

# **Fulton County, Georgia's Trump Investigation**

**An Analysis of the Reported  
Facts and Applicable Law**

**SECOND EDITION**

By Norman Eisen, Donald Ayer,  
Noah Bookbinder, Gwen Keyes Fleming,  
Colby Galliher, Joshua Matz,  
Debra Perlin, and Jason Powell

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*With Dev Ranjan and Madison Gee*

November 2022

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## Executive Summary

In its 246-year history, the United States has never seen a presidential transition remotely resembling that of November 2020 to January 2021. It was a historically unprecedented attempt to overturn an election, led from the Oval Office by Donald J. Trump. His conduct, according to a federal judge, was “more likely than not” criminal, an attempted “coup in search of a legal theory,” and may have included making “false claims in federal court” while “under oath.”<sup>1</sup> Challenges to the election ultimately resulted in the violence of January 6, with five lives lost, hundreds of police injured, and over 800 prosecutions (and counting) of those involved in the insurrection, as well as an impeachment and a subsequent blockbuster set of congressional hearings that are arguably the most important since Watergate.

Central to Trump’s attempt to overturn a free and fair election was the state of Georgia. The contest in that state was an obsessive focus of the former president. He and those around him, including his chief of staff and others, made multiple attempts to intervene and overturn the state’s election results. His personal attorneys testified falsely in the state legislature. His campaign pursued a plan to organize false electors that included a bogus slate in Georgia. Trump attempted to replace his own attorney general in order to seek the unlawful intervention of the Georgia legislature.

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<sup>1</sup> Order Re: Privilege of Documents Dated January 4–7, 2021 at 44, *Eastman v. Thompson*, No. 22-cv-00099-DOC-DFM (C.D. Cal. Mar. 28, 2022), <https://www.courthousenews.com/wp-content/uploads/2022/03/eastman-select-committee-order.pdf> (hereinafter “*Eastman v. Thompson*, Order Re: Privilege of Docs”); *see also* Order Re: Privilege of Remaining Documents at 16–17, *Eastman v. Thompson*, No. 8:22-cv-00099-DOC-DFM (C.D. Cal. Oct. 19, 2022), [https://storage.courtlistener.com/recap/gov.uscourts.cacd.841840/gov.uscourts.cacd.841840.372.0\\_5.pdf](https://storage.courtlistener.com/recap/gov.uscourts.cacd.841840/gov.uscourts.cacd.841840.372.0_5.pdf). In response to the latter ruling, attorneys for Dr. John Eastman confirmed that the House Select Committee to Investigate the January 6th Attack on the U.S. Capitol was in possession of email communications between Trump’s lawyers that appear to indicate that the attorneys for the former president knew information at the core of election-related lawsuits they were filing—in at least one case, with a signed declaration from the former president—was false. *See* Motion to Stay Pending Appeal, *Eastman v. Thompson*, No. 22-56013 (9th Cir. Oct. 28, 2022), <https://s3.documentcloud.org/documents/23227666/eastman-9th-circuit-brief.pdf>.

And Trump relentlessly pressed Georgia officials to go along with his plan. Most notably, on Saturday, January 2, 2021, Trump placed a call to Georgia's Republican Secretary of State Brad Raffensperger. Trump urged and ultimately threatened Raffensperger to reverse the election outcome—including a demand that Raffensperger “find 11,780 votes” that could be deemed fraudulent and tossed out.<sup>2</sup> That number was exactly one more vote than the margin of Joe Biden's 11,779-vote victory in the state.<sup>3</sup> If Raffensperger's office complied with his request, Trump would be named the winner of the state's presidential election, and presumably could use that development to seek a broader unraveling of the certified election results in other states confirming his defeat.

That call and the larger pattern of events were no mere transgression of norms. Georgia law was also strongly implicated. On February 10, 2021, Fulton County District Attorney Fani Willis announced the launch of a criminal investigation into Trump's conduct.<sup>4</sup> At issue was not just Trump's January 2 call to Raffensperger. The former president had publicly pressured, and personally contacted, several other officials in Georgia—including the governor, the attorney general, and the secretary of state's chief investigator—about the election, and how they might assist him in flipping the state's electoral votes over to him even after the results had been duly certified.<sup>5</sup> The former president's potential role in organizing false electors—including 16 who falsely certified Trump as the victor in the 2020 Georgia presidential election—was also seemingly in DA Willis' crosshairs.

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<sup>2</sup> Amy Gardner & Paulina Firozi, Here's the full transcript and audio of the call between Trump and Raffensperger, THE WASHINGTON POST (Jan. 15, 2021, 1:15 PM), [https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356\\_story.html](https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html).

<sup>3</sup> Georgia Presidential Election Results 2020, NBC NEWS (last updated Apr. 8, 2021), <https://www.nbcnews.com/politics/2020-elections/georgia-president-results>.

<sup>4</sup> Richard Fausset & Danny Hakim, Georgia Prosecutors Open Criminal Inquiry Into Trump's Efforts to Subvert Election, THE NEW YORK TIMES (Feb. 10, 2021), <https://www.nytimes.com/2021/02/10/us/politics/trump-georgia-investigation.html>.

<sup>5</sup> *Id.*

In so doing, Willis became one of the first prosecutors in the country to take decisive action in response to the allegations of Trump's election wrongdoing. And she has remained ahead of the curve ever since. That includes the district attorney marching forward and securing voluntary testimony, assembling sufficient evidence to secure the launch of a special grand jury, issuing at least 16 target letters to individuals central to the investigation, and compiling an impressive record of winning the first of a flurry of legal battles that are to be expected whenever Trump and those in his orbit become the focus of a prosecutor. She has indicated that she hopes to conclude her special grand jury by the end of the year.

In this report, we consider the relevant facts and context of the push by Donald Trump and his allies to overturn the 2020 election results in Georgia. The report updates and expands on the first edition published a year ago and takes account of the considerable additional information that is now available. We analyze the extent to which the actions of the former president make him vulnerable to state criminal liability. We also assess how Trump's attorneys may defend his conduct in pre- and (if any) post-indictment proceedings, as well as in the court of public opinion. We update and expand every part of the original report to take account of the numerous developments in the year since the first edition was issued in October 2021.

We conclude that Trump's post-election conduct in Georgia leaves him at substantial risk of possible state charges predicated on multiple crimes. These charges potentially include: criminal solicitation to commit election fraud; intentional interference with performance of election duties; conspiracy to commit election fraud; criminal solicitation; and state Racketeer Influenced and Corrupt Organizations (RICO) Act violations. Our conclusions are based entirely on publicly available reporting and evidence, including the recording of Trump's call to Raffensperger, the false electoral certificates the purported Trump electors issued to Congress and the National



Archives, first-hand congressional testimony that Trump and White House Chief of Staff Mark Meadows tried to influence the Georgia election, and the voluminous relevant evidence introduced into the public record by the House Select Committee to Investigate the January 6th Attack on the U.S. Capitol (the “January 6 Committee”).<sup>6</sup> Our view is anchored by a close reading of the relevant portions of Georgia’s legal code, an unpacking of the extant case law defining the stated crimes, and a searching examination of the main likely defenses. The latter pose some serious questions but (based upon what is currently known of the facts) appear to be unavailing.

Our aim in writing this report is to bring the facts, the law, and the possible defenses together to provide a comprehensive and accessible overview of the investigation and the possible crimes on which it is predicated. Our hope is that such an exercise offers a clear picture to the public, officials, and the press of this possible avenue of accountability for Trump’s ongoing attempts to attack election processes and subvert American democracy. We undertake our analysis with the recognition that, as of November 2022, DA Willis’ investigation is mature but, nevertheless, ongoing.<sup>7</sup> The district attorney will ultimately bear the burden to prove any charges beyond a reasonable doubt using credible evidence in a court of law, and that high hurdle is a paramount consideration in determining whether Fulton County will bring charges at all. It is difficult to know whether, or when, criminal charges may eventually be brought in Georgia against the former president, though comments by Willis and news reports suggest they may come as soon as later this year. But we make no prediction in that regard, only a current assessment of the risk. Trump and others targeted in the investigation are innocent until proven guilty, and, if charged,

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<sup>6</sup> Gardner & Firozi, *supra* note 2.

<sup>7</sup> Sara Murray & Jason Morris, Georgia criminal probe into Trump’s attempts to overturn 2020 election quietly moves forward, CNN (Sept. 17, 2021, 1:50 PM), <https://www.cnn.com/2021/09/17/politics/georgia-probe-trump-election/index.html>; Jose Pagliery & Asawin Suebsaeng, Georgia DA Interviews Witnesses About Trump’s Call to ‘Find’ Votes, THE DAILY BEAST (Sept. 5, 2021, 8:55 AM), <https://www.thedailybeast.com/georgia-district-attorney-investigates-donald-trumps-call-to-find-votes>.

will have the opportunity to present defenses like those we describe below. If past behavior is indicative of his response to future allegations, Trump will undoubtedly vigorously defend himself.

Before turning to our summary of the four parts of this report, we note a threshold matter that cuts across them all. Deference is due under principles of federalism to the state of Georgia in investigating and, if appropriate, prosecuting any transgressions of its own state law. As of this writing, the federal district courts in Georgia have twice remanded federal actions by those involved in the investigation (Congressman Jody Hice and Senator Lindsey Graham) back to Georgia state court.<sup>8</sup> In our federal system, governmental powers are divided between the national and the state governments. States have both the primary responsibility and authority to make determinations about matters within their purview.<sup>9</sup> Those principles apply with full force here: Trump's communications with state officials, Trump's possible role in organizing the false electoral slate, and other conduct we cover potentially violated state criminal laws on matters of immense state interest. While Trump was president at the time he sought to interfere with the election in Georgia, our constitutional scheme (and its protection of federal interests) poses no barrier to the vindication of Georgia's interests in enforcing its criminal code.<sup>10</sup> Following settled Supreme Court precedent (including the most recent in the field, the case of *Trump v. Vance*<sup>11</sup>), Georgia state prosecutors are on firm legal footing in that regard. They certainly have the power to investigate and charge a former president for willfully reaching into their jurisdiction to allegedly transgress their laws and interfere with their officials on a matter of utmost state interest:

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<sup>8</sup> Order, Fulton County Special Purpose Grand Jury v. Hice, No. 1:22-CV-02794-LMM (N.D. Ga. July 25, 2022), <https://storage.courtlistener.com/recap/gov.uscourts.gand.305308/gov.uscourts.gand.305308.11.0.pdf>; Order, Fulton County Special Purpose Grand Jury v. Graham, No. 1:22-cv-03027-LMM (N.D. Ga. Aug. 15, 2022), <https://www.documentcloud.org/documents/22136078-graham-subpoena-order>.

<sup>9</sup> Comparing Federal & State Courts, UNITED STATES COURTS, <https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts>.

<sup>10</sup> National Center for State Courts, Georgia, COURT STATISTICS PROJECT (accessed Nov. 2, 2022), [https://www.court-statistics.org/state\\_court\\_structure\\_charts/georgia](https://www.court-statistics.org/state_court_structure_charts/georgia).

<sup>11</sup> *Trump v. Vance*, 140 S. Ct. 2412 (2020).

the administration of Georgia's election procedures. If it were otherwise, then states would lack authority to enforce important election integrity laws against perhaps the most significant potential violators: the candidates themselves.

Our report proceeds in four parts.

## **I. Summary of the Facts**

In Section I, we review the facts and events on which any eventual charges will likely be based. We recount Trump and his surrogates' campaign to overturn his loss in Georgia, beginning with his claim of victory in the state (along with other battleground states) even before vote counting concluded.<sup>12</sup> As election workers processed Georgians' votes in the first weeks of November, Trump bombarded the state's election officials with tweets containing baseless claims of voter fraud and pushed those officials to diverge from the state's settled election procedures.<sup>13</sup> Meanwhile, his campaign and his allies filed a series of lawsuits to challenge the validity of mail-in ballots and otherwise prevent Joe Biden's win from being certified.<sup>14</sup> Trump's attacks escalated as two recounts affirmed Biden's narrow victory.<sup>15</sup> His attorneys allegedly contracted a Georgia-based computer forensics firm to access and distribute to supporters (who were ostensibly searching for evidence to substantiate their fraud claims) sensitive election files and data in at least one Georgia county.

In December, Trump reportedly began to place direct calls to officials in the state, including Governor Brian Kemp and Attorney General Chris Carr, in order to urge them to go along with his

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<sup>12</sup> Daniel Dale, Fact check: Trump makes series of egregious false claims in Election Night address, CNN (Nov. 4, 2020, 4:33 AM), <https://www.cnn.com/2020/11/04/politics/fact-check-trump-election-night-speech/index.html>.

<sup>13</sup> See, e.g., Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Nov. 4, 2020, 4:56:10 PM), <https://www.thetrumparchive.com/?results=1&dates=%5B%222020-11-04%22%2C%222020-11-17%22%5D&searchbox=%22georgia%22>.

<sup>14</sup> See, e.g., Wood v. Raffensperger, No. 1:20-cv-04651-SDG (N.D. Ga. 2020); Brooks v. Mahoney, III, No. 4:20-cv-00281-RSB-CLR (S.D. Ga. 2020), <https://www.courtlistener.com/docket/18620507/1/brooks-v-mahoneyiii/>.

<sup>15</sup> Kate Brumback, Georgia again certifies election results showing Biden won, AP NEWS (Dec. 7, 2020), <https://ap-news.com/article/election-2020-joe-biden-donald-trump-georgia-elections-4eeca3b24f10de886bcdeab6c26b680a>.

increasingly desperate plans to decertify his loss.<sup>16</sup> His personal lawyer, Rudy Giuliani, appeared before committees in the state legislature with the intent of convincing state lawmakers to take extraordinary action to reverse Biden's win.<sup>17</sup> Officials from his campaign, allegedly with the help of and at the direction of Trump himself, directed Republican state officials to meet on December 14 and sign and submit false electoral certificates purporting to show Trump's victory in the state. Finally, as the January 6 congressional certification of Joe Biden's victory neared, Trump called Secretary of State Brad Raffensperger on January 2.<sup>18</sup> In the now infamous call, Trump both threatened and pleaded with Raffensperger to "find" 11,780 votes for Biden that could be invalidated, thereby tilting the state's presidential election to Trump.<sup>19</sup>

Also in Section I we touch upon larger 2020 election events beyond Georgia, but only for context and to demonstrate Trump's intent, state of mind, or relevant acts. In our view, the case under investigation is one about intrusions into Georgia, concerning a Georgia election, and affecting state officials and interests. The investigation and prosecution, if any, does not require the resolution of allegations about what happened in other states. We discuss some of those public facts but in as limited a fashion as possible to avoid moving the focus away from Georgia.

## **II. Procedural Summary**

In Section II, we take stock of the investigation led by Fulton County DA Willis and where it stands as of this writing. As noted above, Willis announced her office's investigation on February 10, 2021. That was when she sent letters to Georgia officials who were in some way privy to

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<sup>16</sup> Marshall Cohen, Jason Morris & Christopher Hickey, Timeline: What Georgia prosecutors are looking at as they investigate Trump's efforts to overturn the election, CNN (Aug. 5, 2021), <https://www.cnn.com/interactive/2021/08/politics/trump-georgia-2020-election/>.

<sup>17</sup> Stephen Fowler, Fact Checking Rudy Giuliani's Grandiose Georgia Election Fraud Claim, GEORGIA PUBLIC BROADCASTING (Dec. 4, 2020), <https://www.gpb.org/news/2020/12/04/fact-checking-rudy-giulianis-grandiose-georgia-election-fraud-claim>.

<sup>18</sup> Gardner & Firozi, *supra* note 2.

<sup>19</sup> *Id.*

election-reversal efforts by Trump, or his principal allies, requesting that they preserve any records that may be relevant to her investigation.<sup>20</sup> Two days later, Willis confirmed that her investigation would examine both Trump and his allies.<sup>21</sup> Her investigation accelerated thereafter, with reports that she was securing voluntary cooperation from a variety of sources. Her investigation took a leap forward in January 2022, when it was announced she would seek a special purpose grand jury.

That grand jury has been busy. Since its impaneling in May 2022, it has heard testimony from crucial witnesses, among them Secretary of State Brad Raffensperger, Attorney General Chris Carr, Chief Operating Officer in the Secretary of State's Office Gabriel Sterling, two of the false electors (who received target letters in June notifying them that their conduct was the subject of increased scrutiny by investigators), and Rudy Giuliani, Trump's personal lawyer.<sup>22</sup> Negotiations—and in some instances, court battles—are underway as of this writing for testimony from additional important witnesses.<sup>23</sup> State and federal courts have repeatedly affirmed the grand jury's mandate—and the legitimacy of Willis' investigation—by rejecting attempts by witnesses to quash the grand jury's subpoenas.<sup>24</sup>

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<sup>20</sup> Fausset & Hakim, *supra* note 4.

<sup>21</sup> Amy Gardner, Tom Hamburger & Josh Dawsey, Graham's post-election call with Raffensperger will be scrutinized in Georgia probe, person familiar with inquiry says, THE WASHINGTON POST (Feb. 12, 2021), [https://www.washingtonpost.com/politics/lindsey-graham-georgia-investigation/2021/02/12/f12faa82-6d6b-11eb-9f80-3d7646ce1bc0\\_story.html](https://www.washingtonpost.com/politics/lindsey-graham-georgia-investigation/2021/02/12/f12faa82-6d6b-11eb-9f80-3d7646ce1bc0_story.html).

<sup>22</sup> John Wagner & Tom Hamburger, District attorney says Graham's testimony is crucial in election probe, THE WASHINGTON POST (Aug. 19, 2022, 1:37 PM), <https://www.washingtonpost.com/national-security/2022/08/19/trump-georgia-election-investigation/>; Dale Russell, Top Georgia elections official testifies before special grand jury investigating former President Trump, FOX5 ATLANTA (June 15, 2022), <https://www.fox5atlanta.com/news/top-georgia-elections-official-testifies-before-special-grand-jury-investigating-former-president-trump>; *In re* subpoenas from May 2022 Special Purpose Grand Jury, No. 2022-EX-000024 (Ga. Super. Ct. July 19, 2022), <https://s3.documentcloud.org/documents/22089602/motion-to-quash-subpoena.pdf>; Tierney Sneed, Rudy Giuliani, a target in Atlanta probe into Trump 2020 election subversion scheme, appears before grand jury, CNN (Aug. 17, 2022, 4:23 PM), <https://www.cnn.com/2022/08/17/politics/rudy-giuliani-grand-jury-georgia/index.html>.

<sup>23</sup> Kelcey Caulder, Sen. Graham, Gov. Kemp Fight Ga. Election Probe Subpoenas, LAW360 (Aug. 24, 2022), <https://www.law360.com/legalindustry/articles/1524024/sen-graham-gov-kemp-fight-ga-election-probe-subpoenas>.

<sup>24</sup> WSBTV.com News Staff, Federal judge says Rep. Jody Hice must testify for special grand jury in 2020 election probe, WSB-TV ATLANTA (July 25, 2022), <https://www.wsbtv.com/news/georgia/federal-judge-says-rep-jody-hice-must-testify-special-grand-jury-2020-election-probe/NLPXTSF75BBNTARYC2RSCZTCAE/>; Richard Elliot, Judge will make ruling over Fulton DA later, says 'fake electors' have to testify in election probe, WSB-TV ATLANTA (July 21, 2022), <https://tinyurl.com/y48advsk>.

In this section, we also discuss the Georgia-relevant evidence that has come from the January 6 Committee’s investigation and its nine public evidentiary hearings. We address the importance for accountability of the state proceeding because of the jurisdictional and political advantages Willis enjoys over her federal prosecutorial counterparts, whose investigation has moved comparatively slower though it is now showing definite signs of forward impetus.

### III. Summary of Potential Crimes

In Section III, we survey the relevant state criminal statutes and analyze how they may apply to Trump’s conduct. In Section III.A we focus on **potential election crimes** in the Georgia Code. Under Title 21 dealing with elections, there are four main potentially relevant criminal statutes: solicitation to commit election fraud, Ga. Code Ann. § 21-2-604(a); intentional interference with performance of election duties, Ga. Code Ann. § 21-2-597; interference with primaries and elections, Ga. Code Ann. § 21-2-566; and conspiracy to commit election fraud, Ga. Code Ann. § 21-2-603.

While the elements vary, the gravamen of these offenses is that through conduct such as the Raffensperger call demanding the state “find 11,780 votes”<sup>25</sup> and his apparent involvement in the false-electors plan, Trump was clearly exhorting Georgia officials to get them to change the lawful outcome of the election. His actions are required to be intentional,<sup>26</sup> and we explain why, legally speaking, they appear to have been. His full course of conduct from December 23, 2020, through January 2, 2021<sup>27</sup>—as well as his actions preceding and following that time period—demonstrates his consistent intent to solicit, pressure, and threaten government officials to

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<sup>25</sup> Gardner & Firozi, *supra* note 2.

<sup>26</sup> Ga. Code Ann. § 21-2-597.

<sup>27</sup> See, e.g., Jason Morris & Sara Murray, Trump pressured Georgia investigator to find ‘the right answer’ in baseless fraud push, CNN (Mar. 11, 2021), <https://www.cnn.com/2021/03/10/politics/donald-trump-georgia-phone-call/index.html>; Gardner & Firozi, *supra* note 2.

participate in plans to reverse the election results. Although many of these efforts failed, that seems only to have bolstered his resolve to keep trying, as evidenced by his continued calls to Georgia officials.<sup>28</sup>

We also note that criminal liability may attach not only to Trump but to others who allegedly assisted his attempt to subvert the election, such as his former counsel Rudy Giuliani, who traveled to Georgia and trafficked in falsehoods as part of the alleged plan, and who was notified in August 2022 by Willis' office that he is an active target in her investigation.<sup>29</sup> The same can be said of the 16 false electors who signed the false electoral certificate purporting to show Trump's victory in Georgia, and who in June 2022 received target letters from Willis notifying them that their conduct may have been criminal.

In addition, evidence in the public realm suggests that Trump or his cohort, including the false electors, may have committed **other crimes outside of the election title**. In Section III.B we analyze these. They include a variety of possible offenses found in Title 16 of the Georgia Code, the general criminal title. In this Section we again look at four main possible charges: making false statements, Ga. Code Ann. § 16-10-20; influencing witnesses, Ga. Code Ann. § 16-10-93; forgery in the first degree, Ga. Code Ann. § 16-9-1(b); and criminal solicitation, Ga. Code Ann. § 16-4-7. The same core fact pattern comes into play: Trump is alleged to have repeatedly lied about the 2020 election to Georgia officials and to have used that misleading conduct as well as intimidation and threats to try to get them to change the outcome of the election.<sup>30</sup>

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<sup>28</sup> Morris & Murray, *supra* note 27; Jim Rutenberg, Jo Becker, Eric Lipton, Maggie Haberman, Jonathan Martin, Matthew Rosenberg & Michael S. Schmidt, 77 Days: Trump's Campaign to Subvert the Election, THE NEW YORK TIMES (last updated June 14, 2022), <https://www.nytimes.com/2021/01/31/us/trump-election-lie.html>.

<sup>29</sup> Fowler, *supra* note 17; Richard Fausset & Danny Hakim, Giuliani Is Told He Is a Target in Trump Election Inquiry in Georgia, THE NEW YORK TIMES (Aug. 15, 2022), <https://www.nytimes.com/2022/08/15/us/graham-georgia-investigation-trump.html>.

<sup>30</sup> Maggie Astor, A Timeline of the Certification Process That Trump Is Trying to Disrupt, THE NEW YORK TIMES (Dec. 13, 2020), <https://www.nytimes.com/article/us-election-results-trump-biden.html>.

Finally, in Section III.C we consider possible violations of an additional major Title 16 crime, Georgia's **RICO Act**. While the term "RICO" conjures up prosecutions of Mafia bosses,<sup>31</sup> the statute is much broader than that. It recognizes that if violations of individual criminal statutes by a single person are bad, an enterprise that repeatedly violates the law is worse and should be subject to additional sanction.<sup>32</sup> The statute requires a "pattern" of misconduct,<sup>33</sup> as shown by violations of two or more of a long list of specified crimes,<sup>34</sup> including a number of those such as false statements or improper influence analyzed in the earlier Section III.B. We address the evidence prosecutors may rely on to sustain a RICO charge against Trump and his associates based upon their repeated assaults on the Georgia election outcome. We think the possibility of RICO charges—along with other factors—merits serious attention based upon that evidence. The Fulton County DA's Office signaled in its February 10, 2021 letter to Governor Kemp that racketeering is one of the crimes being investigated.<sup>35</sup> The DA has well-known and successful experience with RICO,<sup>36</sup> and she hired a RICO expert to work on the case.<sup>37</sup>

#### **IV. Summary of Potential Defenses**

Finally, in Section IV, we surmise how Trump's legal team may defend him in court if the charges described in Section III are brought against the former president. No doubt Trump's defenses would include claims of immunity grounded in the structure of our constitutional system, which generally protects federal officials from infringements on authorities vested in them by the

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<sup>31</sup> Racketeer Influenced and Corrupt Organizations (RICO) Law, JUSTIA, <https://www.justia.com/criminal/docs/rico/>.

<sup>32</sup> Ga. Code Ann. § 16-14-4(a)-(c).

<sup>33</sup> *Id.*

<sup>34</sup> Ga. Code Ann. § 16-14-3.

<sup>35</sup> Fausset & Hakim, *supra* note 4.

<sup>36</sup> Tamar Hallerman & Christian Boone, Fulton DA's comfort with racketeering law could influence Trump probe, THE ATLANTA JOURNAL-CONSTITUTION (Mar. 15, 2021), <https://www.ajc.com/news/crime/fulton-das-comfort-with-racketeering-law-could-influence-trump-probe/CNOO3VLPBFBQPKCBKRYTT6ARDQ/>.

<sup>37</sup> Kate Brumback, RICO expert hired by prosecutor investigating Trump call, AP NEWS (Mar. 10, 2021), <https://ap-news.com/article/donald-trump-georgia-general-elections-elections-racketeering-6c488fce674bc0f375b60c6be55054a4>.



Constitution and federal laws. However, we explain that in the unusual (and indeed unprecedented) circumstances of this case, constitutional principles point the other way. Fidelity to the rule of law and our federal system of government requires protecting state authority over counting and tabulating ballots and over certifying presidential election results from encroachments by a candidate (who is also a president) if he violates state criminal law.

Trump also might—as he did in cases that arose during his term as president—advance arguments based on immunity arising from his position as president at the time the challenged actions were undertaken. These claims could take two forms. One would claim a categorical immunity of presidents from prosecution and would rest upon authorities including a legal opinion of the Department of Justice Office of Legal Counsel (OLC) that a president may not be prosecuted while in office because it would be unduly disruptive of his ability to do his job. This claim should clearly fail: While it may be attempted by a *sitting* president (who might argue that prosecution while occupying the White House disrupts the performance of his duties), it clearly has no application once a president leaves office. As we explain, a great deal of precedent and practice makes this clear, including OLC precedent<sup>38</sup> and express admissions by Trump before the Supreme Court.<sup>39</sup>

Trump's second and more likely immunity argument would raise a broader claim that he cannot *ever* be second-guessed in court for anything he did while president. As a general proposition, it is true that former presidents enjoy a measure of immunity for actions undertaken

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<sup>38</sup> A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222 (Oct. 16, 2000) (“[A]n immunity from prosecution for a sitting President would not preclude such prosecution once the President's term is over or [the President] is otherwise removed from office by resignation or impeachment.”).

<sup>39</sup> *Trump v. Vance*, 140 S. Ct. 2412, 2426–27 (2020) (“[T]he President is not seeking immunity from the diversion occasioned by the prospect of future criminal *liability*. Instead, he concedes—consistent with the position of the Department of Justice—that state grand juries are free to investigate a sitting President with an eye toward charging him after the completion of his term.”).

while in office—to protect the president’s exercise of discretion in doing his job.<sup>40</sup> But substantial authority establishes that this immunity from liability extends, at the very most, to actions taken by the president that fall somewhere within the scope of his lawful duties as a federal official.<sup>41</sup> And that standard is not satisfied here. Neither the Constitution nor federal law confer any authority on the president over the process of counting or tabulating ballots or certifying the results of an election. To the contrary, the Constitution assigns primary responsibility for the elections to the states.<sup>42</sup> Article II states that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors” who will vote on the president.<sup>43</sup> Congress has a role at the very end of the process in accepting the certifications; the president has none.

Trump’s reported efforts to twist the arms of various state officials to change the outcome in his favor were thus well outside the scope of his official duties. Stated simply, soliciting and then threatening senior state officials to alter the outcome of a presidential election does not fall within any reasoned conception of the scope of presidential power. There is thus no basis for Trump to claim that the Constitution renders him immune from consequences for criminal wrongdoing. For that reason, we also explain, efforts by Trump to remove the case to federal court based upon having a colorable federal defense would not be well-founded.

While the immunity issues will likely come first in Trump’s legal response to any charges, the most important factual defense will likely be Trump’s claim that he was just pressing his strong good-faith conviction that he actually had won—that he was simply trying to secure the proper

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<sup>40</sup> See A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222 (Oct. 16, 2000).

<sup>41</sup> U.S. Const. art. II, § 3, cl. 5.1 (Presidential Immunity to Suits and Official Conduct, Constitution Annotated), [https://constitution.congress.gov/browse/essay/artII-S3-5-1/ALDE\\_00013392/](https://constitution.congress.gov/browse/essay/artII-S3-5-1/ALDE_00013392/).

<sup>42</sup> Cong. Rsch. Serv., RL30747, Congressional Authority to Direct How States Administer Elections (2014), [https://www.everycrsreport.com/files/20141204\\_RL30747\\_ffc309dc278cd2558c38f0b8b1596c47c6046ea0.pdf](https://www.everycrsreport.com/files/20141204_RL30747_ffc309dc278cd2558c38f0b8b1596c47c6046ea0.pdf).

<sup>43</sup> U.S. Const. art. II, § 1, cl. 2.

outcome under the true facts. Given Trump's established ability to lie forcefully and in ways that a great many people find persuasive, the impact of this possibility cannot be discounted.<sup>44</sup>

There are two major flaws in this defense. First, a candidate who believes he has won an election does not enjoy any legal warrant to commit possible crimes in furtherance of that belief. There are procedures in Georgia to lawfully contest an election result.<sup>45</sup> An electoral loser who believes he is an electoral winner must follow those procedures.<sup>46</sup> It would be wrong and unprecedented to accept claims that a strong enough belief in electoral irregularity—even if wholly baseless—allows candidates to commit possible violations of Georgia's criminal law. That is especially true when the candidate also happens to be the president, who is expected to know and follow the law.

