself does not contain the phrase "so inseparably connected with the functioning of the National Government." Rather, that language derives from *United States ex rel. Noia v. Fay*, a Second Circuit opinion. 300 F.2d 345, 354 (1962). The Second Circuit cited *Loney* to support the idea that a federal court could entertain a writ of habeas corpus petition despite the petitioner not having met his duty to exhaust available state remedies. *Id.* ("In upholding an issuance of the federal writ, the Supreme Court held that the state court had no jurisdiction to entertain an action so inseparably connected with the functioning of the National Government. . . . It has been said that the exceptional character of these three cases [including *Loney*], which permitted the by-passing of the state remedial processes, was that they involved either the operations of the federal government or its relations with other nations"). The Second Circuit's broad interpretation of *Loney*'s holding is not binding on this Court and this order evaluates *Loney* based on its more specific holding.

is to prevent a state's prosecution of an individual for perjury in a federal tribunal where such a prosecution was instigated by "local passion or prejudice." *Id.* at 375.

Similarly in *Ross v. State*, a case cited by *Loney*, the Georgia Supreme Court found that a state court did not have jurisdiction to prosecute a defendant for perjury because "[w]hen a 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." 55 Ga. at 193-94. The court in *Ross* based its decision on the federal statute that provides for exclusive jurisdiction in the district courts for crimes against the laws of the United States, the equivalent of the modern codification of 18 U.S.C. § 3231. Therefore, since the perjury statute criminalized false statements under oath in a case where federal laws authorized an oath, the state did not have jurisdiction to try the defendant for perjury.

The Defendants argue that after the safe harbor date, Congress was adjudicating the validity of presidential electors, so any action taken by the Defendants in acting as presidential electors would be barred. Such a broad reading of *Loney* and *Ross* is not persuasive. The majority of the indictment alleges conduct violating state law without alleging perjury committed under oath in a case pending in a judicial tribunal of the United States. Nevertheless, under *Loney*, three counts require closer scrutiny: Count 14 (Criminal Attempt to Commit Filing False Documents), Count 15 (Conspiracy to Commit Filing False Documents), and Count 27 (Filing False Documents).

A. *Count 27*

The central holding of *Loney* is 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." *In re Loney*, 134 U.S. at 375. More recently, the Supreme Court reaffirmed this holding in

Arizona v. United States, a federal preemption case that cited *Loney* for the proposition that "States may not impose their own punishment for perjury in Federal Courts." 567 U.S. 387, 402 (2012). *Loney*'s central holding concerns the federal court's ability to police its own proceedings, certainly with respect to statements made under oath. At the time of this indictment, federal laws provided — and still provide — a mechanism of enforcement against false statements made under oath in judicial proceedings. As a result, Georgia does not have a "legitimate interest" and jurisdiction to punish such statements. *Id.* at 430. In the undersigned's opinion, the State's tenacious effort to distinguish *Loney* in supplemental briefing does not overcome this point.

Decisions from New York's appellate and trial courts provide further persuasive examples of *Loney*'s application to state law enforcement. In *People v. Cohen*, the New York appellate court found that the state could prosecute false statements made to a private entity when that entity was not exclusively federal and the prosecution protected both federal and state interests concerning the securities industry. 773 N.Y.S.2d 371, 382-83 (N.Y. App. Div. 2004). The court distinguished the facts of that case from a lower court opinion involving the Securities and Exchange Commission ("SEC"). *Id.* In that decision, *People v. D.H. Blair & Co.*, the trial court discussed *Loney* and found that the state could not punish perjury originating in testimony before the SEC because it was within the exclusive jurisdiction of the United States as the SEC was acting as a federal agency administering an oath exclusively under federal law when the defendant gave his testimony. 2002 N.Y. Misc. LEXIS 317 (2002). These examples demonstrate the basic application of *Loney* to a state prosecution of alleged perjury committed in a federal tribunal.

