IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA v. DAVID J. SHAFER et al., Defendants.	Case No. 23SC188947

DEFENDANT SHAFER'S PLEA IN BAR AND MOTION TO QUASH THE INDICTMENT

Defendant David Shafer respectfully files this Plea In Bar and Motion to Quash the Indictment pursuant to O.C.G.A. § 17-7-111, moving to dismiss the State of Georgia's Indictment and charges as to Defendant Shafer. The State's charging and prosecution of conduct governed by the Constitution of the United States and federal law as allegedly criminal in violation of Georgia State law violates the Supremacy Clause of the U.S. Constitution, obstructs and usurps Congress' sole authority over the receipt, adjudication, and counting of Presidential Elector ballots and purported ballots, and is preempted by federal law. As a result, the State has no authority or jurisdiction to prosecute Mr. Shafer for his actions as a contingent Presidential Elector, and the Court, therefore, lacks jurisdiction to enter judgment as to Mr. Shafer.

The prosecution is also barred because it charges alleged offenses against the United States, as opposed to the State of Georgia, which are in the exclusive jurisdiction of the federal government and federal courts. The State's indictment is further barred because it charges Mr. Shafer and other lawful nominee Presidential Electors for the Georgia Republican Party for conduct which was expressly authorized by the U.S. Constitution and federal law in violation of Mr. Shafer's due process rights to fair notice and to not be subjected to a novel theory of criminal prosecution. Finally, the

prosecution's application of State criminal laws to the conduct violates Mr. Shafer's rights to freedom of expression, association, and petition, which is unconstitutional under the facts of this case.

"[A] plea in bar is one 'which goes to *bar* the ... state's action; that is, to defeat it absolutely and entirely.'" *State v. Land-O-Sun Dairies, Inc.*, 204 Ga. App. 485, 486 (1992) (emphasis in original) (quoting *Parrish v. State,* 160 Ga. App. 601, 607 (1981)). The pleas "typically involves some legal impediment which precludes the State from prosecuting its case..." *State v. Lampl*, 325 Ga. App. 344, 347–348 (2013), *rev'd*, 296 Ga. 892 (2015), *and vacated*, 334 Ga. App. 339 (2015) (citing *Banks v. State,* 320 Ga. App. 98 (2013); *Singleton v. State,* 317 Ga. App. 637 (2012); *State v. Mullins,* 321 Ga. App. 671 (2013)). Based upon the facts and authorities set forth herein, the Court should properly find that the prosecution's Indictment and charges as to Mr. Shafer are barred and are subject to dismissal.

I. BACKGROUND

The Fulton County District Attorney's Office obtained from the grand jury an unprecedented Indictment against the former President of the United States of America, the former White House Chief of Staff, a former United States Assistant Attorney General for the United States Department of Justice and 16 other defendants, charging the defendants with allegedly conspiring to unlawfully change the outcome of "the United States presidential election held on November 3, 2020." *See* Indictment, p. 14 (emphasis added). The Indictment charges that several of the defendants corruptly solicited officials "to violate their oaths to the Georgia Constitution and to the United States Constitution by unlawfully changing the outcome of the November 3, 2020, presidential election in Georgia in favor of Donald Trump." *Id*. at 16. It also alleges that several of the defendants:

> [C]reated false Electoral College documents and recruited individuals to convene and cast false Electoral College votes at the Georgia State Capitol, in Fulton County, on December 14, 2020. *After the false Electoral College votes were cast, members of the enterprise transmitted the votes to the President of the United States Senate, the Archivist of the United States, the Georgia Secretary of State, and the Chief Judge of the United States District Court for the Northern District of Georgia. The false documents were intended to disrupt and delay the joint session of Congress on January 6, 2021, in order to unlawfully change the outcome of the November 3, 2020, presidential election in favor of Donald Trump.*

Id. at 17 (emphasis added).

The prosecution alleges, as purported overt acts of the alleged conspiracy, that Mr. Shafer was contacted to help with the logistics of the 2020 Republican United States Presidential Elector nominees for the State of Georgia casting their votes on December 14, 2020. *See* Indictment, p. 31. It expressly avers in its Indictment that an attorney co-defendant sent Mr. Shafer documents for the purpose of the Georgia Republican Presidential Electors "casting electoral votes for DONALD JOHN TRUMP on December 14, 2020…" *Id*. The prosecution asserts that communications by Mr. Shafer for the purpose of determining the attendance at the meeting of the Georgia Republican Presidential Electors were alleged overt acts in furtherance of a conspiracy. Id. at 32, 36, 37, 38, 39. It furthermore charges that Mr. Shafer reserved a room at the Georgia State Capitol for a December 14, 2020, meeting of the Georgia Republican Presidential Electors. *Id*. at 35.

The prosecution proceeds to allege that on December 14, 2020, Mr. Shafer and a co-defendant allegedly encouraged the Georgia Republican Presidential Electors to sign a document entitled "Certificate of the Votes of the 2020 Electors from Georgia" (Certificate). *See* Indictment, p. 39. It expressly states that, on December 14, 2020, Mr. Shafer and other defendants allegedly:

> [Held] themselves out as the duly elected and qualified presidential electors from the State of Georgia, public officers, *with intent to mislead the President of the United States Senate, the Archivist of the United States, the Georgia Secretary of State, and the Chief Judge of the United States District Court for the Northern District of Georgia* into believing that they actually were such officers by placing in the United States mail to said persons a document titled "CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM GEORGIA."

Id. at 40 (emphasis added). It alleges that Mr. Shafer and other defendants mailed the Certificate to the Chief Judge of the United States District Court for the Northern District of Georgia. *Id*. at 41. The prosecution also charges that, on December 14, 2020, Mr. Shafer and another defendant signed a document entitled "RE: Notice of Filing of Electoral College Vacancy," which was delivered to the office of the Governor of Georgia. *Id*. at 42. All of the prosecution's allegations and charges against Mr. Shafer relate to the holding of the meeting of the Georgia Republican Presidential Electors.

II. ARGUMENT

A. The State Lacks Authority And Jurisdiction To Prosecute the Conduct Charged Against Mr. Shafer Pursuant to the Supremacy Clause of the U.S. Constitution

The State has no authority or jurisdiction to prosecute its charges against the Georgia Republican 2020 nominee or contingent Presidential Electors and this Court, therefore, lacks jurisdiction to proceed with this unauthorized Indictment. Dismissal of the prosecution's Indictment and charges as to Mr. Shafer is warranted.

1. Neither the Constitution Nor Any Federal Law Delegates Any Power to the State Over Presidential Electors That Authorizes the State's Prosecution of Presidential Electors for Meeting and Balloting

The Supremacy Clause, Article VI, Clause 2 of the United States Constitution, provides that:

> 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.

U.S. Const. Art. VI, Cl. 2. Accordingly, "[t]he government of the United States, within the scope of its powers, is supreme, and cannot be interfered with or impeded in their exercise." *City of Detroit v. The Murray Corp.*, 355 U.S. 489, 497 (1958). The Supremacy Clause "supplies a rule of priority." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019).

Pursuant to the Supremacy Clause, State law cannot "limit the extent to which federal authority can be exercised." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971) (citing *In re Neagle*, 135 U.S. 1 (1890)). Because Presidential Electors are created by the Constitution, any state authority to regulate the casting of Presidential Elector ballots "had to be delegated to, rather than reserved by, the States." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995) (emphasis added) (quoting 1 Story § 627). "'*[T]he 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.[1] Applying these principles to Presidential Electors, "[i]n the absence of any constitutional delegation to the States of power to [regulate or proscribe

[1] While the issue in *U.S. Term Limits* was the States' lack of authority to add qualifications for their state-elected Congressman under Article I, § 4, cl. 1, the Supreme Court specifically indicated that the same analysis would apply, for the same reasons, to Presidential Electors created under the Art. II, § 1, cl. 2. *Id.* at 805 ("This duty [for Congress to set qualifications for members of Congress under the Elections Clause, Art. I, § 4, cl. 1] *parallels the duty* under Article II that "*Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.*" Art. II, § 1, cl. 2. *These Clauses are express delegations of power to the States to act with respect to federal elections*.") (emphasis added).

the conduct of Presidential Electors], such a power does not exist." *Id.*; *cf. Cook v. Gralike*, 531 U.S. 510, 523 (2001) ("By process of elimination, the States may regulate the incidents of such elections, including balloting, *only within the exclusive delegation of power [by the Constitution and Congress]." Id.* (emphasis added). The State's attempt here to interfere with and regulate Presidential Electors is not grounded in any Constitutional grant or Congressional delegation; it is, therefore, unauthorized and prohibited by the Supremacy Clause. *Id.* at 805; *Cook*, 531 U.S. at 523.

In particular, in the context of Presidential Electors, the Constitution and Congress have delegated power to the States in only two discreet areas: (1) the Constitution grants authority to a *state legislature* to set the manner of appointment of its Presidential Electors, *see* U.S. Const. Art. II, § 1; and (2) Congress, through the ECA, delegated to the states the limited right for its adjudicative body (in Georgia, a court and judicial contest under O.C.G.A. §§ 21-2-520 *et seq*.) to resolve disputes about Presidential Electors on or before the Electoral Count Act's safe harbor date. *See* 3 U.S.C.§ 5. No other constitutional provision or federal statute gives the States authority over Presidential Electors or the casting of Presidential Elector ballots. So, unless the State is given the authority to regulate Presidential Electors in the way it seeks to in the Indictment by one of these two specific delegations, it has no authority to do so, whether by statute or by attempted criminalization and prosecution. Here, the State is given *no* authority over the actions of Presidential Electors for which it has indicted them, and its prosecution is barred by the Supremacy Clause.

Specifically, neither of these two specific areas delegated to the States authorizes the State to interfere with or regulate – whether by statute or criminal indictment – Presidential Electors' meeting and casting ballots on the date and time required by federal

law. The constitutional delegation, Article II, § 1, cl. 2, provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," its Presidential Electors.[2] As the Supreme Court has made clear, a state's authority under Article II to select the *manner* of Presidential Electors' *appointment* is separate and distinct from the *exclusive federal authority* under which Presidential Electors act when meeting to ballot for President and Vice-President: "Presidential electors exercise *a federal function* in *balloting for President and Vice-President*[.]" *Ray v. Blair*, 343 U.S. ___, at 224–25 (emphasis added); *Burroughs v. United States*, 290 U.S. 534, 545 (1934) (Presidential Electors "*exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States*") (emphasis added); *see also Matter of Guerra*, 193 Wash. 2d 380, 393 (2019), *aff'd sub nom. Chiafalo*, 140 S. Ct. 2316 ("The State *does not dispute that presidential electors perform a federal function when casting a vote in the Electoral College*") (emphasis added); *cf. United States v. Trump*, Case No. 1:23-CR-00257-TSC, ECF Doc. No. 1, ¶ 9 (Aug. 1, 2023) (describing the process "by which the results of the election for President of the United States are collected, counted, and certified" as a "federal government function" that is "foundational to the United States' democratic process"). The State's Indictment of Mr. Shafer is for the actions that he took in executing federal duties as a Presidential Elector, not for anything relating to his manner of appointment under State law. The State's Indictment, therefore, is not (and cannot be) grounded in the power given to state legislatures by the Constitution to select the manner of Presidential Electors' appointment.

[2] In Georgia, Presidential Elector nominees are selected through the state's two political parties, and Presidential Electors are selected based upon the results of the state's popular vote. *See, e.g.,* O.C.G.A. § 21-2-134 (nomination of presidential electors); O.C.G.A. § 21-2-172 (nomination of candidates by convention).

Nor can the State claim that its prosecution is authorized by Congress' limited delegation to the States, through Section 5 of the Electoral Count Act ("ECA"),[3] the opportunity for its judicial process to conclusively resolve disputes over presidential electors *if* those disputes are finally adjudicated *by the Safe Harbor date* (six days before presidential electors are required to meet and vote). *See* 3 U.S.C §§ 5, 15. At the time of the conduct charged by the prosecution in its Indictment, the ECA provided that the Presidential Electors of each State must meet and give their votes on the first Tuesday after the second Wednesday in December next following their appointment at a place designated by the law of each State. *See* 3 U.S.C. § 7 (2020). The first Tuesday after the second Wednesday in 2020 was December 14, 2020.[4]

The ECA's Safe Harbor provision in Section 5 also provided that if a State has an adjudicative process for deciding a dispute over who are the valid of presidential electors, and that tribunal makes a final determination at least six (6) days before the date of the meeting of the electors, that final determination "shall be conclusive and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned." 3 U.S.C. § 5 (2020).[5]

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[3] The U.S. Supreme Court has recognized that Section 5 of the ECA "creates a "safe harbor" for a State insofar as congressional consideration of its electoral votes is concerned." *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 77 (2000).

[4] https://www.timeanddate.com/calendar/?year=2020.

[5] As the U.S. Supreme Court has observed:

> The 3 U. S. C. § 5 [safe harbor] issue is not serious. That provision sets certain conditions for treating a State's certification of Presidential electors as conclusive in the event that a dispute over recognizing those electors must be resolved in the Congress under 3 U. S. C. § 15. Conclusiveness requires selection under a legal scheme in place before the election, with results determined at least six days before the date set for casting electoral

Pursuant to Section 5 of the ECA, the Georgia legislature created a judicial process to adjudicate disputed regarding presidential electors. *See* O.C.G.A. §§ 21-2-520 *et seq*. On December 4, 2020, the President of the United States and Mr. Shafer, as an elector, filed a judicial action challenging the proper slate of presidential electors in that election pursuant to the provisions of O.C.G.A. §§ 21-2-520 *et seq*., *Trump et al. v. Raffensperger et al.*, case # 2020CV343255 (Super. Ct. Fulton Cnty. 2020) (Georgia election contest). That court, however, failed to make *any* determination of the controversy or contest, much less a final one, by December 8, 2020, the Safe Harbor date.

In light of the state court's failure to make a final determination of the election contest by the ECA's Safe Harbor date, the contingent Georgia Republican Presidential Electors followed the requirements of the Constitution and the ECA by meeting on December 14, 2020, and casting and certifying their contingent votes. During the meeting, counsel for the President of the United States stated to everyone in attendance:

> Yes. We're -- we're conducting I this as -- as Chairman Shafer said, we're conducting this because the contest of the election in Georgia is ongoing. And so we continue to contest the election of the electors in Georgia. And so we're going to conduct this in accordance with the Constitution of the United States, and we're going to conduct the electorate today similar to what happened in 1960 in Hawaii.

> votes. But no State is required to conform to § 5 if it cannot do that (for whatever reason); *the sanction for failing to satisfy the conditions of § 5 is simply loss of what has been called its "safe harbor." And even that determination is to be made, if made anywhere, in the Congress*.

Bush v. Gore, 531 U.S. 98, 130 (2000) (Souter, J., dissenting) (emphasis added). The Supreme Court of Florida, on the remand from the U.S. Supreme Court from its order directing a county Circuit Court to tabulate 9,000 contested ballots from the 2000 general election by hand, noted its concern that an expansive ruling would "*substantially rewrite[e] the Code after the election, in violation of article II, section 1, clause 2 of the United States Constitution and 3 U.S.C. § 5 (1994)*." *Gore v. Harris*, 773 So. 2d 524, 526 (Fla. 2000) (*per curiam*) (emphasis added).

See Transcript of Dec. 14, 2020 Republican Presidential Elector Meeting (attached hereto as Exhibit A).

Because the court did not make a final determination of the Georgia presidential election contest by the Safe Harbor date of December 8, 2020, the State was divested of any further authority or jurisdiction over the presidential elector dispute or the contingent Presidential Electors by the plain language of the ECA. On that date, all authority and jurisdiction over the Presidential Elector certificates or returns, and any determination regarding which slate of Electors were the legally appointed Electors, was exclusively transferred back to Congress by the Twelfth Amendment and the ECA's express terms. *See* 3 U.S.C. §§ 5, 15; *see also Bush*, 531 U.S. at 130. At that point, all authority to adjudicate disputes about valid presidential electors was *exclusively* Congress', s*ee* 3 U.S.C. §§ 5, 15, and through the ECA, Congress made plain that more than one slate of presidential elector ballots from a state can be executed and sent to Congress for its consideration in adjudicating that dispute on January 6. 3 U.S.C § 15 (describing the rules for counting "more than one return *or paper purporting to be a return from a State"*) (emphasis added).[6]

As applied to the 2020 presidential election in Georgia, under the specific terms of the ECA, neither the Republican nor the Democrat presidential electors could claim that they had been declared the valid presidential electors by the State's adjudicative process because the judicial challenge to the election had not been finally decided by the ECA's

[6] That is not to suggest that the State judicial contest would be moot if not decided by the safe harbor date. As the example from Hawaii in 1960 shows, when such a judicial challenge is finally adjudicated even past the safe harbor date, those results can be transmitted to Congress for its consideration; it simply does not have the conclusive effect that a final determination by the safe harbor date would have under the ECA. *See* 3 U.S.C. §§ 5, 15.

Safe Harbor date (December 8, 2020). *See* 3 U.S.C. §§ 5, 15**.** As such, the ECA expressly allowed *both* presidential elector ballots to be sent to Congress, and Congress was not required to give either ballot the presumption of validity. *See* 3 U.S.C. §§ 5, 15**.** Per force, Congress' delegation to the States to allow them to attempt, in the first instance, to resolve disputes regarding presidential electors *if and only if* they can do so by a final judicial decision on or before the Safe Harbor date does not and cannot provide the State with any authority or jurisdiction to bring its indictment against Mr. Shafer or the other Presidential Electors. Indeed, the Indictment is entirely in derogation of this clear federal authority.

In sum, because Presidential Electors were created by the U.S. Constitution, the State has no original or residual power over them and must ground its authority to bring this Indictment in an express grant of authority from the Constitution or federal law – and it simply has not done so and cannot do so here. As such, pursuant to the Supremacy Clause, the State is without any authority to prosecute the actions for which it has indicted Mr. Shafer, and the indictment must be dismissed.[7]

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[7] Because the State lacks authority under the Supremacy Clause to bring this Indictment, the Georgia courts similarly lack authority and jurisdiction to adjudicate this constitutionally barred prosecution. "The requirement that jurisdiction 'be established as a threshold matter 'spring[s] from the nature and limits of the judicial power' ... and is 'inflexible and without exception.'" *Stillwell v. Topa Ins. Co.*, 363 Ga. App. 126, 129 (2022) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U. S. 83, 94-95 (1998) (Scalia, J.) (other citations and quotations omitted). Jurisdiction 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))."'[I]t is *always* the duty of a court to inquire into its jurisdiction.'" *Gutierrez v. State*, 290 Ga. 643, 644 (2012) (emphasis added) (quoting *State v. Watson*, 239 Ga. App. 482, 483–484 (1999)) "'[T]he jurisdiction of the courts of Georgia... derives from the constitutional and statutory law of this state.'" *Rivera v. Washington*, 298 Ga. 770, 775 (2016) (quoting *Turner v. Giles,* 264 Ga. 812, 812 (1994)). Jurisdiction "'refers to the types of cases the court can hear and decide.'" *In re Jud. Qualifications Comm'n Formal Advisory Opinion No. 239*, 300 Ga. 291, 293 (2016) (quoting *Wallace v. Wallace*, 225 Ga. 102, 111 (1969)). It is "'the power of a court to render a binding judgment in the case.'"

2. Because the Election of the President of the United States is Inseparably Connected to the Function of the National Government, the Supremacy Clause Bars the State's Criminal Indictment

More generally, the U.S. Supreme Court has held that states cannot use their criminal law to interfere with actions that are inseparably connected to the functioning of the national government. The election of the President and Vice President through Presidential Electors plainly falls in this category: "The power [of Congress] to judge of the legality of the [electoral] votes is a necessary consequent of the power to count. The existence of this power is of *absolute necessity to the preservation of the Government*. The *interests of all the States in their relations to each other in the Federal Union demand that the ultimate tribunal to decide upon the election of President should be [Congress],* in which the States in their federal relationships and the people in their sovereign capacity should be represented." *Bush v. Gore*, 531 U.S. at 155 (internal quotations and citations omitted) (emphasis added); *see also Burroughs,* 290 U.S. at 545 ("[P]residential electors . . . exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. *The President is vested with the executive power of the nation. The importance of his election and the*

Boca Petroco, Inc. v. Petroleum Realty II, LLC, 292 Ga. App. 833, 838 (2008) (quoting *Williams v. Fuller*, 244 Ga. 846, 849 (1979)). "'It is well established that jurisdiction over a party must be established before the court can enter any ruling binding the party or the ruling is declared null and void.'" *Crispin v. State*, 360 Ga. App. 485, 489–490 (2021) (quoting *Jones v. Isom*, 223 Ga. App. 7, 9 (1996), *overruled in part on other grounds*, *Giles v. State Farm Mut. Ins. Co.*, 330 Ga. App. 314 (2014)). "'[W]hen 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)). The concept of jurisdiction "'prevents courts from abusing all persons by hearing matters which should properly be decided in another court or proceeding…'" *Id.* (quoting *Foskey*, at 304).

vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated.") (internal citation omitted) (emphasis added).

In its response to a similar Supremacy Clause argument made by Co-Defendant Chesebro, the State claims that the Supremacy Clause cannot bar its prosecution because Mr. Chesebro was not a federal officer. *See* State Response to Chesebro Motion to Dismiss on Supremacy Clause at 2-3. But this argument fully misses the mark – the test for whether state criminal prosecution is generally barred by the Supremacy Clause does *not* turn on whether the person the State is seeking to prosecute is a federal officer at all. Instead, it turns on whether the subject matter in which the State is interfering is so closely connected to the functioning of the federal government that only the federal government may be involved in it. *See U.S. ex rel. Noia v. Fay*, 300 F.2d 345, 354-55 (2d Cir. 1962), *aff'd sub nom. Fay v. Noia*, 83 S. Ct. 822 (1963) (noting Supreme Court has barred State prosecutions where the State court had "no jurisdiction to entertain an action so inseparably connected with the functioning of the National Government.")