Second, it must be said that the record here is uniquely free of any evidence that would support a reasonable person in the belief that Trump actually won the 2020 presidential election in Georgia. To the contrary, there is an extraordinary absence of any evidence suggestive of irregularity in any respect in the Georgia process.<sup>47</sup> The fact that the existing outcome was arrived at and consistently reaffirmed in a process overseen by Republican officeholders, in a series of acts against their political interest,<sup>48</sup> is an additional powerful refutation of any such argument Trump might offer.<sup>49</sup> And the categorical rejection of a whole range of allegations offered in

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<sup>44</sup> Glenn Kessler, Salvador Rizzo & Meg Kelly, Trump's false or misleading claims total 30,573 over 4 years, THE WASHINGTON POST (Jan. 24, 2021, 12:00 AM), <https://www.washingtonpost.com/politics/2021/01/24/trumps-false-or-misleading-claims-total-30573-over-four-years/>.

<sup>45</sup> Citizens for Election Integrity Minnesota, Georgia Recount Laws (June 8, 2020), <https://ceimn.org/searchable-databases/recount-database/georgia>.

<sup>46</sup> See, e.g., Ga. Code Ann. § 21-2-495(d).

<sup>47</sup> Press Release, Office of Georgia Secretary of State Brad Raffensperger, Historic First Statewide Audit of Paper Ballots Upholds Result of Presidential Race (Nov. 19, 2020), <https://tinyurl.com/57t6k9ct>.

<sup>48</sup> Stephen Fowler, 'Someone's Going To Get Killed': Ga. Official Blasts GOP Silence On Election Threats, NPR (Dec. 1, 2020), <https://www.npr.org/sections/biden-transition-updates/2020/12/01/940961602/someones-going-to-get-killed-ga-official-blasts-gop-silence-on-election-threats>.

<sup>49</sup> David Siders & Maya King, Trump unloaded on Georgia's GOP governor. But Brian Kemp is still standing, POLITICO (June 6, 2020), <https://www.politico.com/news/2021/06/06/gop-convention-491993>.

lawsuits as some semblance of evidence for Trump’s claims, by courts again having no interest but to apply the law fairly, also weighs heavily against any such argument.<sup>50</sup> So, while no one can be sure that Trump would fail to seduce a jury with his claim that he really thought he had won and thus was just trying to secure a fair result, there is no plausible argument that such beliefs can have any substantial factual basis.

Section IV also addresses other likely legal and factual defenses. They include claims that Trump’s conduct was protected by the First Amendment as well as his likely accusations of selective or retaliatory prosecution. As to the former, it is black letter law that “speech integral to criminal conduct, such as ‘fighting words, threats, and solicitations,’ remains categorically outside” the protection of the First Amendment.<sup>51</sup> The Supreme Court influentially articulated this principle first in *Giboney v. Empire Storage & Ice Company* in 1949 and has reaffirmed it many times since then.<sup>52</sup> On that basis, courts have repeatedly upheld laws criminalizing solicitation, conspiracy, and the like—the types of offenses that Trump could potentially be charged with under Georgia’s criminal code.<sup>53</sup>

As to claims of prosecutorial abuse, to be successful Trump would have to make “a credible showing of different treatment of similarly situated persons” or like infirmities.<sup>54</sup> As we explain,

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<sup>50</sup> Reuters Staff, Fact check: Courts have dismissed multiple lawsuits of alleged electoral fraud presented by Trump campaign, REUTERS (Feb. 15, 2021), <https://www.reuters.com/article/uk-factcheck-courts-election/fact-check-courts-have-dismissed-multiple-lawsuits-of-alleged-electoral-fraud-presented-by-trump-campaign-idUSKBN2AF1G1>.

<sup>51</sup> *United States v. Williams*, 553 U.S. 285, 297 (2008); *United States v. Bibbs*, No. 15 CR 578 (N.D. Ill. Sept. 8, 2016) (citing *Williams*, 553 U.S. at 297).

<sup>52</sup> *Giboney v. Empire Storage & Ice Company*, 336 U.S. 490, 498 (1949); *Williams*, 553 U.S. at 297; *United States v. Stevens*, 559 U.S. 460, 468–69 (2010).

<sup>53</sup> *See, e.g., United States v. Petrovic*, 701 F.3d 849, 855 (8th Cir. 2012); *United States v. Coss*, 677 F.3d 278, 289 (6th Cir. 2012); *United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010); *United States v. Bly*, 510 F.3d 453, 458 (4th Cir. 2007).

<sup>54</sup> *United States v. Armstrong*, 517 U.S. 456, 470 (1996). *Armstrong* was a case about selective prosecution on the basis of race, but criminal defendants have also alleged selective prosecution under the Fifth and Fourteenth Amendments on the basis of political affiliation. *See Walker v. United States*, No. CV109-036, 2012 WL 902797 (S.D. Ga. Mar. 5, 2012) (applying *Armstrong* standard); *United States v. Scrushy*, No. 2:05CR119-MEF, 2012 WL 139259 (M.D. Ala. Jan. 18, 2012) (same). (cont’d next page)

there is no evidence that is the case. Based on our review of the public record concerning Trump's conduct—and our understanding of relevant constitutional and legal principles—we explain that this defense too would be meritless.

For all these reasons, we assess that Trump is at substantial risk of prosecution in Fulton County based upon what is currently known of the facts. Additional evidence uncovered by the DA's ongoing investigation may expand or contract the scope of conduct upon which charges, if any, may be brought. But it is critical to the integrity of our rule-of-law system, and our constitutional republic, that the investigation proceed. As we explain in the conclusion to this paper, we take seriously the norm that a democracy should not use the courts to persecute unsuccessful candidates for high office. But there is a countervailing and even more foundational principle here at stake. As Justice Kavanaugh noted in *Trump v. Vance*, “no one is above the law.”<sup>55</sup>

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Georgia courts impose a similarly heavy burden upon persons seeking to claim a defense of selective prosecution. To successfully do so in a state proceeding, Trump would need to “show that his prosecution represent[ed] an intentional and purposeful discrimination which [was] deliberately based upon an unjustifiable standard such as race religion, or other arbitrary classification.” *Wallace v. State*, 299 Ga. 672, 674, 791 S.E.2d 836, 838–39 (2016) (quoting *Coe v. State*, 274 Ga. 265, 267(3)(a), 553 S.E.2d 784 (2001)). *See also* *State v. Babel*, 220 Ga. App. 130, 469 S.E.2d 203 (1996).

<sup>55</sup> *Trump v. Vance*, 140 S. Ct. 2412, 2432 (2020) (Kavanaugh, J., concurring in the judgment); *see id.* at 2420 (“Since the earliest days of the Republic, ‘every man’ has included the President of the United States.”).

## **I. Reported Facts**

### **Introduction**

Beginning on June 9, 2022, a year and a half after a violent insurrection halted the counting of electoral votes on January 6, 2021, the January 6 Committee held a series of hearings which brought to light disturbing new details of how the events of that day came to pass. The fourth hearing in that series, held on June 21, 2022, focused on former President Donald Trump's efforts to influence and collaborate with state officials to overturn the presidential election.

During that hearing, the January 6 Committee received testimony from Georgia state officials and election workers, among others, who explained Trump's crusade to steal the election and outlined the threats against them when they refused to do so. Georgia Secretary of State Brad Raffensperger testified about the Georgia election process, the unfounded claims of fraud made by Trump and his allies, and the barrage of phone calls, visits, requests, and pressure tactics from Trump and members of his team. Gabriel Sterling, the chief operating officer in the office of the Georgia secretary of state, also testified.

The previous edition of this report, issued before the January 6 Committee's proceedings, relied on news articles and other publicly reported facts to provide an account of how Trump's efforts to reverse the outcome of the 2020 election intensely targeted the state of Georgia, particularly after the state certified the Democratic candidate's win.<sup>56</sup> Now, thanks in large part to the January 6 Committee's work, we have concrete evidence and public testimony, offered under penalty of perjury, confirming many of the facts detailed in the previous report.<sup>57</sup> The January 6

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<sup>56</sup> Stephen Fowler, Trump Continues Georgia Focus with Planned 'Save America' Rally in Perry, GPB NEWS (Sept. 7, 2021), <https://www.gpb.org/news/2021/09/07/trump-continues-georgia-focus-planned-save-america-rally-in-perry>.

<sup>57</sup> See, e.g., Noah Bookbinder, Norman L. Eisen, Fred Wertheimer, Donald Simon, Jason Powell, Debra Perlin, Colby Galliher & Madison Gee, Highlights from the Criminal Evidence Tracker's Reports on Seven Hearings by the January 6th Committee, JUST SECURITY (July 21, 2022), <https://www.justsecurity.org/82463/highlights-from-the-criminal-evidence-trackers-reports-on-seven-hearings-by-the-january-6th-committee/>.

Committee has also revealed previously unknown facts and information about activities by Trump and members of his inner circle targeting Georgia which may violate state criminal statutes.

### **A. The 2020 Presidential Election Results in Georgia**

Joe Biden won the 2020 presidential election in Georgia, receiving a total of 2,473,633 votes to Trump's 2,461,854, a difference of only 11,779 votes out of the nearly five million cast.<sup>58</sup> Trump had won Georgia by 5.1 percent in the 2016 presidential election,<sup>59</sup> but the 2020 outcome was no bolt from the blue.<sup>60</sup> Although Georgia had not voted for a Democratic presidential candidate since 1992<sup>61</sup>—and although Republicans held the governor's mansion, the state legislature, and both U.S. Senate seats—political trends in the state had been shifting for years. Trump's 5.1-point victory over Hillary Clinton in 2016 was nearly three points shy of Mitt Romney's 7.8-point win over President Barack Obama in 2012.<sup>62</sup> And the state's widely followed gubernatorial race in 2018 saw Democratic candidate Stacey Abrams lose to Republican Brian Kemp by only 1.4 points.<sup>63</sup> Analysts point to the suburbs of Atlanta, where a diversifying and increasingly educated electorate has bolstered Democratic vote totals, as the primary driver of this trend.<sup>64</sup>

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<sup>58</sup> Elena Moore, Biden Flips Coveted Georgia, The Last State To Be Called By The AP, AP NEWS (Nov. 19, 2020), <https://www.npr.org/sections/live-updates-2020-election-results>.

<sup>59</sup> The New York Times, Georgia Presidential Race Results: Donald J. Trump Wins, THE NEW YORK TIMES (last updated Aug. 1, 2017), <https://www.nytimes.com/elections/2016/results/georgia-president-clinton-trump>.

<sup>60</sup> Sarah McCammon, How Georgia Turned from Red to Purple, NPR (Nov. 6, 2020), <https://tinyurl.com/yr95yfx6>.

<sup>61</sup> Moore, *supra* note 58.

<sup>62</sup> THE NEW YORK TIMES, *supra* note 59; Patricia Cohen, Election 2012: Georgia State Highlights, THE NEW YORK TIMES (accessed Oct. 19, 2022), <https://www.nytimes.com/elections/2012/results/states/georgia.html>.

<sup>63</sup> RealClear Politics, Georgia Governor—Kemp vs. Abrams, REALCLEAR POLITICS (accessed June 25, 2021), [https://www.realclearpolitics.com/epolls/2018/governor/ga/georgia\\_governor\\_kemp\\_vs\\_abrams-6628.html#](https://www.realclearpolitics.com/epolls/2018/governor/ga/georgia_governor_kemp_vs_abrams-6628.html#).

<sup>64</sup> David Weigel & Lauren Tierney, How votes shifted in the six political states of Georgia, THE WASHINGTON POST (Dec. 8, 2020), <https://tinyurl.com/nhs7mxnj>. *See also* Vanessa Williams & Reis Thebault, In Georgia, get-out-the-vote operations that helped Biden win haven't stopped, THE WASHINGTON POST (Nov. 19, 2020, 7:41 PM), <https://tinyurl.com/4392upm8>. Beyond these demographic changes, get-out-the-vote initiatives such as Stacey Abrams' New Georgia Project played a vital role in engaging first-time and inconsistent voters in the political process.

Georgia's status as a swing state was widely recognized in the months preceding Election Day 2020. On June 13, 2020, Biden surpassed Trump in the state's polling averages.<sup>65</sup> Biden maintained this lead through July 2020, when Trump regained the lead in the polls.<sup>66</sup> In October, however, Biden vaulted back to a 1.2-point lead over Trump that persisted through November 3.<sup>67</sup> In apparent response to the Biden campaign's unexpected competitiveness, Trump held rallies in Georgia twice between October 16 and November 3.<sup>68</sup>

Georgians began casting their ballots on October 12, 2020, when 128,000 voters went to the polls for early voting.<sup>69</sup> The number of total votes cast nearly doubled the next day.<sup>70</sup> By October 31, more than 3.9 million Georgians had voted either in person or by mail.<sup>71</sup> Because many Georgians opted to vote by mail due to the COVID-19 pandemic, hundreds of thousands of mail-in ballots continued rolling into election offices through the deadline for receipt of 7 p.m. on November 3.

This many lawfully cast mail-in and early in-person ballots could not be counted all at once.<sup>72</sup> As a result, the outcome of the 2020 presidential election in Georgia was not known on

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<sup>65</sup> Who's Ahead in Georgia?, FIVETHIRTYEIGHT (accessed Nov. 2, 2022), <https://tinyurl.com/3r4urj8b>.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> John Bailey, President Trump to headline rally in Rome on Sunday at 8:30 p.m., ROME NEWS TRIBUNE (Oct. 30, 2020), [https://www.northwestgeorgianews.com/rome/news/local/faa-records-show-president-trump-headed-to-rome-on-sunday-local-gop-says-no-details/article\\_72a6032c-19f7-11eb-9108-67609dc925c0.html](https://www.northwestgeorgianews.com/rome/news/local/faa-records-show-president-trump-headed-to-rome-on-sunday-local-gop-says-no-details/article_72a6032c-19f7-11eb-9108-67609dc925c0.html).

<sup>69</sup> Kate Brumback, Georgia breaks turnout record for first day of early voting, AP NEWS (Oct. 13, 2020), <https://ap-news.com/article/virus-outbreak-election-2020-elections-georgia-atlanta-afa309fad367434a5bde9888fec89537>.

<sup>70</sup> WSBTV.com News Staff, Early voting day 2: Massive turnout, long lines at polling places after record day in Georgia, WSB-TV 2 (Oct. 13, 2020, 11:40 PM), <https://www.wsbtv.com/news/local/least-1-metro-atlanta-county-making-changes-after-record-breaking-first-day-early-voting/HRN7M2MLBBHA3CN6ZSUN4AQ2OI/>.

<sup>71</sup> Mark Niese, Early voting brought record turnout in Georgia ahead of Election Day, THE ATLANTA JOURNAL-CONSTITUTION (Oct. 31, 2020), <https://www.ajc.com/politics/early-voting-brought-record-turnout-in-georgia-ahead-of-election-day/76JRESFLMVEYBGX2J7AAGKABQ4/>; This marked a 63 percent increase in Georgia's pre-election turnout from 2016, when 2.3 million early votes were cast in person or by mail. Steve Patrick, Georgia voters crush all-time turnout record before Election Day, NEWS4JAX (Oct. 31, 2020), <https://www.news4jax.com/news/georgia/2020/10/31/georgia-voters-crush-all-time-turnout-record-before-election-day/>.

<sup>72</sup> Georgia law stipulates that election workers may begin *processing* absentee ballots when they are received. In this case, processing refers to conducting a second signature check (the first occurs when voters apply for an absentee ballot) and preparing the ballot for eventual tabulation. Tabulation (i.e., counting) of those ballots, however, cannot begin until 7 a.m. on Election Day. For the relevant Georgia law, see Ga. Code Ann. § 21-2-386.



November 3. Even before election night, it was widely expected that day-of votes, which would be tabulated first and likely reported by the media on election night, would heavily favor Trump, while mail-in and early in-person votes, the tabulation of which could not begin until Election Day under Georgia state law and which would likely take longer to tabulate, would heavily favor Biden.<sup>73</sup> Trump's former campaign manager Bill Stepien explained to Trump in advance that this would be the case, a phenomenon that was referred to as the "red mirage."<sup>74</sup> Attorney General Bill Barr also confirmed in congressional testimony that "everyone understood for weeks that that was going to be what happened on election night."<sup>75</sup>

In testimony before the January 6 Committee, former *Fox News* politics editor Chris Stirewalt was asked about the red mirage.<sup>76</sup> He explained:

[I]n the 40 or 50 years ... that Americans have increasingly chosen to vote by mail or early or absentee Democrats prefer that method of voting more than Republicans do. So basically in every election, Republicans win Election Day and Democrats win the early vote, and then you wait and start counting. And it depends on which ones you count first, but usually it's Election Day votes that get counted first. And you see the Republicans shoot ahead ... So in every election and certainly a national election, you expect to see the Republican with a lead, but it's not really a lead.

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<sup>73</sup> Jeff Amy, Hope Yen & Michael Balsamo, AP Fact Check: Trump's Made-up Claims of Fake Georgia Votes, AP NEWS (Jan. 3, 2021), <https://tinyurl.com/39cyvmk3>; Gregory Krieg, Joe Biden becomes first Democrat in 28 years to win Georgia, CNN (Nov. 13, 2020, 3:21 PM), <https://tinyurl.com/yc3s45ry>.

<sup>74</sup> Here's every word of the second Jan. 6 committee hearing on its investigation, NPR (June 13, 2022), <https://www.npr.org/2022/06/13/1104690690/heres-every-word-of-the-second-jan-6-committee-hearing-on-its-investigation> (hereinafter "Second Jan. 6 Hearing Transcript").

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

Stirewalt continued: “[N]o candidate had ever tried to avail themselves of this quirk in the election counting system,” but “the Trump campaign and the President had made it clear that they were going to try to exploit this anomaly.”<sup>77</sup>

On November 4, Secretary of State Raffensperger stated that 200,000 mail-in ballots and between 40,000 and 50,000 early in-person votes remained to be counted.<sup>78</sup> One week later, citing Biden’s thin lead over Trump, Raffensperger announced a discretionary hand recount by election workers of the 4.9 million-plus ballots cast.<sup>79</sup> In total, all ballots cast in Georgia were counted three times: *First*, there was a scanned tabulation of all ballots; *second*, there was a 100 percent hand audit of all ballots; and *third*, all ballots were recounted again through the scanner.<sup>80</sup> As Raffensperger testified before Congress, “Three counts, all remarkably close, ... showed that President Trump did come up short.”<sup>81</sup> On November 16, Raffensperger revealed that Georgia counties had rejected a total of 2,011 mail-in ballots—out of more than 1.3 million cast in that

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<sup>77</sup> *Id.*

<sup>78</sup> Georgia Officials Press Briefing on Election Vote Count Transcript November 4, REV (Nov. 4, 2020), <https://www.rev.com/blog/transcripts/georgia-officials-press-briefing-on-election-vote-count-transcript-november-4>.

<sup>79</sup> Melissa Quinn, Georgia secretary of state announces hand recount of presidential race, CBS NEWS (Nov. 11, 2020, 12:40 PM), <https://www.cbsnews.com/news/georgia-election-hand-recount-audit-presidential-race/>.

<sup>80</sup> Here’s every word from the fourth Jan. 6 committee hearing on its investigation, NPR (June 21, 2022), <https://www.npr.org/2022/06/21/1105848096/jan-6-committee-hearing-transcript> (hereinafter “Fourth Jan. 6 Hearing Transcript”). On November 13, 2020, the ballot count in Georgia, conducted by a machine scanner, was certified by the counties. *See* Addie Haney, Georgia election recount results: Breaking down final numbers, 11ALIVE (Dec. 7, 2020, 9:53 PM), <https://tinyurl.com/2p8z288f>. Two days prior, on November 11, 2020, Georgia Secretary of State Brad Raffensperger announced that election workers would begin conducting a hand-count audit of all ballots in Georgia. The recount began sometime before November 13 and concluded on November 19. *See* Kate Brumback, Georgia audit to trigger hand tally of presidential vote, AP NEWS (Nov. 11, 2020), <https://apnews.com/article/georgia-audit-hand-tally-ballots-vote-8fa73ef353b36eddf14e1360eecc22d>; Emil Moffatt, With Biden Ahead, Georgia Begins Hand Recount of Nearly 5 Million Ballots, NPR (Nov. 13, 2020, 1:46 PM), <https://tinyurl.com/23pbjrbt>. On November 20, 2020, Governor Kemp certified the election results following the hand-count audit of all ballots. On December 7, 2020, the final recount, conducted by a machine scanner, concluded. *See* Haney, *supra*.

<sup>81</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

manner—because of signature-matching issues.<sup>82</sup> It was false when Trump claimed on Twitter three days later that Georgia rejected “[a]lmost ZERO ballots.”<sup>83</sup>

Trump’s national electoral prospects were no brighter. Trump campaign senior aide Jason Miller testified that, in the days after the election, “[he] was in the Oval Office and at some point in the conversation Matt Oczkowski, who was the lead data person was brought on and I remember he delivered to the President pretty blunt terms that he was going to lose.”<sup>84</sup> Stepien also held the view by November 7, 2020, that the chances of Trump winning the presidential election were “very, very, very bleak.”<sup>85</sup>

On November 19, *The Associated Press* called the election in Georgia for Biden, concluding that Biden had received 49.51 percent of the vote, and Trump had received 49.25 percent.<sup>86</sup> The very next day, Raffensperger and Governor Brian Kemp formally certified the election results.<sup>87</sup>

Biden’s victory in Georgia, the last state to be certified, solidified his electoral college count at 306, besting Trump’s 232 votes and matching the incumbent president’s 2016 total.<sup>88</sup> A subsequent recount at the request of the Trump campaign on November 21 did not change the

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<sup>82</sup> Reuters Staff, Fact check: Georgia rejected ballots did not go from 4 percent to “almost zero” in 2020, REUTERS (Nov. 23, 2021), <https://tinyurl.com/yc4xwpha>.

<sup>83</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Nov. 19, 2020, 8:59:47 AM), <https://tinyurl.com/y5beuar6>.

<sup>84</sup> Here’s every word of the first Jan. 6 committee hearing on its investigation, NPR (June 9, 2022), [www.npr.org/2022/06/10/1104156949/jan-6-committee-hearing-transcript](http://www.npr.org/2022/06/10/1104156949/jan-6-committee-hearing-transcript) (hereinafter “First Jan. 6 Hearing Transcript”).

<sup>85</sup> Second Jan. 6 Hearing Transcript, *supra* note 74.

<sup>86</sup> Moore, *supra* note 58; Moffatt, *supra* note 80.

<sup>87</sup> Quinn Scanlan, Georgia certifies election results, making Biden victory official, ABC NEWS (Nov. 20, 2020, 5:50 PM), <https://tinyurl.com/ydj9rwjw>.

<sup>88</sup> Arnie Seipel, FACT CHECK: Trump Falsely Claims A ‘Massive Landslide Victory’, NPR (Dec. 11, 2016, 5:03 PM), <https://www.npr.org/2016/12/11/505182622/fact-check-trump-claims-a-massive-landslide-victory-but-history-differs>.

result: Biden finished with 49.5 percent of the vote and Trump finished with 49.26 percent.<sup>89</sup> On December 7, Raffensperger formally recertified the election results in favor of Biden.<sup>90</sup>

### **B. Trump Team Devises a Plan to Overturn the Election**

From the closing of the polls in Georgia on November 3 until he placed his call to Raffensperger on January 2, Trump and his allies went to extraordinary lengths in their efforts to overturn the certification of the state's election results. Congressional hearing testimony indicates that these efforts were not simply random or inartful reactions by Trump and his associates out of frustration with the results, but instead were a coordinated and deliberate effort.

Documents suggest that efforts to create a strategy to potentially overturn the election in a number of states actually began months before Election Day. A court filing made by Eastman indicated that on September 3, 2020, Trump campaign lawyer Cleta Mitchell asked outside attorney John Eastman to participate in an "Election Integrity Working Group" which would help the Trump campaign prepare for "anticipated post-election litigation."<sup>91</sup> According to this filing, Eastman "began conducting legal research and collaborating with academic advisors and other supporters of the President about the myriad number of factual and legal issues he anticipated might arise following the election."<sup>92</sup> Facing slim chances the vote counts would turn in Trump's favor, Mitchell wrote an email to Eastman two days after the election asking him to write a memo to justify a plan of action.<sup>93</sup>

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<sup>89</sup> Weigel & Tierney, *supra* note 64.

<sup>90</sup> Max Greenwood, Georgia secretary of state recertifies election results after recount, THE HILL (Dec. 7, 2020, 10:42 AM), <https://tinyurl.com/yttp44d2>.

<sup>91</sup> Plaintiff's Brief in Support of Privilege Assertions, *Eastman v. Thompson*, No. 8:22-cv-00099-DOC-DFM (C.D. Cal. Mar. 9, 2022), <https://tinyurl.com/4u9k4baw>.

<sup>92</sup> *Id.* at 8.

<sup>93</sup> Email from Cleta Mitchell, Esq., to Dr. John C. Eastman (Nov. 5, 2020, 9:41 PM), Ex. I, *Eastman v. Thompson*, No. 8:22-cv-00099-DOC-DFM (C.D. Cal. May 26, 2022), <https://tinyurl.com/2p9ccra6>.

Eastman, who was then a professor at Chapman University School of Law, began working closely with Trump and his team and eventually authored two memoranda mapping out a plan to keep Trump in office.<sup>94</sup> According to a court filing, Eastman wrote the first memorandum, a two-page summary, just after Christmas 2020.<sup>95</sup> That memorandum proposed that, at the Joint Session of Congress on January 6, 2021, Vice President Mike Pence should refuse to count certified electoral votes from Georgia, along with other states contested by the Trump campaign. Specifically, the memorandum proposed a strategy by which the vice president would point to “dual slates of electors”—one slate supporting Biden, and one slate supporting Trump—sent by the contested states as justification for Pence to take one of the following actions:

- Say there are “no electors that can be deemed validly appointed” in any state that Biden won, but that the Trump campaign continued to contest, and simply “gavel[] President Trump as re-elected,” declaring that Trump has more electoral votes;
- Say that “no candidate has achieved the necessary majority” of electoral votes and allow the House of Representatives to vote by state delegation, noting that

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<sup>94</sup> One of the authors, Norman Eisen, is a party to litigation involving John Eastman and other individuals and groups mentioned in this report. *See, e.g.*, Letter from States United Democracy Center to George S. Cardona, Chief Trial Counsel of the State Bar of California, Re: Request for Investigation of John C. Eastman (Oct. 4, 2021), <https://statesuniteddemocracy.org/wp-content/uploads/2021/10/10.4.21-FINAL-Eastman-Cover-Letter-Memorandum.pdf>; Letter from States United Democracy Center and Lawyers Defending American Democracy to Hamilton P. Fox, III, Disciplinary Counsel for the District of Columbia Court of Appeals, Re: Request for Investigation of John Charles Eastman (Aug. 11, 2022), [https://statesuniteddemocracy.org/wp-content/uploads/2022/08/08.11.22\\_States-United-LDAD\\_Complaint-to-DC-ODC-re-John-Eastman\\_Final.pdf](https://statesuniteddemocracy.org/wp-content/uploads/2022/08/08.11.22_States-United-LDAD_Complaint-to-DC-ODC-re-John-Eastman_Final.pdf); Press Release, Lawyers Defending American Democracy, LDAD Files Ethics Complaint Against Former Assistant AG Jeffrey Clark (Oct. 5, 2021), <https://ldad.org/letters-briefs/jeffrey-clark-ethics-complaint>; Letter from States United Democracy Center to Colorado’s Attorney Regulation Counsel Jessica E. Yates Re: Request for Investigation of Jenna L. Ellis (also known as Jenna Lynn Rives) (May 4, 2022), <https://statesuniteddemocracy.org/wp-content/uploads/2022/05/2022.05.04-Jenna-Ellis-complaint-cover-letter.pdf>; Letter from LDAD to the Attorney Grievance Committee of the Supreme Court of the State of New York Re: Professional Responsibility Investigation of Kenneth John Chesebro (Oct. 12, 2022), <https://ldad.org/wp-content/uploads/2022/10/Ethics-Complaint-against-Kenneth-Chesebro.pdf>; Press Release, States United Democracy Center, D.C. AG Racine Files Lawsuit to Hold January 6 Insurrectionists Accountable & Stand Up for Harmed District Law Enforcement Officers (Dec. 12, 2021), <https://statesuniteddemocracy.org/jan6case/>.

<sup>95</sup> Eastman v. Thompson, Order Re: Privilege of Docs at 6.

“Republicans ... control[led] 26 of the state delegations, the bare majority needed to win that vote;” or

- Allow an opportunity for a Member of Congress to raise an objection “[t]hat creates a stalemate that would give the state legislatures more time” to take action somehow legitimizing the “alternate slate[s] of electors” supportive of Trump.<sup>96</sup>

According to another court filing, Eastman wrote a second memorandum—a six-page expansion—on January 3, 2021.<sup>97</sup> This second memorandum included a list of conduct by states where Biden won, or officials in those states, that Eastman suggested is illegal and thus justifies the alternate slate of electors plan.<sup>98</sup> With respect to Georgia, Eastman specifically suggested that changes by the Office of the Secretary of State to the state’s “signature verification requirements,” the “targeted” use of “[p]ortable ‘polling places,’” and the “[r]efusal by the state judiciary to even assign a judge to hear” a December 4, 2020, Trump campaign election lawsuit merited implementation of the alternative elector plan.<sup>99</sup>

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<sup>96</sup> First Memorandum from John Eastman on Jan. 6 Scenario (accessed Aug. 1, 2022), <https://tinyurl.com/4mdnk4vb>. As the details surrounding the events of and prior to January 6 became clearer in the months following the joint session, Eastman offered various explanations for his actions. For example, in his resignation letter from Chapman University, Eastman claimed that “every statement I have made is backed up with documentary and/or expert evidence, and solidly grounded in law.” After claiming state legislatures “ignored existing state laws in the conduct of the election” and citing debunked claims about voting machines switching votes and other conspiracies, Eastman insisted that “it is patently untrue that my statements ‘have no basis in fact or law.’” See John C. Eastman, John Eastman’s Statement on His Retirement from Chapman University’s Fowler School of Law, AMERICAN MIND (Jan. 14, 2021), <https://americanmind.org/salvo/john-eastmans-statement-on-his-retirement-from-chapman-university-fowler-school-of-law/>. For a full analysis of the weaknesses of Eastman’s claims in his own defense, see Scott Cummings, The Lawyer Behind Trump’s Infamous Jan. 6 Memo Has a Galling New Defense, SLATE (Oct. 20, 2021), <https://slate.com/news-and-politics/2021/10/eastman-jan-6-trump-memo-defense.html>.

<sup>97</sup> Eastman v. Thompson, Order Re: Privilege of Docs at 6.

<sup>98</sup> Second Memorandum from John Eastman on Jan. 6 Scenario (accessed Oct. 25, 2022), <https://www.washingtonpost.com/context/john-eastman-s-second-memo-on-january-6-scenario/b3fd2b0a-f931-4e0c-8bac-c82f13c2dd6f/>.

