FULTON COUNTY SUPERIOR COURT
STATE OF GEORGIA

STATE OF GEORGIA, V. KENNETH CHESEBRO *ET AL.*, DEFENDANTS.	CASE NO. 23SC188947 JUDGE MCAFEE

GENERAL DEMURRER TO THE INDICTMENT BASED ON FIRST AMENDMENT PROTECTIONS

COMES NOW, Kenneth Chesebro, by and through undersigned counsel, and asks this Honorable Court to dismiss the indictment, as his actions as alleged in the indictment are protected by the First Amendment to the United States Constitution and, therefore, are exempt from prosecution. In support thereof, Mr. Chesebro shows as follows:

PROPOSED FINDINGS OF FACT

Mr. Chesebro's involvement in this matter began when he was asked by his former colleague, Judge James Troupis, on or about November 18, 2020, to provide some research into the Twelfth Amendment and the Electoral Count Act, in relation to allegations of voting irregularities in Wisconsin. Mr. Chesebro, as a distinguished appellate attorney with substantial experience in election law, accepted the task.[1]

As his first task, Mr. Chesebro wrote a legal memo, dated November 18, 2020, outlining his legal theories as supported by his statutory interpretation, case citations,

[1] Mr. Chesebro was on Al Gore's legal team in *Bush v. Gore*, 531 U.S. 98 (2000), and a litany of lower court federal and state cases fighting over the 2000 presidential election.

law review articles, historic precedent, and academic papers.[2]

Mr. Chesebro was subsequently asked for research and input as to the application of his initial findings in other states where there was a pending legal challenge to the election results, including Georgia.[3] In response, he wrote a second legal memorandum, dated December 6, 2020, in which he again outlined his legal theories as supported by his interpretation of statutes, case citations, law review articles, historic precedent, and academic papers.[4]

His December 6, 2020 memo discussed historic precedent such as the presidential election in Hawaii in 1960 (where the Kennedy Campaign utilized alternate electors after the state had already been called for Richard Nixon, but where there was a challenge pending), as well as lessons learned from Al Gore's unsuccessful election challenge in 2000. But in the end, the memo emphasizes that for the proposed legal conclusions to be actionable, there must be valid lower court decisions in each state.[5]

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[2] Importantly, although the underlying case in Wisconsin, *Trump v. Biden*, 394 Wis. 2d 629 (2020), was originally unsuccessful via a 4-3 decision by the Wisconsin Supreme Court (based on the esoteric equitable doctrine of *laches*—meaning the case was brought too late), when those same issues were fully litigated some months later in *Teigen v. Wisconsin Elections Commission*, the position advocated by Mr. Chesebro and Judge Troupis was successful. 403 Wis.2d 607 (2022).

[3] Mr. Chesebro never set foot in Georgia—his only contact with Georgia involved two emails, both sent on December 10, 2020 to David Shafer.

[4] Mr. Chesebro acknowledges his "bold, controversial strategy . . . as one possible option"—but also states, "I'm not necessarily advising this course of action. . . ."

[5] Importantly, during the relevant time period, there was pending litigation in both state and federal court in Georgia.

Over the course of his work, Mr. Chesebro did not provide any guidance as to how to handle any litigation in Georgia. In both his December 6, 2020 memo, and again in another memo dated December 9, 2020, Mr. Chesebro simply described the process in which electors are required to be selected, the process for completing the ballots, as well as the deadlines that apply.

Based on his legal work for the Trump Campaign, Mr. Chesebro has been indicted and alleged to have committed the following overt acts in the RICO conspiracy charged in Count 1:

> Act 39: December 7, 2020, Mr. Chesebro sent an email;
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> Act 46: December 9, 2020, he wrote a memo titled "Statutory Requirements for December 14 Electoral Votes";
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> Act 47: December 10, 2020, he sent an email to David Shafer;
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> Act 48: December 10, 2020, he sent an email to David Shafer;
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> Act 49: December 10, 2020, he sent an email to Greg Safsten;
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> Act 50: December 10, 2020, he sent an email to Brian Schimming;
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> Act 51: December 10, 2020, he sent an email to Jim DeGraffenreid;
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> Act 52: December 10, 2020, he sent an email to Jim DeGraffenreid;
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> Act 52: December 10, 2020, he sent an email to Thomas King;[6]
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> Act 58: December 11, 2020, he sent an email to Jim DeGraffenreid;
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> Act 59: December 11, 2020, he sent an email to Greg Safsten;
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> Act 60: December 11, 2020, he sent an email to Michael Roman;

[6] Count 1 lists "Act 52" twice and skips number 53.