The seminal case on this general Supremacy Clause bar of state criminalization in federal governmental matters is *In re Loney*, 134 U.S. 372, 376 (1890). In that case, a regular citizen – not a federal officer – was charged with perjury under Virginia state law for testimony that he gave in a contest that Congress was adjudicating as to which of two candidates for Congress it was going to seat from a certain district in Virginia. The Supreme Court held that the State of Virginia had no jurisdiction or authority to charge Mr. Loney under state criminal law because he was testifying pursuant to federal law about a matter exclusively within the purview of Congress and, therefore, of the federal government. In so holding, the Court noted that the state governments cannot be allowed to interfere in or impede these federal government processes because they may be

motivated by the preferences of "a disappointed suitor or contestant" or "instigated by local passion or prejudice." *Id*. at 375. The Supreme Court, therefore, barred the state's criminal prosecution of Mr. Loney on Supremacy Clause grounds.

Like Mr. Loney, Mr. Shafer is not subject to state authority or jurisdiction for actions he took as a Presidential Elector, which are wholly within the authority of the national government (Congress). As in *Loney*, Congress in this case was adjudicating a dispute that under the Constitution that was solely within its jurisdiction (a post Safe Harbor dispute regarding the valid slate of Presidential Electors). Like Mr. Loney, Mr. Shafer took actions expressly allowed under and pursuant to federal law – the executing and sending of contingent presidential ballots to Congress pursuant to the Constitution and the ECA. As in *Loney*, Mr. Shafer's actions were inseparably connected to the functioning of the national government, *i.e.,* the election of the President and Vice President. For the same reasons expressed by the Supreme Court in *Loney* and its progeny, the State has no authority to involve itself – through criminalization or otherwise – in this exclusively federal process. *See also In re Waite*, 81 F. 359, 372 (N.D. Iowa 1897) (state criminal laws not applicable to a pension examiner appointed under the laws of the United States for acts done in connection with his duties as examiner); *State of Ohio v. Thomas*, 173 U.S. 276, 283 (1899) (holding that state 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."*); *cf. In re Neagle*, 135 U.S. at 99 (federal officer responsible for protecting federal judge who killed a man in the line of duty was released pretrial from state charges because he was acting under the authority of the law of the United States and, therefore, not liable to answer in the courts of California for murder charges).

B. The State's Indictment of Mr. Shafer's Alleged Conduct Is Preempted By Federal Law

Pursuant to the Supremacy Clause, State law cannot "limit the extent to which federal authority can be exercised." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971) (citing *In re Neagle*, 135 U.S. 1 (1890)). The functioning of the United States Electoral College and its Presidential Electors is governed by the United States Constitution and the federal ECA, 3 U.S.C. §§ 1 *et seq*.[8] "Congress has the final authority over federal elections." *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970). "[T]he constitutional structure… allows the States but a limited role in federal elections, and maintains strict checks on state interference with the federal election process." *U.S. Term Limits, Inc.*, 514 U.S. at 822.

As the Court of Appeals has recognized, "the subject matter jurisdiction of state courts can be preempted by federal law under the Supremacy Clause of the United States Constitution." *Bobick v. Cmty. & S. Bank*, 321 Ga. App. 855, 866 (2013) (citing U.S. Const., Art. 6, Cl. 2; *Norton v. North Ga. Foods,* 211 Ga. App. 684, 685–687 (1994)).[9]

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[8] The ECA was passed in 1887 and was not amended by Congress until 2022. The version of the ECA in place in 2020, which governs this case, is attached hereto as Exhibit C**.**

[9] The law recognizes several types of preemption, including structural, field, and conflict preemption. *Structural preemption* occurs when the Constitution commits authority over a subject to the federal government alone, foreclosing a role for states and localities. "Structural preemption may have a clear textual basis, such as the exclusive federal authority over patent, copyright, and bankruptcy, or it may draw on the structure and relationships created by the Constitution." *See, e.g.,* Clare Huntington, *The Constitutional Dimension of Immigration Federalism,* 61 Vand. L. Rev. 787, 808–09 (2008) (discussing structural preemption) (internal citations omitted). Under *field preemption*, "States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona v. United States*, 567 U.S. 387, 399 (2012) (internal citation omitted). Field preemption can occur in one of two ways: (1) when the intent to completely displace a state law can be inferred from a framework of regulation "so pervasive . . . that Congress left no room for the States to supplement it," *id.*; or (2) where there is a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same

There are several types of federal preemption that apply in this case. As discussed above, the State's indictment is structurally preempted by the Constitution. Federal law also preempts the State's Indictment.

1. Field Preemption

Federal field preemption exists in any area "in which federal legislation is especially pervasive or the federal interest is 'so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject…'" *Smith v. Mitchell Const. Co.*, 225 Ga. App. 383, 384–85, 481 S.E.2d 558, 560 (1997) (quoting *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152–153 (1982)). The doctrine "*ousts a State or other governmental entity from the exercise of police power in an area in which the power of federal government is, by law or by implication, preeminent*." *Cont'l PET Techs., Inc. v. Palacias*, 269 Ga. App. 561, 562 (2004) (emphasis added) (citing *Owen v. City of Atlanta*, 157 Ga. App. 354, 356 (1981)) (describing field preemption). Field preemption applies here because Congress' regulation of and over the casting, collection, adjudication, and counting of presidential elector ballots and purported presidential elector ballots is comprehensive. Indeed, the ECA has been described as so "detailed" and "comprehensive" that even federal courts should be

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subject." *Id.* *Conflict preemption* is exactly as it sounds: when state law conflicts with federal law, state law is preempted. *Id.* Like field preemption, conflict preemption can also occur in two ways: (1) when compliance with both federal and state regulations is impossible, *id.* (internal citations omitted); and (2) "where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (internal citations omitted). All three of these types of preemption apply in this case.

divested of jurisdiction to interfere with Congress' authority to adjudicate and count presidential elector ballots. *Bush*, 531 U.S. at 155.[10]

Field preemption also applies because the federal interest here is so dominant that the exclusion of any state law must be presumed. "The power [of Congress] to judge of the legality of the [electoral] votes is a necessary consequent of the power to count. The existence of this power is of *absolute necessity to the preservation of the Government*. The *interests of all the States in their relations to each other in the Federal Union demand that the ultimate tribunal to decide upon the election of President should be [Congress],* in which the States in their federal relationships and the people in their sovereign capacity should be represented." *Id*. (internal quotations and citations omitted) (emphasis added); *see also Burroughs,* 290 U.S. at 545 ("[P]residential electors . . . exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. *The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated.*)

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[10] The legislative history of the ECA clarifies its intent to give Congress alone the power to resolve such disputes:

> The two Houses are, by the Constitution, authorized to make the count of electoral votes. They can only count legal votes, *and in doing so must determine, from the best evidence to be had, what are legal votes*....
>
> * * * * *
>
> The power to determine rests with the two houses, and *there is no other constitutional tribunal.*

531 U.S. at 154 (*quoting* H.R. Rep. No. 1638, 49th Cong., 1st Sess., 2 (1886) (report submitted by Rep. Caldwell, Select Committee on the Election of President and Vice–President)) (emphasis added); *see generally* Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 Fla. L. Rev. 541 (2004) (Siegel) (describing in detail the comprehensive provisions of the ECA, their application, and their legislative history).

(internal citation omitted) (emphasis added); *see also In re Loney*, 134 U.S. at 376, (holding states cannot use state criminal laws to interfere with Congress' adjudication of a dispute over who was the correct Congressman to be seated because that function is so inseparably connected to the functioning of the national government).

2. <u>Conflict Preemption</u>

Federal conflict preemption applies when there is a conflict between federal and state law such that compliance with both federal and state regulations is impossible and/or where the challenged state law obstructs the full purposes and objectives of Congress. *See, e.g.*, *Parks v. Hyundai Motor Am., Inc.*, 294 Ga. App. 112, 113 (2008) (explaining conflict preemption); *see also Arizona v. United States*, 567 U.S. 387, 398 (2012) (describing conflict preemption). Conflict preemption plainly applies here. The prosecution alleges in its Indictment that conduct expressly permitted under the Constitution and the ECA (executing and sending a contingent slate of presidential elector ballots to Congress for its adjudication on January 6) is allegedly criminal under State law. It charges in its Indictment that the defendants allegedly conspired to change the outcome of the November 3, 2020 United States presidential election. *See* Indictment, p. 14. It states in its Indictment that Mr. Shafer and the other contingent Georgia Republican Presidential Elector defendants with allegedly creating "*false Electoral College documents… on December 14, 2020*," and "*transmit[ing] the votes to the President of the United States Senate [and] the Archivist of the United States…*" Indictment, p. 17 (emphasis added). It furthermore alleges that, on December 14, 2020, Mr. Shafer and the other contingent Presidential Elector defendants allegedly "held themselves out" as Presidential Electors "*with intent to mislead the President of the United States Senate, the Archivist of the United States…*" *Id.* at 40 (emphasis added). As of that date, however,

Section 15 of the ECA specifically anticipated and allowed the submission of more than one slate of presidential elector ballots from a State:

> Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, ***all the certificates and papers purporting to be certificates of the electoral votes***, which ***certificates and papers shall be opened, presented, and acted upon*** in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. ***If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate***, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more

> of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and ***in such case of more than one return or paper purporting to be a return from a State***, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

3 U.S.C. § 15 (2020) (emphasis added).[11] In other words, the ECA made clear that the submission of more than one presidential elector ballot to Congress from a State was permissible, even expected. And yet the State's Indictment *criminalizes* these *very actions called for and permitted by the ECA*.[12]

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[11] *See generally* Declaration of Professor Todd Zywicki (attached hereto as Exhibit B) (describing the ECA, the Hawaii precedent, and applicable Georgia election law) and Supplemental Declaration of Professor Todd Zywicki (attached hereto as Exhibit D) (same).

[12] *See generally* Edward B. Foley, *Preparing for A Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 Loy. U. Chi. L.J. 309, 345 (2019) ("[W]hile state and federal courts may play significant roles in shaping the dynamics of a dispute that reaches Congress, by declaring who is the lawful winner of the state's popular vote and which slate of presidential electors the state's governor must certify as authoritative, *ultimately neither the state nor federal judiciary can prevent a party's slate of presidential electors from purporting to meet on December 14 and acting as if they can cast the state's electoral votes--even if those individuals lack any indicia of authority under state law*. As long as these individuals do meet and do purport to send their electoral votes to the President of the Senate, *then even the intervention of the Supreme Court cannot stop a dispute regarding a state's electoral votes from reaching Congress*.") (emphasis added).

"[A] *'State may not prohibit the exercise of rights which the federal Acts protect*.'" *United Mine Workers of Am. v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 75 (1956) (emphasis added) (citing *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 474 (1955); *Garner v. Teamsters Union*, 346 U.S. 485, 494 (1953)). The Georgia Supreme Court has furthermore held that "*[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort…*'" *Taylor v. State*, 315 Ga. 630, 639 (2023) (emphasis added) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (citing *Corbitt v. New Jersey*, 439 U.S. 212, 221-225 (1978); *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969)).

Former Section 15 of the ECA expressly anticipates that Congress will receive "*more than one*" and "*all*" returns or certificates and purported returns or certificates from Presidential Electors in a State for Congress, in its sole authority, to adjudicate. Mr. Shafer and the other Georgia Republican contingent Presidential Electors were therefore *authorized by federal law* to meet, cast their votes, certify their votes and transmit their votes to Congress. The U.S. Supreme Court itself recognized identical conduct by past Presidential Electors with ostensible approval:

> *[I]n 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines. See Josephson & Ross, Repairing the Electoral College*, 22 J. Legis. 145, 166, n. 154 (1996)…
>
> Republican electors were certified by the Acting Governor on November 28, 1960. A recount was ordered to begin on December 13, 1960. *Both Democratic and Republican electors met on the appointed day to cast their votes*. On January 4, 1961, the newly elected Governor certified the Democratic electors. The certification was received by Congress on January 6, the day the electoral votes were counted. Josephson & Ross, 22 J. Legis., at 166, n. 154.

Bush, 531 U.S. at 127 (Stevens, J., dissenting) (emphasis added).

Conflict preemption also applies because the State's attempt to prohibit the submission of contingent or "purported" presidential electoral ballots to Congress through criminalizing those actions plainly obstructs Congress' objectives and purposes as expressed in the ECA. Again, the ECA is plain that Congress is to receive *both* presidential elector ballots *and contingent or purported presidential electoral ballots* so that it can exercise its exclusive authority to adjudicate the valid ballot after the State has missed its opportunity to make that decision by failing to issue a final judicial decision on or before the Safe Harbor date. *See* 3 U.S.C. §§ 5, 15. The State, however, is attempting to obstruct, through criminal prosecution, Congress' right and ability to receive and adjudicate contingent or purported presidential elector ballots by criminalizing them. The State's Indictment plainly and directly obstructs Congress' objectives and purposes (indeed, its exclusive authority) under the ECA, and its Indictment is preempted. [13]

[13] In its Response to Co-Defendant Chesebro's preemption argument, the State claims that "the federal statutes that direct how Congress counts electoral college votes are fundamentally unrelated to Georgia's criminal statutes that prohibit fraud and harmful lies to departments and agencies of the state government, and they serve entirely different functions." *See* State Response to Chesebro Motion to Dismiss on Supremacy Clause at 4. It is difficult to understand at this stage in the proceedings how the State can make this statement or its preemption arguments with a straight face. First, as discussed herein, the Constitution itself preempts any role for State criminal prosecution here. Second, as explained in detail herein (and in prior pleadings that the State has received), the State is criminalizing actions here – the execution and sending of contingent presidential elector ballots to Congress – that are *expressly permitted by the governing federal law*. Worse, the State is inserting its criminal laws into this area in which Congress alone has the adjudicative power over the validity of presidential elector ballots in a way that, if allowed, would usurp Congress' sole authority to adjudicate presidential elector ballots and directly obstruct Congress' right and ability to receive the ballots it has expressly allowed to be sent to it by making those actions *criminal* under state law. In essence, notwithstanding the plan language of the ECA to the contrary, the State is asserting that, despite missing the ECA's Safe Harbor deadline, the State nonetheless still gets to decide *for Congress* who the valid presidential electors for the State of Georgia are, and based upon the DA's individual, post hoc determination of that question, prevent Congress from receiving the multiple ballots it has authorized under the ECA by criminalizing the execution and sending of them to Congress by the side the District Attorney decides "lost"

C. <u>As a Federal Officer, Mr. Shafer Has Official Immunity</u>

Federal officers are immune from state prosecution if (1) the officer "was authorized to do [what he did] by the law of the United States," (2) whether "it was his duty to do [it] as [an officer] of the United States," and whether (3) "in doing that act he did no more than what was necessary and proper for him to do." *Denson v. United States*, 574 F.3d 1318, 1346–47 (11th Cir. 2009) (quoting *In re Neagle*, 135 U.S. 1, 57) (1890)). "Although setting out three distinct questions for analysis, at bottom, *Neagle* stands for the proposition that an officer of the United States cannot be held in violation of state law while simultaneously executing his duties as prescribed by federal law." *Id*. at 1347.

Here, the Indictment charges Mr. Shafer with conduct relating to the exercise of his federal officer duties as a contingent Presidential Elector in the 2020 presidential election. As set forth in greater detail in Sections I.A. and I.B., the office of Presidential Elector is created by the Constitution, Mr. Shafer was specifically authorized by federal law to take the actions that he took, and he did no more than was necessary to fulfill his federal obligations. *See Denson*, 574 F.3d at 1346–47. Additionally, Mr. Shafer not only

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the election. This is most decidedly not the law. Once the State has missed the Safe Harbor date, as Georgia did in 2020, *neither* set of presidential electors can be deemed the "winners" or the "losers" by *any* branch of the State government – not the courts, not the legislature, and not the executive (including the District Attorney). After a State misses its opportunity to decide the question under the Safe Harbor, *only Congress* has any power or authority to decide who the State's valid presidential electors are – and it does that on January 6. Until then, neither contingent slate of presidential electors is a winner or a loser as a matter of law, and the District Attorney certainly has no authority (and can point to no authority) that would allow or empower her office to simply deem one side the "winner" on some random date before January 6 and declare all others fake and fraudulent, which is exactly what the District Attorney has done here. Only Congress can say, after the Safe Harbor, who are the winners, and no branch of the State government has any power to criminalize the process of sending Congress the information that it has expressly said through the ECA that it will receive and consider in adjudicating that dispute (contingent presidential elector ballots). In short, a clearer case for federal preemption (structural, field, *and* conflict) is hard to imagine.

subjectively believed his actions were justified, but his belief was objectively reasonable. As set forth in Sections I.A. and I.B., Mr. Shafer's actions *were* specifically authorized by federal law, and Mr. Shafer reasonably relied on the only existing legal precedent (1960 Hawaii) and on specific legal advice that his actions were legal and constitutional.

D. The Alleged Offenses With Which Mr. Shafer is Charges Are Alleged Offenses Against the United States

Georgia law also compels dismissal of the State's charging of conduct by persons pursuant to the United States Constitution and the ECA as alleged crimes under State law. The Georgia Supreme Court has expressly ruled that "*[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.*" *Ross v. State*, 55 Ga. 192, 194 (1875) (emphasis added). In *Ross*, the Supreme Court considered the question of "whether the state court had concurrent jurisdiction with the federal courts for the trial of the alleged offense, or whether the federal courts had the exclusive jurisdiction for the trial thereof." *Id*. at 193 (emphasis added). The Court concluded that it was error for the trial court to deny the defendant's motion to quash the indictment of the defendant for an alleged false oath before a United States commissioner. *Id*. at 194.

The plain language of the prosecution's Indictment demonstrates that, as with the prosecution in *Ross*, the State is attempting to prosecute alleged offenses against the United States and its officers as alleged crimes under Georgia law. The prosecution lacks any and all authority to bring such charges in State court. The District Attorney's Office's indictment and prosecution of persons for performing duties under the United States Constitution and federal law is an improper an unlawful prosecutorial overreach.

As with the alleged offense in *Ross*, the federal government and federal courts possess exclusive jurisdiction over the offenses in this case which expressly involves the voting of U.S. Presidential Electors and members of the Electoral College. For the same reasons, the State lacks authority to pursue these charges and this Court lacks jurisdiction to enter any judgment in a case involving charges alleging injury to the United States and federal officers. "*[T]here 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, 271 (1880) (emphasis added). The prosecution's charges against Mr. Shafer and others acting pursuant to the U.S. Constitution and the ECA are barred by the Supremacy Clause, and the charges must be dismissed.

E. <u>The Charges Are Unconstitutional As Applied and Are Barred.</u>

"[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope…" *United States v. Lanier*, 520 U.S. 259, 265 (1997) (citing *Marks v. United States,* 430 U.S. 188, 191–192 (1977); *Rabe v. Washington,* 405 U.S. 313 (1972) (*per curiam*); *Bouie v. City of Columbia*, 378 U.S. 347, 353-354 (1964)). The Georgia Supreme Court has likewise held that:

> In the context of a law which criminalizes certain behavior, due process requires that the law give a person of ordinary intelligence fair warning of the specific conduct which is forbidden or mandated; such a law may be challenged on the basis of vagueness if it fails to provide such notice or if the statute authorizes and encourages arbitrary and discriminatory enforcement.

Pitts v. State, 293 Ga. 511, 514 (2013) (citing *Braley v. City of Forest Park*, 286 Ga. 760, 762 (2010); *Santos v. State*, 284 Ga. 514, 514–515 (2008)). "'[D]ue process requires that criminal statutes give sufficient warning to enable individuals to conform their conduct

to avoid that which is forbidden…'" *Johnson v. Athens-Clarke Cnty.*, 272 Ga. 384, 385 (2000) (quoting *Hall v. State*, 268 Ga. 89, 92 (1997)). "Sufficient warning" means "'fair notice' that by engaging in such conduct, one will be held criminally responsible.'" *Id.* (quoting *Hall*, at 92). A law may be unconstitutionally vague not only where its provisions are ambiguous, but also "if it 'impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.'" *Thelen v. State*, 272 Ga. 81, 82 (2000) (citing *Satterfield v. State*, 260 Ga. 427, 428 (1990); *Hall*, at 93; *Bullock v. City of Dallas*, 248 Ga. 164, 166 (1981); *Dupres v. City of Newport*, 978 F. Supp. 429, 433 (D.R.I. 1997)). In addition to the due process right to fair warning, the rule of lenity requires, that "'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *Bittner v. United States*, 143 S. Ct. 713, 725 (2023) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931); citing *Connally v. General Constr. Co.*, 269 U.S. 385, 393 (1926); *Wooden* v. *United States*, 595 U. S. ––––,142 S. Ct. 1063, 1081-1084 (2022) (Gorsuch, J., concurring in judgment)).

Pursuant to due process and principles of lenity, a statute may be invalid when applied to one set of facts yet valid when applied to another set of facts. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (quoting *Dahnke–Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289 (1921)). Stated otherwise, a statute may be invalid as applied "when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

To the extent Mr. Shafer assisted in organizing the meeting of the nominee and contingent 2020 Republican United States Presidential Elector for the State of Georgia and in meeting with the Electors, Mr. Shafer was exercising his freedom of expression, freedom of association and right to petition government for the redress of grievances under the First Amendment of the Constitution of the United States, made applicable to the States under the Fourteenth Amendment, and Article I, Section I, Paragraph IV of the Constitution of the State of Georgia. *See* U.S. Const. Amend. I; Ga. Const. Art. I, § 1, ¶¶ V, IX; *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) (quoting U.S. Const. Amend. XIV). One of the core purposes of the right to freedom of speech is "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Lane v. Franks*, 573 U.S. 228, 235-236 (2014) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). The right "'protects the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.'" *Brown v. Hartlage*, 456 U.S. 45, 52-53 (1982) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271–272 (1971)). It "'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Fed. Election Comm'n v. Cruz*, 142 S. Ct. 1638, 1650 (2022) (quoting *Monitor Patriot Co.*, 401 U. S. at 272). *Accord Equity Prime Mortg. v. Greene for Cong., Inc.*, 366 Ga. App. 207, 214 (2022) (quoting *Eu v. San Francisco County Democratic Central Committee*, 489 U. S. 214, 223 (1989)). Freedom of speech is essential to democracy. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, --- U.S. ---, 138 S. Ct. 2448, 2463 (2018) (citing *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)). In addition to speech, the First Amendment "affords protection to symbolic or expressive conduct as

well as to actual speech." *Virginia v. Black*, 538 U.S. 343, 358 (2003) (citing *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992); *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *United States v. O'Brien*, 391 U.S. 367, 376–377 (1968); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505 (1969)); *see also State v. Fielden*, 280 Ga. 444, 445 (2006).