<sup>99</sup> *Id.*

The process through which states vote for presidential electors, and Congress counts electors and certifies a presidential victory, is laid out in the Twelfth Amendment of the U.S. Constitution and in the Electoral Count Act, 3 U.S.C. §§ 1–21.<sup>100</sup> According to the Electoral Count Act, on Election Day, each state chooses its presidential electors by popular vote. Then, once votes are counted and a winner is named in each state, each state’s electors meet in their respective states; vote for president and vice president; and a certificate of their votes is sent to Washington, D.C.<sup>101</sup> The Twelfth Amendment sets out the procedure from that point: “The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; The person having the greatest Number of votes for President, shall be the President.”<sup>102</sup> Neither the Constitution nor the Electoral Count Act makes any provision for delay. The proceeding where Congress and the vice president open and count these electoral certificates must occur every four years on January 6.<sup>103</sup> And while the act allows congressional representatives to object in writing to electoral slates, and sets out a process for resolving objections, there is no suggestion that the vice president can unilaterally reject electoral votes.<sup>104</sup> Nevertheless, the Eastman plan called for Vice President Pence to unilaterally “determine[] on his own” which of the states’ electoral certificates “is valid, asserting that the authority to make that determination ... is his alone.”<sup>105</sup> Eastman would later concede the illegality of parts of his plan.<sup>106</sup>

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<sup>100</sup> For an in-depth explainer on the constitutional and legal procedures governing the Joint Session of Congress on January 6, see Joshua Matz, Norman Eisen & Harmann Singh, Guide to Counting Electoral College Votes and the January 6, 2021 Meeting of Congress, STATES UNITED DEMOCRACY CENTER (Jan. 4, 2021), <https://statesuniteddemocracy.org/wp-content/uploads/2021/01/VPP-Guide-to-Counting-Electoral-Votes.pdf>.

<sup>101</sup> 3 U.S.C. §§ 7–11.

<sup>102</sup> U.S. Const. amend. XII.

<sup>103</sup> 3 U.S.C. § 15.

<sup>104</sup> See 3 U.S.C. §§ 5–6, 15.

<sup>105</sup> Second Memorandum from John Eastman on Jan. 6 Scenario (accessed Mar. 30, 2022), <https://s3.documentcloud.org/documents/21066947/jan-3-memo-on-jan-6-scenario.pdf>.

<sup>106</sup> Here’s every word of the third Jan. 6 committee hearing on its investigation, NPR (June 16, 2022), <https://www.npr.org/2022/06/16/1105683634/transcript-jan-6-committee> (hereinafter “Third Jan. 6 Hearing Transcript”).

Ensuring that there were grounds to either claim victory for Trump, or at the very least highlight uncertainty about Joe Biden's actual victory, in Georgia on January 6 was an essential part of the plan.<sup>107</sup>

### **C. Trump Started Planning to Claim He Won Georgia Even Before Election Day**

The testimony from the January 6th hearings also revealed that Trump's plan to retain the presidency regardless of the vote count was conceived prior to Election Day. In July 2020, he declined to agree that he would accept the results of the election, telling *Fox News* host Chris Wallace, "Look, you—I have to see. No, I'm not going to just say 'yes.' I'm not going to say 'no.' And I didn't last time, either."<sup>108</sup> In September 2020, he responded to a pointed question about the peaceful transfer of power by stating, "We're going to have to see what happens."<sup>109</sup> These statements were accompanied by many others in which he insisted that he could lose the election solely through fraud. In August 2020, he asserted that "the only way we're going to lose this election is if this election is rigged"<sup>110</sup>—and one week later, he stated that "the only way they can take this election away from us is if this is a rigged election."<sup>111</sup>

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<sup>107</sup> Eastman v. Thompson, Order Re: Privilege of Docs at 37 ("There is strong circumstantial evidence to show that there was likely an agreement between President Trump and Dr. Eastman to enact the plan articulated in Dr. Eastman's memo. In the days leading up to January 6, Dr. Eastman and President Trump had two meetings with high-ranking officials to advance the plan. On January 4, President Trump and Dr. Eastman hosted a meeting in the Oval Office to persuade Vice President Pence to carry out the plan. The next day, President Trump sent Dr. Eastman to continue discussions with the vice president's staff, in which Vice President Pence's counsel perceived Dr. Eastman as the president's representative. Leading small meetings in the heart of the White House implies an agreement between the president and Dr. Eastman and a shared goal of advancing the electoral count plan.").

<sup>108</sup> Felicia Sonmez, Trump declines to say whether he will accept November election results, THE WASHINGTON POST (July 19, 2020), [https://www.washingtonpost.com/politics/trump-declines-to-say-whether-he-will-accept-november-election-results/2020/07/19/40009804-c9c7-11ea-91f1-28aca4d833a0\\_story.html](https://www.washingtonpost.com/politics/trump-declines-to-say-whether-he-will-accept-november-election-results/2020/07/19/40009804-c9c7-11ea-91f1-28aca4d833a0_story.html).

<sup>109</sup> Allison Pecorin & Trish Turner, Unanimous Senate commits to peaceful transfer of power after Trump refuses, ABC NEWS (Sept. 24, 2020, 5:58 PM), <https://abcnews.go.com/Politics/unanimous-senate-commits-peaceful-transfer-power-trump-refuses/story?id=73216758>.

<sup>110</sup> Kevin Liptak, Trump warns of 'rigged election' as he uses conspiracy and fear to counter Biden's convention week, CNN (Aug. 18, 2020, 11:08 AM), <https://www.cnn.com/2020/08/17/politics/donald-trump-campaign-swing/index.html>.

<sup>111</sup> Nick Niedzwiedek, The 9 most notable comments Trump has made about accepting the election results, POLITICO (Sept. 24, 2020, 6:04 PM), <https://www.politico.com/news/2020/09/24/trump-casts-doubt-2020-election-integrity-421280>.



On November 1, 2020, it was reported that Trump had told associates that he was going to declare victory, no matter what, if it looked like he was ahead on election night.<sup>112</sup> An audio recording from three days before the election appears to confirm that.<sup>113</sup> Former Trump advisor Steve Bannon told a group of Trump associates:

What Trump's gonna do is just declare victory. Right? He's gonna declare victory. But that doesn't mean he's a winner... He's just gonna say he's a winner.<sup>114</sup>

On election night, Trump was told by multiple people, including his former campaign manager Bill Stepien and campaign senior aide Jason Miller, that it was too early to declare victory because votes were still being counted.<sup>115</sup> Nonetheless, Trump rejected their counsel and instead, according to Miller, followed the advice of an “intoxicated”<sup>116</sup> Rudy Giuliani “to go and declare victory and say that we won it outright”<sup>117</sup> on election night. The evidence suggests this was his plan all along.<sup>118</sup>

That night, after all votes had been cast, but long before they had been fully counted, Trump made a late-night statement at the White House: “Millions and millions of people voted for us tonight, and a very sad group of people is trying to disenfranchise that group of people. And we won't stand for it.”<sup>119</sup> Trump then falsely claimed that the election “was just called off” while he

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<sup>112</sup> Jonathan Swan, Scoop: Trump's plan to declare premature victory, AXIOS (Nov. 1, 2020), <https://www.axios.com/2020/11/01/trump-claim-election-victory-ballots>.

<sup>113</sup> Adam Gabbatt & Hugo Lowell, ‘Game over’: Steve Bannon audio reveals Trump planned to claim early victory, THE GUARDIAN (July 14, 2022), <https://www.theguardian.com/us-news/2022/jul/14/steve-bannon-audio-trump-declare-victory>.

<sup>114</sup> *Id.*

<sup>115</sup> Second Jan. 6 Hearing Transcript, *supra* note 74.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Dale, *supra* note 12.

was “winning everything.”<sup>120</sup> He insisted “we did win this election. They can’t catch us.”<sup>121</sup> And, in a sign of things to come, Trump singled out Georgia: “It’s also clear that we have won Georgia ... They’re never gonna catch us. They can’t catch us.”<sup>122</sup>

Trump went on to wrongly describe the continued counting of lawfully cast ballots as “a fraud on the American public.”<sup>123</sup> He added, “We want all voting to stop. We don’t want them to find any ballots at 4 o’clock in the morning and add them to the list, okay?”<sup>124</sup> When Trump made this remark, he had already been briefed by Stepien, who told him that it would take a long time to count all of the votes because mail-in ballots were counted later than in-person ballots.<sup>125</sup>

Prosecutors will likely consider Trump’s election-day remarks in the context of his months of comments in the run-up to that day suggesting he would challenge states’ outcomes if those outcomes were not in his favor—regardless of how the people actually voted. As we discuss below, this is relevant evidence of Trump’s *mens rea*—his criminal state of mind.

#### **D. Trump and His Allies Launch Efforts to Overturn Georgia’s Election Results**

Following Trump’s remarks on election night, he and his allies began pressuring Georgia’s political leaders to disregard lawfully cast ballots from Democratic-leaning counties and to stray from established election administration procedures. They also began filing a barrage of meritless lawsuits around the country, with many lodged in Georgia courts. These efforts set the stage for Trump’s more extreme conduct in December and January; they also illuminate his state of mind and refusal to accept electoral defeat.

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Second Jan. 6 Hearing Transcript, *supra* note 74.

On the afternoon of November 4, even as Georgia election officials were hard at work counting all lawfully cast votes, Trump prematurely publicly “claimed” Georgia (and several other battleground states) for his campaign.<sup>126</sup> That same day, the Trump campaign filed its first post-election lawsuit, joined by the Georgia Republican Party.<sup>127</sup> The two plaintiffs alleged that a Republican poll watcher in Chatham County had “witnessed absentee ballots that had not been properly processed apparently mixed into a pile of absentee ballots that was already set to be tabulated” after the absentee ballot-receipt deadline of 7 p.m. on Election Day.<sup>128</sup> The plaintiffs sought the collection and storage of these purportedly late-arriving ballots by the county’s Board of Elections.<sup>129</sup> The court summarily dismissed the case in a one-page order the next day, citing the plaintiffs’ lack of evidence that the ballots in question had in fact arrived after the 7 p.m. deadline.<sup>130</sup>

On November 6, Trump again tweeted about Georgia: “Where are the missing military ballots in Georgia? What happened to them?”<sup>131</sup> Subsequent analysis by news agencies confirmed that Trump’s reference to “missing military ballots” was not based in fact.<sup>132</sup> Exactly one week later, after Secretary of State Raffensperger initiated a discretionary hand recount of Georgia’s ballots,<sup>133</sup> Trump targeted both Raffensperger and Kemp in a tweet: “Georgia Secretary of State,

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<sup>126</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Nov. 4, 2020, 4:56:10 PM), [thetrumparchive.com/?results=1&dates=%5B%222020-11-03%22%2C%222020-11-05%22%5D](https://twitter.com/realDonaldTrump/status/1222222222222222222).

<sup>127</sup> Makini Brice & Jan Wolfe, Trump campaign files lawsuit over Georgia county ballot sorting, REUTERS (Nov. 4, 2020, 7:18 PM), <https://www.reuters.com/article/us-usa-election-georgia/trump-campaign-files-lawsuit-over-georgia-county-ballot-sorting-idUSKBN27L012>.

<sup>128</sup> Petition to Command Enforcement of Election Laws Pursuant to O.C.G.A. § 21-2-412 at 14, *In re* Enforcement of Election Laws and Securing Ballots Cast or Received After 7:00 P.M. on November 3, 2020, No. SPCV20-00982 (Ga. Super. Ct. 2020).

<sup>129</sup> *Id.*

<sup>130</sup> Order on Petition to Command Enforcement of Election Laws, *In re* Enforcement of Election Laws and Securing Ballots Cast or Received After 7:00 P.M. on November 3, 2020, No. SPCV20-00982 (Ga. Super. Ct. 2020).

<sup>131</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Nov. 6, 2020, 12:38:17 PM), [thetrumparchive.com/?results=1&dates=%5B%222020-11-06%22%2C%222020-11-08%22%5D](https://twitter.com/realDonaldTrump/status/1222222222222222222).

<sup>132</sup> Tara Subramaniam, Fact Check: Georgia’s Military Ballots Are Not Missing, CNN (Nov. 6, 2020, 5:26 PM), <https://www.cnn.com/2020/11/06/politics/georgia-military-ballots-fact-check/index.html>.

<sup>133</sup> Moffatt, *supra* note 80.

a so-called Republican (RINO), won’t let the people checking the ballots see the signatures for fraud. Why? Without this the whole process is very unfair and close to meaningless. Everyone knows that we won the state. Where is @BrianKempGA?”<sup>134</sup> A few days after Trump criticized Raffensperger and Kemp, he fired Chris Krebs—director of the Federal Cybersecurity and Infrastructure Security Agency (CISA), the federal agency responsible for ensuring that state and local election infrastructure is secure—for daring to describe the 2020 presidential election as “the most secure in American history.”<sup>135</sup> Trump thus made clear his willingness to abuse presidential power to punish those who opposed his insistence that this was a “Rigged Election!”<sup>136</sup>

Following Trump’s cue, several of his most prominent allies amplified their attacks on Georgia’s leaders and election administration. On November 9, U.S. Senators Kelly Loeffler and David Perdue of Georgia called for Raffensperger’s resignation.<sup>137</sup> The next day, U.S. Rep. Doug Collins of Georgia—appointed by Trump to lead his campaign’s recount operation in Georgia—endorsed Texas’s lawsuit to void the election results in key states and also sent Raffensperger a letter baselessly alleging the unlawful counting of “tens of thousands of ballots.”<sup>138</sup> And on November 13, two days after the hand recount commenced, Trump ally and U.S. Senator Lindsey

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<sup>134</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Nov. 13, 2020, 7:53:20 PM), [thetrumparchive.com/?searchbox=%22georgia%22&dates=%5B%222020-11-10%22%2C%222020-11-14%22%5D](https://thetrumparchive.com/?searchbox=%22georgia%22&dates=%5B%222020-11-10%22%2C%222020-11-14%22%5D).

<sup>135</sup> Press Release, Cybersecurity and Infrastructure Security Agency, Joint Statement From Elections Infrastructure Government Coordinating Council & The Election Infrastructure Sector Coordinating Executive Committees (Nov. 12, 2020), <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election>; Alana Wise, Trump fires election security director who corrected voter fraud disinformation, NPR (Nov. 17, 2020, 7:37 PM), <https://www.npr.org/2020/11/17/936003057/cisa-director-chris-krebs-fired-after-trying-to-correct-voter-fraud-disinformati>.

<sup>136</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Nov. 10, 2020, 9:37:06 PM), [thetrumparchive.com/?searchbox=%22Rigged+Election%21%22&results=1](https://thetrumparchive.com/?searchbox=%22Rigged+Election%21%22&results=1).

<sup>137</sup> Marianne Levine & James Arkin, Loeffler, Perdue call on Georgia’s Republican secretary of state to resign, POLITICO (Nov. 9, 2020, 4:50 PM), <https://www.politico.com/news/2020/11/09/loeffler-perdue-georgia-secretary-state-resign-435484>.

<sup>138</sup> Reis Thebault & Amy Gardner, His fellow Republicans turned on him, but Georgia Secretary of State Brad Raffensperger isn’t backing down, THE WASHINGTON POST (Nov. 11, 2020, 8:07 PM), [https://www.washingtonpost.com/politics/brad-raffensperger-georgia/2020/11/11/2d0a876e-2426-11eb-952e-0c475972cfc0\\_story.html](https://www.washingtonpost.com/politics/brad-raffensperger-georgia/2020/11/11/2d0a876e-2426-11eb-952e-0c475972cfc0_story.html); Washington Post Staff, Where Republicans in Congress stand on Trump’s false claim of winning the election, THE WASHINGTON POST (Dec. 15, 2021, 4:02 PM), <https://www.washingtonpost.com/graphics/2020/politics/congress-republicans-trump-election-claims/>.

Graham of South Carolina called Raffensperger, supposedly to discuss recount procedures.<sup>139</sup> According to Raffensperger, Graham (then the chairman of the Senate Judiciary Committee) asked him to clarify Georgia's signature-matching law for absentee ballots.<sup>140</sup> Graham then reportedly questioned whether election workers in Atlanta may have accepted mail-in votes with non-matching signatures because of "political bias" against Trump.<sup>141</sup> Finally, Graham asked Raffensperger if his office had the power to disqualify all mail-in ballots from counties where the rate of non-matching signatures was high—a surprising suggestion that would have effectively negated thousands of legally cast (and overwhelmingly pro-Biden) votes.<sup>142</sup>

Even as Trump and his allies sought to pressure state officials to disregard valid Biden votes—and attacked officials who rejected those requests—the legal assault on Georgia's election continued. On November 11, for instance, four Republican voters filed a federal lawsuit seeking the exclusion of all votes cast in a set of Georgia counties that voted for Biden by significant margins—including Fulton, Cobb, and DeKalb Counties.<sup>143</sup> The plaintiffs based their case on claims and anecdotes that closely tracked Trump's public statements, but the plaintiffs voluntarily withdrew their case before the court could address it on the merits.<sup>144</sup>

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<sup>139</sup> Andrew Prokop, Lindsey Graham's controversial call with the Georgia's secretary of state, explained, VOX (Nov. 18, 2020, 9:40 AM), <https://www.vox.com/2020/11/18/21571684/lindsey-graham-brad-raffensperger-georgia-ballots>.

<sup>140</sup> *Id.*

<sup>141</sup> Lauren Gambino, Georgia's Secretary of State Says Lindsey Graham Suggested He Throw Out Legal Ballots, THE GUARDIAN (Nov. 16, 2020), <https://www.theguardian.com/us-news/2020/nov/16/georgia-brad-raffensperger-lindsey-graham-elections-ballots>.

<sup>142</sup> *Id.*

<sup>143</sup> Complaint, Brooks v. Mahoney, No. 4:20-cv-00281-RSB-CLR (S.D. Ga. Nov. 11, 2020), <https://www.courtlistener.com/docket/18620507/1/brooks-v-mahoneyiii/>.

<sup>144</sup> *Id.*; Plaintiffs' Notice of Voluntary Dismissal, Brooks v. Mahoney, No. 4:20-cv-00281-RSB-CLR (S.D. Ga. Nov. 16, 2020), <https://www.courtlistener.com/docket/18620507/20/brooks-v-mahoneyiii/>.

On November 13, prominent Trump ally Lin Wood filed a federal suit attacking the consent decree signed by Raffensperger and several Democratic groups in March 2020, which had added an additional step to the signature-verification process for absentee ballots and standardized the process by which voters are notified if their ballots are rejected for signature-matching issues. (For more on the consent decree, see Box 1.) Wood asserted that this settlement was unlawful and argued that “the inclusion and tabulation of absentee ballots for the general election (and potentially, for all future elections within this state) is improper and must not be permitted.”<sup>145</sup> The day after Wood filed his case, Trump parroted these claims in a tweet: “The Consent Decree [modifying the signature-verification process] signed by the Georgia Secretary of State, with the approval of Governor @BrianKempGA, at the urging of @staceyabrams, makes it impossible to check & match signatures on ballots and envelopes, etc. They knew they were going to cheat. Must expose real signatures!”<sup>146</sup> Ultimately, the district court and the 11th U.S. Circuit Court of Appeals held that Wood lacked standing to bring any of his claims, and the U.S. Supreme Court denied Wood’s petition for a writ of certiorari.<sup>147</sup>

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<sup>145</sup> Verified Complaint for Declaratory and Injunctive Relief at 4, *Wood v. Raffensperger*, No. 1:20-cv-04651-SDG (N.D. Ga. Nov. 13, 2020), <https://www.democracymocket.com/wp-content/uploads/2020/11/File-Stamped-11-13-20-Complaint-00583801xA4094-1.pdf>.

<sup>146</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Nov. 14, 2020, 9:29:25 AM), [thetrumparchive.com/?searchbox=%22The+Consent+Decree+signed+by+the+Georgia+Secretary+of+State%2C+with+the+approval+of+Governor%22](https://thetrumparchive.com/?searchbox=%22The+Consent+Decree+signed+by+the+Georgia+Secretary+of+State%2C+with+the+approval+of+Governor%22).

<sup>147</sup> John L. Dorman, A federal appeals court unanimously shut down a conservative lawyer’s attempt to block Biden’s presidential win in Georgia, *BUSINESS INSIDER* (Dec. 5, 2020), <https://www.businessinsider.com/lin-wood-georgia-election-appeals-lawsuit-dismissed-trump-biden-2020-12>.

### Box 1: The Georgia Consent Decree

Trump and his allies repeatedly criticized a March 2020 agreement struck between Secretary of State Brad Raffensperger and Democratic-aligned groups that modified the state's election rules. The impetus for this decree was widespread dissatisfaction with voting procedures that Georgia used during (and before) the 2018 elections. Prior to the consent decree, Georgia-based election observers and advocates bemoaned the lack of a standardized statewide process for signature-matching on absentee ballots, and for notifying voters whose absentee ballots had been rejected based on a signature mismatch.<sup>148</sup> While state law requires voters to be notified promptly of their faulty ballot, only one in nine voters with rejected ballots ended up voting in the 2018 election.<sup>149</sup> The pre-2020 system was also marked by large discrepancies in rejection rates across counties, with higher rejection rates among racial minorities. Indeed, Democratic and independent analyses noted that it was twice as likely for ballots to be rejected if a voter was Black or Latino.<sup>150</sup> The March 2020 consent decree required revamped, standardized procedures.<sup>151</sup> Among other things, the second signature match described above was implemented to give absentee voters a second chance to submit a matching signature,<sup>152</sup> and voters were given 24 hours to correct their signatures if they were initially linked to a mismatch 11 days before the election.<sup>153</sup>

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<sup>148</sup> Chris Joyner & Jennifer Peebles, AJC Analysis: Absentee voting pitfalls tripped thousands of Ga. Voters, THE ATLANTA JOURNAL-CONSTITUTION (Dec. 20, 2018), [www.ajc.com/news/state--regional-govt--politics/ajc-analysis-absentee-voting-pitfalls-tripped-thousands-voters/5Qu6ynxydaKrT4le1edtPL/](https://www.ajc.com/news/state--regional-govt--politics/ajc-analysis-absentee-voting-pitfalls-tripped-thousands-voters/5Qu6ynxydaKrT4le1edtPL/).

<sup>149</sup> *Id.*

<sup>150</sup> Darragh Roche, Trump Rails Against Georgia Gov. Kemp for Consent Decree Aimed at Helping Minority Voters, NEWSWEEK (Nov. 14, 2020, 11:37 AM), <https://www.newsweek.com/trump-georgia-gov-kemp-consent-decree-1547476>.

<sup>151</sup> Jonathan Raymond, Georgia election official says Trump is 'flat out, 100 percent, four square wrong' about consent decree, 11ALIVE (Nov. 17, 2020), <https://www.11alive.com/article/news/politics/elections/georgia-consent-decree-election-official-says-trump-wrong/85-db462666-11d4-46c1-97e4-18d9bf79e365>.

<sup>152</sup> Tarik Minor, Trust Index finds Trump's claim on Georgia voter signature checks is wrong, NEWS4JAX (Nov. 16, 2020), <https://www.news4jax.com/vote-2020/2020/11/16/ap-trump-wrong-on-georgia-voter-signature-checks/>.

<sup>153</sup> Raymond, *supra* note 151.

Even as his lawsuits failed, Wood<sup>154</sup> (and fellow Trump ally and lawyer Sidney Powell) pushed a burgeoning conspiracy theory that Georgia’s voting machines—operated by Dominion Voting Systems—had been hacked to switch votes to Biden.<sup>155</sup> That theory has since been conclusively disproved, although testimony suggests Trump’s allies knew it lacked merit from the beginning. Trump campaign lawyer Alex Cannon told the January 6 Committee that there were discussions in mid-November among the Trump team that the Dominion allegations lacked credibility because the “hand recount in Georgia would resolve any issues with a technology problem and with Dominion or Dominion flipping votes.”<sup>156</sup> Eric Herschmann, an attorney in the White House Counsel’s Office, told the January 6 Committee that he “never saw any evidence whatsoever to sustain those allegations” regarding Dominion.<sup>157</sup> Public reporting has also revealed that communications staff on the Trump campaign knew the Dominion theory was baseless even before Powell and other Trump surrogates made it a centerpiece of their stolen election claims.<sup>158</sup> In response to a defamation suit filed by Dominion Voting Systems against her for her publicly pushing this theory, Powell admitted that “no reasonable person would conclude that [her] statements were truly statements of fact.”<sup>159</sup>

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<sup>154</sup> On August 25, 2021, U.S. District Judge Linda Parker ordered that Wood, among eight other lawyers pushing these baseless lawsuits, be referred to the relevant disciplinary authority in their practicing state for investigation and potential suspension or disbarment, citing their actions as “a historic and profound abuse of the judicial process.” *See King v. Whitmer*, 505 F. Supp. 3d 720 (E.D. Mich. 2020). Since then, the State Bar of Georgia has opened an investigation into Wood’s fitness to practice the law, requesting that he sit for a mental health examination as a part of their probe. Wood attempted to block this request by filing a lawsuit against the Georgia bar, which the U.S. Court of Appeals for the 11th Circuit dismissed on May 31, 2022. *See Wood v. Frederick*, No. 21-12238 (11th Cir. 2022). *See also* Jacqueline Thomsen, Attorney Lin Wood loses appeal over state bar’s mental health probe, REUTERS (May 31, 2022, 5:05 PM), <https://www.reuters.com/legal/legalindustry/attorney-lin-wood-loses-appeal-over-state-bars-mental-health-probe-2022-05-31/>. On August 3, 2022, the Georgia State Supreme Court also denied Wood’s motion to dismiss the Georgia bar’s investigation. *See* Everett Catts, Pro-Trump Lawyer Lin Wood Fails in Bid to Dismiss Bar’s Formal Complaint, LAW.COM (Aug. 3, 2022, 9:47 AM), <https://www.law.com/dailyreportonline/2022/08/03/pro-trump-lawyer-lin-wood-fails-in-bid-to-dismiss-bars-formal-complaint/>.

<sup>155</sup> Erik Larson, Trump Booster Lin Wood’s Georgia Runoff Suit Tossed Out By Judge, BLOOMBERG (Dec. 28, 2020, 4:25 PM), <https://tinyurl.com/mv6jryhj>.

<sup>156</sup> Second Jan. 6 Hearing Transcript, *supra* note 74.

<sup>157</sup> *Id.*



**Box 2: The False Dominion Systems Voting Machines Conspiracy Theory**

The full universe of conspiracy theories surrounding the Dominion Systems voting machines used by many states in the 2020 presidential election is impossible to map. But the core allegation is that voting machines produced by Dominion automatically switched votes from Trump to Biden, or deleted Trump votes altogether.<sup>160</sup> Some accounts—all false, and each more fantastical than the next—allege that Dominion rigged its machines to give Biden the election because Dominion is purportedly controlled by Smartmatic, a voting-technology company founded in Florida by two Venezuelans who distributed their technology to Venezuela during the dictatorial reign of Hugo Chavez.<sup>161</sup> Smartmatic's technology was purportedly used by Chavez to rig elections in his favor in perpetuity and is allegedly still controlled by Chavez's family, even though Chavez himself died in 2013. Other owners of Dominion, according to the theory's subscribers, include George Soros and the Clinton Foundation.<sup>162</sup>

Top Trump surrogates—including Rudy Giuliani and Sidney Powell—spread versions of the Dominion conspiracy theory on Twitter and *Fox News* in the weeks following the election.<sup>163</sup> Powell, in particular, put anti-Dominion claims at the heart of her declaration that the election was stolen from Trump, telling *Fox Business Network* on November 13, “I can hardly wait to put forth all the evidence we have collected on Dominion.”<sup>164</sup> Trump himself retweeted a story about the Dominion conspiracy theories on November 12.<sup>165</sup> This theory soon became a favorite of adherents of QAnon and other rightwing groups.

**cont'd**

<sup>158</sup> Alan Feuer, Trump Campaign Knew Lawyers' Voting Machine Claims Were Baseless, Memo Shows, *THE NEW YORK TIMES* (Sept. 21, 2021), <https://www.nytimes.com/2021/09/21/us/politics/trump-dominion-voting.html>.

<sup>159</sup> Defendant's Motion to Dismiss at 27, *U.S. Dominion, Inc. v. Powell*, 554 F. Supp. 3d 42 (D.D.C. 2021), [courtlistener.com/docket/29090821/22/us-dominion-inc-v-powell/](https://www.courtlistener.com/docket/29090821/22/us-dominion-inc-v-powell/).

<sup>160</sup> Camille Caldera, Fact Check: Dominion Voting Machines Didn't Delete Votes from Trump, Switch Them to Biden, *USA TODAY* (Nov. 17, 2020), <https://www.usatoday.com/story/news/factcheck/2020/11/14/fact-check-dominion-voting-machines-didnt-delete-switch-votes/6282157002/>.

<sup>161</sup> Facts First: Does the Dominion Voting Systems organization have ties to Venezuelan President Hugo Chavez, George Soros and the Clinton Foundation?, *CNN* (accessed July 31, 2022), [https://www.cnn.com/factsfirst/politics/factcheck\\_829bf37c-cbd5-4a5c-8d87-7e53504997cb](https://www.cnn.com/factsfirst/politics/factcheck_829bf37c-cbd5-4a5c-8d87-7e53504997cb).

<sup>162</sup> *Id.*

<sup>163</sup> JM Rieger, Analysis | The false claims from Fox News and Trump allies cited in Dominion's \$1.6 billion lawsuit, *THE WASHINGTON POST* (Mar. 26, 2021), <https://www.washingtonpost.com/politics/2021/03/26/fox-trump-election-dominion/>.

<sup>164</sup> *Id.*

<sup>165</sup> Donald J. Trump (@realDonaldTrump), *THE TRUMP TWITTER ARCHIVE* (Nov. 12, 2020, 11:34:00 AM), [thetrumparchive.com/?searchbox=%22Report%3A+Dominion%22](https://thetrumparchive.com/?searchbox=%22Report%3A+Dominion%22).

No credible evidence supports any of the theories that Dominion's voting machines were part of a plot to steal the election from Trump. Dominion has no connection to Smartmatic; George Soros and the Clinton Foundation are not controlling shareholders of the company; and a multitude of recounts, machine tests, and independent audits have affirmed the accuracy of the election.<sup>166</sup> Former Attorney General Bill Barr spoke about this conspiracy theory in a recorded interview with the January 6 Committee. He said:

I saw absolutely zero basis for the allegations, but they were made in such a sensational way that they obviously were influencing a lot of people, members of the public that there was this systemic corruption in the system and that their votes didn't count and that these machines controlled by somebody else were actually determining it, which was complete nonsense. And it was being laid out there. And I told them that it was—that it was crazy stuff and they were wasting their time on that. And it was doing a great, grave disservice to the country.<sup>167</sup>

Taken together, these sustained attacks on Georgia's election—led by Trump and echoed by many of his principal allies—sought to pressure Georgia officials to disregard lawfully cast ballots, to vary from established legal procedures governing election recounts, and to declare Trump the winner of an election he lost.

As a result of these public attacks, officials involved in the state's election administration received death threats.<sup>168</sup> Former Fulton County election worker Shaye Moss, one of the individuals depicted in a video presented to the Georgia legislature by Giuliani as purported evidence of fraud, delivered a compelling account of the toll Trump's attacks took on her family to the January 6 Committee. Moss' mother, Ruby Freeman, whom Trump targeted by name 18 times in his call to Raffensperger, was escorted from her home by the Federal Bureau of Investigation (FBI) for her own safety. Ms. Freeman, known as "Lady Ruby," told the January 6

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<sup>166</sup> Ali Swenson, Smartmatic Does Not Own Dominion Voting Systems, AP NEWS (Nov. 17, 2020), <https://ap-news.com/article/fact-checking-afs:Content:9740535009>; Facts First, *supra* note 161.