Act 61: December 11, 2020, he sent an email to Michael Roman;

Act 64: December 12, 2020, he met with Brian Schimming;

Act 69: December 13, 2020, he sent an email to Michael Roman;

Act 70: December 13, 2020, he sent an email to Rudy Giuliani;

Act 71: December 13, 2020, he sent an email to Michael Roman;

Act 72: December 13, 2020, he sent an email to Michael Roman;

Act 94: December 23, 2020, he received an email from John Eastman;

Act 109: January 1, 2021, he sent an email to John Eastman; and

Act 124: January 4, 2021, he sent an email to John Eastman.

The American Bar Association's Model Rules of Professional Conduct say that an attorney may counsel or assist a client "to make a good faith effort to determine the validity, scope, meaning, or application of the law." Rule 1.2(d). An attorney is obviously prohibited from counseling a client on committing a crime or fraud, but the attorney is permitted to give "an honest opinion about the actual consequences that appear likely to result from a client's conduct." *See* Rule 1.2, cmt. [9]. The American Bar Association notes the distinction between presenting a legal analysis versus recommending the means by which to commit a crime.

Mr. Chesebro contends that every action he undertook in his role as an attorney for the Trump Campaign was protected under the First Amendment and should be excluded from prosecution.

CITATION TO AUTHORITY AND ARGUMENT

"As a general matter, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (alternations adopted) (internal quotations omitted). The United States Supreme Court "has rejected as startling and dangerous a free-floating test for First Amendment coverage based on an *ad hoc* balancing of relative social costs and benefits." *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (alterations adopted) (internal quotations omitted) (quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010)).

The First Amendment has long acted as a shield for those wishing to voice opinions, however unpopular. This long held protection includes the right to advance ideas, including beliefs that are held amongst a group of people. *See Scott v. Ark. State Highway Emps., Loc. 1315*, 441 U.S. 463, 464 (1979) ("The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances.").

This protection does not cease to exist merely because the advocating group is made up of those supporting a political position. In fact, freedom of speech "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) (internal quotations omitted) (quoting *Monitor Patriot Co. v. Roy*, 401, U.S. 265, 272 (1971)); *see also Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.").

In 1968, the U.S. Supreme Court explicitly warned of criminalizing this type of behavior:

> [T]he use of constitutionally protected activities to provide the overt acts for conspiracy convictions might well stifle dissent and cool the fervor of those with whom society does not agree at the moment. Society, like an ill person, often pretends it is well or tries to hide its sickness. From this perspective, First Amendment freedoms safeguard society from its own folly. As long as the exercise of those freedoms is within the protection of the First Amendment, the question is presented whether this Court should permit criminal convictions for conspiracy to stand, when they turn on that exercise.

Epton v. New York, 390 U.S. 29, 32 (1968) (per curiam) (Douglas, J., dissenting), *denying cert. to People v. Epton*, 228 N.E.2d 908 (N.Y. Ct. App. 1967) .

Indeed, the U.S. Supreme Court has even said that false statements are protected—and ***inevitable***—in "open and vigorous expression of views in public and private conversation." *Alvarez*, 567 U.S. at 718; *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (stating that an "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the breathing space that they need to survive" (internal quotations and punctuation omitted)).

Here, Mr. Chesebro denies that any legal advice given was false. However, even had it been, it would *still* be **protected speech**. In *Alvarez*, the Court went a step further to state that "[e]ven when considering some instances of defamation and fraud . . . the Court has been careful to instruct that *falsity alone* may not suffice to bring the speech outside the First Amendment. The statement ***must*** be a knowing or reckless falsehood." 567 U.S. at 719 (emphases added); *see also Garrison*, 379 U.S. 64 ("[E]ven where the

utterance is false, the great principles of the Constitution which secure freedom of expression . . . preclude attaching adverse consequences to any except the knowing or reckless falsehood.").