The right to freedom of association "encompasses a political party's decisions about the identity of, and the process for electing, its leaders." *Eu v. San Francisco County Democratic Central Committee*, 489 U. S. 214, 229 (1989) (citing *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *Cousins v. Wigoda*, 419 U.S. 477 (1975); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 235-236 (1986)). "An association must merely engage in expressive activity that could be impaired in order to be entitled to protection." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000).

Mr. Shafer possessed no fair notice that, in acting as a contingent Presidential Elector for the Georgia Republican Party, he would be held criminally responsible under the laws of the State of Georgia. *See Johnson*, 272 Ga. at 385 (quoting *Hall*, 268 Ga. at 92). To the contrary, in relation to all of the conduct alleged by the prosecution in its Indictment, Mr. Shafer followed the political precedent of the 1960 general election in the State of Hawaii, recognized by the U.S. Supreme Court in *Bush v. Gore*. In the more than 60 years since the 1960 United States presidential election, no judicial or law enforcement entity has indicated that a contingent United States Presidential Elector casting a vote in an election for President of the United States is an alleged criminal offense until the District Attorney's Office elected to charge the conduct as a crime. As far as the defense has been able to determine, there has never been a State criminal prosecution of Presidential Electors on the basis of Electors' voting or certifying their votes pursuant to

the Electoral Count Act; to attempt to criminalize this practice now is not only without fair notice and novel – it has been lauded as not only legal but as the ideal way to address close, contested elections by elected Members of Congress and legal scholars of all political stripes. *See* Exhibit B. To attempt, as the State has here, to label it criminal is both incorrect as a matter of law and unprecedented.

The charges in the Indictment are unconstitutional as applied to Mr. Shafer given that the charges are entirely based on political expression and association relating to the 2020 United States Presidential election, which conduct is protected by the United States and Georgia Constitutions. The charges are barred, and the Indictment should be quashed or dismissed. Where a defendant does not have fair notice that he or she could be held criminally responsible for certain conduct under a statute, it is error for a court to deny the defendant's motion to quash. *See Hall*, 268 Ga. at 92, 95; *see also Bouie*, 378 U.S. at 355; *Santos*, 284 Ga. at 516; *Perkins v. State*, 277 Ga. 323, 326 (2003). The prosecution's charging constitutionally protected political expression and association as criminal furthermore places the prosecution in direct conflict with U.S. Supreme Court precedent. "The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views." *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963). "'[T]he substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished…'" *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 845 (1978) (quoting *Bridges v. California*, 314 U.S. 252, 263 (1941); *Pennekamp v. State of Florida*, 328 U.S. 331, 347 (1946)). As the Court has held:

> In [*De Jonge v. Oregon*, 299 U.S. 353 (1937)] this Court held that "consistently with the Federal Constitution, *peaceable assembly for lawful discussion cannot be made a crime.' And 'those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be*

> *preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects*. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. *But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge*."

Thomas v. Collins, 323 U.S. 516, 539–540 (1945) (emphasis added) (quoting *De Jonge*, at 365).

As shown above, the facts, as opposed to the general and conclusory allegations, alleged in the Indictment in relation to Mr. Shafer all relate to the peaceable meeting of the Georgia Republican contingent Presidential Electors on December 14, 2020, the Electors' voting, and documents generated as a result of the voting. The Electors' meeting and voting and certifying their votes constituted conduct at the core of the protections of the First Amendment. The conduct accordingly cannot form the basis for criminal charges by the State under State law, and the criminal statutes alleged in the Indictment are unconstitutional as applied to such conduct. The Court should find that the prosecution of Mr. Shafer for conduct as a contingent United States Presidential Elector is barred, and that the Indictment should be dismissed or quashed.

CONCLUSION

Based upon the authorities and arguments set forth herein, Defendant David Shafer respectfully requests that the Court grant Defendant Shafer's Plea In Bar and Motion to Quash and dismiss the State of Georgia's Indictment and charges as to Defendant Shafer.

Respectfully submitted, this 27th day of September, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of September, 2023, filed the foregoing filing with the Court using the Court's Odyssey eFileGa system, serving copies of the filing on all counsel of record in this action, and furthermore have sent a copy of the filing to the parties and the Court.

/s/ Craig A. Gillen
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EXHIBIT A

UNITED STATES OF AMERICA

STATE OF GEORGIA

COUNTY OF FULTON

MEETING OF THE ELECTORAL COLLEGE OF GEORGIA

RE GEORGIA'S ELECTORAL VOTES

FOR

PRESIDENT and VICE PRESIDENT

OF THE

UNITED STATES

* * *

December 14, 2020

12:05 p.m.

Georgia State Capitol

206 Washington Street

Room 216

Atlanta, Georgia 30334

Anne Hansen, RPR, CCR #2711

Videographer, Ben Jones

A P P E A R A N C E S

Representing the 2020 Electors for the State of Georgia:

Chairman David Shafer
Joseph Brannan
James "Ken" Carroll
Vikki Townsend Consiglio
Carolyn Hall Fisher
Honorable Burt Jones
Gloria Kay Godwin
David G. Hanna
Mark W. Hennessy
Mark Amick
John Downey
Cathleen Alston Latham
Daryl Moody
Brad Carver

Representing President Donald J. Trump:

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PROCEEDINGS

CHAIRMAN SHAFER: My name is David Shafer. I'm the chairman of the Georgia Republican Party. And the hour of noon having arrived, it's my privilege to call to order this meeting of the Republican nominees for the Electoral College from the State of Georgia.

The President has filed a contest to the certified returns. That contest has -- is pending. It's not been decided or even heard by any judge with the authority to hear it. And so in order to preserve his rights, it's important that the Republican nominees for Presidential Elector meet here today and cast their votes.

From my observation, 13 of the 16 nominees are present. The first order of business is for the electors who are present to fill the three vacancies for those who are not present.

Is there a motion to elect Mark Amick, Brad Carver, and Burt Jones as Substitute Presidential Electors?

MS. FISHER: I so move.

JOSEPH BRANNAN: Second.

CHAIRMAN SHAFER: It's been moved and seconded that Mark Amick, Brad Carver, and Burt Jones be elected Substitute Presidential Electors.

Is there any discussion on that motion?

The Chair hears no discussion, and the motion will be put to a vote.

All those in favor signify so by saying "Aye."

Those opposed "No."

The "Ayes" have it. The motion carries. And we now have a full slate of 16 Presidential Electors.

I will pause for a moment and say that Pat Garland, one of our Presidential Electors, his wife died last week, and he is taking care of his family. And our hearts are -- obviously all go out to him.

We will suspend for a moment while the paperwork is prepared to reflect the new slate of Presidential Electors, and then we will conduct the balloting. So this meeting is suspended momentarily.

(Recess 12:07-12:11 p.m.)

CHAIRMAN SHAFER: All right. Is there any objection to Carolyn Fisher serving as the secretary of this meeting?

The Chair hears no objection, and Carolyn Fisher is now the secretary of this meeting.

Now, Secretary, if you would call the roll of the Presidential -- Presidential Electors.

MS. FISHER: Joseph Brannan.

MR. BRANNAN: Here.
MS. FISHER: Ken Carroll.
MR. CARROLL: Here.
MS. FISHER: Vikki Consiglio.
MS. CONSIGLIO: Here.
MS. FISHER: Carolyn Fisher.
Kay Godwin.
MS. GODWIN: Here.
MS. FISHER: David Hanna.
MR. HANNA: Here.
MS. FISHER: Mark Hennessy.
MR. HENNESSY: Here.
MS. FISHER: John Isakson.
CHAIRMAN SHAFER: No. I'm sorry. He was replaced. He was substituted.
MS. FISHER: Sorry.
Cathy Latham.
MS. LATHAM: Here.
MS. FISHER: Daryl Moody.
MR. MOODY: Here.
MS. FISHER: David Shafer.
MR. SHAFER: Here.
MS. FISHER: Shawn Still.
MR. STILL: Here.
MS. FISHER: Chandra Yadav.

MR. YADAV: Here.
MS. FISHER: Mark Amick.
MR. AMICK: Here.
MS. FISHER: Brad Carver.
MR. CARVER: Here.
MS. FISHER: Burt Jones.
MR. JONES: Here.
MS. FISHER: And Frank -- what's that?
CHAIRMAN SHAFER: I'm sorry.
Oh. Can I confer with you for just a moment, please?
MR. SMITH: Yes.
CHAIRMAN SHAFER: Okay. So there is -- we will need to elect one more.
Robert, do you need me to elect one more?
One of our -- one of our presidential electors has -- is no longer eligible because he registered to vote in another state to further his college studies.
Is there a motion to elect John Matt Downey as a substitute presidential elector?
MS. FISHER: I so move.
MS. LATHAM: Second.
CHAIRMAN SHAFER: It's been moved and seconded that John Downey be elected as a substitute

presidential elector. All those -- is there any discussion on that motion?

The Chair hears no discussion and will put the motion to a vote.

All those in favor signify so by saying "Aye."

Those opposed "No."

The "Ayes" have it. The motion carries, and John Downey is a -- now a Presidential -- Republican Candidate for Presidential Elector. And he is present.

MR. DOWNEY: Yes, sir.

CHAIRMAN SHAFER: And -- and so all 16 are present. And we will conduct the voting momentarily.

Ray Smith is a lawyer for President Trump. Do you wish to make any comments at this time?

MR. SMITH: Yes. We're -- we're conducting this as -- as Chairman Shafer said, we're conducting this because the contest of the election in Georgia is ongoing. And so we continue to contest the election of the electors in Georgia. And so we're going to conduct this in accordance with the Constitution of the United States, and we're going to conduct the electorate today similar to what happened in 1960 in Hawaii.

CHAIRMAN SHAFER: And if we did not hold this meeting, then our election contest would effectively be abandoned; is --

MR. SMITH: That's correct.

CHAIRMAN SHAFER: -- that not correct?

MR. SMITH: That's correct.

CHAIRMAN SHAFER: And so the only way for us to have any judge consider the merits of our complaint, the thousands of people who we allege voted unlawfully, is for us to have this meeting and permit the contest to continue; is that not correct?

MR. SMITH: That's correct. That's correct, Mr. Chairman.

MR. SINNERS: Chairman Shafer --

CHAIRMAN SHAFER: Yes, sir.

MR. SINNERS: -- I have John A. Isakson as an original elector being replaced by John Downey.

CHAIRMAN SHAFER: That's correct.

MR. SINNERS: Patrick Garland, Mark -- being replaced by Mark Amick.

CHAIRMAN SHAFER: That's correct.

MR. SINNERS: C.J. Pearson being replaced by Honorable Burt Jones, and Susan Holmes being replaced by Brad Carver.

CHAIRMAN SHAFER: That's -- that's fine.

Yes. And they all 16 are present. And you've got the paperwork ready?

MR. SINNERS: Yes, sir.

CHAIRMAN SHAFER: So if you would -- do you know these people by sight or probably not?

MR. SINNERS: Yes.

CHAIRMAN SHAFER: So how are you going to distribute the --

MR. SINNERS: The ballots?

CHAIRMAN SHAFER: Yeah.

MR. SINNERS: One at a time individually today to cast their ballot.

CHAIRMAN SHAFER: So why don't we . . .

Okay. I want to thank Carolyn Fisher for her service as the secretary of the meeting.

Because the documents have been prepared with Shawn Still listed as the secretary of the meeting -- of the meeting, I would like to avoid reprinting the documents, that there would be a motion to thank Carolyn Fisher for her service and to elect Shawn Still as the proper secretary of the meeting. Is there --

MR. CARROLL: So moved.

CHAIRMAN FISHER: And is there a second?

MS. LATHAM: Second.

CHAIRMAN SHAFER: Is there any discussion on that motion? No discussion.

All those in favor signify so by saying "Aye."

Those opposed "No."

The "Ayes" have it. The motion carries. Shawn Still is elected to Permanent Secretary of this meeting.

MR. STILL: Mr. Chairman, I'd like to take a moment to thank Carolyn for her hard work in this role, and I appreciate all that you've done.

MS. FISHER: Thank you.

CHAIRMAN SHAFER: Shawn, if you would come forward and sign these documents electing the substitute electors so we can move next to the vote.

All right. So the certificates have been executed. Are we prepared now to vote?

MR. SINNERS: Yes, we are.

CHAIRMAN SHAFER: Are the ballots individual?

MR. SINNERS: Yes.

CHAIRMAN SHAFER: So do you want me to -- do you want to call out the name and have that person raise their hand and maybe --

MR. SINNERS: Come up to sign.

CHAIRMAN SHAFER: Huh?

MR. SINNERS: Come up to sign.

CHAIRMAN SHAFER: Okay. So call the name. And then if the elector would come forward and complete the ballot and sign. So why don't you call the name.

MR. SINNERS: Joseph Brannan.

James Ken Carroll.

Vikki Consiglio.

Carolyn Fisher.

Kay Godwin.

David Hanna.

Mark Hennessy.

Mark Amick.

Brad Carver.

The Honorable Burt Jones.

Cathy Latham.

John Downey.

Chairman David Shafer.

Shawn Still.

Chandra Yadav.

CHAIRMAN SHAFER: Did you call Daryl Moody?

MR. SINNERS: Daryl Moody.

16 votes.

CHAIRMAN SHAFER: Do we have 16 votes cast?

MR. SINNERS: 16 have been cast for Vice

President Pence. And 16 have been cast for President Trump. Congratulations.

CHAIRMAN SHAFER: Is there any other business to come before this meeting?

Hearing none, the chair declares this meeting of the Republican Nominees for the Electoral College.

Are you trying to get my attention?

MR. SINNERS: Yes. We must complete some paperwork in private to certify.

CHAIRMAN SHAFER: Okay. So we'll adjourn this meeting. And then if the electors would remain behind for a few minutes for us to complete the paperwork.

But hearing nothing else, this meeting of the electors is hereby adjourned.

(The meeting adjourned at 12:31 p.m.)

C E R T I F I C A T E

STATE OF GEORGIA)

)

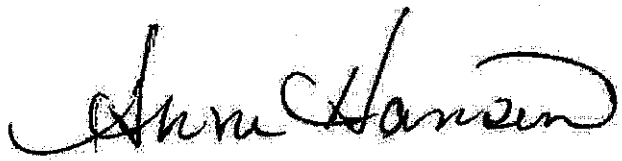
COUNTY OF HENRY)

I hereby certify that the foregoing meeting was taken down, as stated in the caption, and was reduced to typewriting under my direction; that the foregoing transcript is a true and correct record of evidence given.

The above certification is expressly withdrawn and denied upon the disassembly or photocopying of the foregoing transcript, unless said disassembly or photocopying is done under the auspices of AHReporting, Certified Court Reporters, and the signatures and original seal is attached thereto.

I further certify that I am not a relative, employee, attorney of any present, nor am I financially interested in the outcome of this meeting.

This, the 18th day of December, 2020.



Anne Hansen, RPR, CCR #2711

Commission expires 3/31/2021

D I S C L O S U R E

STATE OF GEORGIA)
)
COUNTY OF HENRY)

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Exhibits

Exhibit 1

1

12:07-12:11 4:17
13 3:14
16 3:14 4:8 7:13 9:1
1960 7:24

A

abandoned 8:3
accordance 7:22
allege 8:9
Amick 3:18,24 6:2,3 8:20
arrived 3:4
authority 3:10
avoid 9:18
Aye 4:5 7:6 10:4
Ayes 4:7 7:8 10:6

B

ballot 9:12
balloting 4:16
ballots 9:9 10:19
Brad 3:18,24 6:4 8:24
Brannan 3:22 4:25 5:1
Burt 3:19,24 6:6 8:23
business 3:15

C

C.J. 8:22
call 3:5 4:23 10:22
Candidate 7:10
care 4:11
Carolyn 4:19,21 5:6 9:14,20 10:10
carries 4:7 7:8 10:6
Carroll 5:2,3 9:23
Carver 3:19,24 6:4,5 8:24
cast 3:13 9:12
Cathy 5:17
certificates 10:16
certified 3:8
Chair 4:2,21 7:3
chairman 3:2,3,23 4:18 5:14 6:9,13,24 7:13,18 8:1,5,7,13,14,15,18,21, 25 9:4,7,10,13,24 10:1, 9,13,19,21,25
Chandra 5:25
college 3:6 6:19
comments 7:16
complaint 8:9
conduct 4:15 7:14,22, 23
conducting 7:17,18
confer 6:10
Consiglio 5:4,5
Constitution 7:22
contest 3:7,8 7:19,20 8:2,11
continue 7:20 8:11
correct 8:4,5,6,11,12, 18,21

D

Daryl 5:19
David 3:2 5:9,21
decided 3:9
died 4:11
discussion 4:1,2 7:2,3 10:1,2
distribute 9:8
documents 9:16,19 10:14
Downey 6:20,25 7:9,12 8:17

E

effectively 8:2
elect 3:18 6:14,15,20 9:20
elected 3:25 6:25 10:7
electing 10:14
election 7:19,20 8:2
elector 3:12 6:21 7:1, 10 8:17
Electoral 3:6
electorate 7:24
electors 3:16,20,25 4:8,10,15,24 6:17 7:21 10:15
eligible 6:17
executed 10:17

F

family 4:11
favor 4:4 7:5 10:3
filed 3:7
fill 3:16
fine 8:25
Fisher 3:21 4:19,22,25 5:2,4,6,9,11,13,16,19, 21,23,25 6:2,4,6,8,22 9:14,20,24 10:12
forward 10:14
Frank 6:8
full 4:8

G

Garland 4:10 8:19
Georgia 3:3,6 7:19,21
Godwin 5:7,8

H

hand 10:23
Hanna 5:9,10
happened 7:24
hard 10:10
Hawaii 7:25
hear 3:10
heard 3:9
hears 4:2,21 7:3
hearts 4:12
Hennessy 5:11,12
hold 8:1
Holmes 8:23
Honorable 8:23
hour 3:4

I

important 3:11
individual 10:19
individually 9:11
Isakson 5:13 8:16

J

John 5:13 6:20,25 7:9 8:16,17
Jones 3:19,24 6:6,7 8:23
Joseph 3:22 4:25
judge 3:9 8:8

K

Kay 5:7
Ken 5:2

L

Latham 5:17,18 6:23 9:25
lawyer 7:15
listed 9:17
longer 6:17

M

make 7:16
Mark 3:18,24 5:11 6:2 8:19,20
Matt 6:20
meet 3:12
meeting 3:5 4:16,20,22 8:2,10 9:15,17,18,21 10:8
merits 8:8
moment 4:9,13 6:10 10:10
momentarily 4:16 7:14
Moody 5:19,20
motion 3:18 4:1,2,7 6:20 7:2,4,8 9:19 10:2,6
move 3:21 6:22 10:15
moved 3:23 6:24 9:23

N

nominees 3:5,12,14
noon 3:4

O

objection 4:19,21
observation 3:14
ongoing 7:20
opposed 4:6 7:7 10:5
order 3:5,10,15
original 8:17

P

p.m. 4:17
paperwork 4:14 9:2
Party 3:3
Pat 4:9
Patrick 8:19
pause 4:9
Pearson 8:22
pending 3:8
people 8:9 9:5
Permanent 10:7
permit 8:10
person 10:22
prepared 4:14 9:16 10:17
present 3:15,16,17 7:11,14 9:1
preserve 3:10
President 3:7 7:15
presidential 3:12,19, 25 4:8,10,15,24 6:16,21 7:1,9,10
privilege 3:4
PROCEEDINGS 3:1
proper 9:21
put 4:3 7:3

R

raise 10:23
Ray 7:15
ready 9:2
recess 4:17
reflect 4:14
registered 6:18
replaced 5:15 8:17,20, 22,23
reprinting 9:18
Republican 3:3,5,11 7:9
returns 3:8
rights 3:11
Robert 6:15
role 10:11
roll 4:23

S

seconded 3:24 6:25
secretary 4:19,22,23 9:15,17,21 10:7
service 9:15,20
serving 4:19
Shafer 3:2,23 4:18 5:14,21,22 6:9,13,24 7:13,18 8:1,5,7,14,15, 18,21,25 9:4,7,10,13 10:1,13,19,21,25
Shawn 5:23 9:17,20 10:7,13
sight 9:5
sign 10:14,24
signify 4:4 7:5 10:3
similar 7:24
SINNERS 8:14,16,19, 22 9:3,6,9,11 10:18,20, 24
sir 7:12 8:15 9:3
slate 4:8,14
Smith 6:12 7:15,17 8:4, 6,12
state 3:6 6:18
States 7:23
studies 6:19
substitute 3:19,25 6:21,25 10:15
substituted 5:15
Susan 8:23
suspend 4:13
suspended 4:16

T

taking 4:11
thousands 8:9
time 7:16 9:11
today 3:12 7:24 9:12
Trump 7:15

U

United 7:23
unlawfully 8:10

V

vacancies 3:16
Vikki 5:4
vote 4:3 6:18 7:4 10:15, 17
voted 8:9
votes 3:13
voting 7:14

W

week 4:11
wife 4:10
work 10:10

Y

Yadav 5:25 6:1

EXHIBIT B

EXPERT DECLARATION OF PROFESSOR TODD ZYWICKI

1.