<sup>167</sup> First Jan. 6 Hearing Transcript, *supra* note 84.

<sup>168</sup> Fowler, *supra* note 48.

Committee in a taped interview, “I have lost my sense of security, all because of a group of people, starting with number 45 [Trump] and his ally Rudy Giuliani, decided to scapegoat me, and my daughter, Shaye, to push their own lies about how the election was stolen.”<sup>169</sup> In testimony before the January 6 Committee, Raffensperger described how Trump supporters engaged in a string of threatening behaviors pressuring him to comply with Trump’s wishes or resign. Raffensperger’s email and cell phone were doxxed (made public on the internet), resulting in texts from all over the country.<sup>170</sup> He said his wife also received “sexualized attacks” in the form of text messages, and “some people broke into” his widowed daughter-in-law’s home, where his grandchildren live.<sup>171</sup> All of this was in response to Trump’s months-long pressure campaign on Raffensperger and consistent messaging to the American public that Raffensperger was covering up a treasonous conspiracy.

#### **E. Trump and His Lawyers Pressure Georgia Legislators, State Electors, and Governor Kemp**

On November 20, Raffensperger and Kemp formally certified the state’s election results.<sup>172</sup> This prompted another wave of lawsuits—which Trump’s legal team chose to voluntarily dismiss when the claims on which they rested were summarily debunked<sup>173</sup>—as well as intensified pressure tactics by Trump and his allies, ultimately leading to a call on December 5 in which Trump personally solicited Kemp to abet a plan to overturn the election results, insisting to Kemp

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<sup>169</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Haney, *supra* note 80.

<sup>173</sup> Stephen Fowler, Trump Campaign Drops All Georgia Election Challenges, GBP NEWS (Jan. 7, 2021), <https://www.gpb.org/news/2021/01/07/trump-campaign-drops-all-georgia-election-challenges>.

that “you have a big election integrity problem in Georgia” and stating that “I hope you can help us out and call a special election,”<sup>174</sup> an action the governor has no authority to perform.

Trump’s attorneys did not just rely on lawsuits to attempt to overturn the election. On December 3, Trump’s legal team—led by his personal lawyer, Giuliani—appeared before Republicans on Georgia’s Senate Judiciary Subcommittee. Reciting a laundry list of conspiracy theories endorsed by Trump and his allies, Giuliani implored the legislators to usurp Kemp’s prerogative to name electors for president and appoint an alternative slate of electors for Trump.<sup>175</sup> Appearing alongside Giuliani was Jenna Ellis, another attorney affiliated with Mr. Trump’s reelection campaign.

John Eastman also testified at that December 3 hearing. However, he did not introduce himself as a member of Trump’s legal team, but instead as an expert witness introducing himself as “a professor of constitutional law and former dean at the Chapman University Fowler School of Law,” a “visiting scholar at the University of Colorado ... Benson Center,” and a “fellow at the Claremont Institute.”<sup>176</sup> Eastman delivered the same message as Giuliani and Ellis, pushing legislators to appoint alternate electors.<sup>177</sup>

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<sup>174</sup> Amy Gardner, Colby Itkowitz & Josh Dawsey, Trump calls Georgia governor to pressure him for help overturning Biden’s win in the state, THE WASHINGTON POST (Dec. 5, 2020), [https://www.washingtonpost.com/politics/trump-kemp-call-georgia/2020/12/05/fd8d677c-3721-11eb-8d38-6aea1adb3839\\_story.html](https://www.washingtonpost.com/politics/trump-kemp-call-georgia/2020/12/05/fd8d677c-3721-11eb-8d38-6aea1adb3839_story.html). On September 25, 2021, Trump confirmed that he asked Kemp to call a “special election” to decertify his loss in Georgia: “Remember we wanted to call a special election, so that we could go, Marjorie, into election integrity. What is wrong with that? And he said, ‘No, we won’t.’ And I think the governor is the only one that can call it. And he wouldn’t do it. He wouldn’t do it. So when these guys, they’re young and nice guys, they came back, they said. ‘He won’t do it.’ ... So I said, ‘Let me handle it. This is easy.’ I got this guy elected. One thing has nothing to do with the other. One thing has nothing.... There’s no quid pro quo.... ‘I’ll call them up.’ I said, ‘Brian, listen. you have a big election integrity problem in Georgia. I hope you can help us out and call a special election and let’s get to the bottom of it for the good of the country.’” Donald Trump, Perry, Georgia Rally Speech Transcript September 25, REV (Sept. 26, 2021), [rev.com/blog/transcripts/donald-trump-perry-georgia-rally-speech-transcript-september-25](https://rev.com/blog/transcripts/donald-trump-perry-georgia-rally-speech-transcript-september-25) (hereinafter “Rally Speech Transcript”).

<sup>175</sup> Fowler, *supra* note 17.

<sup>176</sup> Claremont Institute, John Eastman Testimony During Georgia Senate Election Hearing, YOUTUBE (Dec. 4, 2020), [https://www.youtube.com/watch?v=IHt6UEc\\_tQ8](https://www.youtube.com/watch?v=IHt6UEc_tQ8).

<sup>177</sup> *Id.*

This request for unilateral action by the Georgia legislators failed. Nonetheless, Giuliani tried again one week later, appearing before the Georgia House Governmental Affairs Committee, where he opined that election workers in Atlanta “look like they’re passing out dope, not just ballots,” and that “every single vote should be taken away from Biden.”<sup>178</sup> Giuliani presented to Georgia lawmakers a video, which he had also presented the week before, that he inaccurately claimed showed “suitcases filled with ballots pulled from under a table AFTER supervisors told poll workers to leave the room and four people stayed behind to keep counting votes.”<sup>179</sup> (For more on the “Suitcases of Ballots” conspiracy theory, see Box 3.)

This conduct by Giuliani, acting as Trump’s personal lawyer, was consistent with Trump’s own continuing efforts to interfere with Georgia’s election administration by soliciting *ultra vires* acts from state officials—meaning acts beyond the scope of their legal authority. In addition to the contents discussed above, in his December 5 call noted above, Trump also urged Governor Kemp to convene a special session of the legislature so that state lawmakers could override the certified election results and appoint electors for Trump.<sup>180</sup> Trump also reportedly entreated the governor to order a statewide audit of all signatures on mail-in ballots.<sup>181</sup> Kemp turned down both requests.

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<sup>178</sup> Beau Evans, Trump attorney Giuliani again lobs election fraud claims in Georgia House hearing Thursday, AUGUSTA CHRONICLE (Dec. 10, 2020), [augustachronicle.com/story/news/politics/2020/12/10/giuliani-again-makes-election-fraud-claims-georgia-house-hearing/3884219001/](https://www.augustachronicle.com/story/news/politics/2020/12/10/giuliani-again-makes-election-fraud-claims-georgia-house-hearing/3884219001/).

<sup>179</sup> Jason Reynolds, During Georgia Senate Hearing, Giuliani Team Shows Video of Suitcases Filled With Ballots Processed After Counting Supposedly Ended, TENNESSEE STAR (Dec. 4, 2020), [tennesseestar.com/2020/12/04/during-georgia-senate-hearing-giuliani-team-shows-video-of-suitcases-filled-with-ballots-processed-after-counting-supposedly-ended/](https://www.tennesseestar.com/2020/12/04/during-georgia-senate-hearing-giuliani-team-shows-video-of-suitcases-filled-with-ballots-processed-after-counting-supposedly-ended/).

<sup>180</sup> Kristen Holmes & Veronica Stracqualursi, Trump pressured Georgia governor in call to help overturn Biden’s win in state, CNN (Dec. 5, 2021), <https://www.cnn.com/2020/12/05/politics/trump-georgia-brian-kemp-phone-call/index.html>.

<sup>181</sup> Gardner, Itkowitz & Dawsey, *supra* note 174.

Later that night, Trump personally attacked Kemp during a rally he held in support of Perdue and Loeffler in Macon, Georgia: “Your governor could stop [the steal] very easily if he knew what the hell he was doing ... So far we haven’t been able to find the people with the courage to do the right thing.”<sup>182</sup> At that rally on December 5, Trump seemed to acknowledge his direct and personal outreach to Georgia state legislators in his effort to overturn the election, stating:

I’ve become friendly with legislators that I didn’t know four weeks ago... In fact, in my pocket right here, we have a couple of them right here.<sup>183</sup>

Trump went on to name several individuals including Georgia State Senators Brandon Beach, Greg Dolezal, as well as Senator Burt Jones, who as of this writing is the Republican lieutenant governor-elect.<sup>184</sup>

Public reporting shows Trump’s team continued to pressure Georgia legislators throughout the month of December, with Giuliani meeting again with the Georgia State Senate Judiciary Subcommittee on December 30, 2020. During this hearing, Giuliani lambasted the actions of Secretary of State Raffensperger and repeated several falsehoods about the level of (nonexistent) fraud in the election, claiming Georgia was part of “probably the worst situation of voter fraud we’ve ever had in this country.”<sup>185</sup> He called people who did not agree with his claims of fraud “moron[s],” “fool[s],” and “liar[s],” and said that anyone willing to sign an affidavit indicating the certified results were correct could risk going to jail.<sup>186</sup> Specifically, Giuliani said, the legislators

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<sup>182</sup> *Id.*

<sup>183</sup> Donald J. Trump, Remarks at a Campaign Rally Prior to the Georgia State Senate Election Runoff in Valdosta, Georgia (Dec. 5, 2020) (transcript available in The American Presidency Project at the University of California, Santa Barbara), <https://tinyurl.com/s7yxup8f>.

<sup>184</sup> *Id.*

<sup>185</sup> Right Side Broadcasting Network, Georgia State Senate Meeting on 2020 Election Fraud, YOUTUBE (Dec. 30, 2020), [https://www.youtube.com/watch?v=u5ZP\\_HpBKos](https://www.youtube.com/watch?v=u5ZP_HpBKos).

<sup>186</sup> *Id.*

had the responsibility and power to select Georgia's electors, and it was "ultimately a question of courage" as to whether they will "stand up to the obligation the Constitution of the United States put on [them] to save our people from fraud; to save the reputation of the State of Georgia from ... certifying a phony vote."<sup>187</sup> Giuliani finally implored the committee members to "do the right thing" and hold a session to take action to change the outcome of the election.<sup>188</sup>

At the same time, Trump personally, and through his campaign, organized grassroots pressure on state legislators, both in Georgia and around the country.<sup>189</sup> Campaign staff engaged in an organized effort to directly contact other legislators and pressure them to appoint new electors. Trump campaign staffers were given a script to use to call legislators in targeted states.<sup>190</sup> The script obtained by the January 6 Committee said "Hard Sell: Support the resolution to appoint electors for Trump... You have the power to send a slate of Electors that will support President Trump and Vice President Pence."<sup>191</sup>

In addition to directly contacting legislators, during that time period the Trump campaign also spent millions of dollars running digital and television ads asking people to call their legislators to put additional pressure on state officials.<sup>192</sup> An ad run by the Trump campaign in Georgia repeated the "suitcases" conspiracy theory (which had been examined and debunked by the FBI in early December as discussed in Box 3 below) and asked Georgia residents to call their legislators and the governor and "demand they hear the evidence" regarding election fraud.<sup>193</sup> Trump also personally pushed the public to pressure legislators. On January 1, 2021,

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>190</sup> *Id.*

<sup>191</sup> January 6th Committee, 06/21/22 Select Committee Hearing, YOUTUBE (June 21, 2022), [https://youtube.com/watch?v=xa43\\_z\\_82Og&t=1966s](https://youtube.com/watch?v=xa43_z_82Og&t=1966s).

<sup>192</sup> *Id.*

<sup>193</sup> America's Newsroom, Fox News 6:00am-9:00amPST (Dec. 29, 2020) (recording on file with Internet Archive), [https://archive.org/details/FOXNEWSW\\_20201229\\_140000\\_Americas\\_Newsroom/start/9960/end/10020](https://archive.org/details/FOXNEWSW_20201229_140000_Americas_Newsroom/start/9960/end/10020).

Trump retweeted a message from his campaign directing supporters to contact Georgia House Speaker David Ralston and Senate Majority Leader Mike Dugan to “Demand a vote on decertification” of electors “NOW.”<sup>194</sup>

### **Box 3: “Suitcases” of Ballots Theory**

One of the Trump campaign’s main allegations in Georgia was that poll workers in Atlanta’s State Farm Arena had hidden a “suitcase” full of ballots underneath a table. When poll watchers and cameras left, according to their claims, the poll workers pulled out hundreds of Biden ballots and proceeded to run them through a scanner multiple times. Giuliani showed Georgia legislators a video clip of this alleged fraud.

This claim was investigated by FBI agents, Trump-appointed United States Attorney Byung J. (“BJay”) Pak, Acting Deputy Attorney General Richard Donoghue, as well as chief operating officer for the Georgia secretary of state’s office, Gabriel Sterling. Each investigation found no irregularities or fraud, explaining that the “suitcase full of ballots” was simply a tamper-proof official ballot lockbox.

In testimony before the January 6 Committee, Pak explained that his office investigated this matter at Barr’s request in early December:

Mr. Giuliani only played a clip that showed [poll workers] pulling out the official ballot box from under the table and referring to that as a smoking gun of fraud in—in Fulton County, when in actuality in review of the entire video, it showed that that was actually an official ballot box that was kept underneath the—the tables.<sup>195</sup>

Pak continued:

[T]he FBI interviewed the individuals that are depicted in the—the videos that purportedly were double, triple counting...the ballots, and determined that nothing irregular happened in the counting and the allegations made by Mr. Giuliani were false.<sup>196</sup>

**cont’d**

<sup>194</sup> Michael King, Trump encouraging Georgia voters to call state lawmakers and demand decertification, 11ALIVE (Jan. 1, 2021), <https://www.11alive.com/article/news/politics/elections/trump-encouraging-georgia-voters-to-call-state-lawmakers/85-c506eeb5-adb4-4097-a8bd-0375ceacec0f>.

<sup>195</sup> Second Jan. 6 Hearing Transcript, *supra* note 74.

<sup>196</sup> *Id.*



Regarding the allegation that votes were counted multiple times, Sterling testified that the activity seen in the video is “standard operating procedure ... if there is a missed scan, if there’s a misalignment, if it doesn’t read right ... to delete that batch and put it back through again.”<sup>197</sup> Sterling explained that the hand tally of ballots was an additional protection against votes being counted multiple times. “If there had been multiple ballots scanned without a ... corresponding physical ballot, your counts would have been a lot higher than the ballots themselves.”<sup>198</sup> Based on the hand tally, Sterling testified that the results were “dead on accurate” and better than the expected margin for error.<sup>199</sup>

Despite these explanations, the Trump campaign as well as allies like Rudy Giuliani pushed these claims, going as far as to call election worker Shaye Moss a “scammer and hustler.” Moss left her home due to violent threats made against her and her elderly mother.

#### **F. Trump Engages His Campaign and the Republican National Committee (RNC) in a Plan to Organize False Electors**

Irrespective of whether or not his legal and pressure tactics changed the vote tallies in Georgia, congressional reporting and testimony show that Trump and his campaign set out to ensure the state had a slate of electors that would support him at the January 6th Joint Session of Congress.

Starting after the election, Trump campaign lawyer Kenneth Chesebro wrote a series of memos arguing that the Trump campaign should organize its own electors in the swing states that Trump had lost. He noted in his December 9 memo that Georgia state law, which “[u]nlike in other States” requires that the presidential electors’ votes be ratified by the governor, created a wrinkle in this effort and accordingly outlined measures that were “imperative” for the Trump campaign to take if they were to be successful in Georgia.<sup>200</sup> Emails among lawyers working with the Trump

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<sup>197</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*; Memorandum from Kenneth Chesebro to Judge James R. Troupis on the Real Deadline for Settling a State’s Electoral Votes (Nov. 18, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-memorandum-to-james-r.-troupis-attorney-for-trump-campaign-wisconsin-november-18-2020.pdf>; Memorandum from Kenneth Chesebro to Judge James R. Troupis on Statutory Requirements for December 14 Electoral Votes (Dec. 9, 2020), <https://tinyurl.com/5fm37jpy>.

campaign in 2020 articulated the purpose of this false-electors plan. Specifically, in a December 8, 2020 email, Jack Wilenchik, an Arizona lawyer who helped organize a slate of false Trump electors in that state, wrote:

[Chesebro's] idea is basically that all of us (GA, WI, AZ, PA, etc.) have our electors send in their votes (even though the votes aren't legal under federal law—because they're not signed by the Governor); so that members of Congress can fight about whether they should be counted on January 6<sup>th</sup> ... Kind of wild/creative .... My comment to him was that I guess there's no harm in it, (legally at least)—i.e. we would just be sending in 'fake' electoral votes to Pence so that 'someone' in Congress can make an objection when they start counting votes, and start arguing that the 'fake' votes should be counted.<sup>201</sup>

Wilenchik used the term “fake” to characterize electors he and the Trump team were working to organize. Possibly realizing the legal implications of organizing “fake” electoral votes, Wilenchik later followed up and said “‘alternative’ votes is probably a better term than ‘fake’ votes.”<sup>202</sup> As explained by Eastman in an email presented as an exhibit by the January 6 Committee: “The fact that we have multiple slate[s] of electors demonstrates the uncertainty of either. That should be enough.”<sup>203</sup> This email demonstrates that the Trump team was working to manufacture the very uncertainty it needed in order to create the opportunity to overturn the election.

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<sup>201</sup> Maggie Haberman & Luke Broadwater, ‘Kind of Wild/Creative’: Emails Shed Light on Trump Fake Electors Plan, THE NEW YORK TIMES (July 26, 2022), <https://tinyurl.com/3zpkpfr74>.

<sup>202</sup> *Id.*

<sup>203</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

In a December 9, 2020 memo obtained by *The New York Times*, Chesebro acknowledged that the strategy to organize Trump electors was “somewhat dicey in Georgia” given state law.<sup>204</sup> Specifically, Chesebro acknowledged that under Ga. Code Ann. § 21-2-12, which “suppl[ies] a mechanism for replacing one or more of the 16 electors,” those electors must be ratified by the governor. Chesebro opined that “[u]nlike in other States” and in light of Kemp’s refusal to go along with their plan, this ratification requirement may present “a wrinkle” in their efforts to claim that the alternate electors organized by the campaign were legitimate.<sup>205</sup> Likewise, Chesebro acknowledged that “Ga. Code Ann. §21-2-11 ... requir[ing] that the electors ‘assemble at the seat of government of this state at 12:00 Noon’ on December 14” may also be an obstacle to their effort and questioned “must they meet in the Capitol Building” or would meeting “somewhere in Atlanta” be sufficient to make the claim.<sup>206</sup>

Regardless of the legal obstacles,<sup>207</sup> Trump and his campaign moved forward with this plan.<sup>208</sup> Trump, joined by Eastman, personally called RNC Chairwoman Ronna Romney McDaniel to ask them to help with their effort. After Trump “turned the call over to” him, Eastman requested that the RNC help “gather these contingent electors,” stressing to Romney McDaniel the importance of the RNC’s collaboration.<sup>209</sup> In a recorded interview presented by the January 6 Committee, McDaniel told Congress that the Trump campaign took the lead in this effort, but that the RNC provided the requested assistance by “helping them reach out [to contingent electors] and

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<sup>203</sup> Memorandum from Kenneth Chesebro to Judge James R. Troupis on Statutory Requirements for December 14 Electoral Votes (Dec. 9, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-memorandum-to-james-r.-troupis-attorney-for-trump-campaign-wisconsin-december-9-2020.pdf>.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> Ryan Goodman, Timeline: False Alternate Slate of Electors Scheme, Donald Trump and His Close Associates, JUST SECURITY (July 18, 2022), <https://www.justsecurity.org/81939/timeline-false-alternate-slate-of-electors-scheme-donald-trump-and-his-close-associates/>.

<sup>209</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

assemble them.” That and other evidence of Trump’s personal involvement in the implementation of the nationwide efforts, including his direct contact with those within the states, was detailed by the January 6 Committee in its fourth hearing.<sup>210</sup>

The evidence suggests that Trump’s chief of staff, Mark Meadows, also engaged in initial discussions regarding the plan to organize alternate electors and in the plan’s implementation. Arizona Congressman Andy Biggs (R) and Donald Trump Jr. appear to have been among the first to discuss this plan with Meadows.<sup>211</sup> Text messages to and from Meadows, obtained by the January 6 Committee and reported in the media, show that discussions about overturning the election results began even before the presidential election had been called in several states. On November 4, 2020, Meadows received a text message, reportedly from Trump’s former secretary of energy, Rick Perry, proposing to have the Georgia legislature send supportive electors to Congress and the National Archives regardless of the election’s outcome.<sup>212</sup> The text said:

‘HERE’s an AGRESSIVE (sic) STRATEGY: Why can t (sic) the states of GA NC PENN and other R controlled state houses declare this is BS (where conflicts and election not called that night) and just send their own electors to vote and have it go to the SCOTUS.’<sup>213</sup>

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<sup>210</sup> *Id.*

<sup>211</sup> Goodman, *supra* note 208.

<sup>212</sup> Ryan Nobles, Zachary Cohen & Annie Grayer, CNN Exclusive: ‘We control them all’: Donald Trump Jr. texted Meadows ideas for overturning 2020 election before it was called, CNN (Apr. 9, 2022), <https://tinyurl.com/5n7pbvbr> (“A spokesman for Perry told CNN at the time that the former Energy Secretary denies being the author of the text. However, multiple people who know Rick Perry previously confirmed to CNN that the phone number the committee has associated with that text message is Perry’s number.”).

<sup>213</sup> *Id.*

According to findings released by the January 6 Committee:

Meadows received text messages and emails regarding apparent efforts to encourage Republican legislators in certain States to send alternate slates of electors to Congress, a plan which one Member of Congress acknowledged was “highly controversial” and to which Mr. Meadows responded, “I love it.” Mr. Meadows responded to a similar message by saying ... “Yes. Have a team on it.”<sup>214</sup>

According to *The Washington Post*, that text exchange occurred on November 6, 2020, just a few days after Election Day.<sup>215</sup> Documents confirm that Meadows was indeed working to implement this plan. For example, in a December 6, 2020 email from Meadows to Trump campaign senior aide Jason Miller, Meadows told Miller, “[w]e just need to have someone coordinating the electors for states.”<sup>216</sup>

Although Trump, his campaign, and allies aggressively moved forward with this plan, Chesebro’s December 9, 2020 memo acknowledged that the electors they were organizing were not then, and might never be, valid. He wrote:

Even though **none** of the Trump-Pence electors are currently certified as having been elected by the voters of their State, most of the electors (with the possible exception of the Nevada electors) will be able to take the essential steps needed to validly cast and transmit their votes, so that the votes might be eligible to be counted **if later**

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<sup>214</sup> House Select Committee to Investigate the January 6th Attack on the United States Capitol, House Report, Resolution Recommending That the House of Representatives Find Mark Randall Meadows in Contempt of Congress for Refusal to Comply With a Subpoena Duly Issued by the Select Committee to Investigate the January 6th Attack on the United States Capitol (Dec. 13, 2021), <https://tinyurl.com/8wmya3hx>.

<sup>215</sup> Aaron Blake, Timeline: The Trump team’s ‘fake elector’ plot, THE WASHINGTON POST (June 20, 2022), <https://www.washingtonpost.com/politics/2022/06/20/trump-fake-electors-timeline/>.

<sup>216</sup> Goodman, *supra* note 208.

**recognized** (by a court, the state legislature, or Congress) as the valid ones that actually count in the presidential election... It is important that the Trump-Pence Campaign focus carefully on these details, as soon as possible, if the aim is to ensure that all 79 electoral votes are properly cast and transmitted—each electoral vote being potentially important **if the election ultimately extends to, and perhaps past, January 6 in Congress.** (emphasis added).<sup>217</sup>

On December 13, 2020, the day before the Electoral College was to meet and cast its votes as required under the law, Robert Sinners, the Trump campaign election operations director for Georgia, emailed instructions to the group of would-be false electors requesting they act covertly.<sup>218</sup> He wrote:

I must ask for your complete discretion in this process... Your duties are imperative to ensure the end result—a win in Georgia for President Trump—but will be hampered unless we have complete secrecy and discretion.<sup>219</sup>

The false Trump electors were even specifically instructed not to tell security at the Georgia State Capitol why they were there on December 14.<sup>220</sup> They were instead told to say they needed access to the building for a meeting with Republican State Senator Jones and/or State Senator

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<sup>217</sup> Memorandum from Kenneth Chesebro to Judge James R. Troupis on Statutory Requirements for December 14 Electoral Votes (Dec. 9, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-memorandum-to-james-r.-troupis-attorney-for-trump-campaign-wisconsin-december-9-2020.pdf>.

<sup>218</sup> Amy Gardner, Beth Reinhard, Rosalind S. Helderman & Jacqueline Alemany, Fake Trump electors in Ga. told to shroud plans in 'secrecy,' email shows, THE WASHINGTON POST (June 6, 2022), <https://www.washingtonpost.com/politics/2022/06/06/fake-trump-electors-ga-told-shroud-plans-secrecy-email-shows/>.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

Beach.<sup>221</sup> Senator, and 2022 lieutenant governor-elect, Jones was himself one of the false electors.<sup>222</sup>

On December 14, while Georgia's legitimate electors met on the floor of the Georgia State Senate and cast their votes for Biden, 16 individuals organized by the Trump campaign, including Jones and Cathy Latham, a former GOP chairwoman of Coffee County, Georgia who also played a role in the potentially unauthorized breach of voting machines, met in a conference room in the Georgia State Capitol "sitting around a U-shaped table" as they signed certificates falsely certifying that they were "duly elected and qualified Electors for President and Vice President of the United States of America from the State of Georgia" and casting each of their respective so-called "ballots" for Trump and Pence.<sup>223</sup> It is notable that individuals serving as false electors organized by local operators of the Trump campaign in Pennsylvania added conditional language when they signed similar documents certifying their votes for Trump and Pence "if, as a result of a final non-appealable Court Order or other proceeding prescribed by law we are recognized as being duly elected and qualified."<sup>224</sup> And, similarly, the false electors in New Mexico included language stating that they were certifying their votes for Trump and Pence "on the understanding that it might be later determined that we are the duly elected and qualified Electors."<sup>225</sup>

The false electors in Georgia included no such reservation in their document. Rather, they signed and submitted an unconditional certification that they were "duly elected and qualified." A copy of the envelope in which the false elector certificates were transmitted shows that they were

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<sup>221</sup> *Id.*

<sup>222</sup> Certificate of the Votes of the 2020 Electors from Georgia, Records from the National Archives and Records Administration in response to American Oversight's request for copies of the purported alternate elector slates from Arizona, Georgia, Michigan, New Mexico, Nevada, Pennsylvania, and Wisconsin, No. NARA-21-0174-A (Feb. 17, 2021), <https://tinyurl.com/z8rhsbz8> (hereinafter "False Electors Certificates").

<sup>223</sup> Gardner et al., *supra* note 218.

<sup>224</sup> False Electors Certificates at 32.

<sup>225</sup> *Id.*

sent to the National Archives by registered mail on December 14, 2020, the same day the Electoral College met.<sup>226</sup>

The false electors “vigorously reject the characterization of their conduct as in any way criminal as a matter of both law and fact.” They say they were simply acting to preserve Trump’s position in the event litigation was successful, doing so pursuant to federal and state law, on the advice of counsel and with the guidance the Trump campaign.<sup>227</sup>

Throughout the effort to organize alternate electors, Trump campaign staff and White House staff knew that the plan to recruit or convene alternate electors, except as an outcome of litigation, was illegal. In a recorded interview, Trump campaign lawyer Justin Clark told the January 6 Committee that he argued with Chesebro about this plan and told him that it was inappropriate to organize alternate electors if there was no litigation pending in the state, refusing to participate in the plan.<sup>228</sup> Trump campaign lawyer Matt Morgan told Congress that he objected and took action to ensure he had “zero” responsibility for this effort.<sup>229</sup> Meadows’ aide Cassidy Hutchinson heard the White House counsel, Pat Cipollone, tell Meadows, Giuliani, and a few of Giuliani’s associates that the plan to organize alternate electors was not legally sound.<sup>230</sup> Sinners, the campaign staffer who communicated the instructions to the false electors, told the January 6 Committee that he now feels like he and his colleagues were “useful idiots” and said that he “absolutely would not have” participated in the effort to organize alternate electors had he been aware that the Trump team’s “three main lawyers” were not in favor of the plan.<sup>231</sup>

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<sup>226</sup> National Archives, 2020 Presidential Election Unofficial Certificates submitted to The Office of the Federal Register (Feb. 25, 2022), <https://www.archives.gov/files/foia/ga-full.pdf>.

<sup>227</sup> Elector Nominees’ Opposition to State’s Motion to Disqualify Counsel, In re subpoenas from May 2022 Special Purpose Grand Jury, No. 2022-EX-000024 (Ga. Super. Ct. Nov. 10, 2022), <https://www.politico.com/f/?id=00000184-6734-d9a6-a994-6f74e2280000> (hereinafter “Electors Oppo.”). For more detail see p. 100 of this report at n. 496.

<sup>228</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>229</sup> *Id.*

<sup>230</sup> Goodman, *supra* note 208.

<sup>231</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.



### **G. Trump Pressures Georgia's Attorney General**

Trump's efforts to interfere with the administration of the election in Georgia by pressuring state officials continued after his December 5 call to Governor Kemp. On December 8, he went on to urge Georgia's attorney general not to oppose a lawsuit seeking to undo the election results.<sup>232</sup>

Trump's call to Attorney General Chris Carr arose from a lawsuit filed at the Supreme Court of the United States by Texas Attorney General Ken Paxton on December 7, which sought to influence the outcome of the election counts in Georgia, Michigan, Wisconsin, and Pennsylvania, and requested relief that would all but ensure Trump's reelection.<sup>233</sup> Many Republican officeholders quickly jumped in to support Paxton by signing on to a multistate brief in support of the complaint,<sup>234</sup> but a number of other state officials were steadfast in their rejection of the filing. Those holdouts included Carr, who deemed the suit "constitutionally, legally, and factually wrong."<sup>235</sup> Trump reportedly responded to Carr's statement by calling him on December 8 and warning him not to interfere in the proceedings<sup>236</sup>—an unsubtle threat intended to intrude upon Carr's defense of the state's election.<sup>237</sup>

### **H. Trump Pressures a Senior Georgia Election Official**

On December 14, 2020, even though the Electoral College had already met, and Georgia had certified its 16 electoral votes for Biden—reflecting the will of the majority of the voters—

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<sup>232</sup> Cohen, Morris & Hickey, *supra* note 16.