Applied to this indictment, Count 27 alleges the filing of false documents in violation of O.C.G.A. § 16-10-20.1. This code section criminalizes knowingly filing, entering, or recording any

document which contains a "materially false, fictitious, or fraudulent statement or representation" in public record or in a Georgia court or court of the United States. [15] Here, the document in question is the "Verified Complaint for Emergency Injunctive and Declaratory Relief" in civil action *Trump v. Kemp et al.*, Docket No. 1:20-cv-05310 (N.D. Ga. Dec. 31, 2020). Verified complaints to a federal district court come within the ambit of federal perjury statutes. 18 U.S.C. §§ 1621–23. Because the statutory reach of O.C.G.A. § 16-10-20.1 provides a criminal sanction for verified false statements made under oath in federal court, the undersigned concludes that the Defendants' quasi-facial challenge succeeds. This charge must be quashed.

B. *Counts 14 and 15*

Counts 14 and 15 present a slightly different question and require consideration of dual sovereignty. While the conduct under Count 27 could be directly punished under a federal perjury statute, these two charges allege that certain false documents were mailed to the district court in violation of O.C.G.A. § 16-10-20.1. Without a certification, these writings fall outside the federal perjury statutes but within the purview of 18 U.S.C. § 1001, which generally criminalizes false statements to any branch of government outside of parties to judicial proceedings. Because this lies beyond *Loney*'s narrow holding, the question becomes whether the state has concurrent jurisdiction to prosecute conduct also covered by the federal statute.

The doctrine of dual-sovereignty holds that the federal government has concurrent jurisdiction with the states when the same conduct is an offense both against the United States and against the state where the offense is committed. *U.S. v. Lanza*, 260 U.S. 377, 382 (1922) ("[A]n act denounced

[15] The Court notes that since the 2014 amendment expanding the reach of this statute to include "courts [] of the United States," O.C.G.A. § 16-10-20.1 has never been substantively reviewed by our appellate courts.

as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."). For example, as previously noted, *In re Green* held that states have concurrent power with the United States to punish fraudulent voting for presidential electors. 134 U.S. at 380. Both Georgia law and the reasoning of *Loney* aid the inquiry here of whether the crime of attempting or conspiring to file false documents in a federal district court is within a state court's jurisdiction.

First, in *Cross v. State*, the Georgia Court of Appeals addressed the concept of concurrent jurisdiction with respect to an indictment charging a defendant with forgery of various state documents and federal currency. 122 Ga. App. 208, 209 (1970). To decide whether the state had concurrent jurisdiction with the federal government in that case, the court focused on the distinction between a "private wrong" and an "offense committed directly against the Federal Government." *Id.* There, the defendant's indictment for forgery was found to be a private wrong under Georgia's forgery statute at the time as opposed to the public wrong of counterfeiting. *Id.* Here, unlike the forgery of currency which can be used to commit fraud against individuals in the state, filing false documents in U.S. District Court is an offense — like perjury — committed directly against the public justice of the United States because that is where the primary effect of the false filing lies. As *Ross v. State* similarly noted, "[w]hen a 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." 55 Ga. at 194.

The reasoning employed by the court in *Loney* also supports this conclusion. In reaching its holding, the Court stressed that "[i]t 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." 134 U.S. at 375. Applying this reasoning to the facts alleged in the indictment, filing a document in a federal court is sufficiently analogous to providing testimony. Punishment for filing certain documents would enable a state to constrict the scope of materials assessed by a federal court and impair the administration of justice in that tribunal. At its core, *Loney* concerns the ability of a federal tribunal to police its own proceedings. Counts 14 and 15, as alleged here, interfere with the District Court's ability to do just that by imposing a state sanction when a federal sanction is already in place. For these reasons, the undersigned believes that Counts 14 and 15 must also be quashed as beyond the jurisdiction of this State.