My name is Todd Zywicki. I am the George Mason Foundation Professor of Law at the Antonin Scalia Law School at George Mason University in Arlington, Virginia. I have published academic papers on a range of subjects, including specifically laws governing presidential elections and transitions. *See* Todd Zywicki, *The Law of Presidential Transitions and the 2000 Election*, 2001 BYU L. Rev. 1573 (2001), available at https://digitalcommons.law.byu.edu/lawreview/vol2001/iss4/3/.[1] On December 4, 2000, while the Bush-Gore election dispute was ongoing, I was invited to testify before Congress on the law governing presidential elections and transitions.[2] I have also practiced law in the State of Georgia. My full curriculum vitae is attached hereto as **Exhibit A.**

2.

I have been asked to render an expert opinion with respect to the reasonableness and propriety of the casting of contingent presidential electoral votes when a judicial contest to a Presidential election has been filed under the Georgia Election Code but has not been decided as of the date that the Presidential Electors are required by the federal Electoral Count Act ("ECA") to meet and cast their votes. I have also been asked to

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[1] *See also* Michael T. Morley, *Ascertaining the President-Elect Under the Presidential Transition Act*, 74 STAN. L. REV. May 2022), *available in* https://www.stanfordlawreview.org/online/ascertaining-the-president-elect-under-the-presidential-transition-act/ (referring to my article as "the most comprehensive analysis of the issue" of the process to "ascertain" the results of a presidential election).

[2] Testimony before United States House of Representatives, Committee on Government Reform, Subcommittee on Government Management, Information, and Technology, on "Transitioning to a New Administration: Can the Next President Be Ready?" (Dec. 4, 2000).

render an expert opinion with respect to the reasonableness and propriety of actions taken by the 2020 Republican nominees for Presidential Elector when confronted with an unresolved judicial contest to a presidential election on the date that the Presidential Electors were required to meet.

3.

The Georgia Election Code provides that the Georgia Presidential Electors be elected in 1964 and every four years thereafter in the General Election, which is held the first Tuesday after the first Monday in November. *See* O.C.G.A. § 21-2-10.

4.

The U.S. Constitution provides that "[t]he Congress may determine the time of choosing the [presidential] electors, and the day on which they shall give their votes; which day shall be the same throughout the United States." *See* U.S. CONST. art. II, § 1; U.S. CONST, Amendment 12. The Electoral Count Act ("ECA"), in turn, requires Presidential Electors to meet in their respective states on the first Monday after the second Wednesday in December of each Presidential election year and cast their votes for President and Vice President.[3] *See* 3 U.S.C. §§ 7-8.

5.

The date set by the ECA for the Presidential Electors to meet and vote was presumably selected by Congress with the intent of allowing sufficient time for States to count their votes in the Presidential election and then certify the appropriate slate of Presidential Electors (i.e., the Presidential Electors for the party whose candidate received the most votes for President).

[3] In the 2020 presidential election, this date was December 14, 2020.

6.

When election results have been certified but a judicial contest to that election is still pending, Georgia law provides that contingent commissions may be issued to the person who was apparently elected and that such person may take office. O.C.G.A. § 21-2-503(a) (permitting the issuance of a commission to a person who appears to have been elected to office "notwithstanding the fact that the election of such person to any office may be contested in the manner provided by this chapter."); *see also* O.C.G.A. § 21-2-503(c) ("Upon the certification of the results of the election, a person elected to a federal, state, or county office may be sworn into office notwithstanding that the election of such person may be contested in the manner provided by this chapter.")

7.

That same Code section just as explicitly makes the validity of such a commission contingent on the ultimate outcome of the judicial contest. Specifically, O.C.G.A. § 21-2-503(a) provides that "[w]henever it shall appear, by the final judgment of the proper tribunal having jurisdiction of a contested election, *that the person to whom such commission shall have been issued has not been elected legally to the office for which he or she has been commissioned, then a commission shall be issued to the person who shall appear to be elected legally to such office.*" (Emphasis added). The statute goes on to state that "[t]he issuing of such commission *shall nullify the commission already issued.*" *Id.* (Emphasis added).[4]

[4] Additionally, O.C.G.A. § 21-2-503(c) further provides that "[u]pon the final judgment of the proper tribunal having jurisdiction of a contested election which orders a second election or declares that another person was legally elected to the office, *the person sworn into such office shall cease to hold the office and shall cease to exercise the powers, duties, and privileges of the office immediately.*" (Emphasis added).

8.

Upon the filing of an action contesting a Presidential election under the Georgia Election Code, then, *both* the certified (but contested) Presidential Electors and the uncertified (but contesting) Presidential Electors become contingent Presidential Electors by operation of law. Where litigation is still pending and will not be resolved by a "final judgment of the proper tribunal" by the time the Presidential Electors are required to meet and vote by the ECA, the state faces a dilemma. If the state attempts to short-circuit the election contest before final resolution of the claims in the case, it would deny the candidates, the voters, and the public an opportunity to have disputes regarding the election adjudicated, which is contrary to Georgia and federal law. If the state certifies the contingent winner as the actual and final winner on or before the date set forth in the ECA for presidential electors to cast their ballots it would deprive the state of all of its electoral votes should the contesting candidate ultimately prevail in his or her judicial contest, which is also contrary to Georgia and federal law. In such circumstances, and to avoid these unlawful and unintended consequences, both sets of Presidential Electors could execute their respective ballots on the date required by federal law, with the State ultimately certifying the election for whichever candidate prevails in the judicial election contest.

When faced with this dilemma, the best and most prudent way to ensure that Georgia has valid presidential electoral ballots for Congress to count would be for both sets of contingent Presidential Electors to meet and cast their votes for President and Vice President in the required format. Both sets should fulfill their duties and complete, execute, and submit the required paperwork as prescribed by the Constitution and the ECA as though the election contest had been adjudicated in each of their favor. Given the disagreeable nature of the first two alternatives (either short-circuiting electoral challenges or risking being unrepresented in the Presidential election), this option of certifying contingent slates of electors offers a reasonable, proper and lawful solution to the problem. Both sets of contingent Presidential Electors performing their duties as though the unresolved judicial contest had been (or will be) adjudicated in their favor is entirely consistent with both federal and Georgia law, and it is the only way to assure that the State of Georgia would have valid presidential electoral votes available to be counted by Congress regardless of the ultimate outcome of the judicial election challenge. The lawfulness, reasonableness and propriety of this solution is supported by state and federal law[5] and further evidenced by a review of historical precedent where that solution has been offered.

[5] In addition to the Georgia law outlined herein, the ECA specifically anticipates that Congress may, at times, receive two competing presidential electoral ballots from one state. The federal statute is plain that there is nothing improper about the submission of two slates and that the decision of which of these two competing slates is to be counted must be resolved solely by Congress. *See* 3 U.S.C. § 15 ("If *more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate*, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of

10.

In several presidential elections throughout history, including most recently in the contested elections of 1960, 2000, and 2020, judicial challenges to the presidential election had not been finally adjudicated either on or immediately prior to the date that the ECA requires the Presidential Electors to cast their votes. In each of these elections, the question has arisen as to the appropriate and lawful actions that must be taken to preserve the ability of both presidential candidates and the state itself to have valid presidential electoral votes available to be ultimately counted by Congress regardless of the ultimate outcome of the vote count or judicial challenge. The clear (and historically uncontroversial) legal answer in each of these circumstances is that both sets of the Presidential Electors should meet, vote, and transmit ballots to Congress to preserve the ability of that state to have valid electoral votes that can be counted by Congress.

11.

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a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; *but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law*; and *in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State*, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. *But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.*) (emphasis added).

In the 1960 presidential election, for example, Richard Nixon, the Republican candidate, was initially certified by the State of Hawaii as having carried the state. Supporters of John F. Kennedy, the Democrat presidential candidate, filed a legal action contesting the election and charging voting irregularities in 198 of Hawaii's 240 precincts, including the claim that there were more votes counted in the presidential election contest than were actually cast and that 1,283 ballots were unaccounted for in the final tabulation. That election contest was still pending and unresolved on December 19, 1960, when the Presidential Electors were required by the ECA to meet and cast their votes. Accordingly, both sets of Presidential Electors -- the certified (but contested) Republican/Nixon electors and the uncertified (but contesting) Democratic/Kennedy electors -- met separately at the Hawaii state capitol building and each cast their votes for their respective candidates in the same manner and form as though their candidate had won the state.

12.

Ultimately, on December 30, 1960, John F. Kennedy prevailed in the judicial contest, and the election was re-certified in his favor. On January 4, 1961, the Governor of Hawaii transmitted a second Certificate of Ascertainment on behalf of the state reporting that as a result of the lawsuit, the electoral votes of Hawaii were to be recorded for Kennedy rather than Nixon. Because the Democratic Presidential Electors had cast ballots back on December 19, 1960 in the precise form required by the Constitution and the ECA, Congress was able to and did count the votes from Hawaii when it met on January 6, 1961 to count the votes and certify the result. A copy of the paperwork completed and executed by the Hawaii Democratic Presidential Electors on December

19, 1960 and mailed to the Administrator of General Services of the United States of America on December 20, 1960 is attached as **Exhibit B.**[6]

13.

In the contested Presidential election of 2000, the concept of two contingent elector slates specifically relying on the Hawaii precedent was actively promoted by advocates for the Democratic presidential candidate, Al Gore, drawing support from noted constitutional scholars.[7]

14.

Democrat Congresswoman Patsy Mink of Hawaii publicly advocated for the submission of two elector slates from Florida to Congress in the 2000 election as follows:

> *The [Hawaii] precedent of 40 years ago suggests the means for resolving the electoral dispute in Florida: ...both slates of electors meet on December 18 and send their certificates to Congress;* the Governor of Florida send a subsequent certificate of election based on ... the decision of the court; and Congress accepts the slate of electors named by the Governor in his final certification.

See Statement of Representative Patsy Mink, CONGRESSIONAL RECORD, December 13, 2000 (emphasis added), available at https://www.govinfo.gov/content/pkg/CRECB-2000-pt18/html/CRECB-2000-pt18-Pg26609-2.htm.

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[6] Two of the three Democratic Presidential Electors who executed the Hawaii electoral documents, William Heen and Gilbert Metzger, were retired federal judges and noted constitutional scholars.

[7] The judicial challenges to the 2000 election in Florida were finally adjudicated before December 18, 2020, the date the Presidential Electors were required by the ECA that year to meet and vote, so two electoral ballots were not executed and submitted from Florida in that election.

15.

In anticipation of the likelihood of a close and contested presidential election in 2020, electoral college scholars openly and publicly advocated for both sets of Presidential Electors to each cast their ballots for their respective candidates on the date required by the ECA and submit both ballots to Congress in any state where the vote count was not yet final or was subject to a pending, unresolved judicial contest. Michael Rosin and Jason Harrow argued, for example, that Hawaii's approach to dealing with the issue by having both sets of electors meet and case votes for their candidate "*should serve as a model for a close election this year or in any year.*" Michael L. Rosin and Jason Harrow, *How to Decide a Very Close Election/or Presidential Electors: Part 2* (Oct. 23, 2020), available at https://takecareblog.com/blog/how-to-decide-a-very-close-election-for-presidential-electors-part-2 (emphasis added); *see id.* (stating "the way the recount was handled by all involved [in the 1960 election in Hawaii] provides a model for how a very close election should be determined"). Rosin and Harrow went on to note that when the judicial contest eventually resulted in Kennedy being declared the winner, the state re-issued its certification: "Fortunately, because both slates of electors had voted on the proper day, there was still a chance to tell Congress which slate was actually appointed by the voters." *Id.*

16.

Rosin and Harrow further explain that although the process "feels disorderly," "in fact the dueling certificates, with the Governor later telling Congress who really won, was an excellent way to navigate a system that, for no good reason, occasionally provides too short a time to conduct a full recount in a very close election." *Id.* The authors also

point out that both sets of presidential electors executing contingent ballots in these circumstances eliminates the risk that the state could lose its presidential electoral votes altogether: "[I]f, by elector voting day, a result is still uncertain and no presidential electors from a particular state cast votes, then Congress probably cannot count any electoral votes from that state for that particular election. . . . That means if a state wants to have its electoral votes counted, but which presidential electors were appointed by the voters on election day remains uncertain . . . . *there is only one possible solution: both potentially-winning slates of electors should case elector votes on the day required while the recount continues." Id.* (emphasis added).

17.

Harrow and Rosin subsequently argue that the 1960 Hawaii precedent of casting two sets of contingent electoral votes provides not only one reasonable solution to the difficulty of squaring the ECA's purported deadlines with a fair and accurate vote count, but actually provides the *best* solution to a difficult problem.[8] Even if one disagrees with that considered judgment, it makes plain that the State of Hawaii was not violating the law in 1960 by doing so, nor would subsequent sets of presidential electors be doing so by following this precedent: Harrow and Rosin were obviously not advocating for or urging some sort of criminal conspiracy in holding 1960 Hawaii up as a model for future close elections.

[8] Jason Harrow and Michael L. Rosin, *How To Decide a Very Close Election for Presidential Electors: Part 3*, TAKECARE (Oct. 28, 2020), *available in* https://takecareblog.com/blog/how-to-decide-a-very-close-election-for-presidential-electors-part-3.

18.

While the 2020 presidential election was in process, former CNN host Van Jones, an attorney, and Professor Larry Lessing of Harvard Law School similarly advocated that Presidential Electors should follow the Hawaii precedent if the election was not finally decided in their state by the date the ECA required Presidential Electors to meet and cast their votes. As they write, "Even though Richard Nixon said it should not be a precedent, what he did in 1960 *should be the model for this election* in 2020." Doing so would allow the state to take its time "to have an orderly and complete vote count." In particular, they described the execution of both sets of presidential ballots a "genius legal insight," noting that "*the only way their votes could matter was if they were cast on the day that Congress had set.*" *See* Van Jones and Larry Lessing, *"WHY PENNSYLVANIA SHOULD TAKE ITS TIME COUNTING VOTES,"* https://www.cnn.com/2020/11/04/opinions/pennsylvania-take-time-counting-votes-opinion-jones-lessig/index.html (Nov. 4, 2020) (citing favorably to the 1960 Hawaii precedent and noting that "[t]he key – *and this is the critical fact for 2020 as well* – is that the Democratic slate had also met on December 19 and had also cast their ballots in the manner specified by the Constitution. *When they voted, no one knew whether their votes would matter. But at least someone recognized that the only way their votes could matter was if they were cast on the day that Congress had set.* History does not record who had that *genius legal insight.*") (Emphasis added).

19.

The actions taken by both sets of Presidential Electors in Hawaii in 1960 that have been lauded and advocated by elected officials and legal scholars in 2000 and 2020 are supported by and consistent with federal and Georgia law. Specifically, federal law expressly anticipates and permits the submission of more than one slate of Presidential Electors from a State, and the Constitution gives Congress exclusive jurisdiction to adjudicate the validity of those competing slates within the parameters set in the ECA and through their own internal procedures. *See* 3 U.S.C.A. § 15 and U.S. CONST. art. II, § 1.[9] *See also* COUNTING ELECTORAL VOTES: AN OVERVIEW OF PROCEDURES AT THE JOINT SESSION, INCLUDING OBJECTIONS BY MEMBERS OF CONGRESS, Congressional Research Service at pp. 8-9 (explaining Congress'

[9] That statute states, in pertinent part, as follows:

> If *more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate,* those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; *but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law;* and *in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by Lawful electors appointed in accordance with the laws of the State,* unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. *But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof shall be counted.*
>
> 3 U.S.C.A. § 15 (emphasis added).

process to adjudicate between two sets of presidential elector ballots from the same state), available at https://crsreports.congress.gov/product/details?prodcode=RL32717; Todd Zywicki, *The Law of Presidential Transitions and the 2000 Election*, 2001 BYU L. Rev. 1573, 1609 n. 110 (2001) ("Hawaii's situation in 1960 is also important in that it provides the primary congressional precedent for congressional procedures for resolving disputes over two competing Certificates of Ascertainment."), available at https://digitalcommons.law.byu.edu/lawreview/vol2001/iss4/3/.

20.

In 2020, Georgia was confronted with the identical dilemma as Hawaii in 1960, except that in Georgia, the Democratic candidate for President had been certified as having carried the state, and it was the Republican candidate who filed a legal action contesting the election. That judicial contest was still pending on December 14, 2020 when the Presidential Electors were required by the ECA to meet and cast their votes. Indeed, no hearing or other proceeding had even been had in that contest.

21.

Based upon the materials that I have reviewed, the contingent Georgia Republican Presidential Electors received advice of legal counsel to take the actions they took on December 14, 2020, and they followed the Hawaii precedent precisely, using materially identical forms and the same procedures as the contingent 1960 Hawaii Democratic Presidential Electors. At the same time, the contingent Georgia Republican Presidential Electors publicly announced that the votes they cast and related actions they took were expressly contingent on the outcome of the pending election contest and were cast only to protect and preserve the remedies for that contest and the ability of the

State of Georgia to have a valid electoral ballot for Congress to count on January 6, 2021 regardless of the ultimate outcome that contest.

22.

Legally, the Georgia Democratic Presidential Electors were also acting contingently in casting their votes, as their status as Presidential Electors was directly contingent on the outcome of the pending judicial contest to the election. Despite this fact, the Georgia Democratic Presidential Electors made no similar announcement that their votes and actions on December 14, 2020 were contingent on the outcome of the election contest. They, however, have come under no criticism or scrutiny for having not done so.

23.

Based upon the Hawaii precedent as well as federal and Georgia law, when contingent Presidential Electors execute contingent electoral ballots under these circumstances, they are not required to insert into those ballots any reference to the pending election contest or that they are executing their ballots provisionally or contingently. Indeed, the insertion of such additional or surplus language into the Presidential Elector's ballots could render them subject to validity challenges. And by operation of Georgia and federal law, their contingent nature is obvious on their face.

24.

Tellingly, the contingent 1960 Hawaii Democratic Electors included no such reference in the certificates they executed. Instead, in their documents, they declared themselves to be "duly and legally appointed and qualified" and "certified by the Executive" even though they had not been so certified as of the date the certificates were executed. Additionally, they stated in those documents that "We hereby certify that the

lists of all the votes of the state of Hawaii given for President, and of all the votes given for Vice President, are contained herein." *See* Exhibit B. As noted, those ballots were ultimately the ones that Congress officially counted as the official electoral votes of Hawaii for the 1960 presidential election.

25.

Accordingly, the fact that the 2020 electoral ballots cast by the contingent Georgia Republican Presidential Electors did not include any explicit reference to the pending election challenge or the contingent nature of the ballots does not render them false or invalid. Instead, these ballots, which were prepared by and in the specific form advised by legal counsel, were in exactly the correct and necessary format for the contingent Georgia Republican Electors to perform their duties legally and validly as prescribed by the Constitution, federal and Georgia law.

26.

As noted, the 2020 Georgia Democratic Electors were also acting contingently when they met and voted. The Democrats also (appropriately) did not include any reference to the pending judicial election contest or the contingent nature of the ballots they were executing in their documents. Instead, both sets of contingent Presidential Electors by necessity completed and executed the requisite paperwork as prescribed by law and as though they possessed uncontested certificates at that time of execution.

27.

Additionally, transmission of the contingent Republican electoral ballots to Congress (and to the other entities required to receive them) at the time that they are executed is part of the legally required process under federal law to ensure that the ballots are valid and available to be counted by Congress if the judicial contest changes

the outcome of the election. In the 1960 Hawaii example, the contingent Democratic Presidential Electors not only executed their ballots as provided by federal law, but they also transmitted them to Congress and as otherwise required by federal law at the time that they executed them. Failure to transmit the ballots as required by law would put the validity of the electoral ballots at issue.

28.

The fact that there was a recount ordered by the court in the 1960 Hawaii election is irrelevant and does not distinguish the 1960 Hawaii situation from the 2020 presidential election in Georgia in any legally material way. The legally relevant point is that a judicial challenge was filed in Hawaii in 1960, that challenge was pending and unresolved at the time federal law required the presidential electors to cast their ballots. As a result, to preserve Hawaii's ability to have their electoral votes counted regardless of the ultimate outcome of the judicial challenge, both sets of presidential electors lawfully, prudently, and appropriately cast their ballots. In Hawaii, the court took action in response to that challenge, and the court ultimately entered judgment for the challenger, John Kennedy, and declared him the winner of the election. One of the steps to that result happened to be a recount, but that fact specific to the Hawaii situation has no legal relevance to the 2020 election challenge in Georgia that was pending when the electors were required to act on December 14, 2020. In Georgia, unlike in Hawaii (and contrary to Georgia law requiring a timely consideration), the court took *no* action on the pending election challenge – it did not even schedule a timely hearing, much less assess any of the evidence to determine what steps (such as a recount) may be necessary to adjudicate the challenge. Georgia's court could have ordered a recount, assessed the merits of the evidence submitted with the complaint in that case, or taken any number

of other actions to adjudicate the matter, up to and including declaring Trump as the actual winner of the Georgia election. The fact that the Hawaii court acted rapidly to resolve the pending issues and the Georgia court dragged its feet bears no legal or logical relevance as to the precedential value of the 1960 Hawaii election or to the propriety of the actions taken by Georgia s presidential electors on December 14, 2020, the date mandated by the ECA. And regardless, because the result of the litigation and any subsequent remedy the court might order remained unresolved as of that date, neither set of Georgia's 2020 presidential electors could have known on December 14, 2020 what actions the court would or would not take (including but not limited to ordering a recount) in adjudicating the election challenge or what the ultimate outcome of that challenge would be.

29.