<sup>233</sup> Motion for Leave to File Bill of Complaint, *Texas v. Pennsylvania*, No. 220155 (S. Ct. Dec. 7, 2020); Emma Platoff, In new lawsuit, Texas contests election results in Georgia, Wisconsin, Michigan, Pennsylvania, THE TEXAS TRIBUNE (Dec. 8, 2020), <https://www.texastribune.org/2020/12/08/texas-ken-paxton-election-georgia/>.

<sup>234</sup> Emma Platoff, Trump, Republicans pin hopes on Texas lawsuit to overturn election results, but legal experts say it's a long shot, THE TEXAS TRIBUNE (Dec. 9, 2020), <https://www.texastribune.org/2020/12/09/texas-lawsuit-election-trump/>.

<sup>235</sup> Rutenberg et al., *supra* note 28.

<sup>236</sup> Cohen, Morris & Hickey, *supra* note 16.

<sup>237</sup> Greg Bluestein, Trump warns Georgia AG not to rally other Republicans against Texas lawsuit, THE ATLANTA JOURNAL-CONSTITUTION (Dec. 9, 2020), <https://www.ajc.com/politics/trump-warns-georgia-ag-not-to-rally-other-republicans-against-texas-lawsuit/37ASZD4PJNENHOLVIXZHRXCIJI/>; Ariane de Vogue & Paul LeBlanc, Battleground states issue blistering rebukes to Texas' lawsuit to invalidate millions of votes, CNN (Dec. 10, 2020), <https://www.cnn.com/2020/12/10/politics/2020-election-supreme-court-texas-trump/index.html>.

Secretary of State Raffensperger announced “a signature match audit in Cobb County and an additional statewide signature match audit.”<sup>238</sup> Raffensperger initiated the audit in response to claims, which were ultimately deemed baseless, of mismatched signatures on mail-in ballots.<sup>239</sup> But he was very explicit in his announcement that the purpose of the audit was not to overturn the election results. He said:

Though the outcome of the race in Georgia will not change, conducting this audit follows in the footsteps of the audit-triggered hand recount we conducted in November to provide further confidence in the accuracy, security, and reliability of the vote in Georgia.<sup>240</sup>

Regardless of the stated purpose of the audit, Trump and his team continued to suggest that the results of the audit would allow them to win Georgia, and Trump quickly grew frustrated with the pace of the audit. On December 21, Trump posted a tweet criticizing state officials and suggesting that he still would win the state as a result. Trump tweeted:

Governor @BrianKempGA and his puppet @GeoffDuncanGA, together with the Secretary of State of Georgia, are very slow on Signature Verification, and won't allow Fulton County to be examined. What are these RINOS hiding? We will easily win Presidential State race....<sup>241</sup>

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<sup>238</sup> Press Release, Office of Georgia Secretary of State Brad Raffensperger, Secretary Raffensperger Launches Cobb County and Statewide Signature Match Audits (Dec. 14, 2020), <https://sos.ga.gov/news/secretary-raffensperger-launches-cobb-county-and-statewide-signature-match-audits>.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Dec. 21, 2020, 10:30:09 AM), <https://www.thetrumparchive.com/?searchbox=%22%5C%22very+slow%5C%22%22>.

The very next day, Meadows showed up in an unscheduled visit to the site where the audit of Georgia absentee ballots was being conducted in Cobb County.<sup>242</sup> Meadows was reportedly joined by an entourage of Secret Service agents as he asked questions and attempted to observe the review of absentee ballot envelope signatures.<sup>243</sup> While Meadows was reportedly not allowed in the room where the signatures were being examined, he met with Georgia Deputy Secretary of State Jordan Fuchs and the Secretary of State's chief investigator, Frances Watson, and collected their contact information, "including their cell phone numbers."<sup>244</sup> Watson was directly overseeing the inquiry into the mismatched signatures on the mail-in ballots being audited in Cobb County, a Democratic stronghold in suburban Atlanta where Biden won 56.35 percent of the vote.<sup>245</sup> This small-scale audit was being done by 18 two-person teams composed of agents from the Georgia Bureau of Investigation who would check the signed outer envelopes of more than 15,000 absentee ballots against signatures in voters' registration files;<sup>246</sup> in the event of a mismatch, a three-member investigative team would conduct a follow-up check to make a final ruling on any potential mismatches.<sup>247</sup>

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<sup>242</sup> Mark Niese, Top Trump aide Mark Meadows visits Georgia ballot signature audit, THE ATLANTA JOURNAL-CONSTITUTION (Dec. 22, 2020), <https://www.ajc.com/politics/top-trump-aide-mark-meadows-visits-georgia-ballot-signature-audit/LC5HBS3AUVH4ZONJFSEL5RO2XA/>.

<sup>243</sup> *Id.*

<sup>244</sup> Linda So, Trump's chief of staff could face scrutiny in Georgia criminal probe, REUTERS (Mar. 19, 2021), <https://www.reuters.com/article/us-usa-trump-georgia-meadows-insight-idUSKBN2BB0XX>.

<sup>245</sup> Office of Brad Raffensperger, November 2020 General Election Results, <https://tinyurl.com/529bk6y4>.

<sup>246</sup> Mark Niese, No fraud: Georgia audit confirms authenticity of absentee ballots, THE ATLANTA JOURNAL-CONSTITUTION (Dec. 29, 2020), <https://www.ajc.com/politics/no-fraud-georgia-audit-confirms-authenticity-of-absentee-ballots/QF2PTOGHLNDLNDJEWBU56WEQHM/>.

<sup>247</sup> *Id.*

According to Rep. Adam Schiff, a member of the January 6 Committee, text messages obtained by the Committee revealed that after Meadows' site visit and meeting with Watson, "Meadows wanted to send some of the investigators in her office in the words of one White House aide a shitload of POTUS [President of the United States] stuff, including coins, actual autographed MAGA hats, etc.," but "White House staff intervened to make sure that didn't happen."<sup>248</sup>

Next, on December 23, the day after meeting with Watson, Meadows coordinated a call between Trump and Watson.<sup>249</sup> Trump urged her to find "dishonesty" that would overturn the state's election results, insisted that he had won the election, and said she would be praised if she found the "right answer" while spearheading Georgia's audit of election results.<sup>250</sup>

When Trump called Watson, he told her that her role spearheading the audit meant that she had "the most important job in the country right now."<sup>251</sup> He once again insisted that he had won Georgia and other states by "hundreds of thousands" of votes and that the contest in the state "wasn't close."<sup>252</sup> He then elaborated on his claims that he had decisively won the election, as can be heard in the audio tape of the conversation:

... the people of Georgia are so angry at what happened to me. They know I won, won by hundreds of thousands of votes, it wasn't close. And Alabama you know where they go, because I won South Carolina in a record, Alabama in a record, Florida in a record. You

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<sup>248</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>249</sup> *Id.*; Cameron McWhirter, Trump Call to Georgia Lead Investigator Reveals New Details, THE WALL STREET JOURNAL (Mar. 11, 2021), <https://www.wsj.com/articles/recording-of-trump-phone-call-to-georgia-lead-investigator-reveals-new-details-11615411561>.

<sup>250</sup> Morris & Murray, *supra* note 27.

<sup>251</sup> Amy Gardner, Recording reveals details of Trump call to Georgia's chief elections investigator, THE WASHINGTON POST (Mar. 11, 2021), [www.washingtonpost.com/politics/trump-call-georgia-investigator/2021/03/11/c532ea2e-827a-11eb-ac37-4383f7709abe\\_story.html](http://www.washingtonpost.com/politics/trump-call-georgia-investigator/2021/03/11/c532ea2e-827a-11eb-ac37-4383f7709abe_story.html).

<sup>252</sup> *Id.*

know I won Florida by six or seven hundred thousand votes, it's never happened before with a Republican. And uh with all that money they spent, you know, you heard all about these guys go down spending a fortune. And we won Texas by a record, Texas was won by the biggest, biggest number ever, and it, you know, it didn't, it didn't... And Ohio, of course, you know that you know about that. That was won by nine points or something, And it's uh ... all of it. Iowa, I mean. And it didn't—it never made sense and, ya know, they dropped ballots. They dropped all these ballots. Stacey Abrams—really really terrible, I mean just a terrible thing.<sup>253</sup>

Trump pushed Watson to depart from established procedures for the audit she was supervising, insisting that she compare signatures on mail-in ballots to signatures from two years prior.<sup>254</sup> He also bluntly urged her to look skeptically at Fulton County, a well-known Biden stronghold: “You know I hope you’re going back two years, as opposed to just checking you know one against the other, because that would be a signature check that didn’t mean anything. But if you go back two years, and if you can get to Fulton, you’re going to find things that are gonna be unbelievable, the dishonesty that we’ve heard from them.”<sup>255</sup>

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<sup>253</sup> American Oversight, Georgia Secretary of State Recording of Trump Phone Call to Election Investigator, AMERICAN OVERSIGHT (Mar. 10, 2021), <https://www.americanoversight.org/document/georgia-secretary-of-state-recording-of-trump-phone-call-to-election-investigator>.

<sup>254</sup> Gardner, *supra* note 251.

<sup>255</sup> American Oversight, *supra* note 253.

During the call, Trump also claimed that Fulton County—which includes much of Atlanta—was the “mother lode” of “dishonesty.”<sup>256</sup> He implored Watson to continue the investigation past Christmas in order to ensure the audit’s conclusion before “the date, which is a very important date”—seemingly a reference to January 6, when Congress would certify Joe Biden’s win.<sup>257</sup> Throughout the discussion, Trump accentuated how “important” Watson’s job was for the nation, insisting that she would be praised when the “right answer” emerged.<sup>258</sup> He asked her to do “whatever [she] can do.”<sup>259</sup>

Watson’s audit in Cobb County concluded on December 29, failing to uncover fraud except for a single case of a signature mismatch occurring when a woman signed both her and her husband’s ballots.<sup>260</sup> In combination with Trump’s calls to Kemp and Carr, this call to Watson evinced a clear pattern of personal efforts by Trump to interfere with the administration of Georgia’s election that would later culminate in his conversation with Raffensperger.

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<sup>256</sup> Gardner, *supra* note 251.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>260</sup> Georgia Secretary of State, SEB2020-257, Cobb County: Absentee Ballot Signature Verifications (2020); Niese, *supra* note 246.

#### **Box 4: Georgia's Signature-Matching Law**

When election workers in Georgia mail absentee ballot applications to voters upon request, would-be voters complete and sign their application and mail it back to their county headquarters. Election workers then conduct the first signature check of the process by comparing the signature on the absentee ballot application to the signature on the voter's registration file. If the signatures match, the voter then receives an absentee ballot in the mail.<sup>261</sup> When that ballot is later submitted for the election, poll workers conduct their second signature check by comparing the signature on the outside envelope in which the ballot is sent (the ballot itself contains no personal information to protect voter privacy) to the signature on file.

Trump's request to Watson revealed a clear misunderstanding of the state's voting process.<sup>262</sup> Signatures are matched—twice—to the signature on the voter's registration file, which is pulled from any number of sources, including driver's licenses, passports, voter registration forms, and so on. Depending on the voter, the signatures on file may be anywhere from months to years to decades old. To maintain active registration, voters must re-register to vote if they move or have not voted in three or more years; that said, registrations remain active if a voter goes to the polls at least once every three years or does not change their address.

For this reason, “going back two years”—as Trump demanded—is arbitrary and nonsensical. The comparison between signatures on the ballot request form, the ballot itself, and the signature on file is designed to authenticate the identity of the voter. The age of the signature has no bearing on that process, nor does it affect the accuracy of the signature.

Furthermore, Trump's repeated request that election workers “see the signatures for fraud” during the first-hand recount was misplaced because the recount is of ballots to confirm the state's initial totals, not signed outer envelopes; the ballot itself contains no identifying information to protect the voter's identity and to distance them from their ballot selections. Signature verification is a part of the initial vote, not the recount. That verification had already been completed when signed envelopes and ballots were separated during the initial count. To do so after the outer envelopes have been separated from the ballots would be implausible and, in fact, illegal under Georgia state law. It stipulates that elections must be held by “secret ballot,” i.e., one that is protective of a voter's identity.

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<sup>261</sup> Ga. Code Ann. § 21-2-386.

<sup>262</sup> Gardner, *supra* note 251; Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Nov. 13, 2020, 7:50:23 PM), [thetrumparchive.com/?results=1&searchbox=%22people+checking+the+ballots%2C%22](https://thetrumparchive.com/?results=1&searchbox=%22people+checking+the+ballots%2C%22).

## I. Trump Solicits the Justice Department to Interfere in Georgia's Election

While Trump called Carr and Watson, he also enlisted the United States Department of Justice in his campaign to overturn the election outcome. Prosecutors may deem these events relevant because they further illuminate Trump's state of mind—and confirm his willingness to use his power and position for personal political gain. Following Election Day 2020, Attorney General Bill Barr—who had supported Trump throughout his presidency, including in ways that courts found questionable<sup>263</sup>—changed course. He now tried to protect the integrity of the Justice Department from Trump's attempts to use it as a tool to spread election misinformation and pressure state officials to change their state's Electoral College votes.

According to Barr's testimony before the January 6 Committee, he had three meetings with the president where he made it clear that he “did not agree with the idea of saying the election was stolen and putting out this stuff, which [he] told the president was bullshit” and insisted that the Department of Justice (DOJ) will not and should not “take sides in elections.”<sup>264</sup> Instead, Barr repeatedly explained to Trump that DOJ's only role was to investigate fraud, and that they would “look at something if it's—if it's specific, credible, and could have affected the outcome of the election.”<sup>265</sup>

In fact, the Justice Department did investigate allegations of fraud. As Barr explained in his testimony “when we received specific and credible allegations of fraud, [we] made an effort to look into these to satisfy ourselves that they were without merit.”<sup>266</sup> However, according to Barr,

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<sup>263</sup> See, e.g., *Citizens for Responsibility & Ethics in Washington v. U.S. Department of Justice*, 538 F. Supp. 3d 124 (D.D.C. 2021), *aff'd*, No. 21-5113 (D.C. Cir. 2022), <https://tinyurl.com/muxvv98m>; Memorandum Opinion, *Citizens for Responsibility & Ethics in Washington v. U.S. Department of Justice*, No. 19-1552-ABJ (D.D.C. 2021), <https://tinyurl.com/43d6edty>; Memorandum Opinion, *Electronic Privacy Information Center v. U.S. Department of Justice*, No. 19-810 (D.D.C. Mar. 5, 2020), [https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2019cv0810-111](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2019cv0810-111).

<sup>264</sup> First Jan. 6 Hearing Transcript, *supra* note 84; Second Jan. 6 Hearing Transcript, *supra* note 74.

<sup>265</sup> Second Jan. 6 Hearing Transcript, *supra* note 74.

<sup>266</sup> *Id.*



“it was like playing Whac-A-Mole, because something would come out one day and then the next day it would be another issue.”<sup>267</sup>

U.S. Attorney BJay Pak—the top federal prosecutor in Atlanta, nominated by Trump in July 2017—confirmed that Barr did indeed look into the various Georgia fraud claims circulated by Trump, Giuliani, and others within Trump’s circle. Pak testified that, in early December 2020, Barr contacted him.<sup>268</sup> Pak said that Barr specifically noted the conspiracy theory (discussed above and explained in detail in Box 3) being pushed by Giuliani that video footage purportedly showed poll workers at the State Farm Arena in Atlanta bringing out a “suitcase” of illegitimate ballots from beneath a table and adding them to the official vote count. Pak did not testify that Barr asked him to debunk the claim.<sup>269</sup> In fact, Pak testified: “He asked me to make it [a] priority to get to the bottom of—to try to substantiate the allegation made by Mr. Giuliani.”<sup>270</sup> Regarding that particular claim, Pak confirmed that he and his office looked into the claim, “reviewed the videotape,” the FBI “interview[ed] the witnesses,” and his office found that the footage was taken out of context by Trump and his allies.<sup>271</sup> Pak testified, flatly, that “Giuliani was wrong in representing that this was a suitcase full of ballots.”<sup>272</sup> Pak confirmed the “suitcase” was an official ballot lockbox containing legitimate ballots. Pak further testified that his successor, Bobby Christine, continued to investigate election-fraud leads and found nothing that would have altered the outcome of the election.<sup>273</sup>

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>272</sup> *Id.*

<sup>273</sup> Second Jan. 6 Hearing Transcript, *supra* note 74. It is worth noting that Christine was the Trump-appointed U.S. attorney for the Southern District of Georgia. Conventionally, when a U.S. attorney resigns during the lame-duck period after a presidential election, their first assistant assumes the role until the newly elected president makes an appointment. That Trump appointed Christine, rather than Pak’s deputy, was highly unusual.

On December 1, 2020, Barr told an *Associated Press* reporter “we have not seen fraud on a scale that could have effected a different outcome in the election.”<sup>274</sup> Upon seeing Barr’s quote in the news, Trump erupted, according to a White House staffer’s testimony, angrily throwing his lunch against the wall and shattering a dish in the White House dining room.<sup>275</sup> Barr was summoned to a meeting with Trump, who was “as mad as [Barr had] ever seen him.”<sup>276</sup> Following that meeting, in response to Barr questioning Meadows and Jared Kushner about how far Trump would take his fraud claims, which Barr had informed Trump were “not meritorious,” Meadows seemed to acknowledge that the election claims were baseless, stating, “I think he [Trump] is becoming more realistic,”<sup>277</sup> according to Barr. And, according to Barr, Kushner said, “Yeah, we’re working on this.”<sup>278</sup>

Ultimately, Barr offered his resignation to Trump on December 14, 2020, because the attorney general was aware Trump was dissatisfied with his unwillingness to have the Justice Department lend support to Trump’s claims of election fraud.<sup>279</sup> Barr’s resignation took effect on December 23, the same day that Trump called Watson.<sup>280</sup> In Barr’s place, Trump appointed Jeffrey Rosen to serve as acting attorney general; Richard Donoghue was elevated to acting deputy attorney general.<sup>281</sup>

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<sup>274</sup> Michael Balsamo, Disputing Trump, Barr says no widespread election fraud, AP NEWS (Dec. 1, 2020), <https://ap-news.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d>.

<sup>275</sup> Here’s every word from the sixth Jan. 6 committee hearing on its investigation, NPR (June 28, 2022), <https://www.npr.org/2022/06/28/1108396692/jan-6-committee-hearing-transcript> (testimony of Cassidy Hutchinson) (hereinafter “Sixth Jan. 6 Hearing Transcript”).

<sup>276</sup> Second Jan. 6 Hearing Transcript, *supra* note 74.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> Sixth Jan. 6 Hearing Transcript, *supra* note 275; Kevin Breuninger & Christina Wilkie, Attorney General William Barr resigns, effective Dec. 23, CNBC (Dec. 14, 2020), <https://www.cnbc.com/2020/12/14/attorney-general-william-barr-resigns-effective-dec-23.html>.

<sup>280</sup> Alexander Mallin & William Mansell, Attorney General William Barr to resign, Trump tweets, ABC NEWS (Dec. 14, 2020), <https://tinyurl.com/56z4vdm5>.

<sup>281</sup> Breuninger & Wilkie, *supra* note 279.

On December 15, 2020, immediately after Rosen's appointment as acting attorney general was announced, Trump summoned him and Donoghue to the Oval Office and pressed them to throw the Justice Department's formidable weight behind lawsuits challenging Trump's electoral defeat and raised multiple ways the department could support or advance his unsupported allegations of fraud.<sup>282</sup> According to Donoghue, Trump discussed claims of fraud in counting the ballots in Fulton County, Georgia. Donoghue testified:

I told the president myself that several times, in several conversations, that these allegations about ballots being smuggled in a suitcase and run through the machines several times, it was not true.<sup>283</sup>

Nonetheless, Trump continued to pressure the Justice Department to support his position.<sup>284</sup> These efforts accelerated through late December. Rosen testified, "between December 23rd and January 3rd, the president either called me or met with me virtually every day."<sup>285</sup> On December 27, Donoghue had a lengthy conversation with Trump.<sup>286</sup> Donoghue said Trump "wanted to talk a great deal about Georgia, the State Farm Arena video which he believed for various reasons was as he said it—fraud staring you right in the face," but the allegations were not credible.<sup>287</sup>

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<sup>282</sup> Here's every word from the fifth Jan. 6 committee hearing on its investigation, NPR (June 23, 2022), <https://www.npr.org/2022/06/23/1106700800/jan-6-committee-hearing-transcript> (hereinafter "Fifth Jan. 6 Hearing Transcript").

<sup>283</sup> Second Jan. 6 Hearing Transcript, *supra* note 74.

<sup>284</sup> Katie Benner, Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General, THE NEW YORK TIMES (Jan. 22, 2021), <https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html>.

<sup>285</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 282.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

Describing the totality of the conversation, Donoghue testified:

The December 27th conversation was in my mind an escalation of the earlier conversations... As we got later in the month of December, the president's entreaties became more urgent. He became more adamant that we weren't doing our job.<sup>288</sup>

According to Donoghue's contemporaneous handwritten notes and testimony, Trump asked him directly for the Department of Justice to "just say that the election was corrupt and leave the rest to [Trump] and the Republican congressmen."<sup>289</sup> Trump was apparently asking for Donoghue to lie publicly, despite Donoghue telling Trump that the theories of fraud were not true.<sup>290</sup>

Trump's allies and lawyers sought to persuade the Justice Department to align itself against certification of the election.<sup>291</sup> They pushed a dizzying array of conspiracy theories, evidently including the wild claim that an Italian aerospace engineer had worked with the Central Intelligence Agency (CIA) to switch tallies in voting machines via satellite.<sup>292</sup> (See Box 5 describing the "Italygate" conspiracy theory.) Meadows pursued these efforts by sending Rosen emails alleging election fraud without any evidence;<sup>293</sup> Rosen and Donoghue reviewed these emails and found them to be "pure insanity" and "patently absurd," according to Donoghue's testimony.<sup>294</sup>

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<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> Press Release, House Committee on Oversight and Reform, Committee Obtains Key Evidence of President Trump's Attempts to Overturn the 2020 Election (July 30, 2021), <https://oversight.house.gov/news/press-releases/committee-obtains-key-evidence-of-president-trump-s-attempts-to-overturn-the>.

<sup>292</sup> Emma Brown & Jon Swaine, 'Italygate' election conspiracy theory was pushed by two firms led by woman who also falsely claimed \$30 million mansion was hers, THE WASHINGTON POST (June 19, 2021), [https://www.washingtonpost.com/investigations/italygate-michele-edwards-meadows-trump/2021/06/19/2f6314d2-d05f-11eb-8014-2f3926ca24d9\\_story.html](https://www.washingtonpost.com/investigations/italygate-michele-edwards-meadows-trump/2021/06/19/2f6314d2-d05f-11eb-8014-2f3926ca24d9_story.html).

<sup>293</sup> Ali Breland, Emails Show Mark Meadows Pushed the DOJ to Investigate Election Fraud Conspiracy Theories, MOTHER JONES (June 5, 2021), <https://www.motherjones.com/politics/2021/06/emails-mark-meadows-jeffrey-rosen-donald-trump-election-conspiracies-italygate/>.

<sup>294</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 282.

### Box 5: Italygate

As explained in a June 15, 2021 *Washington Post* article, the basic premise of this conspiracy theory promoted by Trump's team is that "people connected to the Italian defense firm Leonardo used satellites to change the votes cast in the 2020 election from Trump to Biden."<sup>295</sup> An individual named Bradley Johnson, claiming to be a retired CIA officer, recorded and posted a video in December 2020 advancing a version of the claim.<sup>296</sup>

As explained during a June 21, 2022 January 6 Committee hearing, Rep. Scott Perry texted Chief of Staff Mark Meadows a link to that video.<sup>297</sup> Former Acting Attorney General Rosen testified that Meadows emailed him the video and then called him and asked him to meet with Johnson and Giuliani.<sup>298</sup> Rosen responded to Meadows telling him "if [Johnson] has real evidence which this video doesn't show, he can walk into an FBI field office anywhere in the United States."<sup>299</sup> When Rosen did not agree to meet with Johnson and Giuliani himself, the request to investigate was reportedly passed on to the Department of Defense.<sup>300</sup> Acting Secretary of Defense Christopher Miller called a defense official in Italy at the White House's request to look into the matter.

Trump did not relent in pressuring Rosen and Donoghue, but by late December 2020, none of his appointees to fill the attorney general, acting attorney general, or acting deputy attorney general roles had yielded in the nearly two months since Election Day. Trump and members of his inner circle sought to identify and potentially elevate others who would support their agenda of working to overturn the election from within the Justice Department.

On December 28, Jeffrey Clark, the acting head of the Civil Division and head of the Environment and Natural Resources Division at the Justice Department, emailed Acting Attorney General Rosen and Acting Deputy Attorney General Donoghue a draft letter to Georgia officials.

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<sup>295</sup> Aaron Blake, 'Pure insanity': Here's perhaps the craziest election fraud conspiracy the Trump team pushed, THE WASHINGTON POST (June 15, 2021), <https://www.washingtonpost.com/politics/2021/06/15/pure-insanity-heres-perhaps-craziest-election-fraud-conspiracy-trump-team-pushed/>.

<sup>296</sup> Zachary Cohen et al., Meadows' texts reveal new details about the key role a little-known GOP congressman played in efforts to overturn election, CNN POLITICS (Apr. 26, 2022), <https://www.cnn.com/2022/04/26/politics/mark-meadows-texts-scott-perry-key-role-overturn-election/index.html>.

<sup>297</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 282.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

The letter claimed that the department had discovered “significant concerns” bearing on the state’s election results. Sending such a letter is one of the actions Rosen testified Trump had suggested in their December 15 meeting.<sup>301</sup> Clark’s draft letter, if sent, would have recommended that the Georgia General Assembly convene a special session to “deliberate on the matter” and consider sending an alternate slate of electors to Congress.<sup>302</sup> The clear implication of the letter was that Georgia lawmakers should nullify Biden’s win—and would have federal backing to do so.

Clark’s alleged collaborator in drafting the letter was attorney Ken Klukowski, a lawyer who had just joined the Justice Department on December 15, 2020<sup>303</sup> (the day after the Electoral College met). According to Rep. Liz Cheney, vice chair of the January 6 Committee, Klukowski worked under Clark, and they cooperated to draft the letter to Georgia officials.<sup>304</sup> Vice Chair Cheney noted that the draft contained “text... similar to what we have seen from John Eastman and Rudy Giuliani, both of whom were coordinating with President Trump to overturn the 2020 election” indicating that they were all working together.<sup>305</sup> Based on an email obtained by the January 6 Committee, Cheney stated that, “Mr. Klukowski was simultaneously working with Jeffrey Clark to draft the proposed letter to Georgia officials to overturn their certified election and working with Dr. Eastman to help pressure the vice president to overturn the election.”<sup>306</sup> However, it should be noted that Klukowski has since disavowed any support of Eastman’s plan

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<sup>301</sup> *Id.*

<sup>302</sup> Draft Letter from Assistant Attorney General Jeffrey Clark to Georgia Officials on Proof of Concept (Dec. 28, 2020), <https://int.nyt.com/data/documenttools/jeffrey-clark-draft-letter/9a9ffa97a521729b/full.pdf>.

<sup>303</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 282.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* As discussed in Section I.B above, Eastman is the outside attorney who wrote the memos outlining the strategy to have Vice President Pence unilaterally “determine[] on his own” which of the states’ electoral certificates “is valid” at the joint session of Congress on January 6. He is also the attorney, discussed above, who testified before the Georgia state legislature on December 3, 2020, at the same hearing where Giuliani appeared, and advocated for the legislature to intervene and appoint alternate electors. The Select Committee cited an email, dated Dec. 18, 2020, recommending that Eastman and Klukowski brief Pence together.

and disputed the implication that he co-authored the letter to Georgia officials, stating that he merely built out an outline and supplied legal citations “at the direction of [his] then-boss,” Clark.<sup>307</sup>

Regardless of the nature of Klukowski's involvement, it was clear that Clark was willing to champion Trump's agenda to use the Justice Department to challenge the election results. Trump had been introduced to Clark by Rep. Scott Perry of Pennsylvania (whose phone has since been seized by federal authorities).<sup>308</sup> Giuliani testified in a congressional deposition that he recommended Clark be given election-related responsibilities within the Justice Department.<sup>309</sup> He specifically said: “[S]omebody should be put in charge of the Justice Department who isn't frightened of what's going to be done to their reputation.”<sup>310</sup>

On December 22, 2020, Rep. Perry, who had met with Trump in the Oval Office the previous day about unsubstantiated claims of voter fraud, went back to the White House and brought Clark with him.<sup>311</sup> Unbeknownst to Rosen and Donoghue, Trump and Clark spoke several times between late December to early January.<sup>312</sup> That happened despite Clark agreeing not to meet with Trump after Rosen, Cipollone, and Deputy White House Counsel Patrick Philbin admonished him for violating policy limiting who at the department can have contact with the

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<sup>307</sup> Response of Ken Klukowski to January 6 Committee Hearing of June 23, 2022 (accessed Aug. 24, 2022), <https://ia601509.us.archive.org/9/items/ken-klukowski-public-statement-of-6-25-22/Ken%20Klukowski%20Public%20Statement%20of%206-25-22.pdf>.

<sup>308</sup> Alan Feuer, Luke Broadwater & Katie Benner, Seizure of Congressman's Phone Is Latest Sign of Escalating Election Inquiry, THE NEW YORK TIMES (Aug. 10, 2022), <https://www.nytimes.com/2022/08/10/us/politics/scott-perry-phone-fbi.html>.

<sup>309</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 282.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*; Andrew Solender, Jan. 6 panel reveals news details about GOP lawmakers' role in Trump's DOJ schemes, AXIOS (June 23, 2022), <https://www.axios.com/2022/06/23/scott-perry-jeffrey-clark-white-house-jan6>.

<sup>312</sup> Benner, *supra* note 284.

president without prior authorization. Clark reportedly discussed the Georgia letter with both Trump and Perry, as Rosen and Donoghue continued to rebuff Clark's proposal.<sup>313</sup>

Donoghue responded to Clark's email and draft letter on December 28, testifying that he emphasized to Clark:

This is not the department's role to suggest or dictate to state legislatures how they should select their electors. But more importantly, this was not based on fact. This was actually contrary to the facts as developed by department investigations... And for the department to insert itself into the political process this way, I think would have had grave consequences for the country. It may very well have spiraled us into a constitutional crisis.<sup>314</sup>

Donoghue said he later told Clark:

What you're proposing is nothing less than the United States Justice Department meddling in the outcome of a presidential election.<sup>315</sup>

At some point, White House lawyer Eric Herschmann also spoke to Clark about the draft letter to Georgia officials. Speaking to the January 6 Committee in a recorded interview, Herschmann said he told Clark that sending the letter "would be committing a felony."<sup>316</sup> When Clark also appeared before the January 6 Committee for a deposition and was asked by committee counsel if he had discussed the letter to Georgia officials with President Trump, Clark invoked the Fifth Amendment.<sup>317</sup>

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<sup>313</sup> *Id.*; Katie Benner & Catie Edmondson, Pennsylvania Lawmaker Played Key Role in Trump's Plot to Oust Acting Attorney General, THE NEW YORK TIMES (Jan. 23, 2021), <https://www.nytimes.com/2021/01/23/us/politics/scott-perry-trump-justice-department-election.html>.