C. *Other Counts*

This reasoning does not extend to the similar allegations of Counts 10, 11, 16, and 17. Counts 10 and 11 charge the Defendants with forgery in the first degree and conspiracy to commit forgery in the first degree under O.C.G.A. §§ 16-9-1(b) & 16-4-8. Both counts involve the making of a document titled "Certificate of The Votes of the 2020 Electors From Georgia" and delivering that document to the Archivist of the United States.[16] Similarly, Counts 16 and 17 charge the Defendants with forgery in the first degree and conspiracy to commit forgery in the first degree under O.C.G.A. §§ 16-9-1(b) & 16-4-8 for the making and sending of a document titled "RE: Notice of Electoral College Vacancy" to the Archivist of the United States and Office of the Governor of Georgia.[17]

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[16] The Archivist of the United States is the head and chief administrator of the National Archives and Records Administration which is an independent agency of the United States within the executive branch.

[17] With the inclusion of the Governor, Counts 16 and 17 allege a distinct injury directed against the State and survive on this ground alone.

False statements to the Archivist which are not under oath do not fall under the federal perjury statutes in 18 U.S.C. §§ 1621–23 and the narrow holding of *Loney* regarding the punishment of perjury in federal courts, but could fall under 18 U.S.C. § 1001 and the slightly broader reading of *Loney* to include the exclusive power of the federal government to police federal court proceedings. But under the principal statute charged, O.C.G.A. § 16-9-1(b), the alleged injury occurs whenever the false writing is uttered and delivered, regardless of the official status of the recipient. *See Cross v. North Carolina*, 132 U.S. 131, 137-39 (1889) (finding state forgery charge for a promissory note to a national bank not preempted because the state crime was not a necessary component of the corresponding federal crime and constituted an injury to the state); *Cross v. State*, 122 Ga. App. 208, 209 (1970). Because nothing else indicates that O.C.G.A. §§ 16-9-1(b) & 16-4-8 would be impliedly or expressly preempted by 18 U.S.C. § 1001, these counts survive a *Loney* based challenge.

D. *Overt Acts*

Finally, as noted in a prior order granting several special demurrers,[18] the quashal of these three counts does not affect the corresponding overt acts listed in Count One. Overt acts alleged as part of a conspiracy are not held to the same pleading standards as statutorily based offenses. Instead, "[a]ll that is required is a reference to the overt act alleged by the State." *Bradford v. State*, 283 Ga. App. 75, 78-79 (2006); *see also State v. Pittman, 302 Ga. App.* 531, 535 (2010) (quoting *Bradford*). And even then, a defendant can be found guilty of conspiracy even after acquittal of any overt acts alleged to have been committed by that defendant, as long as at least one overt act is proven to have been committed by a co-conspirator. *Hall v. State*, 241 Ga. App. 454, 460 (1999); *Thomas v. State*,

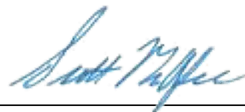
[18] (Trump Doc. 150, 3/13/24).

215 Ga. App. 522, 523 (1994). Defendants have not provided any authority subjecting overt acts to the standards of as-applied or facial constitutional challenges. The Defendants' challenge of these overt acts is therefore denied.

Conclusion

The ECA does not preempt any of the statutes invoked in the State's indictment. The indictment is also within the scope of state authority under the appointment powers granted in Article II, Section 1 of the U.S. Constitution and the police powers reserved by the states in the 10th Amendment. Nor is the subject of the indictment so inseparably connected to the functioning of the national government that it is barred entirely by the Supremacy Clause. However, because Counts 14, 15, and 27 lie beyond this State's jurisdiction and must be quashed, the Defendants' motions to dismiss the indictment under the Supremacy Clause are granted in part. Any other arguments based on the Supremacy Clause not specifically addressed in this Order are denied.

SO ORDERED, this 12th day of September, 2024.



Judge Scott McAfee
Superior Court of Fulton County
Atlanta Judicial Circuit