In light of the 1960 Hawaii precedent and the widespread support from elected officials and legal scholars that the execution and submission of both presidential electoral ballots in a close election has received since then, reasonable attorneys could not have predicted that a presidential elector in 2020 taking the same actions taken in Hawaii in 1960 could or would be viewed anything but entirely proper; certainly they could not have reasonably predicted that any law enforcement official would ever suggest that any or all of these actions were criminal. Given the difficulties presented under current laws, the actions taken by the state of Georgia were the best available means for addressing extended electoral challenges that remain unresolved by the relevant deadlines. Once the challenges are resolved, the appropriate response should be for the State to disregard the losing slate of electors and certify the winning slate; there is no basis to criminally prosecute those who acted to ensure the state's electoral votes

would be counted in the event that known but unresolved election contests remain pending as of the deadline.[10]

30.

Based on my analysis of the historical record, particularly the example of the 1960 Hawaii election, it is my expert opinion that the contingent Republican Presidential Electors in Georgia in 2020 acted in a reasonable, proper, and lawful manner. Moreover, it is my opinion, shared by a consensus of experts who have considered the issue over the past several decades, that the casting of contingent electoral votes is not only reasonable, proper and lawful, but the best approach available to enable the resolution of election contests while preserving the ability of a state to have its electoral votes counted by Congress should a judicial contest change the outcome of the election. In conclusion, it is my opinion that the actions taken by the contingent Georgia Republican Presidential Electors *were* lawful, reasonable, proper, and necessary, and any suggestion that they could be "criminal" ignores legal and historical precedent, the reasoned advice of legal counsel received, and the plain language of the Constitution, federal and Georgia law.

[10] Although a full discussion of the constitutional implications of any State taking such action against its Presidential Electors is beyond the scope of this declaration, it is worth noting that the actions taken by the Republican presidential elector nominees in Georgia in 2020 enjoy broad constitutional protection, regardless of the Hawaii precedent.

Signed this day 11th July, 2023.

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PUBLICATIONS

BOOKS

Editor, UNPROFITABLE SCHOOLING: EXAMINING CAUSES OF, AND FIXES FOR, AMERICA'S BROKEN IVORY TOWER (with Neal McCluskey), (Cato Press, 2019).

LAW AND ECONOMICS: PRIVATE AND PUBLIC (with Maxwell Stearns and Tom Micelli), (West, 2018).

TEACHERS MANUAL TO LAW AND ECONOMICS: PRIVATE AND PUBLIC PUBLIC (with Maxwell Stearns and Tom Micelli), (West, 2018).

Editor, RESEARCH HANDBOOK ON AUSTRIAN LAW AND ECONOMICS (with Peter J. Boettke), (Edward Elgar, 2017).

CONSUMER CREDIT AND THE AMERICAN ECONOMY (with Thomas Durkin, Gregory Elliehausen, and Michael Staten), (Oxford University Press, 2014).

PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW (with Maxwell Stearns) (West Publishing, 2009).

Editor, *The Rule of Law, Freedom, and Prosperity*, 10 SUPREME COURT ECONOMIC REVIEW (Chicago: University of Chicago Press, 2003). 278 pp. ISBN: 0-226-99962-9).

- Reviewed by Professor William A. Fischel, 14(6) LAW AND POLITICS BOOK REV. 493-97 (June 2004).

ARTICLES AND BOOK CHAPTERS

Simple Rules for a Complex Regulatory World: The Case of Financial Regulation (with Christopher Mufarrige), __ EUROPEAN J. OF L. & ECON. __ (Forthcoming 2020), working paper *available* here.

Bruce Yandle and the Art of Economic Communication, *in* THE LEGACY OF BRUCE YANDLE 67-98 (Donald J. Boudreaux and Roger Meiners, eds., 2020), *available* here.

Friedrich A. Hayek (with Edward Peter Stringham), *in* ENCYCLOPEDIA OF LAW & ECONOMICS (Alain Marciano and Giovanni Battista Ramello, eds.) (2019).

A Chip Off the Old Block or a New Direction for Payment Card Security? The Law and Economics of the U.S. Transition to EMV (with James Cooper), 2018 MICH. ST. L. REV. 869 (2018).

The Behavioral Economics of Behavioral Law & Economics, 5 REVIEW OF BEHAVIORAL ECONOMICS 439 (2018).

The Chrysler and General Motors Bankruptcies, *in* RESEARCH HANDBOOK ON CHAPTER 11 REORGANIZATION 298 (Barry Adler, ed., 2020).

The Changing of the Guard: The Political Economy of Administrative Bloat in Higher Education (with Christopher Koopman), *in* UNPROFITABLE SCHOOLING: EXAMINING CAUSES OF, AND FIXES FOR, AMERICA'S BROKEN IVORY TOWER 147 (Todd J. Zywicki and Neal McCluskey, eds., 2019).

Introduction (with Neal McCluskey), *in* UNPROFITABLE SCHOOLING: EXAMINING CAUSES OF, AND FIXES FOR, AMERICA'S BROKEN IVORY TOWER 1 (Todd J. Zywicki and Neal McCluskey, eds., 2019).

Law and Economics: The Contributions of the Austrian School of Economics (with Peter J. Boettke), *in* RESEARCH HANDBOOK ON AUSTRIAN LAW AND ECONOMICS 3 (Todd J. Zywicki and Peter J. Boettke, eds., 2017).

Austrian Law and Economics and Efficiency in the Common Law, *in* RESEARCH HANDBOOK ON AUSTRIAN LAW AND ECONOMICS 192 (Todd J. Zywicki and Peter J. Boettke, eds. 2017).

Bankruptcy Judge as Central Planner (with Shruti Rajagopalan), *in* RESEARCH HANDBOOK ON AUSTRIAN LAW AND ECONOMICS 371 (Todd J. Zywicki and Peter J. Boettke, eds., 2017).

Conclusion: The Future of "Austrian" Law and Economics (with Peter J. Boettke), *in* RESEARCH HANDBOOK ON AUSTRIAN LAW AND ECONOMICS 423 (Todd J. Zywicki and Peter J. Boettke, eds., 2017).

Behavioral Law & Economics Goes to Court: The Fundamental Flaws in the Behavioral Law & Economics Arguments Against No-Surcharge Laws, 82 MISSOURI L. REV. 770 (2017) (Symposium on behavioral law & economics).

Punishing Rewards: How Clamping Down on Credit Card Interchange Fees Can Hurt the Middle Class (with Julian Morris, Geoffrey A. Manne, and Ian Lee), Macdonald-Laurier Institute (Nov. 2017).

Unreasonable and Disproportionate: How the Durbin Amendment Harms Poorer Americans and Small Businesses (with Geoffrey A. Manne and Julian Morris), International Center for Law & Economics Working Paper (April 25, 2017).

Dodd-Frank at Five Years: Its Impact on Freedom and the Rule of Law, 43 J. OF FINANCIAL TRANSFORMATION 62 (2016).

Do Americans Really Save Too Little and Should We Nudge Them to Save More? The Ethics of Nudging Retirement Savings, 16 GEORGETOWN J. OF LAW & PUBLIC POLICY 877 (2017).

Market-Reinforcing versus Market-Replacing Consumer Finance Regulation, in REFRAMING FINANCIAL MARKET REGULATION: ENHANCING STABILITY AND PROTECTING CONSUMERS (Hester Peirce and Benjamin Klutsey eds. 2016).

Market Based Nudges: How Financial Markets Improve Their Own Choice Architecture, in NUDGE THEORY IN ACTION: BEHAVIORAL DESIGN IN POLICY AND MARKETS (2016).

The Rule of Law During Times of Economic Crisis, in ECONOMIC AND POLITICAL CHANGE AFTER CRISIS: PROSPECTS FOR GOVERNMENT, LIBERTY, AND THE RULE OF LAW 36 (Stephen H. Balch and Ben Powell, eds., 2016).

Rent-Seeking, Crony Capitalism, and the Crony Constitution, 23 SUPREME CT. ECON. REV. 77 (2016).

The Law and Economics of Consumer Debt Collection and Its Regulation, 28 LOYOLA CONSUMER L. J. 167 (2016).

The CFPB's Arbitration Study: A Summary and Critique (with Jason Scott Johnston), 35(5) BANKING AND FINANCIAL SERVICES POLICY REPORT 9 (May 2016).

Consumer Credit and the American Economy: An Overview (with Thomas A. Durkin and Gregory Elliehausen), 11 J. L. ECON. & POL'Y 279 (2015).

Dodd-Frank at Five Years: Implications for Consumers and the Economy, 34(11) BANKING AND FINANCIAL SERVICES POLICY REPORT 1 (Nov. 2015).

The Consumer Financial Protection Bureau and the Return of Paternalistic Command-and-Control Regulation, 16(2) ENGAGE 48 (2015).

Hayek's Jurisprudence: And Ratnapala's Hayek, 33(2) UNIVERSITY OF QUEENSLAND LAW JOURNAL 311 (2015).

Bruno Leoni's Legacy and Continued Relevance, 30(1) J. OF PRIVATE ENTERPRISE 131-41 (2015).

Behavior, Paternalism, and Policy: Evaluating Consumer Financial Protection (with Adam C. Smith), 9 NYU J. OF LAW & LIBERTY 201 (2015).

An Assessment of Behavioral Law and Economics Contentions and What We Know Empirically About Credit Card Use by Consumers (with Thomas A. Durkin and Gregory Elliehausen), 22 SUPREME COURT ECON. REV. 1 (2014).

Commentary on CFPB Report: Data Point: Checking Account Overdraft (with G. Michael Flores) (2014).

Price Controls on Payment Card Interchange Fees: The U.S. Experience (with Geoffrey Manne and Julian Morris), ICLE Financial Regulatory Research Program White Paper 2014-2 (2014).

Keynote Address: Is There a George Mason School of Law and Economics? 10 J. LAW, ECONOMICS & POLICY 543 (2014).

Uncertainty, Evolution, and Behavioral *Economic Theory* (with Geoffrey Manne), 10 J. OF LAW, ECONOMICS & POLICY 555 (2014).

Overdraft Protection and Consumer Protection: A Critique of the CFPB's Analysis of Overdraft Programs (with G. Michael Flores and Brian M. Deignan), 33(3) BANKING AND FINANCIAL SERVICES POLICY REPORT 10 (March 2014).

The Consumer Financial Protection Bureau, *in* PERSPECTIVES ON DODD-FRANK AND FINANCE (2014, MIT Press).

The Behavioral Law and Economics of Fixed-Rate Mortgages (And Other Just-So Stories), 21 SUPREME COURT ECON. REV. 157 (2014).

Payday Lending, Bank Overdraft Protection, and Fair Competition at the Consumer Financial Protection Bureau (with Robert L. Clarke), 33 REVIEW OF BANKING AND FINANCIAL LAW 235 (2013-2014).

Commentary: CFPB Study of Overdraft Programs (with G. Michael Flores), MERCATUS RESEARCH (Nov. 4, 2013).

Credit Where It's Due: How Payment Cards Benefit Canadian Merchants and Consumers, and How Regulation Can Harm Them (with Ian Lee, Geoffrey A. Manne, and Julian Morris), MacDonald-Laurier Institute (Oct. 2013).

The Economics and Regulation of Network Branded Prepaid Cards, 65 FLORIDA L. REV. 1477 (2013).

The Consumer Financial Protection Bureau: Savior or Menace?, 81 GEORGE WASHINGTON L. REV. 856 (2013).

Libertarianism, Law and Economics, and The Common Law, 16 CHAPMAN L. REV. 309 (2013) (symposium on "Libertarian Legal Theory").

The Bankruptcy Clause, *in* THE HERITAGE GUIDE TO THE CONSTITUTION (2d ed. 2013).

The Coinage Clause, *in* THE HERITAGE GUIDE TO THE CONSTITUTION (2d ed. 2013).

Senate Vacancies, *in* THE HERITAGE GUIDE TO THE CONSTITUTION (2d ed. 2013).

Auto Bailout or UAW Bailout? Taxpayer Losses Came from Subsidizing Union Compensation, HERITAGE FOUNDATION BACKGROUNDER #2700 (June 13, 2012).

The Senate and Hyper-Partisanship: Would the Constitution Look Different if the Framers Had Known that Senators Would be Elected in Partisan Elections? 10 GEORGETOWN J. L. & PUB. POL'Y 375 (2012).

The Economics and Regulation of Bank Overdraft Protection, 69 WASHINGTON & LEE L. REV. 1141 (2012).

Economic Uncertainty, The Courts, and The Rule of Law, 35 HARVARD J. OF L. & PUB. POL'Y 195 (2012).

The Balancing of Markets, Litigation, and Regulation, 7 J. OF LAW, ECONOMICS, AND POL'Y 351 (2010).

Perspectives on Dodd-Frank Wall Street Reform and Consumer Protection Act, 7 J. OF LAW, ECONOMICS, AND POL'Y 307 (2010).

Protecting the Public Health: Litigation and Obesity, 7 J. OF LAW, ECONOMICS, AND POL'Y 259 (2010).

The Auto Bailout and the Rule of Law, NATIONAL AFFAIRS, Issue 7, p. 66 (Spring 2011).

Does Increased Litigation Increase Justice in a Second-Best World?, *in* THE AMERICAN ILLNESS (Frank Buckley, ed., 2013, Yale University Press).

Hayekian Anarchism (with Edward Peter Stringham), 78 J. ECON. BEHAVIOR & ORGANIZATION 290 (2011).

Rivalry and Superior Dispatch: An Analysis of Competing Courts in Medieval and Early Modern England (with Edward Peter Stringham), 147 PUBLIC CHOICE 497 (2011).

Common Law and Economic Efficiency (with Edward Peter Stringham), *in* 7 ENCYCLOPEDIA OF LAW AND ECONOMICS: THE PRODUCTION OF LEGAL RULES (2d ed., Francesco Parisi, ed., 2012).

The Economics of Payment Card Interchange Fees and the Limits of Regulation, ICLE FINANCIAL REGULATORY PROGRAM WHITE PAPER SERIES (June 2, 2010).

Expansion of Liability Under Public Nuisance (with Henry N. Butler), 18 SUPREME COURT ECONOMIC REVIEW 1 (2010).

Money To Go, 33(2) REGULATION 32 (2010).

Subprime Mortgages: What We Have Learned From a New Class of Homeowners (with Satya Thallam), *in* LESSONS FROM THE FINANCIAL CRISIS: CAUSES, CONSEQUENCES, AND OUR ECONOMIC FUTURE 181 (2010).

Anna Nicole Smith Goes Shopping: The New Forum Shopping Problem in Bankruptcy, 2010 UTAH L. REV. 511 (2010).

Consumer Use and Government Regulation of Title Pledge Lending, 22 LOYOLA CONSUMER L. REV. 425 (2010).

Three Problematic Truths About the Consumer Financial Protection Agency Act of 2009 (with Joshua D. Wright), 1 LOMBARD STREET, No. 12 (2009).

The Market for Information and Credit Card Regulation, 28(1) BANKING AND FINANCIAL SERVICES POLICY REPORT 13 (2009).

The Law and Economics of Subprime Lending (with Joseph Adamson), 80 UNIVERSITY OF COLORADO L. REV. 1 (2009).

Spontaneous Order and the Common Law: Gordon Tullock's Critique, 135 PUBLIC CHOICE 35 (2008).

Posner, Hayek, and the Economic Analysis of Law (with Anthony B. Sanders), 93 IOWA L. REV. 559 (2008).

Bankruptcy, *in* THE CONCISE ENCYCLOPEDIA OF ECONOMICS (2d ed., David Henderson ed. 2008).

Consumer Bankruptcy, Doctrinal Issues in, *in* ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES (2008).

Evolutionary Psychology, *in* ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES (2008).

Institutional Review Boards as Academic Bureaucracies: An Economic and Experiential Analysis, 101 NORTHWESTERN L. REV. 861 (2007).

The U.S. Federal Trade Commission and Competition Advocacy: Lessons for Latin American Competition Policy (with James C. Cooper), in LATIN AMERICAN ANTITRUST DEVELOPMENTS (D. Daniel Sokol ed.) (2007).

Group Selection, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES, 2ND ED. (2007).

Institutional Review Boards and Academic Bureaucracies, 101 NORTHWESTERN L. REV. 861 (2007).

Is Forum-Shopping Corrupting America's Bankruptcy Courts? 94 GEORGETOWN L. J. 1141 (2006) (Review essay of Lynn M. LoPucki, *Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts*).

Institutions, Incentives, and Consumer Bankruptcy Reform, 62 WASHINGTON & LEE L. REV. 1071 (2005).

An Economic Analysis of the Consumer Bankruptcy Crisis, 99 NORTHWESTERN L. REV. 1463 (2005).

Wine, Commerce, and the Constitution (with Asheesh Agarwal), 1 NYU J. LAW & LIBERTY 609 (2005).

The Original Meaning of the 21st Amendment (with Asheesh Agarwal), 8 GREEN BAG 2d 135 (2005).

Wine Wars: Uncorking E-Commerce? (with Asheesh Agarwal and Jerry Ellig, 27(4) REGULATION 10 (Winter 2004-2005).

Obesity and Advertising Policy (with Debra Holt and Maureen Ohlhausen), 12 GEORGE MASON L. REV. 979 (2004) (Symposium on Obesity, Health Claims, and Advertising).

The Theory and Practice of Competition Advocacy at the FTC (with James Cooper and Paul Pautler), 72 ANTITRUST L. J. 1091 (2005) (Symposium on 90th Anniversary of FTC).

The FTC and State Action: Evolving Views on the Proper Role of Government (with John T. Delacourt), 72 ANTITRUST L.J. 1075(2005) (Symposium on 90th Anniversary of FTC).

The Bankruptcy Clause, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 112 (2005).

The Coinage Clause, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 114 (2005).

Senate Vacancies, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 415 (2005).

Reconciling Group Selection and Methodological Individualism, 7 ADVANCES IN AUSTRIAN ECONOMICS 267 (2004).

The Past, Present, and Future of Bankruptcy Law in America, 101 MICHIGAN L. REV. 2016 (2003).

The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis, 97 NORTHWESTERN L. REV. 1551 (2003).

The Rule of Law, Freedom, and Prosperity, 10 SUPREME COURT ECONOMIC REVIEW 1 (2003), *reprinted and translated El Estado De Derecho, La Libertad y La Prosperidad*, 4(2) APUNTES DE ECONOMIA Y POLITICA: ANALISIS ECONOMICO DE LAS DECISIONES PUBLICAS 2 (2005).

Baptists? The Political Economy of Environmental Interest Groups, 53 CASE WESTERN RESERVE LAW REVIEW 315 (2002) (symposium on BJORN LOMBORG, THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD (2001)).

Competition Policy and Regulatory Reforms: Means and Ends, *in* HOW SHOULD COMPETITION POLICY TRANSFORM ITSELF? DESIGNING THE NEW COMPETITION POLICY (2003).

Corporate Law Practice, *in* THE OXFORD COMPANION TO AMERICAN LAW (Kermit Hall ed.) (2002).

Bankruptcy Law As Social Legislation, 5 TEX. REV. L. & POLITICS 393 (2001).

The Law of Presidential Transitions and the 2000 Election, 2001 BYU L. REV. 1573 (2001).

Evolutionary Psychology and the Social Sciences, 13 *Humane Studies Review*, Issue 1 (Fall 2000) (On-Line Journal available at http://www.humanestudiesreview.org/index.html)

With Apologies to Screwtape: A Response to Professor Alexander, 9 J. BANKR. L. & PRACTICE 613 (2000).

Book Review Essay, BRUCE G. CARRUTHERS & TERENCE C. HALLIDAY, RESCUING BUSINESS: THE MAKING OF CORPORATE BANKRUPTCY LAW IN ENGLAND AND THE UNITED STATES, 16 BANKR. DEV. J. 361 (2000).

The Economics of Credit Cards 3 CHAPMAN L. REV. 79 (2000) (Selected to participate in Chapman Law School "Rising Stars in Bankruptcy" symposium).

Talk is Cheap: The Existence Value Fallacy (with Donald J. Boudreaux and Roger E. Meiners), 29 ENVIRONMENTAL LAW 765 (1999).

Was Hayek Right about Group Selection After All? 13 REV. OF AUSTRIAN ECON. 81 (2000).

Industry and Environmental Lobbyists: Enemies or Allies? in THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW 185 (Roger E. Meiners and Andrew P. Morris eds. 2000).

Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Decision-Making (with A.C. Pritchard) 77 N. C. L. REV. 409 (1999).

Constitutions and Spontaneous Orders: A Response to McGinnis's "In Praise of Decentralized Traditions and their Preconditions" (with A.C. Pritchard), 77 N. C. L. REV. 537 (1999).

Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform, 73 TULANE L. REV. 845 (1999).

Rewrite the Bankruptcy Code, Not the Scriptures: Protecting a Debtor's Right to Tithe in Bankruptcy, 1998 WISCONSIN L. REV. 1223 (1998).

It's Time for Means Testing (with Judge Edith H. Jones), 1999 BYU L. REV. 177 (1999).

The Nature of the State and the State of Nature: A Comment on Grady and McGuire's "The Nature of Constitutions," 1 J. BIOECONOMICS 241 (1999) (The State and the Ethnic Group: The Bioeconomics of Economic Organizations).

Mend It, Don't End It: The Case for Retaining the Disinterestedness Requirement for Debtor in Possession's Counsel, 18 MISS. COL L. REV. 291 (1998) (Symposium on Bankruptcy Law).

Of Bubbling Pots and Bankruptcy Conflicts: A Reply to Smith and Wolfram, 18 MISS. COL L. REV. 399 (1998).

Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals, 45 CLEVELAND ST. L. REV. 165 (1997) (solicited article).

Epstein & Polanyi on Simple Rules, Complex Systems, and Decentralization, 9 CONST. POL. ECON. 143 (1998).

A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large-Number Externality Problems, 46 CASE WESTERN RESERVE L. REV. 961 (1996).

Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment, 73 OREGON L. REV. 1007 (1994).

Federal Judicial Review of State Ballot Access Regulation: Escape from the Political Thicket, 20 T. MARSHALL L. REV. 87 (1994).

Cramdown and the Code: Calculating Cramdown Interest Rates Under the Bankruptcy Code, 19 T. MARSHALL L. REV. 241 (1994).