Mr. Chesebro, in suggesting the use of alternate electors in states where there were pending legal challenges, was *not* knowingly or recklessly advancing a falsehood. Instead, Mr. Chesebro—relying on legal and historic precedent, the United States Constitution, and the Electoral Count Act—suggested that the Republican Presidential Electors, who had been qualified and elected by the Georgia Republican Party, meet and vote, in accordance with the Constitution and State statutes, in order to ***preserve*** any potential remedies following the conclusion of ongoing litigation.

Relevant to this discussion is a California federal court's decision in *Eastman v. Thompson*. 594 F. Supp. 3d 1156 (C.D. Cal. 2022). In *Eastman*, the court analyzed whether any documents that were obtained from John Eastman (another attorney for the Trump campaign and another defendant in this prosecution) should be excluded in his proceedings under attorney–client privilege. In so doing, the court analyzed a voluminous set of documents, including Mr. Chesebro's November 18 memo. *Id.* at 1186–87. In reviewing, the court broke down the large batch of documents into smaller batches, explaining how different batches of documents should be analyzed under differing legal theories. Notably, one legal theory the court explored was the crime-fraud exception, which would overcome attorney–client privilege. *Id.* at 1188. However, the court did not analyze Mr. Chesebro's November 18, 2020 memo with the batch of documents that were examined under the crime-fraud exception. In fact, the court found that the November

18, 2020 memo would have been excluded due to it being protected work product if it had not been leaked to the media by a party unbeknownst to Mr. Chesebro. *Id.* at 1187. In other words, the court in *Eastman* concluded that Mr. Chesebro's memo is, in fact, protected work product.

Similarly, the federal indictment issued in the pending *United States v. Donald J. Trump*[7] is also instructive on the issue here. In the federal indictment, Special Counsel Jack Smith took special care to note that

> [t]he Defendant had a right, like every American, to speak publicly about the election and ***even to claim, falsely, that there had been outcome-determinative fraud*** during the election and that he had won. ***He was also entitled to formally challenge the results of the election through lawful and appropriate means***, such as by seeking recounts or audits of the popular vote in states or filing lawsuits challenging ballots and procedures.

Id. at 2.

Here, Mr. Chesebro's advice and conduct falls squarely into Special Counsel Smith's words. Mr. Chesebro's legal advice was just that; legal advice regarding procedures that must be followed in order to preserve any potential success in election related litigation.

As stated above, Mr. Chesebro made no false or fraudulent statements nor did he

[7] Case No. 1:23-CR-00257-TSC, ECF 1 (D.D.C. Aug. 1, 2023).

encourage anyone to impersonate a public official.[8] Mr. Chesebro was solicited for his expertise in election law. In response, Mr. Chesebro provided legal advice. This advice was tendered in the form of legal memoranda and email communications. This medium of conduct is wrapped tightly in a cloak of First Amendment protection. As stated by the numerous courts above, the First Amendment is a stalwart of civil liberties and does not easily bend nor break when confronted with feeble challenges, including misguided prosecutions.

WHEREFORE, Mr. Chesebro requests that the Trial Court dismiss the indictment based on the First Amendment to the United States Constitution.

Respectfully submitted, this the 18th day of September, 2023.

[8] Especially prudent to the charges alleged against Mr. Chesebro, the *Alvarez* decision contemplates the First Amendment protection awarded to statements made by those who are falsely representing that they are speaking on behalf of the government, including speech that results in impersonating an officer or employee of the United States. *Alvarez* 567 U.S. 709 (2012). Defense counsel anticipates that the prosecution will manipulate this language to assert that the actions of Mr. Chesebro, in suggesting an alternate slate of electors, strips him of First Amendment protection because his legal advice furthered the alleged impersonation of government officials and interfered with the integrity of government processes. However, Mr. Chesebro, in suggesting an alternate slate of electors, was *not* suggesting that anyone impersonate an officer. Instead, Mr. Chesebro—relying on precedent, the U.S. Constitution, and the Electoral Count Act—suggested that the Presidential Electors, who had been qualified and elected by the Georgia Republican Party, meet and vote, in accordance with the Constitution and State statutes, in order to *preserve* any potential remedies following the conclusion of ongoing litigation. In no way does this conduct impersonate a public officer. Instead, it advises the alternate slate of electors to act as prescribed in clear black letter law.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing ***General Demurrer to the Indictment Based on First Amendment Protections*** to all parties via the Fulton County e-filing system.

This the 18th day of September, 2023.

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