<sup>314</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 282.

<sup>315</sup> First Jan. 6 Hearing Transcript, *supra* note 84.

<sup>316</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 282.

<sup>317</sup> *Id.*



On December 31, 2020, Trump again summoned Rosen and Donoghue to an Oval Office meeting. According to Donoghue's testimony, Trump was "very agitated" as they discussed "a variety of election matters," and Trump pushed for the Justice Department's leadership to support the appointment of a special counsel to investigate election fraud.<sup>318</sup>

At that meeting, Trump also asked Rosen and Donoghue to have the Justice Department seize voting machines.<sup>319</sup> This was not the first time Trump had explored that option. Earlier, on December 18, 2020, Trump met privately with a group of outside advisors, including Giuliani, former National Security Advisor Gen. Michael Flynn, outside attorney Sidney Powell, and former Overstock.com CEO Patrick Byrne, to discuss alternative strategies to contest the election.<sup>320</sup> One of the strategies they discussed was issuing an executive order the visitors were proposing directing the secretary of defense to use the military to seize voting machines across the country, "effective immediately"—an action White House Counsel Pat Cipollone said was illegal and unconstitutional.<sup>321</sup> They also discussed a proposal for Trump to provide Sidney Powell a vague special counsel appointment to oversee the seizures and pursue criminal charges "with all resources necessary." Powell believed Trump appointed her in the meeting, but his official advisors, like Cipollone, did not recognize the appointment as legally valid.<sup>322</sup>

At the meeting with the Justice Department leadership on December 31, Trump was still focused on the plans he had discussed on December 18 to seize voting machines and appoint a

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<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> Here's every word from the seventh Jan. 6 committee hearing on its investigation, NPR (July 12, 2022), <https://www.npr.org/2022/07/12/1111123258/jan-6-committee-hearing-transcript> (hereinafter "Seventh Jan. 6 Hearing Transcript").

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

special counsel. Regarding Trump's proposal to seize voting machines, Rosen testified that he responded:

That we [the Justice Department] had—we had seen nothing improper with regard to the voting machines. And I told him that the—the real experts that had been at DHS [the Department of Homeland Security] and they had briefed us, that they had looked at it and that there was nothing wrong with the—the voting machines. And so that was not something that was appropriate to do... I don't think there was legal authority either.<sup>323</sup>

Donoghue testified that Trump was “very agitated” by Rosen's reply and immediately responded by getting Ken Cuccinelli, a senior official at the Department of Homeland Security, on the phone.<sup>324</sup> According to Donoghue's testimony, Trump said: “Ken, I'm sitting here with the Acting Attorney General. He just told me it's your job to seize [voting] machines and you're not doing your job.”<sup>325</sup> Rosen testified that he was “certainly not” suggesting that the Department of Homeland Security could seize voting machines.<sup>326</sup>

Ultimately, all of the president's proposals were rebuffed and Trump's frustration with Rosen and Donoghue grew during the December 31 meeting. Donoghue testified:

Toward the end of the meeting the president ... said people tell me I should just get rid of both of you. I should just remove you and make a change in the leadership. Put Jeff Clark in, maybe something will finally get done. And I responded as I think I had earlier in the

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<sup>323</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 282.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

December 27th call, Mr. President you should have the leadership that you want. But understand, the United States Justice Department functions on facts, evidence, and law, and those are not going to change. So you can have whatever leadership you want, but the department's position is not going to change.<sup>327</sup>

After the meeting, Trump and Meadows continued to push the Justice Department for action in support of their effort to overturn the election. On January 1, 2020, according to the January 6 Committee, Meadows sent “a flurry of emails” to Rosen making new requests.<sup>328</sup> Meadows specifically asked Rosen to send Jeffrey Clark to Fulton County.<sup>329</sup> Rosen testified that he did “nothing” in response to those requests and “certainly didn't send Mr. Clark to Fulton County,” but said “Meadows' email was something of a corroboration that there were discussions going on that I had been—not been informed about by Mr. Clark or anybody else.”<sup>330</sup>

Despite Trump's threats to replace Rosen and Donoghue, both held firm. Rosen testified:

[I]t was really not our role to function as—as, you know, an arm of any campaign for any party or any campaign. That wasn't our role. And that's part of why I had been unwilling to meet with Mr. Giuliani or any of the—the campaign people before. And the other part was it was another one of these ones where lots of work had already been done. And I thought it was a rehash of things that had been debunked previously.<sup>331</sup>

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<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

Rosen and Donoghue's most profound clash with Trump and Clark, described below, would come later, on January 3, in the Oval Office, but only after Trump once again tried and failed to get Georgia to act on its own.

#### **J. Trump Calls, Pressures, and Threatens Secretary Raffensperger**

By the end of 2020, Trump's lawsuits had all failed; his calls to Kemp, Watson, and Carr had failed; his team of lawyers, consisting of Giuliani, Jenna Ellis, and Eastman, had failed to convince the Georgia legislature to engage in extralegal action; and he had failed to persuade the Justice Department to challenge Georgia's election certification.

On December 30, 2020, Trump went on a 24-tweet rant. Most of the tweets related to the election. Among those tweets, he wrote: "I love the Great State of Georgia, but the people who run it, from the Governor, @BrianKempGA, to the Secretary of State, are a complete disaster and don't have a clue, or worse. Nobody can be this stupid. Just allow us to find the crime, and turn the state Republican..."<sup>332</sup> Trump also implied a conspiracy, falsely<sup>333</sup> tweeting, "Now it turns out that Brad R's [Raffensperger's] brother works for China, and they definitely don't want 'Trump'. So disgusting!"<sup>334</sup>

That is the context in which, on January 2, Trump called Raffensperger, the state's top elections official. According to press reports, Trump had previously attempted to reach Raffensperger at least 18 times since November 3.<sup>335</sup> Those preceding calls reportedly failed to

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<sup>332</sup> The American Presidency Project, Donald J. Trump Tweets of December 30, 2020, THE AMERICAN PRESIDENCY PROJECT (last accessed Aug. 18, 2022), <https://www.presidency.ucsb.edu/documents/tweets-december-30-2020>.

<sup>333</sup> Matt Wilstein, Trump Tweets Conspiracy About Georgia Secretary of State's 'Brother' Who 'Works for China,' THE DAILY BEAST (Dec. 30, 2020), <https://www.thedailybeast.com/trump-tweets-conspiracy-about-georgia-secretary-of-state-brad-raffenspergers-nonexistent-brother>.

<sup>334</sup> The American Presidency Project, *supra* note 332.

<sup>335</sup> Kristen Holmes, Jim Acosta & Kaitlan Collins, There were 18 attempted calls from the White House to GA secretary of state's office, sources say, CNN (Jan. 4, 2021), <https://www.cnn.com/2021/01/04/politics/trump-brad-raffensperger-calls-georgia>.

connect because interns in the secretary of state's office believed they were prank calls.<sup>336</sup> Other reports suggest that Raffensperger purposely avoided Trump's calls because he believed they could pose a conflict of interest.<sup>337</sup>

When Trump did reach Raffensperger on January 2, he was joined on the call by Meadows and several of his own lawyers. Raffensperger was accompanied by his general counsel, Ryan Germany, and deputy, Jordan Fuchs.<sup>338</sup> Everyone on the call knew that Congress would certify the election results just four days later at the Joint Session of Congress on January 6, 2021.

Based on an audio tape of the call that has been made public<sup>339</sup> and Raffensperger's testimony to the January 6 Committee, we know a great deal about the 67-minute discussion. Trump pressed Raffensperger and Germany to "find 11,780 votes, which is one more than we have because we [Trump] won the state."<sup>340</sup> This number was no accident. 11,780 was the exact number of votes necessary to flip the state's electoral votes from Biden to Trump. So, Trump's demand that Raffensperger "find 11,780 votes" was nothing less than a demand that Raffensperger alter the election outcome.

At times referring to himself in the third person as "the president," Trump let fly the litany of conspiracy theories and grievances that had become well-known refrains on his Twitter page over the prior months. He asked Raffensperger and Germany to "give [him] a break" by delivering the roughly 11,000 votes he wanted.<sup>341</sup> To support this solicitation, Trump cited a variety of dubious sources—including "rumors," "Trump media," "political people," and "what I've

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<sup>336</sup> Amy Gardner, Trump pressured a Georgia elections investigator in a separate call legal experts say could amount to obstruction, THE WASHINGTON POST (Mar. 11, 2021), [https://www.washingtonpost.com/politics/trump-call-georgia-investigator/2021/01/09/7a55c7fa-51cf-11eb-83e3-322644d82356\\_story.html](https://www.washingtonpost.com/politics/trump-call-georgia-investigator/2021/01/09/7a55c7fa-51cf-11eb-83e3-322644d82356_story.html).

<sup>337</sup> So, *supra* note 244.

<sup>338</sup> Gardner & Firozi, *supra* note 2.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

heard.”<sup>342</sup> Among his unfounded and ultimately fully discredited claims were allegations of suitcases containing 18,000 Biden votes being smuggled in during the night.<sup>343</sup> (See Box 3 on the “Suitcase” conspiracy theory.) Another claim that 5,000 votes were cast for Biden in the name of deceased voters was also raised, while in fact the Georgia state investigation only found a total of four votes that had been cast in the name of dead citizens.<sup>344</sup>

Raffensperger testified before the January 6 Committee about some of Trump’s specific allegations. He said:

We had many allegations and we investigated every single one of them. In fact, I challenged my team, did we miss anything? They said that there was over 66,000 underage voters. We found that there was actually zero. You can register to vote in Georgia when you’re 17 and a half. You have to be 18 by Election Day. We checked that out. Every single voter. They said that there was 2,423 nonregistered voters. There were zero. They said that there was 2,056 felons. We identified less than 74 or less that were actually still on a felony sentence. Every single allegation we checked, we ran down the rabbit trail to make sure that our numbers were accurate.<sup>345</sup>

Despite thorough investigations that had rebutted each claim Trump brought to Raffensperger, Trump and his team continued to push. Trump sought to convince Germany to meet with his attorneys personally to, in his own words, “work out on these numbers.”<sup>346</sup>

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<sup>342</sup> *Id.*

<sup>343</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> Gardner & Firozi, *supra* note 2.

At several points, Trump threatened Raffensperger and his deputies, insinuating that they were opening themselves up to criminal charges by not uncovering the fraud Trump described. For instance, at one point he stated regarding alleged voter fraud, “you are going to find that they are—which is totally illegal—it is more illegal for you than it is for them because, you know what they did and you’re not reporting it.”<sup>347</sup> Trump told Raffensperger that not identifying this fraud was “a big risk to you and to Ryan, your lawyer,” and that it was “very dangerous” for Raffensperger to publicly insist that there was “no criminality” in the administration of Georgia’s election.<sup>348</sup> Later, Trump claimed that “the people of Georgia are angry” and alluded to the possibility of depressed Republican turnout in the state’s upcoming Senate run-off elections if Raffensperger and other Republican state officials failed to take action.<sup>349</sup>

Despite Trump’s threats, Raffensperger and Germany pushed back against Trump’s claims throughout the conversation. In response to one of Trump’s many assertions that he won the state, Raffensperger replied: “Well, Mr. President, the challenge that you have is, the data you have is wrong.”<sup>350</sup> He told Trump that “we don’t agree that you have won [the election],” and he aggressively defended the accuracy and integrity of their administration of the vote.<sup>351</sup> At the end of the call, it was clear that Raffensperger and Germany had refused to concede to Trump’s assorted requests, solicitations, demands, and threats. The parties hung up the phone with conventional niceties. *The Washington Post* reported the call within 24 hours.<sup>352</sup>

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<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> Amy Gardner, ‘I just want to find 11,780 votes’: In extraordinary hour-long call, Trump pressures Georgia secretary of state to recalculate the vote in his favor, *THE WASHINGTON POST* (Jan. 3, 2021), [https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555\\_story.html](https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html).

**K. Trump and His Allies Knew Fraud Claims Were Untrue**

The allegations of fraud made by Trump and his team were refuted over and over again by federal and state officials as well as attorneys on Trump's own campaign staff. Trump campaign lawyer Alex Cannon, who was tasked with assessing allegations of election fraud, testified before the January 6 Committee that he reported to Meadows in "mid to late" November 2020 that he wasn't "finding anything that would be sufficient to change the results in any of the key states," and Meadows appeared to accept his conclusion stating: "[S]o there's no there there."<sup>353</sup> Trump deputy campaign manager Justin Clark also confirmed that it was "fair" to say he had never learned that Giuliani "produced evidence of election fraud," and former campaign senior aide Jason Miller testified that "to say that [the legal challenges the Trump campaign posed regarding election fraud] was [thin] is probably an understatement."<sup>354</sup> In describing Trump's claims of fraud and attempts to overturn the election, Trump's former campaign manager Bill Stepien testified: "I didn't think what was happening was necessarily honest or professional."<sup>355</sup>

Up until his resignation on December 14, 2020, former Attorney General Bill Barr assessed the various claims of fraud brought to him by Trump and his allies and personally told the president that they were not credible.<sup>356</sup> After taking over at the Justice Department following Barr's resignation, then-Acting Attorney General Jeffrey Rosen and then-Acting Deputy Attorney General Richard Donoghue told Trump on multiple occasions that his various claims of election fraud were incorrect or had already been debunked by the Department of Justice.<sup>357</sup>

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<sup>353</sup> First Jan. 6 Hearing Transcript, *supra* note 84.

<sup>354</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 320.

<sup>355</sup> Second Jan. 6 Hearing Transcript, *supra* note 74.

<sup>356</sup> *Id.*

<sup>357</sup> Second Jan. 6 Hearing Transcript, *supra* note 74.



Documents and testimony obtained by the January 6 Committee established that Rudy Giuliani appeared to know his claims were without merit. A top member of his own legal team conceded that they could not find proof of voter fraud that would have affected the outcome of the election. In a December 28, 2020 email, Bernie Kerik, Giuliani's top investigator, informed Meadows that Trump's team could "do all the investigations we want later," but that "if the President plans on winning, it's the legislators that have to be moved."<sup>358</sup> In November 2021, Timothy Parlatore, a lawyer claiming to represent Kerik, wrote a letter to the January 6 Committee stating that "it was impossible" for Kerik's team "to determine conclusively whether there was widespread fraud or whether that widespread fraud would have altered the outcome of the election."<sup>359</sup> Giuliani himself admitted in conversations with Arizona Speaker of the House Rusty Bowers: "We've got lots of theories, we just don't have the evidence" on allegations of election fraud in key states.<sup>360</sup>

Despite Giuliani's team, DOJ leadership, and the president's own advisors failing to turn up adequate proof of fraud, Trump and Meadows continued to repeat conspiracies and pressured Raffensperger during their call on January 2, 2021.

#### **L. Trump Continues to Pursue His False Claims of Fraud in Georgia**

Prosecutors' ability to discern Trump's objectives on the Raffensperger call—and his state of mind in this period—is informed by several additional developments outside the state of Georgia. On January 2 (the same day that Trump called Raffensperger), Clark met with Rosen and Donoghue and informed Rosen that he intended to discuss with Trump his plan to push the Georgia

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<sup>358</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 320.

<sup>359</sup> Letter from Timothy C. Parlatore to Representative Bennie G. Thompson Re: Subpoena to Bernard B. Kerik (Dec. 31, 2021), <https://www.justsecurity.org/wp-content/uploads/2022/01/january-6-clearinghouse-bernard-kerik-parlatore-law-firm-letter-december-31-2021.pdf>.

<sup>360</sup> Brett Samuels, Rusty Bowers says Giuliani told him: 'We've got lots of theories, we just don't have the evidence', THE HILL (June 21, 2022), <https://thehill.com/homenews/house/3531342-rusty-bowers-says-giuliani-told-him-weve-got-lots-of-theories-we-just-dont-have-the-evidence/>.

legislature to overturn the election results.<sup>361</sup> Clark told Rosen that Trump was prepared to fire him and had offered to install Clark as the new acting attorney general—a step that would give Clark broad power to throw the Justice Department behind Trump's interference with the 2020 presidential election. Clark again asked Rosen and Donoghue to sign the letter he had drafted and advocated sending to Georgia officials recommending they consider sending an alternate slate of electors to Congress.<sup>362</sup> Rosen testified that Clark said he would turn down Trump's offer and thus allow Rosen to remain acting attorney general if Rosen and Donoghue agreed to sign the letter.<sup>363</sup>

REP. ADAM KINZINGER: So in that meeting did Mr. Clark say he would turn down the President's offer if you reversed your position and signed the letter?

JEFFREY A. ROSEN: Yes.

ADAM KINZINGER: Did Mr. Clark—so you still refuse to sign and send that letter, I take it?

JEFFREY A. ROSEN: That's right. I think Mr. Donoghue and I were both very consistent that there was no way we were going to sign that letter. And it didn't matter what Mr. Clark's, you know, proposition was in terms of—of his own activities. We were not going to sign that letter as long as we were in charge of the Justice Department.<sup>364</sup>

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<sup>361</sup> Benner, *supra* note 284; Fifth Jan. 6 Hearing Transcript, *supra* note 282.

<sup>362</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 282.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

The next day, January 3, Clark informed Rosen that he was accepting Trump's offer to replace Rosen as acting attorney general.<sup>365</sup> Rosen testified that he "wasn't going to accept being fired by [his] subordinate" and "[he] wanted to talk to the President directly."<sup>366</sup> Rosen called Meadows and requested a meeting with Trump, which Meadows arranged for that evening.<sup>367</sup> The meeting participants were Trump, Rosen, Donoghue, Clark, Assistant Attorney General Steven Engel, Cipollone, Herschmann, and Philbin.<sup>368</sup> By the time of the meeting, White House call logs had already begun referring to Clark as the acting attorney general, according to documents obtained by the January 6 Committee.<sup>369</sup>

Rosen described in detail that meeting with Trump. Rosen testified:

[T]he president turned to me and he said, well, one thing we know is you, Rosen, you aren't going to do anything. You don't even agree with the—the claims of election fraud, and this other guy at least might do something. And then I said, well, Mr. President, you're right that I'm not going to allow the Justice Department to do anything to try to overturn the election. That's true. But the reason for that is because that's what's consistent with the facts and the law, and that's what's required under the Constitution. So, that's the right answer and a good thing for the country, and therefore I submit it's the right thing for you, Mr. President. And that kicked off another two hours of discussion, in which everyone in the room was in one

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<sup>365</sup> *Id.*

<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

<sup>368</sup> Staff of S. Comm. on the Judiciary, 117th Cong., *Subverting Justice: How the Former President and His Allies Pressured DOJ to Overturn the 2020 Election* 38 (Comm. Print 2021), <https://tinyurl.com/mr4cuhuj>.

<sup>369</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 282.

way or another making different points but supportive of my approach for the Justice Department and critical of Mr. Clark.<sup>370</sup>

Donoghue told Trump that he would resign if Trump replaced Rosen with Clark, as would every single assistant attorney general. Donoghue testified that he told Trump: “[W]ithin 24, 48, 72 hours, you could have hundreds and hundreds of resignations of the leadership of your entire Justice Department because of your actions.”<sup>371</sup>

Engel also testified about the meeting and the discussion of the letter to the Georgia legislature and whether to elevate Jeffrey Clark. Engel said:

[T]he president turned to me and said, Steve, you wouldn't leave, would you, I said, Mr. President, I've been with you through four attorneys general, including two acting as attorney general, but I couldn't be part of this ... [N]o one is going to read this letter. All anyone is going to think is that you went through two attorneys general in two weeks until you found the environmental guy to sign this thing. And so, the story is not going to be that the Department of Justice has found massive corruption that would have changed the result of the election. It's going to be the disaster of Jeff Clark. And I think at that point Pat Cipollone said, yeah, this is a murder suicide pact, this letter.<sup>372</sup>

Based on that, Trump finally relented on elevating Clark and sending the letter to the Georgia legislature—but he did not relent in his focus on claiming election fraud in Georgia to

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<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

support his continued effort to overturn the election. Donoghue testified that, not long after he got back to his apartment after the January 3 meeting at the White House, his “cell phone rang.” Donoghue said “[i]t was the president, and he had information about a truck supposedly full of shredded ballots in Georgia that was in the custody of an ICE [Immigration and Customs Enforcement] agent.”<sup>373</sup> Donoghue said that he merely passed along that information to Ken Cuccinelli, a senior official at DHS.<sup>374</sup> The phone call shows that Trump was not planning to discontinue his efforts.

Also on January 3, U.S. Attorney Pak was informed by Donoghue that Trump was likely to fire him.<sup>375</sup> The next day, Pak abruptly resigned, citing “unforeseen circumstances.”<sup>376</sup> In a transcribed interview, Pak told the U.S. Senate Judiciary Committee that Donoghue emailed and called him several times late in the evening after the Oval Office meeting.<sup>377</sup> Pak called Donoghue back, and in that conversation, Donoghue explained that Trump was displeased with Pak and wanted to fire him, believing him to be a “Never Trumper.” Donoghue suggested that Pak leave quietly without a fuss. In his interview before the committee, Pak said that he had nearly resigned immediately after hearing of Trump’s infamous January 2 call to Raffensperger. However, Pak said, he had initially decided to stay on as U.S. attorney due to the upcoming special election in Georgia, specifically citing concern that his sudden resignation might be spun to “give some credence to the allegations of fraud ... or be used as a certain kind of talking point.”<sup>378</sup> Ultimately, however, after his January 3 call with Donoghue, Pak did indeed choose to resign.

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<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> Benner, *supra* note 284.

<sup>376</sup> Alexis Stevens & J. Scott, US Attorney for North Georgia abruptly resigns due to ‘unforeseen circumstances’, THE ATLANTA JOURNAL-CONSTITUTION (Jan. 4, 2021), <https://www.ajc.com/news/breaking-us-attorney-for-north-georgia-resigns-effective-immediately/UDJNKRRKLRFILC4NC5QKWEUKXM/>.

<sup>377</sup> Transcribed Interview of Byung J. “BJay” Pak, S. Comm. on the Judiciary at 90 (Aug. 11, 2021), <https://www.judiciary.senate.gov/imo/media/doc/Pak%20Transcript.pdf>.

<sup>378</sup> *Id.*

Almost immediately, Trump called Bobby Christine—the U.S. attorney for the Southern District of Georgia—to tap him as Pak's replacement.<sup>379</sup> According to *The Wall Street Journal*, Christine promptly recruited two attorneys from his office in Savannah who were already looking into alleged impropriety in the state's election.<sup>380</sup> Christine did not ultimately bolster Trump's efforts to stop Congress from accepting Georgia's election results. On January 11, Christine stated on a staff call that “there's just nothing to” the various Trump-supported fraud claims his office was investigating.<sup>381</sup>

#### **M. Trump and Allies Continue to Press Forward After the Raffensperger Rebuff**

The evening of January 2, 2021, the same day that Trump and Meadows were rebuffed by Raffensperger, Meadows told his aide, Cassidy Hutchinson, that “things might get real, real bad on January 6” after she inquired about the White House's plans for that day. On January 2, Meadows was also contacted by Katrina Pierson, a former Trump campaign spokeswoman and one of the planners of Trump's “Stop the Steal” Ellipse rally in Washington, D.C. on January 6.<sup>382</sup> In a recorded interview with the January 6 Committee, Pierson said that she contacted Meadows to raise “red flags” regarding potential Stop the Steal speakers. Pierson was alarmed that proposed guests included Ali Alexander and Alex Jones, who spearheaded a pro-Trump protest at the Georgia State Capitol on November 18, 2020. In November, Jones had used his *Infowars* radio program to tell his audience, “Everyone must go to the capital of Georgia now and you must

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<sup>379</sup> Katelyn Polantz, Evan Perez & Chandelis Duster, Trump hand-picks replacement for Atlanta's US attorney after surprise resignation, CNN (Jan. 5, 2021), <https://www.cnn.com/2021/01/05/politics/georgia-us-attorney-byung-pak-bobby-christine/index.html>.

<sup>380</sup> Aruna Viswanatha, Sadie Gurman & Cameron McWirter, White House Forced Georgia U.S. Attorney to Resign, THE WALL STREET JOURNAL (last updated Jan. 9, 2021, 9:07 PM), [https://www.wsj.com/articles/white-house-forced-georgia-u-s-attorney-to-resign-11610225840?mod=article\\_inline](https://www.wsj.com/articles/white-house-forced-georgia-u-s-attorney-to-resign-11610225840?mod=article_inline).

<sup>381</sup> Chris Joyner, Trump's pick for U.S. attorney in Georgia dismisses election fraud claims: ‘There's just nothing to them’, THE ATLANTA JOURNAL-CONSTITUTION (Jan. 12, 2021), <https://www.ajc.com/news/trumps-pick-for-us-attorney-in-georgia-dismisses-election-fraud-claims-theres-just-nothing-to-them/7JMIL37WAN-HWXCZD4FTJXH4CIQ/>.

<sup>382</sup> Seventh Jan. 6 Hearing Transcript, *supra* note 320.

surround the governor's mansion now.”<sup>383</sup> Additionally, as noted in a November 18, 2020 *Newsweek* article, Jones had repeatedly “attempted to boost Trump’s allegations of election fraud.”<sup>384</sup>

Three days after Trump called Raffensperger and pressured him to find enough votes to flip the state’s election, Georgians went to the polls again in a run-off election to choose the state’s two U.S. senators. Republicans Kelly Loeffler and David Perdue faced Democrats Raphael Warnock and Jon Ossoff. Trump appeared at a rally in Dalton for both Republican candidates on January 4, 2021.<sup>385</sup> From the podium in Dalton, Trump restated the false claim that “there is no way we lost Georgia.”<sup>386</sup> Trump publicly urged Pence to “come through” for him on what we now know was his plot to overturn the 2020 election results on January 6.<sup>387</sup> He also railed against state officials who defied his demands, claiming: “They say they are Republicans, I really don’t think they are ... I will be here in a year and a half, and I will be campaigning against your governor and your crazy secretary of state.”<sup>388</sup> The next day, Warnock and Ossoff both won their races.<sup>389</sup>

Trump’s loss in Georgia was still on his mind the following day, January 6. Speaking before a mass of supporters on the Ellipse, south of the White House, Trump again railed against the election and repeated the lie that it had been rigged against him.<sup>390</sup> He made reference to vote

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<sup>383</sup> Alexandra Hutzler, Alex Jones Leads ‘Stop the Steal’ Rally at Georgia’s Capitol to Protest Election Results, *NEWSWEEK* (Nov. 18, 2020), <https://www.newsweek.com/alex-jones-leads-stop-steal-rally-georgias-capitol-protest-election-results-1548533>.

<sup>384</sup> *Id.*

<sup>385</sup> Andrew Desiderio & Matthew Choi, Trump uses Georgia rally to pressure GOP on Electoral College challenge, *POLITICO* (Jan. 5, 2021), <https://www.politico.com/news/2021/01/05/trump-rally-georgia-454923>.

<sup>386</sup> *Id.*

<sup>387</sup> Third Jan. 6 Hearing Transcript, *supra* note 106 (presenting a video clip of Trump from the rally).

<sup>388</sup> Bloomberg Quicktake: Now, LIVE: Trump Stumps for Georgia Republicans David Perdue, Kelly Loeffler Ahead of Senate Runoff, *YOUTUBE* (Jan. 4, 2021), <https://www.youtube.com/watch?v=9HisWmJJ3oE>.

<sup>389</sup> Richard Fausset, Jonathan Martin & Stephanie Saul, Democrats Win Both Georgia Races to Gain Control of Senate, *THE NEW YORK TIMES* (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/warnock-loeffler-ossoff-perdue-georgia-senate.html>.

<sup>390</sup> Brian Naylor, Read Trump’s Jan. 6 Speech, A Key Part of Impeachment Trial, *NPR* (Feb. 10, 2021, 2:43 PM), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial>.

totals he claimed were illegally cast in the swing states that allegedly tipped the election in Joe Biden's favor, with a heavy focus on Georgia: "They defrauded us out of a win in Georgia, and we're not going to forget it."<sup>391</sup> Trump also returned to his familiar *ad hominem* attacks on Raffensperger and defended the January 2 call, saying about the secretary of state: "I can't believe this guy's a Republican. He loves recording telephone conversations. You know what that was? I thought it was a great conversation personally. So did a lot of other[s]. People love that conversation because it says what's going on."<sup>392</sup> His personal attacks also included Governor Brian Kemp, whom he called "pathetic" for refusing to carry out Trump's election subversion attempts in the state.<sup>393</sup>

#### **N. Trump and Allies Continue to Attack Georgia's Election After January 6**

Ultimately, Trump's efforts to flip Georgia's electoral votes proved unsuccessful. After his supporters were finally driven out of the Capitol on January 6, Congress certified the election results and confirmed Joe Biden's victory. Nevertheless, Trump and his allies continued to push forward in Georgia. The evening of January 6, Cleta Mitchell sent Justin Clark and Matthew Morgan a draft letter to Attorney General Chris Carr accepting an alleged settlement offer to dismiss Georgia-based pro-Trump lawsuits in exchange for access to the state's election data. According to Mitchell, state officials would impose sanctions on the Trump legal team if they refused to cooperate and that "[t]he potential exposure to the president and the other plaintiffs could be in the millions of dollars."<sup>394</sup>

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<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> Mitchell's important role has been further exposed by a series of recently revealed emails in which she was involved in Trump attesting to inaccurate evidence of voter fraud, mentioned reviewing Georgia lawsuits with Trump on January 6, and expressed alarm over the sanctions state officials could seek on the president and his legal team (as discussed above). See Jonathan Swan & Zachary Basu, Exclusive emails: Inside Trump's botched Georgia fight, AXIOS (updated Nov. 4, 2022), <https://www.axios.com/2022/11/04/trump-georgia-lawsuit-cleta-mitchell>.



The next day, White House attorney Eric Herschmann revealed that Eastman contacted him to discuss “dealing with Georgia” in a potential appeal. An incredulous Herschmann told Eastman to “get a great f-ing criminal defense lawyer, you’re going to need it.”<sup>395</sup> Trump has persisted in disputing the integrity of Georgia’s election up to the time of this writing—and has at least partially made good on his threats by attacking officials like Raffensperger and Kemp who refused to kowtow to him during the 2020 election cycle.<sup>396</sup>

### **O. Trump Campaign Accesses Voting Machine Data**

Trump and his allies incessantly challenged the integrity of the voting machines in multiple states, both in public statements and in legal filings.<sup>397</sup> Emails and other documents reveal that the campaign secretly hired and deployed a team of computer experts to access voting equipment in several battleground states, including Georgia, and to copy sensitive election information.<sup>398</sup> Records indicate that the effort was launched by Sidney Powell around the same time she and Lin Wood launched several legal challenges to the election results in Georgia and other states.<sup>399</sup>

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<sup>395</sup> Third Jan. 6 Hearing Transcript, *supra* note 106.