Foreword to Symposium on Bankruptcy Law, 18 MISS. COL. L. REV. 281 (1998).

The Bankruptcy Rules: 1994, in 1995-96 ANNUAL SURVEY OF BANKRUPTCY LAW 1111 (William L. Norton, Jr. ed., 1995) (co-authored with Matthew W. Levin).

Book Review, ROBERT WRIGHT, NONZERO: THE LOGIC OF HUMAN DESTINY, 51 IDEAS ON LIBERTY 61 (2001).

Book Review, GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 4 INDEPENDENT REV. 147 (1999).

Book Review, JEREMY SHEARMUR, BEYOND HAYEK, 11 CONST. POL. ECON. 205 (2000).

Book Review, BRUCE YANDLE, COMMON LAW AND COMMON SENSE FOR THE ENVIRONMENT, 9 CONST. POL. ECON. 349 (1998).

Book Review, CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT, 8 CONST. POL. ECON. 355 (1997).

Book Review, C.H. HOEBEKE, THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT, 1 INDEPENDENT REVIEW 439 (1996).

WORKING PAPERS

Wine Wars: The 21st Amendment and Discriminatory Bans to Direct Shipment of Wine, available in http://papers.ssrn.com/sol3/papers.cfm?abstract_id=604803.

Why So Many Bankruptcies and What to Do About It: An Economic Analysis of Consumer Bankruptcy Law and Bankruptcy Reform, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=454121

EXPERIENCE

CHAIR, CONSUMER FINANCIAL PROTECTION BUREAU TASKFORCE ON FEDERAL CONSUMER FINANCIAL LAW, WASHINGTON, DC 2020-21
Chaired a federal taskforce that produced a 2 volume, 900 page comprehensive report on the consumer financial protection system and recommendations for reforms.

ANTONIN SCALIA LAW SCHOOL, GEORGE MASON UNIVERSITY, ARLINGTON, VA 1998-PRESENT.
Executive Director, Law and Economics Center, 2015-2017. George Mason University Foundation Professor of Law, 2009-present; Professor of Law, 2002-2009; Associate Professor, 2000-2002; Assistant Professor, 1998-2000. Editor, *Supreme Court Economic Review*, 2006-present, 2002-2003. Senior Scholar, Mercatus Center; Senior Fellow, F.A. Hayek Program for Advanced Study in Philosophy, Politics, and Economics.

SENIOR FELLOW, CATO INSTITUTE, WASHINGTON, DC (2018-PRESENT).

VANDERBILT UNIVERSITY LAW SCHOOL, NASHVILLE, TN 2007.
Visiting Professor of Law.

GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC 2004-2005.
Visiting Professor of Law, August 2004-May 2005.

DIRECTOR, OFFICE OF POLICY PLANNING, FEDERAL TRADE COMMISSION, WASHINGTON, DC MAY 2003-JULY 2004.
Director of Federal Trade Commission's policy office (SES Appointment). Responsible for helping to conceive and execute policies and priorities of Commission on issues of Consumer Protection, Competition, and Competition Advocacy.

BOSTON COLLEGE SCHOOL OF LAW, BOSTON, MA 2002.
Visiting Professor.

MISSISSIPPI COLLEGE SCHOOL OF LAW, JACKSON, MISSISSIPPI, 1996-1998.
Assistant Professor of Law.

ALSTON & BIRD, ATLANTA, GEORGIA, 1994-1996.
Representations included SportsTown, Inc., Chapter 11 Debtor in Possession; Sonic Communications, Inc., Chapter 11 Operating and Chapter 7 Trustee; Krystal Corp.,

Unsecured Creditors Committee; and a variety of secured and unsecured creditors in federal bankruptcy and state collection proceedings.

LAW CLERK TO HON. JUDGE JERRY E. SMITH, UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, HOUSTON, TEXAS, 1993-1994.

SUMMER LAW CLERK FOR HON. JUDGE ALEX KOZINSKI, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, PASADENA, CALIFORNIA, 1991.

HONORS AND AWARDS

Chair, Section on Law & Economics, Association of American Law Schools (2019).

Winner (with Edward Stringham), 2012 Society for Development of Austrian Economics Prize for Best Article in Austrian Economics.

Invited Lecture, Dean Lindsey Cowen Lecture in Business Law and Regulation Presented by the Center for Business Law and Regulation at Case Western Reserve University School of Law (March 3, 2011).

George Mason Foundation Professor of Law (2009-present).

Institute for Humane Studies Charles G. Koch Outstanding IHS Alum Award (2009).

Searle Fellow, George Mason University (Fall 2008).

Senior Fellow, Goldwater Institute (2008-2015).

W. Glenn Campbell and Rita Ricardo-Campbell National Fellow and the Arch W. Shaw National Fellow at the Hoover Institution on War, Revolution and Peace (Fall 2008).

Senior Scholar, Mercatus Center at George Mason University (2005-present).

~~Senior Fellow, James M. Buchanan Center for the Study of Political Economy~~ (2005-present).

Honorable Mention American College of Consumer Financial Services Lawyers 2006 writing competition for *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NORTHWESTERN L. REV. 1463 (2005).

Recipient of 2001 "Win Whittaker Award for Student Development" as Professor of the Year at George Mason University School of Law.

Recipient of grant from The John Templeton Foundation Freedom Project to teach a course on "The Rule of Law, Freedom, and Prosperity." (Co-taught with Peter Boettke, Department of Economics, George Mason University). Fall 2001.

Recipient of grant from The John Templeton Foundation Freedom Project to teach a course on "The Rule of Law and the Legal Foundations of a Free Society." (Co-taught with Peter Boettke, Department of Economics, George Mason University). Fall 1999.

TEACHING INTERESTS

Bankruptcy, Contracts, Secured Transactions, Business Associations, Mergers and Acquisitions, Corporate Finance, Commercial Law, Electronic Commerce, Payment Systems, Consumer Law, Law & Economics, Public Choice & The Law, Evolutionary Analysis of Law, Law & Behavioral Economics. *Currently Teaching (2002-03):* Bankruptcy, Contracts, Law & Behavioral Economics.

RESEARCH INTERESTS

Bankruptcy, Contracts, Law and Economics, Evolutionary Analysis of Law, Law & Behavioral Economics, Consumer Law, Environmental Law and Economics, Public Choice, Constitutional Economics, Business Associations, Electronic Commerce.

LAW SCHOOL AND UNIVERSITY SERVICE

Member of Dean Search Committee (2014-2015).
Editor, *Supreme Court Economic Review* Volume 1 (2001-2002), Volume 17-23 (2011-2017).
Member of Dean Retention Committee (Spring 2001).
Member of Faculty Appointments Committee (1999-2002, 2004-current); Clerkship Committee (2000-02, 2005-current).
Faculty Advisor, St. Thomas More Catholic Law Students Society (1999-2007).
Member of several dissertation committees for Economics Department PhD Candidates.

EDUCATION

UNIVERSITY OF VIRGINIA SCHOOL OF LAW

J.D., 1993
Executive Editor, Virginia Tax Review.
John M. Olin Scholar in Law and Economics.

CLEMSON UNIVERSITY

M.A. Economics, 1990.
H.W. Close Fellow in College of Commerce and Industry.
Only Student Member of Clemson Law and Economics Workshop.
Training in Statistics, Econometrics, and Computer Analysis.

DARTMOUTH COLLEGE

A.B. cum Laude with High Honors in Government Major, 1988.
Rufus Choate Scholar.
Three Citations for Exceptional Class Performance.

CONGRESSIONAL TESTIMONY

Testimony before the Senate Committee on Banking, Housing and Urban Affairs, "Assessing the Effects of Consumer Credit Regulations" (Apr. 5, 2016).

Testimony before the House Committee on Financial Services, "The Dodd-Frank Act Five Years Later: Are We Freer?" (Sept. 17, 2015).

Testimony before the House Committee on Financial Services, "The Dodd-Frank Act Five Years Later: Are We More Stable?" (July 9, 2015).

Testimony before the House Committee on Oversight and Government Relations, Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs, "The Administration's Auto Bailouts and the Delphi Pension Decisions: Who Picked the Winners and Losers?" (July 10, 2012).

Testimony before the House Committee on Oversight and Government Relations, Subcommittee on TARP, Financial Services and Bailouts of Public and Private Programs, "Who's Watching the Watchmen?" (May 24, 2011).

Testimony before United States House of Representatives, Committee on Financial Services and Committee on Small Business, "The Condition of Small Business and Commercial Real Estate Lending in Local Markets," (Feb. 26, 2010).

Testimony before United States House of Representatives, Committee on Financial Services, "Banking Industry Perspectives on the Obama Administration's Financial Regulatory Reform Proposals" (July 15, 2009).

Testimony before United States House of Representatives, Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, "Circuit City Unplugged: Why Did Chapter 11 Fail to Save 34,000 Jobs?" (March 11, 2009).

Testimony before the United State Senate Committee on Banking, Housing, and Urban Affairs, "Modernizing Consumer Protection in the financial Regulatory System: Strengthening Credit Card Protections" (February 12, 2009).

Testimony before the United States House of Representatives, Financial Services Committee, Subcommittee on Financial Institutions and Consumer Credit, "Credit Card Practices: Current Consumer and Regulatory Issues" (April 26, 2007).

Testimony before the United States House of Representatives, Judiciary Committee, Subcommittee on Commercial and Administrative Law, "Hearing on Working Families in Financial Crisis: Medical Debt and Bankruptcy" (July 17, 2007).

Testimony before United States Senate, Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, "Oversight of the Implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act" (December 5, 2006).

Testimony before United States Senate, Committee on the Judiciary, "Bankruptcy Reform" (February 10, 2005).

Testimony before United States House of Representatives, Committee on Commerce, Trade, and Consumer Protection, "E-Commerce: The Case of Online Wine Sales and Direct Shipment" (October 30, 2003).

Testimony before Federal Judicial Conference Committee on Bankruptcy Rules, "Proposed Amendments to the Bankruptcy Rules" (January 26, 2001).

Testimony before United States House of Representatives, Committee on Government Reform, Subcommittee on Government Management, Information, and Technology, on "Transitioning to a New Administration: Can the Next President Be Ready?" (December 4, 2000).

Testimony before United States House of Representatives, Committee on the Judiciary, Subcommittee on Commercial and Administrative Law on "Perspectives on Consumer Bankruptcy and the Bankruptcy Reform Act of 1999" (March 17, 1999).

Testimony before Joint Hearing of the United States Senate, Committee on the Judiciary, Judiciary Subcommittee on Administrative Oversight and the Courts and House of Representatives, Committee on the Judiciary, Subcommittee on Commercial and Administrative Law on "The Bankruptcy Reform Act of 1999" (March 11, 1999).

Testimony before United States Senate, Committee on the Judiciary, Judiciary Subcommittee on Administrative Oversight and the Courts on " Bankruptcy Issues in Review: The Bankruptcy Code's Effect on Religious Freedom and A Review of the Need for Additional Bankruptcy Judgeships" (September 22, 1997).

PROFESSIONAL ACTIVITIES

Consumer Representative, Debt Buyers Association Certification Council (2013-2015).

Board of Directors, Competitive Enterprise Institute (2013-2016; 2019-present), Chairman (2014-2016).

Senior Fellow, F.A. Hayek Program on Politics, Philosophy, and Economics (2012-present).

Board of Trustees, Center for Excellence in Higher Education (2010-present).

Board of Trustees, Yorktown University (2009-2016).

Board of Trustees, Institute for Humane Studies (2009-present).

Editor, *Supreme Court Economic Review* (2001-2003, 2006-present).

Board of Directors (2007-2015) and Advisory Council (2006-2015), Financial Services Research Program.

Board of Directors (2008-present) and Chair of Academic Advisory Council (2000-present), The Bill of Rights Institute.

Senior Fellow, Goldwater Institute (2007-2012).

Board of Trustees, Foundation for Research on Economics and the Environment (2009-present).

Member, United States Department of Justice Study Group on "Identifying Fraud, Abuse and Errors in America's Bankruptcy System" (2006-2007).

Alumni Trustee, Dartmouth College Board of Trustees (2005-2009).

Chair, Academic Advisory Panel, McCormick-Tribune Foundation Freedom Museum, Chicago, Illinois (August 2004-present).

Advisory Board, *American Bankruptcy Institute Law Review* (2003-present).

Chair, Academic Advisory Panel, "We the People in IMAX," IMAX Film with accompanying educational material.

Referee, *American Political Science Review; Contemporary Economic Policy; Review of Austrian Economics*; *Journal of Institutional and Theoretical Economics*; *Philosophy, Politics, and Economics*; *Journal of Bioeconomics*; *Public Choice*; *Supreme Court Economic Review* (2000-present).

Research Fellow, International Center for Economic Research (ICER), Turin, Italy (May-June, 2002).

Advisory Council, Centro para el Analisis de law Decisiones Publicas, Universidad de Francisco Marroquin, Guatemala City, Guatemala (2000-c.2008).

Consejo Consultivo of the Centro de Opcion Publica, Universidad de Francisco Marroquin, Guatemala (Academic Advisory Council of Public Choice Center at University of Francisco Marroquin in Guatemala) (2000-c.2008).

Senior Research Fellow, Program on Markets and Institutions, James Buchanan Center for Political Economy at George Mason University (2001-2012).

Contributing Editor, NORTON BANKRUPTCY TREATISE Chapter 51, Property of the Estate (1997-present).

Co-Chair, Bankruptcy Subcommittee, Federalist Society Financial Services and E-Commerce Practice Group (1999-present).

Co-Authored several proposals and position papers for the National Bankruptcy Review Commission (1997).

Member, American Bankruptcy Institute (1999-present).

SELECTED MEDIA

TELEVISION

"The Larry Parks Show" (June 7, 2012) discussing "The Rule of Law."

Fox Business, Freedom Watch with Andrew Napolitano (January 13, 2012) discussing "Food Advertising Regulation."

Fox Business, "The Willis Report" (Oct. 5, 2011) discussing "The Dick Durbin Bank Fees."

Fox Business, "The Willis Report" (Jan. 4, 2011) discussing "Dodd-Frank and the Return of the Loan Shark."

Fox News, John Stosell's "Top 10 Politicians' Promises Gone Wrong" (Dec. 17, 2010).

NBC Nightly News (Oct. 17, 2010) discussing public employee pensions.

ABC World News Tonight (June 3, 2009) discussing General Motors bankruptcy.

Fox Business, "Neil Caputo Show" (May 14, 2009) to discuss "Chrysler and the Rule of Law."

Fox News, "Fox and Friends" (December 19, 2008) discussing reorganization of automotive industry.

PBS, "The Newshour with Jim Lehrer" (October 17, 2005) discussing bankruptcy reform legislation.

CNN, "Lou Dobbs Tonight" (March 2005) discussing bankruptcy reform legislation.

CNBC, (July 2002) discussing WorldCom Bankruptcy.

CNBC, "Business Center" (February 6, 2002) discussing Congressional Hearings on Enron matter.

CNBC, "Business Center" (February 1, 2002) discussing Enron bankruptcy.

ABC World News Tonight, "Bankruptcy Reform" (February 2001).

Bloomberg News, "Bankruptcy Reform" (February 2001).

CNNfn, "Bankruptcy Reform" (February 2001).

Bloomberg News (November 2000).

RADIO

The Bob Zadek Show, "Repeal the 17th Amendment?" (June 24, 2012), listen here.

WTOP Radio, "Obama Acts Alone in Picking Head of Consumer Protection Bureau" (Jan 4, 2011), listen here.

John Batchelor Show, "The Auto Bailouts and the Rule of Law" (April 25, 2011), listen here.

"To The Point," NPR, "The Supreme Court and the Bankrupt: Is Debt the American Way?" (Jan. 14, 2011), listen here.

"On Point," NPR, "Pension Envy, Pension Crisis" (July 28, 2010) discussing public employee pensions, listen here.

Lou Dobbs Show to Discuss "Chrysler and the Rule of Law" (May 14, 2009).

Jerry Doyle Show to discuss "Chrysler and the Rule of Law" (May 13, 2009).

The Diane Rehm Show to discuss "Credit Card Holders' Bill of Rights" (May 5, 2009).

California Commerce (with John McCauley), "Regulation of Consumer Credit," listen here.

California Commerce (with John McCauley), "Modifying Mortgages in Bankruptcy," listen here.

Econtalk (with Russ Roberts), "Zywicki on Debt and Bankruptcy," Podcast, listen here.

The Exchange, New Hampshire Public Radio, "Bankruptcy Law Reform," listen here.

American Radioworks Documentary, "Bankrupt: Maxed Out in America," listen here.

Appearance on "The Conversation" to discuss "New Consumer Bankruptcy Laws," KUOW Radio Seattle (Sept. 20, 2005), Audio available here.

Regular Commentator on "The Laura Ingraham Show"

Appearance on "The Connection," National Public Radio, to discuss Bankruptcy Reform (March 2002).

Appearance on NPR "The Diane Rehm Show" to discuss Bankruptcy Reform (May 25, 2000).

Appearance on CNN "Burden of Proof" to discuss AOL-Time Warner merger (March 2000).

Appearance on PBS "The Newshour with Jim Lehrer" to discuss bankruptcy reform (June 14, 1999).

PRINT

The CFPB Could Be a Force For Good, WALL ST. J. (Feb. 19, 2018).

Durbin's Debit-Card Price Controls Hit the Poor Hardest (with Julian Morris), WALL ST. J. (May 1, 2017).

The Constitution Says Nothing About Behavioral Economics (with Geoffrey A. Manne), WALL ST. J. (Man. 9, 2017).

Credit is a Powerful Tool for American Families (with Thomas A. Durkin), WASHINGTON POST (April 17, 2015).

Overdraft Protection Rules Could Hurt Consumers More Than They Help (with G. Michael Flores), AMERICAN BANKER (November 24, 2014).

A Nobel Economist's Caution About Government: Friedrich Hayek Warned that Intervening can Make Things Worse. ObamaCare and Dodd-Frank, Anyone? (with Donald J. Boudreaux), WALL STREET JOURNAL, page A15 (Oct. 13, 2014).

The new EU price controls that will hold back a cashless future--and hit the poor (with Geoffrey Manne and Julian Morris), CITY A.M. (London, England) (June 9, 2014).

If you want to whiten the economy, payments should be made electronically, ZIARUL FINANCIAR (Bucharest, Romania) (May 13, 2014).

America's Taxpayers Lost Big in UAW Bailout (with James Sherk), DETROIT NEWS (June 26, 2012).

Obama's United Auto Workers Bailout (with James Sherk), WALL STREET JOURNAL, page A19 (June 13, 2012).

Spongebob Squarepants' Last Stand, WALL STREET JOURNAL, page A11 (April 13, 2012).

Set Interac Free: Burdensome Federal Regulations Discourage Innovation, NATIONAL POST (Dec. 19, 2011).

The Dick Durbin Bank Fees, WALL STREET JOURNAL, page A15 (Sept. 30, 2011).

Lender Punishment Mustn't Reward Defaulters: Forced Principal Reduction is the Wrong Solution to the Foreclosure Fiasco, WASHINGTON TIMES, p. B3 (June 9, 2011).

Bureau of Consumer Protection Must Put Consumers First, WASHINGTON TIMES, page B3 (May 6, 2011).

Roar of the Lion Father: Parenting for Creativity Beats Parenting for Performance, WASHINGTON TIMES, page B1 (Jan. 25, 2011).

Anna Nicole Smith Case Offers Court Opportunity to Limit Forum-Shopping in Bankruptcy Cases, NATIONAL LAW JOURNAL (Jan. 11, 2011).

Dodd-Frank and the Return of the Loan Shark, WALL STREET JOURNAL, page A17 (Jan. 4, 2011).

Repeal the Seventeenth Amendment, NATIONAL REVIEW 20 (Nov. 15, 2010).

The Next Hot Ticket in Financial Reform (with John Morrall and Richard Williams), REUTERS (Oct. 8, 2010).

In Elizabeth Warren We Trust?, WALL STREET JOURNAL, page A25 (Sept. 30, 2010).

How Public Employee Pensions are Too Rich for New York's--and America's--Blood, NEW YORK DAILY NEWS (Aug. 8, 2010).

Durbin's Antitrust Fantasies: Flawed Economics Behind Democrats Price Control Plan (with Josh Wright), WASHINGTON TIMES, page B4 (June 17, 2010).

Why Aren't Banks Lending? Because Bureaucrats and Politicians Won't Let Them, WASHINGTON TIMES, page B1 (June 10, 2010).

*Durbin Regulations are Aimed at Your Wallet: They'll Cost us **All** Money and Convenience*, WASHINGTON TIMES, page B1 (June 3, 2010).

Stripper Searches for Loot Loophole, WASHINGTON TIMES, page B3 (Feb. 26, 2010).

Complex Loans Didn't Cause the Crisis, WALL STREET JOURNAL, page A18 (Feb. 18, 2010).

Will Congress Take Another Swipe at Credit Cards?, WALL STREET JOURNAL, page A17 (Jan. 5, 2010).

~~*America's Debt Paranoia*, 59(8) THE FREEMAN (October 2009).~~

Check that Checkbook: A Guide to Smarter Alumni Giving, NATIONAL REVIEW, page A43 (Oct. 5, 2009),

Let's Treat Borrowers Like Adults: The Problems with a Financial Products Safety Panel, WALL STREET JOURNAL, page A17 (July 8, 2009),

Chrysler and the Rule of Law, WALL STREET JOURNAL, page A19 (May 13, 2009).

Low Rates Led to ARMs, WALL STREET JOURNAL, page A18, (March 26, 2009).

Bankruptcy is the Perfect Remedy for Detroit, WALL STREET JOURNAL, page A21 (December 16, 2008).

The Two-Income Tax Trap, WALL STREET JOURNAL (August 2007).

Junk Social Science Index (with Gail Heriot), WASHINGTON TIMES, page A16 (July 26, 2007), *available* here.

A Great Mind? Miers Might Vote Right, But What the Court Truly Needs Is Intellectual Leadership, LEGAL TIMES (October 10, 2005).

Reforming Bankruptcy Laws: Changes Will Help Everyone, SAN DIEGO UNION-TRIBUNE (March 17, 2005).

Op-Ed, "Deadbeats Cost All of Us Dearly," USA TODAY, page 17A (June 22, 2000).

I have also been quoted regularly in major media outlets on issues of bankruptcy law and consumer credit, including *Forbes*, *Fortune*, *Business Week*, *The New York Times*, *The Wall Street Journal*, *Washington Post*, *Washington Times*, *Chronicle of Higher Education*, *Boston Globe*, *Christian Science Monitor*, *Houston Chronicle*, *Dallas Morning News*, *Toronto Star*, and many other leading newspapers and magazines. Quoted in "Washington Whispers," *U.S. News & World Report* (Aug. 5, 2002). I have also been quoted in several foreign publications, including the BBC (Britain), the *Daily Yomiuri* (Japan), and *RP Online* (Germany).

I have been profiled in *The Daily Deal* for my views on Bankruptcy Reform and other bankruptcy-related issues, as well as a recurrent commentator for *The Daily Deal*. *See* http://www.thedeal.com/NASApp/cs/ContentServer?pagename=FutureTense/Apps/Xcelerate/Render&c=TDDArticle&cid=TDD6A64S8MC

INTERNET

Member of the "Volokh Conspiracy," www.volokh.com

From Kelo *With Love: Revisiting* Kelo's *Flawed Economics and Vacuous Constitutionalism*, LIBERTY FORUM (Nov. 4, 2012), *available* here.

The Banality of Bailouts, Special-Interests, and Political Corruption, LIBERTY LAW (Oct. 29, 2012), *available* here.

The Revenge of Richard Nixon: The Consumer Financial Protection Bureau Spreads Its Tentacles, LIBERTY LAW (Oct. 20, 2012), *available* here.

The Rule of Law and the Auto Bailouts: A Conversation with ToddG Zywicki, LIBERTY LAW TALK PODCAST (June 3, 2012), *available* here.

Milton Friedman and Friedrich Hayek: Fifty Years Later, LIBERTY LAW (May 4, 2012), *available* here.

Upholding the Rule of Law, In Season and Out of Season, LIBERTY LAW (Apr. 20, 2012), *available* here.

The Robo-Signing Settlement: Seeds of Recovery or Chaos?, FORBES.COM (Feb. 20, 2012), *available* here.

It's Time to Finalize the Robo-Signing Settlement, FORBES.COM (OCT. 17, 2011), *available* here.

The Truth About the Auto Bailouts, REAL CLEAR POLITICS (July 13, 2011), *available* here.

Durbin's Innovation Killer: The Durbin Amendment would Raise Costs for Consumers, Increase Fraud, and Kill Innovation, THE AMERICAN (June 11, 2011), *available* here.

Deutsche Bank a Scapegoat for Bad Housing Policy, FORBES.COM (May 11, 2011), *available* here.

Reason.tv, "The Next Great Leap Backwards for Consumer 'Rights'" (August 2009), *available* here.

Obama's Ailing Popularity, FORBES.COM (August 21, 2009), *available* here.

My Favorite President: Calvin Coolidge, NATIONAL REVIEW ON-LINE (February 16, 2009), *available* here.

Rebalancing the Bankruptcy Code, JURIST, August 18, 2005, *available* here.

Credit Worthy, NATIONAL REVIEW ON-LINE (March 16, 2005), *available* here.

Bankrupt Criticisms, NATIONAL REVIEW ON-LINE (March 15, 2005), *available* here.

EXPERT TESTIMONY

Hawkins v. First Tennessee Bank, Shelby County Circuit Court, Tennessee, 13th Judicial District, Case No. CT-004085-11, Div. VII (2011).

Consumer Financial Protection Bureau v. CashCall, Inc., et al., United States District Court for the Central District of California, Case No. 2:15-cv-07522-JFW (RAOx) (2015).

In re: HSBC USA, N.A., Debit Card Overdraft Fee Litigation, Civil Action No. 2:13-MD-02451 (2013).

James v. National Financial, Delaware Court of Chancery, C.A. No. 8931-VCL (2014).

Morgan Drexen, Inc. and Kimberly A. Pisinski v. Consumer Financial Protection Bureau, United States District Court for the District of Columbia, Civil Action No. 13-01112 (CKK) (2013).

Cox v. Community Loans of America, United States District Court, Middle District of Georgia, Case No. 4:11-cv-177 (CDL) (2013)

Hammer v. Sam's East, Inc., United States District Court, Western District of Missouri, Case No. Case No. 4:08-cv-00788-HFS (2012).

Experian Information Solutions, Inc. v. Lifelock, Inc., United States District Court, Central District of California, Case No. SACV08-00165 AB (2009).

Anthony V. Valaitis v. Third Federal Saving & Loan Association of Cleveland, Court of Common Pleas, Lake County, OH, Case No. 07 CV 002329 (2008).

Bhandari v. Nilsestuen, et al., Dane County, Wisconsin, Case No. 07-CV-2226 (2008).

Charles Brown, et al. v. David Hovatter, et al., United States District Court for the District of Maryland, Case No. 1:06-CV-00524-RDB (2007).

Smith v. PNC Mortgage Corp. of America (*In re Smith*), United States Bankruptcy Court, Southern District of Alabama, Southern Division, Case No. 98-11129, Adv. No. 99-1138 (2002).

Rocky Dwayne Sheffield v. Homeside Lending, Inc. (*In re Sheffield*), United States Bankruptcy Court for the Southern District of Alabama, Southern Division, Case No. 97-10511-MAM (2000).

Democratic Electors

Copy

STATE OF HAWAII

WE, the undersigned, Electors of President and Vice-President of the United States of America, for the respective terms beginning on the twentieth day of January, in the year of our Lord one thousand nine hundred and sixty-one, being electors duly and legally appointed and qualified by and for the State of Hawaii, as appears by the annexed list of electors, made, certified, and delivered to us by the Executive of the State, having met and convened at the Capitol, in Honolulu, in said State, in pursuance of the Constitution and laws of the United States, and in the manner provided by the laws of the State of Hawaii, on the first Monday after the second Wednesday, being the nineteenth day of December, in the year of our Lord one thousand nine hundred and sixty.

DO HEREBY CERTIFY, That being so assembled and duly organized, we proceeded to vote by ballot, and balloted first for such President and then for such Vice-President, by distinct ballots.

AND WE FURTHER CERTIFY, That the following are two distinct lists; one, of the votes for President, and the other, of the votes for Vice-President, so cast as aforesaid:

List of all Persons Voted for as President, with the Number of Votes for Each.

NAME OF PERSON VOTED FOR	NUMBER OF VOTES
JOHN F. KENNEDY OF MASSACHUSETTS	THREE

Copy

List of all Persons Voted for as Vice-President, with the Number of Votes for Each.

NAME OF PERSON VOTED FOR	NUMBER OF VOTES
LYNDON B. JOHNSON OF TEXAS	THREE

IN WITNESS WHEREOF, we have hereunto set our hands. Done at the Capitol, in the City of Honolulu, and State of Hawaii, on the first Monday after the second Wednesday, being the nineteenth day of December, in the year of our Lord one thousand nine hundred and sixty.

/s/ Jannie K. Wilson
/s/ William H. Heen
Gilbert E. Metzger
Electors

We hereby certify that the lists of all the votes of the State of Hawaii given for President, and of all the votes given for Vice President, are contained herein.

Jennie K. Wilson

William Atherton

Delbert E. Metzger

From 95a

From:

Jennie K. Wilson
Delbert E. Metzger
William H. Heen
Honolulu, Hawaii

WM. H. HEEN
602 Trustco Bldg.
Honolulu 13, Hawaii

AIRMAIL

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The Administrator of General Services
Of the United States of America
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VIA ..... MAIL

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EXHIBIT C

United States Code Annotated
Title 3. The President (Refs & Annos)
Chapter 1. Presidential Elections and Vacancies (Refs & Annos)

3 U.S.C.A. § 1

§ 1. Time of appointing electors

Effective: December 29, 2022
Currentness

The electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day.

CREDIT(S)

(Added Pub.L. 117-328, Div. P, Title I, § 102(a), Dec. 29, 2022, 136 Stat. 5233.)

Notes of Decisions (5)

3 U.S.C.A. § 1, 3 USCA § 1
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 3. The President (Refs & Annos)
Chapter 1. Presidential Elections and Vacancies (Refs & Annos)

3 U.S.C.A. § 3

§ 3. Number of electors

Currentness

The number of electors shall be equal to the number of Senators and Representatives to which the several States are by law entitled at the time when the President and Vice President to be chosen come into office; except, that where no apportionment of Representatives has been made after any enumeration, at the time of choosing electors, the number of electors shall be according to the then existing apportionment of Senators and Representatives.

CREDIT(S)

(June 25, 1948, c. 644, 62 Stat. 672.)

3 U.S.C.A. § 3, 3 USCA § 3
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 3. The President (Refs & Annos)
Chapter 1. Presidential Elections and Vacancies (Refs & Annos)

3 U.S.C.A. § 4

§ 4. Vacancies in electoral college

Effective: December 29, 2022
Currentness

Each State may, by law enacted prior to election day, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote.

CREDIT(S)

(June 25, 1948, c. 644, 62 Stat. 673; Pub.L. 117-328, Div. P, Title I, § 103, Dec. 29, 2022, 136 Stat. 5234.)

3 U.S.C.A. § 4, 3 USCA § 4
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 3. The President (Refs & Annos)
Chapter 1. Presidential Elections and Vacancies (Refs & Annos)

3 U.S.C.A. § 5

§ 5. Certificate of ascertainment of appointment of electors

Effective: December 29, 2022
Currentness

(a) In general.--

(1) Certification.--Not later than the date that is 6 days before the time fixed for the meeting of the electors, the executive of each State shall issue a certificate of ascertainment of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day.

(2) Form of certificate.--Each certificate of ascertainment of appointment of electors shall--

(A) set forth the names of the electors appointed and the canvass or other determination under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast;

(B) bear the seal of the State; and

(C) contain at least one security feature, as determined by the State, for purposes of verifying the authenticity of such certificate.

(b) Transmission.--It shall be the duty of the executive of each State--

(1) to transmit to the Archivist of the United States, immediately after the issuance of a certificate of ascertainment of appointment of electors and by the most expeditious method available, such certificate of ascertainment of appointment of electors; and

(2) to transmit to the electors of such State, on or before the day on which the electors are required to meet under section 7, six duplicate-originals of the same certificate.

(c) Treatment of certificate as conclusive.--For purposes of section 15:

(1) In general.--

(A) Certificate issued by executive.--Except as provided in subparagraph (B), a certificate of ascertainment of appointment of electors issued pursuant to subsection (a)(1) shall be treated as conclusive in Congress with respect to the determination of electors appointed by the State.

(B) Certificates issued pursuant to court orders.--Any certificate of ascertainment of appointment of electors required to be issued or revised by any State or Federal judicial relief granted prior to the date of the meeting of electors shall replace and supersede any other certificates submitted pursuant to this section.

(2) Determination of Federal questions.--The determination of Federal courts on questions arising under the Constitution or laws of the United States with respect to a certificate of ascertainment of appointment of electors shall be conclusive in Congress.

(d) Venue and expedited procedure.--

(1) In general.--Any action brought by an aggrieved candidate for President or Vice President that arises under the Constitution or laws of the United States with respect to the issuance of the certification required under section (a)(1), or the transmission of such certification as required under subsection (b), shall be subject to the following rules:

(A) Venue.--The venue for such action shall be the Federal district court of the Federal district in which the State capital is located.

(B) 3-Judge Panel.--Such action shall be heard by a district court of three judges, convened pursuant to section 2284 of title 28, United States Code, except that--

(i) the court shall be comprised of two judges of the circuit court of appeals in which the district court lies and one judge of the district court in which the action is brought; and

(ii) section 2284(b)(2) of such title shall not apply.

(C) Expedited procedure.--It shall be the duty of the court to advance on the docket and to expedite to the greatest possible extent the disposition of the action, consistent with all other relevant deadlines established by this chapter and the laws of the United States.

(D) Appeals.--Notwithstanding section 1253 of title 28, United States Code, the final judgment of the panel convened under subparagraph (B) may be reviewed directly by the Supreme Court, by writ of certiorari granted upon petition of any party to the case, on an expedited basis, so that a final order of the court on remand of the Supreme Court may occur on or before the day before the time fixed for the meeting of electors.

(2) Rule of construction.--This subsection--

(A) shall be construed solely to establish venue and expedited procedures in any action brought by an aggrieved candidate for President or Vice President as specified in this subsection that arises under the Constitution or laws of the United States; and

(B) shall not be construed to preempt or displace any existing State or Federal cause of action.

CREDIT(S)

(June 25, 1948, c. 644, 62 Stat. 673; Pub.L. 117-328, Div. P, Title I, § 104(a), Dec. 29, 2022, 136 Stat. 5234.)

Notes of Decisions (10)

3 U.S.C.A. § 5, 3 USCA § 5
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 3. The President (Refs & Annos)
Chapter 1. Presidential Elections and Vacancies (Refs & Annos)

3 U.S.C.A. § 6

§ 6. Duties of Archivist

Effective: December 29, 2022
Currentness

The certificates of ascertainment of appointment of electors received by the Archivist of the United States under section 5 shall--

(1) be preserved for one year;

(2) be a part of the public records of such office; and

(3) be open to public inspection.

CREDIT(S)

(June 25, 1948, c. 644, 62 Stat. 673; Oct. 31, 1951, c. 655, § 6, 65 Stat. 711; Pub.L. 98-497, Title I, § 107(e)(1), (2)(A), Oct. 19, 1984, 98 Stat. 2291; Pub.L. 117-328, Div. P, Title I, § 105(a), Dec. 29, 2022, 136 Stat. 5236.)

Notes of Decisions (4)

3 U.S.C.A. § 6, 3 USCA § 6
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 3. The President (Refs & Annos)
Chapter 1. Presidential Elections and Vacancies (Refs & Annos)

3 U.S.C.A. § 7

§ 7. Meeting and vote of electors

Effective: December 29, 2022
Currentness

The electors of President and Vice President of each State shall meet and give their votes on the first Tuesday after the second Wednesday in December next following their appointment at such place in each State in accordance with the laws of the State enacted prior to election day.

CREDIT(S)

(June 25, 1948, c. 644, 62 Stat. 673; Pub.L. 117-328, Div. P, Title I, § 106(a), Dec. 29, 2022, 136 Stat. 5236.)

Notes of Decisions (2)

3 U.S.C.A. § 7, 3 USCA § 7
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 3. The President (Refs & Annos)
Chapter 1. Presidential Elections and Vacancies (Refs & Annos)

3 U.S.C.A. § 8

§ 8. Manner of voting

Currentness

The electors shall vote for President and Vice President, respectively, in the manner directed by the Constitution.

CREDIT(S)

(June 25, 1948, c. 644, 62 Stat. 674.)

3 U.S.C.A. § 8, 3 USCA § 8
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 3. The President (Refs & Annos)
Chapter 1. Presidential Elections and Vacancies (Refs & Annos)

3 U.S.C.A. § 9

§ 9. Certificates of votes for President and Vice President

Effective: December 29, 2022
Currentness

The electors shall make and sign six certificates of all the votes given by them, each of which certificates shall contain two distinct lists, one of the votes for President and the other of the votes for Vice President, and shall annex to each of the certificates of votes one of the certificates of ascertainment of appointment of electors which shall have been furnished to them by direction of the executive of the State.

CREDIT(S)

(June 25, 1948, c. 644, 62 Stat. 674; Pub.L. 117-328, Div. P, Title I, § 104(c)(1), Dec. 29, 2022, 136 Stat. 5236.)

3 U.S.C.A. § 9, 3 USCA § 9
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 3. The President (Refs & Annos)
Chapter 1. Presidential Elections and Vacancies (Refs & Annos)

3 U.S.C.A. § 10

§ 10. Sealing and endorsing certificates

Effective: December 29, 2022
Currentness

The electors shall seal up the certificates of votes so made by them, together with the annexed certificates of ascertainment of appointment of electors, and certify upon each that the lists of all the votes of such State given for President, and of all the votes given for Vice President, are contained therein.

CREDIT(S)

(June 25, 1948, c. 644, 62 Stat. 674; Pub.L. 117-328, Div. P, Title I, § 106(b), Dec. 29, 2022, 136 Stat. 5236.)

3 U.S.C.A. § 10, 3 USCA § 10
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 3. The President (Refs & Annos)
Chapter 1. Presidential Elections and Vacancies (Refs & Annos)

3 U.S.C.A. § 11

§ 11. Transmission of certificates by electors

Effective: December 29, 2022
Currentness

The electors shall immediately transmit at the same time and by the most expeditious method available the certificates of votes so made by them, together with the annexed certificates of ascertainment of appointment of electors, as follows:

(1) One set shall be sent to the President of the Senate at the seat of government.

(2) Two sets shall be sent to the chief election officer of the State, one of which shall be held subject to the order of the President of the Senate, the other to be preserved by such official for one year and shall be a part of the public records of such office and shall be open to public inspection.

(3) Two sets shall be sent to the Archivist of the United States at the seat of government, one of which shall be held subject to the order of the President of the Senate and the other of which shall be preserved by the Archivist of the United States for one year and shall be a part of the public records of such office and shall be open to public inspection.

(4) One set shall be sent to the judge of the district in which the electors shall have assembled.

CREDIT(S)

(June 25, 1948, c. 644, 62 Stat. 674; Oct. 31, 1951, c. 655, § 7, 65 Stat. 712; Pub.L. 98-497, Title I, § 107(e)(1), Oct. 19, 1984, 98 Stat. 2291; Pub.L. 117-328, Div. P, Title I, § 107(a), Dec. 29, 2022, 136 Stat. 5236.)

3 U.S.C.A. § 11, 3 USCA § 11
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 3. The President (Refs & Annos)
Chapter 1. Presidential Elections and Vacancies (Refs & Annos)

3 U.S.C.A. § 12

§ 12. Failure of certificates of electors to reach President of the Senate or Archivist of the United States; demand on State for certificate

Effective: December 29, 2022
Currentness

When, after the meeting of the electors shall have been held, no certificate of vote mentioned in sections 9 and 11 of this title from any State shall have been received by the President of the Senate or by the Archivist of the United States by the fourth Wednesday in December, the President of the Senate or, if the President of the Senate be absent from the seat of government, the Archivist of the United States shall request, by the most expeditious method available, the chief election officer of the State to send up the certificate lodged with such officer by the electors of such State; and it shall be the duty of such chief election officer of the State upon receipt of such request immediately to transmit same by the most expeditious method available to the President of the Senate at the seat of government.

CREDIT(S)

(June 25, 1948, c. 644, 62 Stat. 674; Oct. 31, 1951, c. 655, § 8, 65 Stat. 712; Pub.L. 98-497, Title I, § 107(e)(1), (2)(B), Oct. 19, 1984, 98 Stat. 2291; Pub.L. 117-328, Div. P, Title I, § 108(a), Dec. 29, 2022, 136 Stat. 5237.)

3 U.S.C.A. § 12, 3 USCA § 12
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 3. The President (Refs & Annos)
Chapter 1. Presidential Elections and Vacancies (Refs & Annos)

3 U.S.C.A. § 13

§ 13. Same; demand on district judge for certificate

Effective: December 29, 2022
Currentness

When, after the meeting of the electors shall have been held, no certificates of votes from any State shall have been received at the seat of government on the fourth Wednesday in December, the President of the Senate or, if the President of the Senate be absent from the seat of government, the Archivist of the United States shall send a special messenger to the district judge in whose custody one certificate of votes from that State has been lodged, and such judge shall forthwith transmit that certificate by the hand of such messenger to the seat of government.

CREDIT(S)

(June 25, 1948, c. 644, 62 Stat. 674; Oct. 31, 1951, c. 655, § 9, 65 Stat. 712; Pub.L. 98-497, Title I, § 107(e)(1), Oct. 19, 1984, 98 Stat. 2291; Pub.L. 117-328, Div. P, Title I, § 108(b), Dec. 29, 2022, 136 Stat. 5237.)

3 U.S.C.A. § 13, 3 USCA § 13
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 3. The President (Refs & Annos)
Chapter 1. Presidential Elections and Vacancies (Refs & Annos)

3 U.S.C.A. § 15

§ 15. Counting electoral votes in Congress

Effective: December 29, 2022
Currentness

(a) In general.--Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer.

(b) Powers of the President of Senate.--

(1) Ministerial in nature.--Except as otherwise provided in this chapter, the role of the President of the Senate while presiding over the joint session shall be limited to performing solely ministerial duties.

(2) Powers explicitly denied.--The President of the Senate shall have no power to solely determine, accept, reject, or otherwise adjudicate or resolve disputes over the proper certificate of ascertainment of appointment of electors, the validity of electors, or the votes of electors.

(c) Appointment of tellers.--At the joint session of the Senate and House of Representatives described in subsection (a), there shall be present two tellers previously appointed on the part of the Senate and two tellers previously appointed on the part of the House of Representatives by the presiding officers of the respective chambers.

(d) Procedure at joint session generally.--

(1) In general.--The President of the Senate shall--

(A) open the certificates and papers purporting to be certificates of the votes of electors appointed pursuant to a certificate of ascertainment of appointment of electors issued pursuant to section 5, in the alphabetical order of the States, beginning with the letter A; and

(B) upon opening any certificate, hand the certificate and any accompanying papers to the tellers, who shall read the same in the presence and hearing of the two Houses.

(2) Action on certificate.--

(A) In general.--Upon the reading of each certificate or paper, the President of the Senate shall call for objections, if any.

(B) Requirements for objections or questions.--

(i) Objections.--No objection or other question arising in the matter shall be in order unless the objection or question--

(I) is made in writing;

(II) is signed by at least one-fifth of the Senators duly chosen and sworn and one-fifth of the Members of the House of Representatives duly chosen and sworn; and

(III) in the case of an objection, states clearly and concisely, without argument, one of the grounds listed under clause (ii).