<sup>396</sup> Letter from Donald J. Trump, 45th President of the United States of America, to Bennie G. Thompson, Chairman of the January 6 Committee, Re: The Presidential Election of 2020 Was Rigged and Stolen!, at 9 (Oct. 13, 2022), [s3.documentcloud.org/documents/23132276/830-am-final-january-6th-committee-letter14446.pdf](https://s3.documentcloud.org/documents/23132276/830-am-final-january-6th-committee-letter14446.pdf); Donald Trump, Statement by Donald J. Trump, 45th President of the United States of America, DONALD J. TRUMP OFFICIAL WEBSITE (July 14, 2021), <https://www.donaldjtrump.com/news/statement-by-donald-j-trump-45th-president-of-the-united-states-of-america-07.14.21>; Rally Speech Transcript, *supra* note 174. *See also* Davey Alba, Ella Koeze & Jacob Silver, What Happened When Trump Was Banned on Social Media, THE NEW YORK TIMES (June 7, 2021), <https://www.nytimes.com/interactive/2021/06/07/technology/trump-social-media-ban.html>; Brandy Zadrozny, Trump’s blog isn’t lighting up the internet, NBC NEWS (May 11, 2021), <https://www.nbcnews.com/tech/tech-news/trumps-blog-isnt-lighting-internet-rcna890>.

<sup>397</sup> *See, e.g.*, Murray Waas, Revealed: how Sidney Powell could be disbarred for lying in court for Trump, THE GUARDIAN (Dec. 2, 2021), <https://www.theguardian.com/us-news/2021/dec/02/revealed-sidney-powell-trump-us-election>; Fausset & Hakim, *supra* note 29; Donald J. Trump, Tweets of December 15, 2020, THE AMERICAN PRESIDENCY PROJECT (accessed Aug. 24, 2022), <https://www.presidency.ucsb.edu/documents/tweets-december-15-2020>.

<sup>398</sup> Emma Brown, John Swaine, Aaron C. Davis & Amy Gardner, Trump-allied lawyers pursued voting machine data in multiple states, records reveal, THE WASHINGTON POST (Aug. 15, 2022, 3:13 PM), <https://www.washingtonpost.com/investigations/2022/08/15/sidney-powell-coffee-county-sullivan-strickler/>.

<sup>399</sup> *Id.*

Powell and Jim Penrose, a former intelligence officer, arranged to have upfront retainers paid to SullivanStrickler, a Georgia-based forensics firm.<sup>400</sup>

On or about January 7, 2021, upon receiving a \$26,000 retainer, SullivanStrickler dispatched a four-person team to rural Coffee County, Georgia for the purpose of “copying data from a Dominion voting system.”<sup>401</sup> After Scott Hall, a pro-Trump businessman, arranged for the travel, the team “went in there and imaged every hard drive of every piece of equipment,” in addition to scanning ballots, apparently in consultation with the “elections committee there” who bought into Trump’s claims of nonexistent fraud.<sup>402</sup> Later-revealed surveillance footage indicated that Cathy Latham, one of the 16 false Trump electors from Georgia and a former GOP chairwoman of Coffee County, escorted Hall and Paul Maggio, SullivanStrickler’s chief operations officer, into the county’s elections office, where they spent nearly eight hours openly handling and copying information from the county’s voting machines.<sup>403</sup>

Latham would later claim in sworn testimony that she “didn’t go into the office” that day. But she was reported by *The Washington Post* based on the video footage to have spent at least four hours in total at the elections office with the SullivanStrickler team.<sup>404</sup> Maggio checked in with Powell throughout the day indicating that they were on the way to the site and later that the job was “going well.”<sup>405</sup> Directories where the files were ultimately stored revealed that “data

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<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

<sup>403</sup> Zachary Cohen & Jason Morris, Newly obtained surveillance video shows fake Trump elector escorted operatives into Georgia county’s elections office before voting machine breach, CNN (Sept. 6, 2022), <https://tinyurl.com/2vf3vmbx>. See also Emma Brown & Jon Swaine, Video appears to undercut Trump elector’s account of alleged voting-data breach in Georgia, THE WASHINGTON POST (Sept. 20, 2022), <https://tinyurl.com/bdcnmsz3>.

<sup>404</sup> Brown & Swaine, *supra* note 403.

<sup>405</sup> Brown et al., *supra* note 398.

obtained by the investigators included copies of virtually every component of the county voting system, including the central tabulation server and a precinct tabulator.”<sup>406</sup>

Emails also show that Powell instructed the company to share the retrieved data “with other pro-Trump operatives.”<sup>407</sup> Penrose followed up with more detailed instructions, including looping in Stephanie Lambert, an attorney who has represented Powell, to receive the electronic data and arrange for final payment.<sup>408</sup> Hard copies of the information were sent by overnight mail. The compromised systems were replaced by the Secretary of State’s Office in June 2021.<sup>409</sup> As of this writing, Penrose, Lambert, and others are also under investigation by the Michigan attorney general for allegedly inappropriately accessing voting machines in that state.<sup>410</sup>

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<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

## II. The Fulton County Investigation

On February 8, 2021, Raffensperger announced that his office had opened an investigation into Trump's attempts to interfere with Georgia's electoral processes. Raffensperger's office indicated that a complaint from George Washington University Law Professor John Banzhaf III had prompted the "fact finding and administrative" probe.<sup>411</sup> The Banzhaf complaint suggested that Trump may have committed three separate crimes under Georgia law: conspiracy to commit election fraud, criminal solicitation to commit election fraud, and intentional interference with performance of election duties.

Two days later—on February 10—Fulton County District Attorney Fani Willis opened a separate investigation into efforts to interfere with the 2020 presidential election in Georgia.<sup>412</sup> Public reporting indicates that Raffensperger's investigation was paused pending the outcome of the Fulton County criminal investigation.<sup>413</sup> Willis is a prosecutor with a combined 26 years of experience as an attorney in both private practice and in the Fulton County DA's office. She became Fulton County's district attorney on January 1, 2021, after ousting a six-term incumbent in the 2020 election.<sup>414</sup> On January 4, 2021, she described the January 2 call between Trump and

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<sup>411</sup> Linda So, Georgia Secretary of State's office launches probe into Trump's election phone call, REUTERS (Feb. 8, 2021), <https://tinyurl.com/mrxnfma9>; Citizens for Responsibility and Ethics in Washington (CREW) filed an early complaint requesting that the Department of Justice and the Fulton County DA's office investigate Trump's potential criminal conduct during his call with Raffensperger. *See* Letter from CREW to Acting Attorney General Jeffrey Rosen and Fulton County District Attorney Fani T. Willis (Jan. 4, 2021), <https://www.citizensforethics.org/wp-content/uploads/2021/01/2021-1-4-Trump-overturning-election-DOJ-Fulton-County-DA.pdf>.

<sup>412</sup> Fausset & Hakim, *supra* note 4. There is no legal or jurisdictional conflict between Raffensperger's and Willis' investigations. Georgia's secretary of state bears responsibility for investigating potential law violations that take place in Georgia. For each of Georgia's 50 judicial circuits, the district attorney in any given circuit is that circuit's top prosecutorial officer for the state of Georgia, making Willis Georgia's top prosecutor in Fulton County, which includes Atlanta, where the state's government buildings are located, and thus where Raffensperger spoke with Trump on January 2. Because Trump's potential crimes took place within Fulton County, both Willis and Raffensperger reserve the right to investigate his conduct.

<sup>413</sup> Murray & Morris, *supra* note 7; Pagliery & Suebsaeng, *supra* note 7.

<sup>414</sup> DISTRICT ATTORNEY FANI WILLIS (accessed Aug. 8, 2022), <https://fultoncountyga.gov/inside-fulton-county/fulton-county-departments/district-attorney/da-executive-team/fani-willis>.

Raffensperger as “disturbing” when asked about it by a reporter and said in a statement that her team would “enforce the law without fear or favor.”<sup>415</sup>

Willis kicked off her investigation by sending letters to a slate of state officials who were in some way privy to election-reversal efforts by Trump and his principal allies, providing them notice of her investigation.<sup>416</sup> Notable recipients included Raffensperger, Kemp, and Attorney General Chris Carr.<sup>417</sup> Willis' correspondence stated: “This investigation includes, but is not limited to, potential violations of Georgia law prohibiting the solicitation of election fraud, the making of false statements to state and local governmental bodies, conspiracy, racketeering, violation of oath of office and any involvement in violence or threats related to the election's administration.”<sup>418</sup>

Willis explained that her office is the most logical home for the investigation into potentially criminal interference because it “is the one agency with jurisdiction that is not a witness to the conduct that is the subject of the investigation.” Calling the nascent probe “a matter of high priority,” she urged the recipients of her letters to preserve documents related to the investigation and stated that her office would “begin requesting grand jury subpoenas as necessary.”<sup>419</sup> The letters did not state whether Trump was the primary focus of Willis' investigation.

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<sup>415</sup> Quinn Scanlan, Devin Dwyer & Olivia Rubin, Georgia election officials formally launch investigation into Trump phone calls, ABC NEWS (Mar. 15, 2021), <https://abcnews.go.com/Politics/georgia-election-officials-formally-launch-investigation-trump-phone/story?id=75760557>.

<sup>416</sup> Fausset & Hakim, *supra* note 4.

<sup>417</sup> Amy Gardner, Georgia prosecutors open criminal investigation into Trump's efforts to subvert election results, THE WASHINGTON POST (Mar. 12, 2021), [https://www.washingtonpost.com/politics/in-wake-of-trump-calls-to-state-officials-georgia-prosecutors-open-criminal-investigation-into-efforts-to-subvert-election-results/2021/02/10/17709bd0-6bb3-11eb-9f80-3d7646ce1bc0\\_story.html](https://www.washingtonpost.com/politics/in-wake-of-trump-calls-to-state-officials-georgia-prosecutors-open-criminal-investigation-into-efforts-to-subvert-election-results/2021/02/10/17709bd0-6bb3-11eb-9f80-3d7646ce1bc0_story.html).

<sup>418</sup> Letter from Fulton County District Attorney Fani Willis to Governor Brian P. Kemp (Feb. 10, 2021), <https://int.nyt.com/data/documenttools/letters-to-georgia-officials-from-fulton-district-attorney/70d7cbc8ba0ae1dd/full.pdf>.

<sup>419</sup> *Id.*

On February 12, 2021, Willis confirmed that her investigation would encompass both Trump's conduct and that of his allies. Willis stated: "[A]n investigation is like an onion. You never know. You pull something back, and then you find something else." She continued: "Anything that is relevant to attempts to interfere with the Georgia election will be subject to review."<sup>420</sup>

Over the course of February, March, and April 2021, Willis and her staff met with more than 50 potential witnesses to gather information and understand the full scope of any potential criminal wrongdoing.<sup>421</sup> In March 2021, investigators in Willis' office appeared before a grand jury to secure subpoenas for relevant evidence and witness testimony.<sup>422</sup> That same month, Willis expanded her investigative team. She recruited Atlanta-based attorney John E. Floyd, a noted racketeering expert who has written a national guide for prosecutors.<sup>423</sup> She also hired Michael Carlson, an expert on the rules of evidence, to join her team on a full-time basis.<sup>424</sup> Although neither Floyd nor Carlson were reportedly hired solely to work on the election-interference investigation, both brought expertise highly relevant to that investigation.

By late April 2021, reports emerged that Willis' investigators were frustrated with a purported lack of cooperation from Raffensperger's staff. *CNN* reported that investigators were experiencing "difficulty" obtaining materials and records kept by the secretary of state's office, and that Willis' office was considering a more expansive slate of subpoenas than initially planned

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<sup>420</sup> Richard Fausset & Danny Hakim, In Georgia, a New District Attorney Starts Circling Trump and His Allies, *THE NEW YORK TIMES* (Feb. 13, 2021), <https://www.nytimes.com/2021/02/13/us/politics/fani-willis-trump.html>.

<sup>421</sup> Tamar Hallerman, Fulton DA clarifies timeline for witness testimony in Trump probe, *THE ATLANTA JOURNAL-CONSTITUTION* (Apr. 19, 2022), <https://www.ajc.com/news/georgia-news/fulton-da-clarifies-timeline-for-witness-testimony-in-trump-probe/QPKS7EJWYZHDRDXYH5NOR3KXGE/>.

<sup>422</sup> Christian Boone & Tamar Hallerman, Fulton DA's investigation into Trump heads to grand jury, *THE ATLANTA JOURNAL-CONSTITUTION* (Mar. 1, 2021), <https://tinyurl.com/5ab9p5h4>.

<sup>423</sup> So, *supra* note 244.

<sup>424</sup> Sara Murray & Jason Morris, Georgia prosecutor investigating Trump hires new evidence expert, *CNN* (Mar. 17, 2021), <https://www.cnn.com/2021/03/16/politics/georgia-trump-investigation-evidence-expert-hired/index.html>.

to obtain access to evidence.<sup>425</sup> Raffensperger and staffers in his office disputed *CNN*'s reporting, but Kemp subsequently appointed a special counsel to represent the secretary of state's office in its correspondence with the Fulton DA's office after Attorney General Carr declined to represent Raffensperger and his office in the criminal matter.<sup>426</sup>

In early September 2021, public reporting revealed that Willis and her team had interviewed at least four staff members in Raffensperger's office. "They've asked us for documents, they've talked to some of our folks, and we'll cooperate fully,"<sup>427</sup> Raffensperger told *The Daily Beast*. Ryan Germany, the general counsel in Raffensperger's office who was on the January 2 call with Trump, and who pushed back against the former president's false assertions about the election, was among those with whom investigators reportedly spoke.<sup>428</sup>

On January 20, 2022, Willis sent a letter to the chief judge of the Fulton County Superior Court requesting that a special purpose grand jury be impaneled to issue subpoenas and hear witness testimony relevant to her investigation.<sup>429</sup> She stated that her office had received information indicating a "reasonable probability" of criminal disruptions in Georgia's administration of the 2020 election.<sup>430</sup> She also stated that "a significant number of witnesses and prospective witnesses ... refused to cooperate with the investigation absent a subpoena requiring

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<sup>425</sup> Sara Murray & Jason Morris, Fulton County DA has grown frustrated with Georgia Secretary of State's office cooperation in Trump probe, source says, *CNN* (Apr. 24, 2021), <https://www.cnn.com/2021/04/23/politics/georgia-trump-2020-election-probe-fulton-county/index.html>.

<sup>426</sup> *Id.*; Tamar Hallerman & Christian Boone, Special counsel to represent secretary of state's office in Trump probe, *THE ATLANTA JOURNAL-CONSTITUTION* (Apr. 30, 2021), <https://www.ajc.com/news/crime/special-counsel-to-represent-secretary-of-states-office-in-trump-probe/S5UTIMAWFFCYZDSTSQ4I3IXWCA/>.

<sup>427</sup> Pagliery & Suebsaeng, *supra* note 7.

<sup>428</sup> *Id.*

<sup>429</sup> Letter from Fulton County District Attorney Fani Willis to the Hon. Christopher S. Brasher, Chief Judge, Fulton County Superior Court (Jan. 20, 2022), <https://tinyurl.com/ytz6tu96>; Tamar Hallerman, Timeline: Key moments from the Fulton DA's Trump probe, *THE ATLANTA JOURNAL-CONSTITUTION* (May 2, 2022), <https://www.ajc.com/politics/timeline-key-moments-from-the-fulton-das-trump-probe/2FRKDE5MAFHZJP4FHHWKIB7Q5Y/>.

<sup>430</sup> Letter from Fulton County District Attorney Fani Willis to the Hon. Christopher S. Brasher, Chief Judge, Fulton County Superior Court (Jan. 20, 2022), <https://tinyurl.com/ytz6tu96>.

their testimony.”<sup>431</sup> She went on to specifically note that “Georgia Secretary of State Brad Raffensperger, an essential witness to the investigation ... indicated that he will not participate in an interview or otherwise offer evidence until he is presented with a subpoena.”<sup>432</sup> A majority of the court’s judges quickly granted Willis’ request and approved a special purpose grand jury to “commence on May 2, 2022, and continu[e] for a period not to exceed 12 months.”<sup>433</sup>

This marked a significant escalation in the investigation. Only a few days after the request was granted, on January 29, 2022, an aggrieved Trump, in a speech in Texas, told supporters to take action and protest in Atlanta and elsewhere.<sup>434</sup> He referred generally to prosecutors investigating him as “radical, vicious, [and] racist.”<sup>435</sup> In response to this potential threat of protests and attention, Willis asked the FBI to take steps to protect the Fulton County Courthouse.<sup>436</sup>

Despite the granting of her special grand jury request, on April 18, 2022, Willis told reporters that she would delay hearing from witnesses until after June 1 to preempt claims that her efforts were designed to “influence the outcome of [the then] upcoming” May 24, 2022 primary election.<sup>437</sup>

Also in May, Willis continued her investigation by focusing on the alternate slates of electors put forth by Republicans in the state.<sup>438</sup> Willis’ office interviewed several of the state’s

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<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

<sup>433</sup> Order Approving Request for Special Purpose Grand Jury Pursuant to O.C.G.A. § 15-12-100, et seq, No. 2022-EX-000024 (Ga. Super. Ct. Jan. 24, 2022), <https://www.documentcloud.org/documents/21185617-554820014-special-grand-jury-approved>; Tamar Hallerman, Fulton judges greenlight special grand jury for Trump probe, THE ATLANTA JOURNAL-CONSTITUTION (Jan. 24, 2022), <https://www.ajc.com/news/atlanta-news/breaking-fulton-judges-greenlight-special-grand-jury-for-trump-probe/DEBK3IQKLZHLBO6EYBGDXAH4/>.

<sup>434</sup> Alana Wise, Georgia district attorney calls for FBI security help after Trump’s rally comments, NPR (Jan. 31, 2022), <https://tinyurl.com/yckn3mhk>.

<sup>435</sup> *Id.*

<sup>436</sup> *Id.*

<sup>437</sup> Hallerman, *supra* note 421.

<sup>438</sup> Zachary Cohen & Sara Murray, Multiple fake electors cooperating in Georgia criminal probe of Trump’s efforts to overturn 2020 election, CNN (May 10, 2022), <https://www.cnn.com/2022/05/10/politics/georgia-trump-investigation-fake-electors-witness-interviews/index.html>.



false electors.<sup>439</sup> At the time, Willis' focus was on these alternate electors as witnesses, rather than criminal suspects.<sup>440</sup>

On May 2, the Fulton County Superior Court impaneled Willis' special purpose grand jury. The presiding judge selected 23 jurors from a pool of 200 Georgians.<sup>441</sup> The jury's term is limited to a year, meaning it will adjourn at the latest on May 2, 2023.<sup>442</sup> Unlike a traditional grand jury, the special purpose grand jury can issue recommendations based on its findings, but not charges.<sup>443</sup> Any specific recommendations dealing with identifiable individuals are not made public or are redacted from the grand jury's report.<sup>444</sup> The district attorney then brings those recommendations to a regular grand jury, which deliberates on and can issue charges within days.

While Willis' grand jury did not hear from witnesses in May, numerous individuals were subpoenaed.<sup>445</sup> Subpoenas were not limited to Republicans. Reportedly, at least two Democratic members of the Georgia state legislature, who were members of the subcommittee that heard testimony from Giuliani in December 2020, received subpoenas.<sup>446</sup> In addition to state legislators, Raffensperger and Gabriel Sterling were also subpoenaed.<sup>447</sup>

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<sup>439</sup> *Id.*

<sup>440</sup> *Id.*

<sup>441</sup> Tamar Hallerman & Ben Brasch, Special grand jury selected for Fulton DA's election investigation, THE ATLANTA JOURNAL-CONSTITUTION (May 2, 2022), <https://www.ajc.com/news/georgia-news/special-grand-jury-selected-for-fulton-das-election-investigation/GKSZJA3RNVHU5OTF2MPL7OUUJY/>.

<sup>442</sup> Hallerman, *supra* note 421.

<sup>443</sup> Norman Eisen & Donald Ayer, Will Trump Face a Legal Reckoning in Georgia?, THE NEW YORK TIMES (May 2, 2022), <https://www.nytimes.com/2022/05/02/opinion/trump-georgia-fulton-county.html>.

<sup>444</sup> Grand Jury Handbook, Prosecuting Attorneys' Council of Georgia (2017), <https://tinyurl.com/eurmb5mc>.

<sup>445</sup> Richard Fausset & Danny Hakim, Up to 50 Subpoenas Expected as Grand Jury Begins Trump Inquiry, THE NEW YORK TIMES (May 27, 2022), <https://www.nytimes.com/2022/05/27/us/trump-grand-jury-georgia.html>.

<sup>446</sup> *Id.*

<sup>447</sup> *Id.*

In June, the grand jury heard testimony from state officials including Attorney General Carr.<sup>448</sup> Sterling also testified on June 15, just six days before his public testimony before the January 6 Committee.<sup>449</sup>

On June 27, 2022, Georgia legislators contested subpoenas issued by Willis, claiming that representatives have “privilege and immunity protections” under Georgia’s state constitution for actions and meetings taken as part of their official duties.<sup>450</sup> That argument was made in a court filing by attorney Don Samuel, who was retained by the Georgia General Assembly to represent state legislators of either party seeking to use him as counsel.<sup>451</sup> Willis disagreed with the legislators.<sup>452</sup> According to her filing, the legislators’ actions relating to overturning the election are “entirely outside the General Assembly’s jurisdiction or legitimate activities,”<sup>453</sup> and therefore the lawmakers can be forced to discuss the matters before the grand jury.<sup>454</sup>

On July 1, Fulton County Superior Court Judge Robert McBurney, who supervises the special purpose grand jury, ruled that if the actions of the legislators themselves are not under potential criminal review by Willis, she can ask them questions,<sup>455</sup> and also that “communications

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<sup>448</sup> Dale Russell, Georgia Attorney General Chris Carr testifies before Donald Trump grand jury, FOX 5 ATLANTA (June 21, 2022), <https://www.fox5atlanta.com/news/georgia-attorney-general-chris-carr-testifies-before-donald-trump-grand-jury>.

<sup>449</sup> Russell, *supra* note 22.

<sup>450</sup> Motion to Quash at 1, *In re* Subpoenas from Special Purpose Grand Jury, No. 2022-EX-000024 (Ga. Super. Ct. June 27, 2022), <https://www.fultonclerk.org/DocumentCenter/View/1195/EX-PARTE-FILING>.

<sup>451</sup> *Id.*; see also Jason Morris, Georgia state GOP lawmakers file motion to quash subpoenas to appear in front of special grand jury investigating Trump, CNN POLITICS (June 28, 2022), <https://www.cnn.com/2022/06/28/politics/donald-trump-georgia-grand-jury/index.html>.

<sup>452</sup> Tamar Hallerman, Fulton DA pushes back against legislators fighting subpoenas, THE ATLANTA JOURNAL-CONSTITUTION (June 30, 2022), <https://www.ajc.com/politics/fulton-da-pushes-back-against-legislators-fighting-subpoenas/COOXST6FYND3VNL7FZQLW5I4FA/>.

<sup>453</sup> State’s Response to Motion to Quash at 1, *In re* Special Purpose Grand Jury, No. 2022-EX-000024 (Ga. Super. Ct. June 30, 2022), <https://www.fultonclerk.org/DocumentCenter/View/1190/EX-PARTE-FILING-1?bidId=>.

<sup>454</sup> *Id.*

<sup>455</sup> Tierney Sneed, Judge indicates he’ll limit what Atlanta grand jury probing 2020 election reversal plots can ask lawmakers, CNN POLITICS (July 1, 2022), <https://www.cnn.com/2022/07/01/politics/trump-fulton-county-investigation-subpoenas-lawmakers/index.html>.

with people outside [the] legislative sphere that are related to the investigation ... are not protected by legislative immunity.”<sup>456</sup>

On June 28, the special grand jury subpoenaed Alex Holder, a documentary filmmaker who had intimate access to the Trump White House.<sup>457</sup> Willis at this point also reached what was assumed to be an agreement with Georgia Governor Brian Kemp for relevant documents and his late-July testimony by settling for a recorded sworn statement to the grand jury, but not requiring his live appearance to answer questions in front of the panel.<sup>458</sup> Willis' office also sought documents and records from Kemp's office.<sup>459</sup> As discussed below, the deal for Kemp's recorded statement would fall through in July, leading a judge to require him to testify after the midterm elections.

During the month of July, subpoenas were issued for a number of notable and high-profile figures. These included subpoenas to Trump advisors and legal team members Rudy Giuliani,<sup>460</sup>

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<sup>456</sup> *Id.*

<sup>457</sup> Subpoena for the Production of Documentary Evidence Pursuant to O.C.G.A. § 24-13-13, *In re* Special Purpose Grand Jury, 2022-EX-000024 (Ga. Super. Ct. June 28, 2022) (subpoena for Alex Holder), <https://www.politico.com/f/?id=00000181-abf6-d618-a99d-ebf73a1a0000>; Associated Press, Filmmaker to testify in Georgia Trump election investigation, WABE (June 28, 2022), <https://www.wabe.org/filmmaker-to-testify-in-georgia-trump-election-investigation/>.

<sup>458</sup> Letter from Fulton County District Attorney Fani Willis to Special Prosecutor Nathan Wade (June 22, 2022) (on file with THE ATLANTA JOURNAL-CONSTITUTION); Tamar Hallerman, Gov. Kemp to testify in Fulton County's Trump probe, THE ATLANTA JOURNAL-CONSTITUTION (June 23, 2022), <https://www.ajc.com/politics/breaking-kemp-to-testify-in-fulton-co-trump-probe/PXZ4ZEMJRCSTCJJBYVU6IK7EU/>.

<sup>459</sup> *Id.*; Subpoena for the Production of Documentary Evidence Pursuant to O.C.G.A. § 24-13-13, *In re* Special Purpose Grand Jury, 2022-EX-000024 (Ga. Super. Ct. June 22, 2022) (subpoena for Governor Brian P. Kemp), <https://www.ajc.com/politics/breaking-kemp-to-testify-in-fulton-co-trump-probe/PXZ4ZEMJRCSTCJJBYVU6IK7EU/>.

<sup>460</sup> Petition for Certification of Need for Testimony Before Special Purpose Grand Jury Pursuant to O.C.G.A. § 24-13-90 et seq., *In re* Special Purpose Grand Jury, 2022-EX-000024 (Ga. Super. Ct. July 5, 2022) (subpoena for Rudolph William Louis Giuliani), <https://www.fultonclerk.org/DocumentCenter/View/1218/EX-PARTE-PETITION-6?bidId=>.

Kenneth Chesebro,<sup>461</sup> John Eastman,<sup>462</sup> Jenna Ellis,<sup>463</sup> Cleta Mitchell,<sup>464</sup> and Senator Lindsey Graham (R-SC).<sup>465</sup>

Graham announced his legal challenge to the subpoena on July 6,<sup>466</sup> based on claims that the subpoena was a political move and that, as chairman of the Senate Judiciary Committee, Graham “was well within his rights to discuss with state officials the processes and procedures around administering elections.”<sup>467</sup> Graham retained Trump’s former White House counsel, Don

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<sup>461</sup> Certificate of Material Witness Pursuant to Uniform Act to Secure the Attendance of Witnesses from Without the State, Codified in the State of Georgia as O.C.G.A. § 24-13-90 et seq., *In re* Special Purpose Grand Jury, 2022-EX-000024 (Ga. Super. Ct. July 5, 2022) (subpoena for Kenneth Chesebro), <https://tinyurl.com/5atm23hh>.

<sup>462</sup> Certificate of Material Witness Pursuant to Uniform Act to Secure the Attendance of Witnesses from Without the State, Codified in the State of Georgia as O.C.G.A. § 24-13-90 et seq., *In re* Special Purpose Grand Jury, 2022-EX-000024 (Ga. Super. Ct. July 5, 2022) (subpoena for John C. Eastman).

<sup>463</sup> Petition for Certification of Need for Testimony Before Special Purpose Grand Jury Pursuant to O.C.G.A. § 24-13-90 et seq., *In re* Special Purpose Grand Jury, 2022-EX-000024 (Ga. Super. Ct. July 5, 2022) (subpoena for Jenna Ellis), <https://www.fultonclerk.org/DocumentCenter/View/1216/EX-PARTE-PETITION-4?bidId=>.

<sup>464</sup> Certificate of Material Witness Pursuant to Uniform Act to Secure the Attendance of Witnesses from Without the State, Codified in the State of Georgia as O.C.G.A. § 24-13-90 et seq., *In re* Special Purpose Grand Jury, 2022-EX-000024 (Ga. Super. Ct. July 5, 2022) (subpoena for Cleta B. Deatherage Mitchell), <https://www.fultonclerk.org/DocumentCenter/View/1203/EX-PARTE-ORDER-OF-THE-JUDGE-8?bidId=>.

<sup>465</sup> Certificate of Material Witness Pursuant to Uniform Act to Secure the Attendance of Witnesses from Without the State, Codified in the State of Georgia as O.C.G.A. § 24-13-90 et seq., *In re* Special Purpose Grand Jury, 2022-EX-000024 (Ga. Super. Ct. July 5, 2022) (subpoena for Senator Lindsey Olin Graham), <https://www.fultonclerk.org/DocumentCenter/View/1204/EX-PARTE-ORDER-OF-THE-JUDGE-9?bidId=>; *see also* Matthew Brown, Georgia grand jury subpoenas Sen. Graham, Giuliani and Trump legal team, THE WASHINGTON POST (July 5, 2022), <https://www.washingtonpost.com/national-security/2022/07/05/georgia-grand-jury-subpoenas-sen-graham-giuliani-trump-legal-team/>.

<sup>466</sup> Statement on Behalf of Senator Lindsey O. Graham from Attorneys Bart Daniel and Matt Austin (July 6, 2022), <https://www.scribd.com/document/581439901/2022-07-06-Attorney-Statement-on-Behalf-of-Senator-Graham>. One of the co-authors of this report, Norman Eisen, is the executive co-chair of the States United Democracy Center, which filed an amicus brief in Graham’s case. *See* Motion for Leave to File Brief as Amici Curiae in Opposition to U.S. Senator Lindsey Graham’s Expedited Motion to Quash, *Fulton County Special Purpose Grand Jury v. Graham*, No. 1:22-cv-03027-LMM (N.D. Ga. Aug. 4, 2022), <https://tinyurl.com/3rf3nda8>. States United then filed an amicus brief in Graham’s case at the 11th Circuit Court of Appeals. *Unopposed Motion By Former Federal Prosecutors As Amici Curiae For Leave To File Amended Amicus Brief In Opposition To Appellant Lindsey Graham’s Supplement to Emergency Motion to Stay District Court’s Order And Enjoin Select Grand Jury Proceedings Pending Appeal*, *Fulton County Special Purpose Grand Jury v. Graham*, No. 22-12696 (11th Cir. Oct. 7, 2022). States United also filed an amicus brief in Graham’s case at the Supreme Court. *See* Motion of Former Federal Prosecutors for Leave to File Brief as Amici Curiae in Opposition to Emergency Application for Stay & Injunction Pending Appeal Without 10 Days’ Notice & in Paper Format, *Graham v. Fulton County Special Purpose Grand Jury*, No. 22A337 (S. Ct. Oct. 27, 2022), [https://www.supremecourt.gov/DocketPDF/22/22A337/244172/20221027162942638\\_22A337%20Motion%20and%20Amici%20Brief%20Former%20Federal%20Prosecutors.pdf](https://www.supremecourt.gov/DocketPDF/22/22A337/244172/20221027162942638_22A337%20Motion%20and%20Amici%20Brief%20Former%20Federal%20Prosecutors.pdf).