(ii) Grounds for objections.--The only grounds for objections shall be as follows:

(I) The electors of the State were not lawfully certified under a certificate of ascertainment of appointment of electors according to section 5(a)(1).

(II) The vote of one or more electors has not been regularly given.

(C) Consideration of objections and questions.--

(i) In general.--When all objections so made to any vote or paper from a State, or other question arising in the matter, shall have been received and read, the Senate shall thereupon withdraw, and such objections and questions shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections and questions to the House of Representatives for its decision.

(ii) Determination.--No objection or any other question arising in the matter may be sustained unless such objection or question is sustained by separate concurring votes of each House.

(D) Reconvening.--When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No vote or paper from any other State shall be acted upon until the objections previously made to any vote or paper from any State, and other questions arising in the matter, shall have been finally disposed of.

(e) Rules for tabulating votes.--

(1) Counting of votes.--

(A) In general.--Except as provided in subparagraph (B)--

(i) only the votes of electors who have been appointed under a certificate of ascertainment of appointment of electors issued pursuant to section 5, or who have legally been appointed to fill a vacancy of any such elector pursuant to section 4, may be counted; and

(ii) no vote of an elector described in clause (i) which has been regularly given shall be rejected.

(B) Exception.--The vote of an elector who has been appointed under a certificate of ascertainment of appointment of electors issued pursuant to section 5 shall not be counted if--

(i) there is an objection which meets the requirements of subsection (d)(2)(B)(i); and

(ii) each House affirmatively sustains the objection as valid.

(2) Determination of majority.--If the number of electors lawfully appointed by any State pursuant to a certificate of ascertainment of appointment of electors that is issued under section 5 is fewer than the number of electors to which the State is entitled under section 3, or if an objection the grounds for which are described in subsection (d)(2)(B)(ii)(I) has been sustained, the total number of electors appointed for the purpose of determining a majority of the whole number of electors appointed as required by the Twelfth Amendment to the Constitution shall be reduced by the number of electors whom the State has failed to appoint or as to whom the objection was sustained.

(3) List of votes by tellers; declaration of winner.--The tellers shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses.

CREDIT(S)

(June 25, 1948, c. 644, 62 Stat. 675; Pub.L. 117-328, Div. P, Title I, § 109(a), Dec. 29, 2022, 136 Stat. 5237.)

Notes of Decisions (17)

3 U.S.C.A. § 15, 3 USCA § 15
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 3. The President (Refs & Annos)
Chapter 1. Presidential Elections and Vacancies (Refs & Annos)

3 U.S.C.A. § 16

§ 16. Same; seats for officers and Members of two Houses in joint session

Effective: December 29, 2022
Currentness

At such joint session of the two Houses seats shall be provided as follows: For the President of the Senate, the Speaker's chair; for the Speaker, immediately upon his left; the Senators, in the body of the Hall upon the right of the presiding officer; for the Representatives, in the body of the Hall not provided for the Senators; for the tellers, Secretary of the Senate, and Clerk of the House of Representatives, at the Clerk's desk; for the other officers of the two Houses, in front of the Clerk's desk and upon each side of the Speaker's platform. Such joint session shall not be dissolved until the count of electoral votes shall be completed and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, or otherwise under this subchapter, in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess of such House not beyond the next calendar day, Sunday excepted, at the hour of 10 o'clock in the forenoon. But if the counting of the electoral votes and the declaration of the result shall not have been completed before the fifth calendar day next after such first session of the two Houses, no further or other recess shall be taken by either House.

CREDIT(S)

(June 25, 1948, c. 644, 62 Stat. 676; Pub.L. 117-328, Div. P, Title I, § 110(c)(1), Dec. 29, 2022, 136 Stat. 5240.)

Notes of Decisions (2)

3 U.S.C.A. § 16, 3 USCA § 16
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 3. The President (Refs & Annos)
Chapter 1. Presidential Elections and Vacancies (Refs & Annos)

3 U.S.C.A. § 17

§ 17. Same; limit of debate in each House

Effective: December 29, 2022
Currentness

When the two Houses separate to decide upon an objection pursuant to section 15(d)(2)(C)(i) that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter--

(1) all such objections and questions permitted with respect to such State shall be considered at such time;

(2) each Senator and Representative may speak to such objections or questions for up to five minutes, and not more than once;

(3) the total time for debate for all such objections and questions with respect to such State shall not exceed two hours in each House, equally divided and controlled by the Majority Leader and Minority Leader, or their respective designees; and

(4) at the close of such debate, it shall be the duty of the presiding officer of each House to put each of the objections and questions to a vote without further debate.

CREDIT(S)

(June 25, 1948, c. 644, 62 Stat. 676; Pub.L. 117-328, Div. P, Title I, § 110(a), Dec. 29, 2022, 136 Stat. 5240.)

Notes of Decisions (2)

3 U.S.C.A. § 17, 3 USCA § 17
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 3. The President (Refs & Annos)
Chapter 1. Presidential Elections and Vacancies (Refs & Annos)

3 U.S.C.A. § 18

§ 18. Same; parliamentary procedure at joint session

Effective: December 29, 2022
Currentness

While the two Houses shall be in session as provided in this chapter, the President of the Senate shall have power to preserve order; and no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw under section 15(d)(2)(C)(i).

CREDIT(S)

(June 25, 1948, c. 644, 62 Stat. 676; Sept. 3, 1954, c. 1263, § 3, 68 Stat. 1227; Pub.L. 117-328, Div. P, Title I, § 110(b), (c)(2), Dec. 29, 2022, 136 Stat. 5240.)

3 U.S.C.A. § 18, 3 USCA § 18
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 3. The President (Refs & Annos)
Chapter 1. Presidential Elections and Vacancies (Refs & Annos)

3 U.S.C.A. § 19

§ 19. Vacancy in offices of both President and Vice President; officers eligible to act

Effective: March 9, 2006
Currentness

(a)(1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President.

(2) The same rule shall apply in the case of the death, resignation, removal from office, or inability of an individual acting as President under this subsection.

(b) If, at the time when under subsection (a) of this section a Speaker is to begin the discharge of the powers and duties of the office of President, there is no Speaker, or the Speaker fails to qualify as Acting President, then the President pro tempore of the Senate shall, upon his resignation as President pro tempore and as Senator, act as President.

(c) An individual acting as President under subsection (a) or subsection (b) of this section shall continue to act until the expiration of the then current Presidential term, except that--

(1) if his discharge of the powers and duties of the office is founded in whole or in part on the failure of both the President-elect and the Vice-President-elect to qualify, then he shall act only until a President or Vice President qualifies; and

(2) if his discharge of the powers and duties of the office is founded in whole or in part on the inability of the President or Vice President, then he shall act only until the removal of the disability of one of such individuals.

(d)(1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is no President pro tempore to act as President under subsection (b) of this section, then the officer of the United States who is highest on the following list, and who is not under disability to discharge the powers and duties of the office of President shall act as President: Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, Secretary of Education, Secretary of Veterans Affairs, Secretary of Homeland Security.

(2) An individual acting as President under this subsection shall continue so to do until the expiration of the then current Presidential term, but not after a qualified and prior-entitled individual is able to act, except that the removal of the disability of

an individual higher on the list contained in paragraph (1) of this subsection or the ability to qualify on the part of an individual higher on such list shall not terminate his service.

(3) The taking of the oath of office by an individual specified in the list in paragraph (1) of this subsection shall be held to constitute his resignation from the office by virtue of the holding of which he qualifies to act as President.

(e) Subsections (a), (b), and (d) of this section shall apply only to such officers as are eligible to the office of President under the Constitution. Subsection (d) of this section shall apply only to officers appointed, by and with the advice and consent of the Senate, prior to the time of the death, resignation, removal from office, inability, or failure to qualify, of the President pro tempore, and only to officers not under impeachment by the House of Representatives at the time the powers and duties of the office of President devolve upon them.

(f) During the period that any individual acts as President under this section, his compensation shall be at the rate then provided by law in the case of the President.

CREDIT(S)

(June 25, 1948, c. 644, 62 Stat. 677; Pub.L. 89-174, § 6(a), Sept. 9, 1965, 79 Stat. 669; Pub.L. 89-670, § 10(a), Oct. 15, 1966, 80 Stat. 948; Pub.L. 91-375, § 6(b), Aug. 12, 1970, 84 Stat. 775; Pub.L. 95-91, Title VII, § 709(g), Aug. 4, 1977, 91 Stat. 609; Pub.L. 96-88, Title V, § 508(a), Oct. 17, 1979, 93 Stat. 692; Pub.L. 100-527, § 13(a), Oct. 25, 1988, 102 Stat. 2643; Pub.L. 109-177, Title V, § 503, Mar. 9, 2006, 120 Stat. 247.)

3 U.S.C.A. § 19, 3 USCA § 19
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 3. The President (Refs & Annos)
Chapter 1. Presidential Elections and Vacancies (Refs & Annos)

3 U.S.C.A. § 20

§ 20. Resignation or refusal of office

Currentness

The only evidence of a refusal to accept, or of a resignation of the office of President or Vice President, shall be an instrument in writing, declaring the same, and subscribed by the person refusing to accept or resigning, as the case may be, and delivered into the office of the Secretary of State.

CREDIT(S)

(June 25, 1948, c. 644, 62 Stat. 678.)

3 U.S.C.A. § 20, 3 USCA § 20
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 3. The President (Refs & Annos)
Chapter 1. Presidential Elections and Vacancies (Refs & Annos)

3 U.S.C.A. § 21

§ 21. Definitions

Effective: December 29, 2022
Currentness

As used in this chapter the term--

(1) "election day" means the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President held in each State, except, in the case of a State that appoints electors by popular vote, if the State modifies the period of voting, as necessitated by force majeure events that are extraordinary and catastrophic, as provided under laws of the State enacted prior to such day, "election day" shall include the modified period of voting.

(2) "State" includes the District of Columbia.

(3) "executive" means, with respect to any State, the Governor of the State (or, in the case of the District of Columbia, the Mayor of the District of Columbia), except when the laws or constitution of a State in effect as of election day expressly require a different State executive to perform the duties identified under this chapter.

CREDIT(S)

(Added Pub.L. 87-389, § 2(a), Oct. 4, 1961, 75 Stat. 820; amended Pub.L. 117-328, Div. P, Title I, §§ 102(b), 104(b), Dec. 29, 2022, 136 Stat. 5233, 5235.)

3 U.S.C.A. § 21, 3 USCA § 21
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 3. The President (Refs & Annos)
Chapter 1. Presidential Elections and Vacancies (Refs & Annos)

3 U.S.C.A. § 22

§ 22. Severability

Effective: December 29, 2022
Currentness

If any provision of this chapter, or the application of a provision to any person or circumstance, is held to be unconstitutional, the remainder of this chapter, and the application of the provisions to any person or circumstance, shall not be affected by the holding.

CREDIT(S)

(Added Pub.L. 117-328, Div. P, Title I, § 111(a), Dec. 29, 2022, 136 Stat. 5240.)

3 U.S.C.A. § 22, 3 USCA § 22
Current through P.L.118-10. Some statute sections may be more current, see credits for details.

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EXHIBIT D

SUPPLEMENTAL EXPERT DECLARATION OF PROFESSOR TODD ZYWICKI

1.

My name is Todd Zywicki. This supplemental expert declaration incorporates and adds to my previous expert declaration that I executed on July 11, 2023, attached hereto as **Exhibit 1**.

2.

Under the Electoral Count Act ("ECA") as it existed at the time of the 2020 presidential election, Congress had delegated to the states only one way to decide for themselves in the first instance who their rightful presidential electors were in the event of a dispute. 3 U.S.C. §§ 5, 15.

3.

Specifically, Section 5 provided that if a state had set up an adjudicative process to resolve disputes about presidential electors, and that adjudicative body issued a final decision on the dispute on or before the ECA's safe harbor date, then that final judicial decision would be binding on Congress when it opened, adjudicated, and counted the presidential ballots on January 6.

4.

In Georgia, the state legislature long ago created such a process – a judicial challenge to the election results. *See* O.C.G.A. § 21-2-521. This

statute set forth the process by which a dispute about, among other things, the state's rightful presidential electors is to be resolved.

5.

On December 4, 2020, presidential elector nominee David Shafer invoked this judicial dispute resolution process by filing a lawsuit challenging the results of the presidential election in Georgia in Fulton County Superior Court. *See Trump et al. v. Raffensperger et al.*, Case No. 2020CV343255.

6.

A review of the docket in that case reveals that no final judicial decision was rendered in that case by the ECA's safe harbor date of December 8, 2020. *See* Shafer Notice of Removal and Request for Habeas and Injunctive Relief, Case No. 1:23-cv-03720-SCJ,ECF No. 1, Ex. E.

7.

Because the Fulton County Superior Court did not issue a final decision in the judicial contest by December 8, 2020 and it remained pending, the State of Georgia failed to satisfy the necessary requirements in Section 5 of the ECA. As a result, Georgia missed its one opportunity under the ECA to conclusively decide the presidential elector dispute for itself. 3 U.S.C. §§ 5, 15.

8.

The certification of Georgia's vote by the Secretary of State and the Governor is not relevant to and has no legal weight or authority over the resolution of the presidential elector dispute at this point in Congress' adjudication of the presidential elector dispute (after the safe harbor date through Congress' adjudication on January 6). 3 U.S.C. §§ 5, 6, 15.[1]

9.

Section 6 of the ECA (as it existed in 2020) addressed the Governor's certification of the election and the presidential electors, and it required the Governor, as soon as practicable after a presidential election, to provide certificates of ascertainment to the presidential electors whose candidate is

[1] The argument that the Governor's certification of the State's vote has any role, much less a conclusive role, in deciding a dispute about a state's valid or rightful presidential electors is not only be incorrect as a matter of law, but also is unprecedented. I have not been able to find a single case, scholar, or commentator that has ever made that argument in the past. Under the 2020 ECA, when there is *no dispute* in Congress regarding *who the state's valid presidential electors are*, the Governor's certification of the vote does have some significance. Specifically, under Section 15 of the ECA as it existed in 2020, when a state sends a *single presidential elector ballot* to Congress and that single ballot is certified as the legitimate vote of the state by the Governor, then Congress may not reject that ballot *unless* both houses of Congress agree that such certified votes were not lawfully given. This provision, however, has no application when more than one slate of presidential elector ballots is submitted from a state and there is a dispute about which slate of a State's presidential electors are the valid ones, as there was in Georgia in 2020.

the winner (or apparent winner, in the event that the results of the election are challenged) and to transmit those also to Congress. 3 U.S.C. § 6. Section 6 also clarifies, however, that the Governor's certificates of ascertainment do not settle any pending dispute about which slate of presidential ballots are the State's valid ones. Unlike Section 5 of the ECA that explicitly states that a final judicial determination by the state on or before the safe harbor date is conclusive on Congress when it adjudicates and counts the ballots on January 6, 3 U.S.C. § 5, Section 6 addressing the Governor's certification contains no such language. 3 U.S.C. § 6. Indeed, it specifically provides that if there is a state judicial contest to the election (and, therefore, to the rightful slate of presidential electors), and the court resolves that dispute after the initial certificates of ascertainment are issued, the Governor must transmit *that result* to Congress as well. *Id.*

10.

And this makes sense. At this point in the process under the ECA, where there is a challenge to the State's presidential electors, after a state has failed to meet the safe harbor requirements of Section 5 by not issuing a final judicial decision by or on the safe harbor date, Congress is the exclusive adjudicative body for that dispute. And even though Congress is not bound by any later judicial decision *or* the Governor's certification,

Congress sought to ensure, through the provisions of the ECA, that it would have this potentially relevant evidence before it to consider in adjudicating that dispute, including the Governor's certification and any later judicial determination.

11.

The ECA does give the Governor's certification of the presidential electors a potentially binding role to play in Congress' adjudication of competing presidential elector slates, but that role comes only at the *very end* of Congress' process on January 6. In particular, under Section 15, when Congress is adjudicating between two competing presidential ballots from a state on January 6, Congress can consider whatever it believes to be the best evidence of a state's lawful vote, including (but not limited to) any post-safe harbor judicial decision and a Governor's certification(s). After going through that process, however, if the House and the Senate cannot agree about which of the competing presidential elector slates is the valid one, Congress agrees *at the end* to default to the presidential elector slate certified by the state's Governor. 3 U.S.C. § 15. Prior to this default at the very end of Congress' process on January 6, however, Congress is in no way bound by the Governor's certification (or by any post-safe harbor date judicial decision).

12.

In other words, the fact that a Governor has certified an election and/or presidential electors under Section 6 of the ECA cannot and does not settle a dispute about which slate of presidential electors are the valid ones for the state as a matter of law. *See* 3 U.S.C. §§ 5, 6, 15. Instead, when that dispute goes back to Congress because it was not resolved by a final judicial decision by the safe harbor date, the Governor's certification is evidence that Congress may consider, but is not bound by, when it is adjudicating that dispute. *See* 3 U.S.C. §§ 5, 6, 15. Congress is not required to defer to it unless and until, at the end of its process on January 6, the House and the Senate cannot otherwise agree on the rightful ballot from a state. *See* 3 U.S.C. § 15.

13.

Applying these legal principles to the 2020 presidential election in Georgia, no final judicial decision was issued by Section 5 of the ECA's safe harbor date of December 8, 2020, at which time the dispute moved backed to Congress to adjudicate under Section 15 of the ECA. *See* 3 U.S.C. §§ 5, 15. The fact that the Governor fulfilled his obligations under Section 6 of the ECA to certify the apparent winner and apparent presidential electors

before December 14 when the electors were required to meet and vote was evidence that Congress *could* consider in adjudicating between competing presidential electors slates, but Congress was *not bound* by the Governor's certification in its adjudication of the dispute. *See* 3 U.S.C. §§ 5, 6, 15. Had both the House and Senate agreed, for example, that the Republican slate of presidential electors were the valid ones from Georgia, then Congress was free to accept and count the ballots from the Republican presidential electors regardless of the fact that the Democrat presidential electors had been certified by the Governor. *See* 3 U.S.C. § 15. *Only if and when* the House and Senate could not agree about which presidential elector slate was the valid one from Georgia on January 6 *after* going through its adjudication process did the ECA require Congress, *in the end*, to default to the slate certified by the Governor. 3 U.S.C. § 15.

14.

As a matter of law, then, the Governor's certification of Georgia's vote and presidential electors in December 2020 had no authority to end and did not end the pending dispute regarding the presidential electors for Georgia. After December 8, that dispute was Congress' alone to decide, and Congress could accept or reject that certification as it saw fit based upon what it considered to be the best evidence of the State's lawful vote. *See* 3

U.S.C. § 15. Because the dispute regarding the presidential electors in Georgia was fully vested in Congress as of at least December 9, the State of Georgia had no authority to interfere with or obstruct Congress' receipt of any information or evidence that it wanted to consider in adjudicating that dispute, including "all the *certificates and papers purporting to be certificates of the electoral votes*" that Congress has expressly stated in the ECA that it would receive and consider. *Id.*

15.

The significant amendments made to the ECA in 2022 drive home these points. In 2022, Congress amended Section 5 of the ECA to diminish the role it had previously given the states' judicial processes to resolve disputes about presidential electors in the first instance by the safe harbor date. In the new Section 5, Congress provides that the Governor of a state must certify the election and the presidential electors by the safe harbor date. *See* 2022 Amended ECA at § 5 (the 2022 ECA is attached hereto as **Exhibit 2**). Under new Section 5, the Governor's certification is now binding on Congress unless a federal or state court issues judicial relief requiring a different slate of presidential electors to be certified as the valid electors before the date that the presidential electors are required to meet and cast their votes. *Id.* In that case, the new court-ordered certificates to

the presidential electors "shall replace and supersede any other certificate[,]"[2] *Id.*

16.

While Congress amended Section 5 of the ECA in 2022 to make the Governor's certification of the vote and the presidential electors legally material and, under most circumstances, binding on Congress, these amendments bring into sharp focus the lack of legal weight or conclusive authority that the Governor's certification held under the version of Section 5 the ECA in effect in 2020.

17.

Regarding the precedent from the Hawaii presidential election in 1960 discussed in my initial July 2023 Expert Declaration, attempts to distinguish it from the situation faced in Georgia in the 2020 presidential election based upon supposed differences between Hawaii law and Georgia law miss the most critical point. Whether the actions of both sets of presidential electors in Hawaii in 1960 and Georgia in 2020 were legally

[2] Further truncating the States' roles in adjudicating presidential elector disputes, the 2022 Amended ECA provides that "[a]ny action brought by an aggrieved candidate for President or Vice President that arises under the Constitution or laws of the United States with respect to the issuance of the certification [of presidential electors]" shall be heard in the federal district court in the federal district where the State capitol is location. *See* 2022 Amended ECA at § 5.

permissible or not turns solely on the provisions of the ECA, and the states' laws have no bearing on the inquiry.

18.

Specifically, in both Hawaii 1960 and Georgia 2020, the states failed to meet the safe harbor of Section 5 of the ECA because neither state issued a final judicial decision in the presidential elector contest by the safe harbor date. 3 U.S.C. § 5, 15. At that point, the dispute could only be adjudicated by Congress, and Congress' adjudication of that dispute was governed by the provisions of the ECA. As established, the ECA explicitly permitted the submission of more than one presidential elector ballot from a state in its resolution of the dispute. 3 U.S.C. § 15. Thus, neither factual differences in the post-safe harbor date judicial resolution by either state nor any differences in the states' laws have any relevance to the legality and propriety of the presidential electors executing presidential elector ballots and/or contingent ballots in Hawaii in 1960 or in Georgia in 2020.

Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that both my initial July 11, 2023 Expert Declaration (Exhibit 1) and the foregoing Supplemental Expert Declaration are true and correct.

[signature on following page]

This the 18th day of September, 2023.

Todd Zywicki
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