<sup>467</sup> Statement on Behalf of Senator Lindsey O. Graham from Attorneys Bart Daniel and Matt Austin (July 6, 2022), <https://www.scribd.com/document/581439901/2022-07-06-Attorney-Statement-on-Behalf-of-Senator-Graham>.

McGahn, to join his legal team to quash the subpoena and remove the subpoena dispute from state to federal court.<sup>468</sup>

Graham's legal team succeeded in removing the case to federal court.<sup>469</sup> They argued that the subpoena should be quashed because requiring Graham to appear to testify would violate his immunity from inquiry into his legislative activities under the Speech or Debate clause of the Constitution and also be contrary to the principle of sovereign immunity.<sup>470</sup> On August 15, U.S. District Judge Leigh Martin May denied Senator Graham's request to quash the subpoena, finding that there are "considerable areas of potential grand jury inquiry falling outside the Speech or Debate Clause's protections," that Graham is not exempt from testifying because he is a high-ranking government official, and sovereign immunity does not protect individual members of Congress from testifying in front of a state grand jury.<sup>471</sup> Judge May also noted that "the [Fulton County] District Attorney has shown extraordinary circumstances and a special need for Senator Graham's testimony on issues relating to alleged attempts to influence or disrupt the lawful administration of Georgia's 2022 elections."<sup>472</sup> Because "Senator Graham has largely (and indeed publicly) disputed [the] characterizations" of "phone calls with Georgia election officials" the court found his potential testimony and knowledge to be unique.<sup>473</sup>

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<sup>468</sup> Kate Brumback, Sen. Graham fights subpoena in Georgia election probe, AP NEWS (Aug. 10, 2022), <https://ap-news.com/article/2022-midterm-elections-donald-trump-georgia-atlanta-crime-5560602d043602172db2e2313064c979>.

<sup>469</sup> Notice of Removal of Action to United States District Court for the Northern District of Georgia, Fulton County Special Purpose Grand Jury v. Graham, No. 2022-EX- 000024 (Ga. Super. Ct. July 29, 2022), <https://www.fulton-clerk.org/DocumentCenter/View/1237/Notice-of-Removal-of-Action-to-The-United-States-District-Court-for-The-Northern-District-of-GA?bidId=>.

<sup>470</sup> Response by Senator Graham to Former Federal Prosecutors' Amicus Brief, Fulton County Special Purpose Grand Jury v. Graham, No. 2022-EX- 000024, No. 1:22-cv-03027-LMM (N.D. Ga. Aug. 11, 2022).

<sup>471</sup> Order, Fulton County Special Purpose Grand Jury v. Graham, No. 1:22-cv-03027-LMM (N.D. Ga. Aug. 15, 2022), <https://www.documentcloud.org/documents/22136078-graham-subpoena-order>.

<sup>472</sup> *Id.*

<sup>473</sup> *Id.*

On August 17, the South Carolina senator appealed the district court's ruling to the U.S. Court of Appeals for the 11th Circuit.<sup>474</sup> On August 21, the appeals court sent the decision back to the district court, tasking Judge May with reconsidering or modifying the subpoena in a way she “deems appropriate,” with the goal of identifying some areas of questioning that would not be appropriate under the Speech or Debate clause.<sup>475</sup> That Monday, August 22, Judge May set a series of deadlines for Graham to identify what in the subpoena he wished for the court to address, and for the district attorney's office to respond in kind.<sup>476</sup> Graham responded by contending that May should bar Willis from questioning him “on all the topics” she sought, as well as on “other topics” filed in amicus briefs by outside groups.<sup>477</sup> The district attorney's office requested of May that Graham's new motion be denied, claiming that he recycled arguments from previous iterations of the case.<sup>478</sup> On September 1, Judge May once again ordered Graham to testify, sending the matter back to the appeals court.<sup>479</sup> Graham subsequently urged the appeals court to fully quash the subpoena, a request the court rejected on October 20.<sup>480</sup> The next day, Graham took his challenge

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<sup>474</sup> Notice of Appeal, *Fulton County Special Purpose Grand Jury v. Graham*, No. 1:22-cv-03027-LMM (N.D. Ga. Aug. 17, 2022).

<sup>475</sup> Order, *Fulton County Special Purpose Grand Jury v. Graham*, No. 22-12696-DD (11th Cir. Aug. 21, 2022), <https://www.documentcloud.org/documents/22156179-grahamca11ord082122>.

<sup>476</sup> Order, *Fulton County Special Purpose Grand Jury v. Graham*, No. 1:22-cv-03027-LMM (N.D. Ga. Aug. 22, 2022), <https://www.law360.com/dockets/documents/63038645bb81c502dd9dc862>.

<sup>477</sup> Memorandum in Support of Supplemental Motion for Partial Quashal Ordered by This Court (Doc. 38), by Senator Lindsey Graham, *Fulton County Special Purpose Grand Jury v. Graham*, No. 1:22-cv-03027-LMM (N.D. Ga. Aug. 24, 2022); Tierney Sneed, Sen. Graham tells judge that grand jury should not be allowed to question him on any topics laid out in subpoena, CNN (Aug. 24, 2022), <https://www.cnn.com/2022/08/24/politics/lindsey-graham-georgia-election-investigation/index.html>.

<sup>478</sup> Response in Opposition to Senator Lindsey O. Graham's Supplemental Motion, *Fulton County Special Purpose Grand Jury v. Graham*, No. 1:22-cv-03027-LMM (N.D. Ga. Aug. 29, 2022); *see also* Jason Morris, Sara Murray & Nick Valencia, *Fulton County DA's office slams Graham's 'extreme position' in trying to quash subpoena*, CNN (Aug. 29, 2022), <https://www.cnn.com/2022/08/29/politics/lindsey-graham-fulton-county-subpoena/index.html>.

<sup>479</sup> Order, *Fulton County Special Purpose Grand Jury v. Graham*, No. 1:22-cv-03027-LMM (N.D. Ga. Sept. 1, 2022), <https://storage.courtlistener.com/recap/gov.uscourts.gand.305825/gov.uscourts.gand.305825.44.0.pdf>.

<sup>480</sup> Order, *Fulton County Special Purpose Grand Jury v. Graham*, No. 22-12696-DD (11th Cir. Oct. 20, 2022), <https://s3.documentcloud.org/documents/23170281/1020-appeals-graham-order.pdf>.

to the Supreme Court.<sup>481</sup> Justice Clarence Thomas ordered a stay of the lower court's order on October 24 before the full court denied Graham's emergency motion on November 1.<sup>482</sup>

Senator Graham's subpoena challenge echoed a similar challenge that had played out in July, involving a subpoena directed to Rep. Jody Hice, a House Republican. On July 25, Judge May denied a similar motion to quash the subpoena directed to Rep. Hice.<sup>483</sup> Hice's attorneys had also argued that the Speech or Debate Clause, as well as the "high-ranking official" doctrine, which provides limits on requiring high-ranking officials to testify, protected Hice from being compelled to appear before the Georgia grand jury.<sup>484</sup> Judge May refused to quash the subpoena and sent the matter back to the Fulton County Superior Court so that Rep. Hice could potentially raise objections to being forced to answer specific questions, thus suggesting that there may be grounds to assert legislative protections against some, but not all, questioning in the Fulton County investigation.<sup>485</sup>

In another July 2022 development, Willis subpoenaed *The Atlanta Journal-Constitution* newspaper for the full recording of a January 11, 2021 call the paper had reported on involving U.S. Attorney Bobby Christine, who had been the U.S. attorney for the Southern District of Georgia before being tapped to take over the Northern District upon BJay Pak's resignation.<sup>486</sup>

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<sup>481</sup> Emergency Application for Stay and Injunction Pending Appeal, Fulton County Special Purpose Grand Jury v. Graham, No. 22A337 (S. Ct. Oct. 21, 2022), <https://s3.documentcloud.org/documents/23171175/22a337.pdf>.

<sup>482</sup> Order, Fulton County Special Purpose Grand Jury v. Graham, No. 22A337 (S. Ct. Oct. 24, 2022) (Thomas, J., in chambers), <https://tinyurl.com/yjj7cv65>. For the full court's rejection of Graham's motion, see Order in Pending Case, Graham v. Fulton County Special Purpose Grand Jury, 598 U.S. \_\_\_\_ (Nov. 1, 2022) (No. 22A337), [https://www.supremecourt.gov/orders/courtorders/110122zr1\\_qol1.pdf](https://www.supremecourt.gov/orders/courtorders/110122zr1_qol1.pdf).

<sup>483</sup> Order, Fulton County Special Purpose Grand Jury v. Hice, No. 1:22-cv-02794-LMM (N.D. Ga. July 25, 2022); see also Jason Morris, Federal judge to deny Rep. Jody Hice's challenge to subpoena from Georgia DA in Trump election probe, CNN (July 25, 2022), <https://www.cnn.com/2022/07/25/politics/jody-hice-subpoena-trump-grand-jury-investigation-georgia-willis/index.html>.

<sup>484</sup> Motion to Quash, Fulton County Special Purpose Grand Jury v. Hice, No. 1:22-cv-02794-LMM (N.D. Ga. July 18, 2022).

<sup>485</sup> Morris, *supra* note 483.

<sup>486</sup> Tamar Hallerman, AJC subpoenaed by Fulton prosecutors for audio of leaked call, THE ATLANTA JOURNAL-CONSTITUTION (July 8, 2022), <https://www.ajc.com/politics/ajc-subpoenaed-by-fulton-prosecutors-for-audio-of-leaked-call/VWJWL6KXZFANZL6JWT5KGS7WEY/>.

Georgia Speaker of the House David Ralston also testified before Willis' grand jury in July. Ralston reportedly confirmed Trump's personal and direct requests for a special session by the state legislature to address his claims of voter fraud.<sup>487</sup>

On July 15, it was reported that Georgia's 16 false electors had received target letters from Willis.<sup>488</sup> Prosecutors issue such letters to individuals who they suspect may have committed a crime; the letters often precede prosecution.<sup>489</sup> According to court filings and as discussed earlier, Willis' team had previously told the electors that they were witnesses, not targets, of the district attorney's investigation.<sup>490</sup> But on June 1, the electors received grand jury subpoenas ordering them to testify in Atlanta,<sup>491</sup> and upon confirming that they would testify, the electors were told that their status had shifted: They were now targets of the investigation. The district attorney's office explained this shift of the witnesses' status on the ground that the "investigation has matured and new evidence has come to light."<sup>492</sup>

The target letters sparked a legal battle over the electors' testimony. On July 19, 11 of the 16 electors filed a motion in the Fulton County Superior Court to quash the district attorney's subpoenas.<sup>493</sup> The filing claimed that the subpoenas were "unreasonable and oppressive,"<sup>494</sup> and furthermore, unenforceable because the electors' actions "were lawful and done upon the advice

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<sup>487</sup> Dale Russell, Trump election probe: Grand jury explores Trump's phone call to Georgia House Speaker, FOX 5 ATLANTA (July 14, 2022), <https://www.fox5atlanta.com/news/speaker-ralston-testifies-before-special-grand-jury-in-trump-election-probe>.

<sup>488</sup> Motion to Quash and Disqualify at 8, *In re* Subpoenas from May 2022 Special Purpose Grand Jury, No. 2022-EX-000024 (Ga. Super. Ct. July 19, 2022), <https://s3.documentcloud.org/documents/22089544/fulton-special-grand-jury-gop-electors-filing.pdf>; Michael Isikoff & Daniel Klaidman, Exclusive: Fulton County DA sends 'target' letters to Trump allies in Georgia investigation, YAHOO! NEWS (July 15, 2022), <https://news.yahoo.com/exclusive-fulton-county-da-sends-target-letters-to-trump-allies-in-georgia-investigation-152517469.html>.

<sup>489</sup> See, e.g., U.S. Dep't of Just., Just. Manual § 9-11.151 (2020), <https://www.justice.gov/jm/jm-9-11000-grand-jury>.

<sup>490</sup> Motion to Quash and Disqualify at 1, *In re* Subpoenas from May 2022 Special Purpose Grand Jury, No. 2022-EX-000024 (Ga. Super. Ct. July 19, 2022), <https://s3.documentcloud.org/documents/22089544/fulton-special-grand-jury-gop-electors-filing.pdf>.

<sup>491</sup> *Id.* at 2.

<sup>492</sup> *Id.* at 3.

<sup>493</sup> *Id.*

<sup>494</sup> *Id.* at 1.



of counsel.”<sup>495</sup> Among the arguments for the legality of their conduct, the electors cited pending litigation at the time of their December 14 meeting as reason to sign and send the false electoral slate, relying on the dual electoral slates sent to Congress by Hawaii in 1960 as a precedent.<sup>496</sup>

The court refused to nullify Willis’ subpoenas. “I will not be quashing any of the subpoenas,”<sup>497</sup> the presiding judge ruled. “I’m going to let the parties develop the framework they want to use as we go forward ... It may be that the witnesses have very brief appearances in front of the grand jury.”<sup>498</sup>

Their efforts to quash the subpoenas unsuccessful, 12 of the electors—the 11 from the July 19 filing and State Senator Burt Jones—then moved to have Willis disqualified from investigating their conduct as part of her probe. Only one succeeded. On July 25, 2022, Judge Robert McBurney, the same judge who had ruled against the challenges to the grand jury subpoenas, issued a ruling disqualifying Willis from criminally investigating State Senator Burt Jones.<sup>499</sup> Jones was among Georgia’s 16 false pro-Trump electors in 2020<sup>500</sup> and had been warned by Willis’ office that he

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<sup>495</sup> *Id.* at 3.

<sup>496</sup> The electors’ comparison to the 1960 Hawaii example is specious for several reasons. There, the Kennedy electors cast their votes on December 19, 1960, amid an ongoing court-ordered recount of Nixon’s slim preliminary victory. The ceremony was public, and the Democratic certificate was ultimately approved by the governor as required by law. Under the circumstances of the Hawaii case, the court-ordered recount created reasonable uncertainty surrounding the vote total, giving the Kennedy electors a justifiable basis for their production of a Kennedy certificate. The 2020 Georgia Trump electors, on the other hand, met and signed their fraudulent certificate on December 14, seven days after the results were recertified (for the second time) on December 7. The governor—a Republican—never approved. Furthermore, Nixon’s initial Hawaii victory (pre-recount) was by a margin of only 141 votes, well within the realm of possibility for a recount to change; Biden’s total, on the other hand, was more than 12,000 votes (and still 11,779 after the second recount) greater than Trump’s, a much larger advantage unlikely to be overturned by a recount. For more on the Hawaii example, *see* Matz, Eisen & Singh, *supra* note 100.

<sup>497</sup> Jason Morris & Paul LeBlanc, Georgia judge declines to quash subpoenas for fake Trump electors, CNN (July 21, 2022), <https://edition.cnn.com/2022/07/21/politics/georgia-fake-trump-electors-probe/index.html>.

<sup>498</sup> *Id.*

<sup>499</sup> Order Disqualifying District Attorney’s Office, *In re* 2 May 2022 Special Purpose Grand Jury, No. 2022-EX-000024 (Ga. Super. Ct. July 25, 2022), <https://www.fultonclerk.org/DocumentCenter/View/1235/Order-to-Disqualify-District-Attorney-7-25-2022?bidId=>; John Kruzal, Atlanta-area DA disqualified from investigating fake Trump elector, THE HILL (July 25, 2022), <https://thehill.com/homenews/state-watch/3573521-atlanta-area-da-disqualified-from-investigating-fake-trump-elector/>.

<sup>500</sup> Richard Fausset, Danny Hakim & Sean Keenan, Prosecutor Is Barred From Pursuing Criminal Case Against Trump Ally, THE NEW YORK TIMES (July 25, 2022), <https://www.nytimes.com/2022/07/25/us/georgia-prosecutor-fani-willis-trump.html>.

might face indictment.<sup>501</sup> Judge McBurney ruled that Willis’ participation in a June 2022 fundraising event for Jones’ eventual Democratic opponent for lieutenant governor constituted “a plain—and actual and untenable” conflict of interest requiring her disqualification from pursuing charges against Jones.<sup>502</sup>

Outside ethics experts disagreed.<sup>503</sup> But as a result of McBurney’s ruling, in order to prosecute Jones, under Georgia law, the Prosecuting Attorneys’ Council of the State of Georgia (Council) will select a new prosecuting attorney to determine whether charges should be brought against Jones.<sup>504</sup> Under statute, the Council has the option to “(1) ... appoint a district attorney, a solicitor-general, a retired prosecuting attorney..., or an attorney employed by the Department of Law; (2) [d]esignate an attorney from the Prosecuting Attorneys’ Council of the State of Georgia; or (3) [a]ppoint a competent attorney to act as district attorney pro tempore in place of the district attorney.”<sup>505</sup>

Attorneys representing 11 of the other false electors also joined Jones’ motion asking the court to disqualify Willis and her office from investigating them. The court denied the disqualification motion as to the other 11 on the grounds that Willis’ investigation of them did not

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<sup>501</sup> *Id.*

<sup>502</sup> Order Disqualifying District Attorney’s Office at 4, *In re 2 May 2022 Special Purpose Grand Jury*, No. 2022-EX-000024 (Ga. Super. Ct. July 25, 2022), <https://www.fultonclerk.org/DocumentCenter/View/1235/Order-to-Disqualify-District-Attorney-7-25-2022?bidId=>; Tamar Hallerman, Judge blocks Fulton DA from examining GOP senator in Trump probe, THE ATLANTA JOURNAL-CONSTITUTION (July 25, 2022), <https://www.ajc.com/politics/judge-blocks-fulton-da-from-questioning-gop-senator-in-trump-probe/E5UE3RMBQBC5XJ4YSRVTLCALXY/>.

<sup>503</sup> Norman L. Eisen, Patrick Longan & Richard W. Painter, A MAGA Candidate is Trying to Sabotage the Investigation Into His Alleged Crimes for Trump, SLATE (July 21, 2022), <https://slate.com/news-and-politics/2022/07/burt-jones-fani-willis-investigation-trump-crimes.html>.

<sup>504</sup> Ga. Code Ann. § 15-18-95; Ga. Code Ann. § 15-18-5.

<sup>505</sup> Ga. Code Ann. § 15-18-5.

pose a conflict of interest akin to that surrounding Jones.<sup>506</sup> The disqualification motion was renewed by the other 11 but was once more rejected by McBurney on August 24.<sup>507</sup>

Willis' investigation pressed forward in August 2022. On August 15, Rudy Giuliani's legal team was reportedly informed that Giuliani is a target of Willis' investigation and may face criminal charges.<sup>508</sup> This notification came after Giuliani had attempted to delay or avoid appearing in person before the grand jury in the Fulton County investigation, citing a "medical condition which precludes him from traveling by air."<sup>509</sup> Those efforts failed, and Giuliani was ordered to appear in person on August 17 by Judge McBurney.<sup>510</sup> Willis' office offered to provide Giuliani alternate transportation to Georgia if he was unable to travel by air.<sup>511</sup> Ultimately, Giuliani did appear on August 17.<sup>512</sup> He testified for roughly six hours and afterwards stated that he had "satisfied his obligation."<sup>513</sup> Additionally, on August 25 Willis' grand jury issued subpoenas for

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<sup>506</sup> Order Disqualifying District Attorney's Office, *In re 2 May 2022 Special Purpose Grand Jury*, No. 2022-EX-000024 (Ga. Super. Ct. July 25, 2022), <https://www.fultonclerk.org/DocumentCenter/View/1235/Order-to-Disqualify-District-Attorney-7-25-2022?bidId=>; Hallerman, *supra* note 502.

<sup>507</sup> Order Denying Motion to Reconsider Disqualification Request, *In re 2 May 2022 Special Purpose Grand Jury*, No. 2022-EX-000024 (Ga. Super. Ct. Aug. 24, 2022), <https://www.fultonclerk.org/DocumentCenter/View/1398/SPGJ-ORDER-DENYING-MOTION-TO-RECONSIDER-DISQUALIFICATION-REQUEST>.

<sup>508</sup> Fausset & Hakim, *supra* note 29.

<sup>509</sup> Rudolph William Louis Giuliani's Emergency Motion To Continue Hearing/Grand Jury Appearance Pursuant to O.G.C.A. § 24-13-26, No. 2022-Ex-000024 (Ga. Super. Ct. Aug. 8, 2022), <https://www.fultonclerk.org/DocumentCenter/View/1339/R-GIULIANI---EMERGENCY-MOTION-TO-CONTINUE-HEARING>.

<sup>510</sup> Matthew Brown & Tom Hamburger, Giuliani arrives at Atlanta courthouse to testify before Georgia grand jury, THE WASHINGTON POST (Aug. 17, 2022), <https://www.washingtonpost.com/politics/2022/08/17/giuliani-georgia-grand-jury/>.

<sup>511</sup> *Id.*

<sup>512</sup> *Id.*

<sup>513</sup> Kate Brumback & Larry Neumeister, Giuliani says he 'satisfied' obligation with Georgia grand jury probe into 2020 election, PBS NEWSHOUR (Aug. 18, 2022), <https://www.pbs.org/newshour/politics/giuliani-says-he-satisfied-obligation-with-georgia-grand-jury-probe-into-2020-election>.

testimony to Mark Meadows,<sup>514</sup> Sidney Powell,<sup>515</sup> and cyber researcher James Waldron,<sup>516</sup> who assisted Powell and Trump's legal team with their vote-flipping efforts.<sup>517</sup>

Other disputes over critical witness testimony played out in the courts in July and August. As noted above, Governor Brian Kemp agreed in June to deliver on July 25 a "sworn recorded statement" to the district attorney's office rather than agreeing to testify before the special grand jury. The grand jury also subpoenaed reams of documents from Kemp's office related to the 2020 election.<sup>518</sup> The voluntary statement, however, never materialized, as negotiations between Kemp and Willis devolved into disagreements over the documents sought and the scope of his recorded statement. Even as Kemp's office produced tens of thousands of documents from late July into August, exchanges between lawyers in each office grew more bitter. On August 4, Kemp was subpoenaed to testify before the special grand jury in Atlanta.<sup>519</sup> Kemp's legal team then filed an August 17 motion in the Fulton County Superior Court to delay his testimony before the grand

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<sup>514</sup> Petition for Certification of Need for Testimony Before Special Purpose Grand Jury Pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State, O.C.G.A. § 24-13-90 et seq., *In re* Special Purpose Grand Jury, 2022-EX-000024 (Ga. Super. Ct. Aug. 25, 2022) (subpoena for Mark Meadows). At the end of October, Meadows asked a judge in South Carolina, his residential state, to reject Willis' attempt to secure his testimony. *See* Response to Georgia's Petition for Attendance of Out of State Witness, *Georgia v. Meadows*, No. 2022-CP-39-01085 (SCRCF Oct. 24, 2022), <https://www.documentcloud.org/documents/23183911-piimagedisplay-2>. That judge rejected Meadows' request and ordered him to testify before the Atlanta grand jury in a ruling from the bench. Nicholas Wu, South Carolina judge rules Mark Meadows must testify in 2020 election probe, *POLITICO* (Oct. 26, 2022), <https://www.politico.com/news/2022/10/26/south-carolina-mark-meadows-testify-2020-election-probe-00063572>. It remains to be seen whether he will appeal.

<sup>515</sup> Petition for Certification of Need for Testimony Before Special Purpose Grand Jury Pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State, O.C.G.A. § 24-13-90 et seq., *In re* Special Purpose Grand Jury, 2022-EX-000024 (Ga. Super. Ct. Aug. 25, 2022) (subpoena for Sidney Powell).

<sup>516</sup> Certificate of Material Witness Pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State, O.C.G.A. § 24-13-90 et seq., *In re* Special Purpose Grand Jury, 2022-EX-000024 (Ga. Super. Ct. Aug. 25, 2022) (subpoena for James Waldron).

<sup>517</sup> Kyle Cheney, Mark Meadows ordered to testify in Fulton County probe of Trump election overturn efforts, *POLITICO* (Aug. 25, 2022), <https://www.politico.com/news/2022/08/25/mark-meadows-ordered-to-testify-in-fulton-county-probe-of-trump-election-overturn-efforts-00053817>.

<sup>518</sup> Hallerman, *supra* note 458.

<sup>519</sup> Kyle Cheney & Nicholas Wu, Kemp fights subpoena from Atlanta-area Trump probe after talks break down, *POLITICO* (Aug. 17, 2022), <https://www.politico.com/news/2022/08/17/kemp-fights-subpoena-willis-trump-probe-00052588>.

jury scheduled for the next day, which was granted by the court.<sup>520</sup> On August 23, Willis called Kemp’s delay “wholly without merit,” with a hearing to determine the validity of Kemp’s motion to delay set for August 25.<sup>521</sup> That hearing concluded without a clear indication of whether Kemp would be forced to testify.<sup>522</sup> Four days later, the judge overseeing the case ruled that Kemp must testify, though the governor’s request to appear after the November 8 election was granted.<sup>523</sup>

Courts also deliberated in August on whether other non-Georgia witnesses could be compelled to testify before Willis’ grand jury. On August 17, a New Mexico state judge ruled that John Eastman, a Santa Fe resident and Trump’s outside lawyer whose election-reversal activities in Georgia and other states were discussed in Section I, had to testify before the grand jury in Atlanta on August 30.<sup>524</sup> Eastman appeared before the grand jury on that date, reportedly pleading the Fifth Amendment repeatedly.<sup>525</sup> After his appearance, an attorney for Eastman stated that Eastman is “probably a target” in Willis’ probe.<sup>526</sup>

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<sup>520</sup> Motion to Quash Subpoena Issued to Gov. Brian P. Kemp and Memorandum in Support, *In re* Special Purpose Grand Jury, No. 2022-EX-000024 (Ga. Super. Ct. Aug. 17, 2022).

<sup>521</sup> Response in Opposition to Witness Governor Brian P. Kemp’s Motion to Quash, *In re* Special Purpose Grand Jury, No. 2022-EX-000024 (Ga. Super. Ct. Aug. 23, 2022), <https://s3.documentcloud.org/documents/22187114/fulton-da-response-to-kemp-motion-to-quash.pdf>.

<sup>522</sup> 11Alive, Judge wraps hearing on motion to quash Brian Kemp subpoena, YOUTUBE (Aug. 25, 2022), <https://www.youtube.com/watch?v=oS12VhR8R4I>; Tamar Hallerman & Bill Rankin, Kemp’s grand jury testimony still in question after courtroom clash, THE ATLANTA JOURNAL-CONSTITUTION (Aug. 25, 2022), <https://www.ajc.com/politics/kemps-grand-jury-testimony-still-in-question-after-courtroom-clash/FZGLMXMNE-ZAZVECHI5BJQFFTNI/>.

<sup>523</sup> Order Denying Motion to Quash, *In re* 2 May 2022 Special Purpose Grand Jury—Subpoena for Governor Kemp, No. 2022-EX-000024 (Ga. Super. Ct. Aug. 29, 2022), <https://www.politico.com/f/?id=00000182-e9da-dac8-a3cb-fddb85250000>; Kyle Cheney & Nicholas Wu, Judge rejects bid by Gov. Kemp and Trump attorney Chesebro to quash subpoenas, POLITICO (Aug. 29, 2022), <https://www.politico.com/news/2022/08/29/judge-kemp-trump-attorney-subpoenas-00054053>.

<sup>524</sup> Dan Boyd, Santa Fe lawyer ordered to appear in Georgia probe, ALBUQUERQUE JOURNAL (Aug. 18, 2022), <https://www.abqjournal.com/2525560/nm-judge-orders-eastman-to-appear-before-georgia-grand-jury.html>.

<sup>525</sup> Kyle Cheney & Nicholas Wu, Eastman appears before Atlanta-area grand jury probing Trump election scheme, POLITICO (Aug. 31, 2022), <https://www.politico.com/news/2022/08/31/eastman-appears-before-atlanta-area-grand-jury-probing-trump-election-scheme-00054391>.

<sup>526</sup> Richard Fausset & Danny Hakim, Conservative Lawyer a Likely Target in Atlanta Trump Investigation, His Lawyer Says, THE NEW YORK TIMES (Aug. 31, 2022), <https://www.nytimes.com/2022/08/31/us/john-eastman-trump-investigation.html?action=click&module=Well&pgtype=Homepage&section=US%20News>.

Another of Trump's outside lawyers who participated in the election-reversal plan in Georgia and elsewhere, Jenna Ellis, was ordered on August 16 by a judge in her home state of Colorado to appear before the Atlanta grand jury on August 25.<sup>527</sup> Ellis proceeded to testify before the grand jury on August 25.<sup>528</sup> Meanwhile, Kenneth Chesebro, who was subpoenaed by the special grand jury on July 12 and set to testify on August 30, filed a last-minute motion in Fulton County Superior Court on August 25 to block the subpoena.<sup>529</sup> The presiding judge rejected that effort on August 29.<sup>530</sup> Chesebro appeared before the grand jury on the following day, August 30, reportedly pleading the Fifth Amendment throughout his session.<sup>531</sup>

The district attorney sought testimony from additional witnesses in September. A few days before September, a judge granted Willis' motion for the testimony of Boris Epshteyn, an aide to Trump's reelection campaign and a conservative commentator.<sup>532</sup> Epshteyn openly professed earlier in 2022 to have worked with Rudy Giuliani to coordinate the false-electors plan in advance

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<sup>527</sup> Tierney Sneed, Colorado judge says Jenna Ellis must appear before 2020 election scheme grand jury probe, CNN (Aug. 16, 2022), <https://www.cnn.com/2022/08/16/politics/jenna-ellis-testimony-georgia/index.html>.

<sup>528</sup> Ryan King, Former Trump campaign lawyer Jenna Ellis testified before Fulton County inquiry: Report, WASHINGTON EXAMINER (Aug. 26, 2022), <https://www.washingtonexaminer.com/news/jenna-ellis-testified-before-fulton-county-inquiry>.

<sup>529</sup> Motion to Quash Grand Jury Subpoena by Kenneth Chesebro, *In re* Special Purpose Grand Jury, No. 2022-EX-000024 (Ga. Super. Ct. Aug. 25, 2022), <https://www.fultonclerk.org/DocumentCenter/View/1399/SPGJ-MOTION-TO-QUASH-GRAND-JURY-SUBPOENA-BY-KENNETH-CHESEBRO>; Kyle Cheney, Trump-tied attorney who helped craft fake electors strategy resists grand jury subpoena, POLITICO (Aug. 25, 2020), <https://www.politico.com/news/2022/08/25/trump-attorney-fake-electors-subpoena-00053765>.

<sup>530</sup> Order Denying Motion to Quash, *In re* Special Purpose Grand Jury—Subpoena for Kenneth Chesebro, No. 2022-EX-000024 (Ga. Super. Ct. Aug. 29, 2022), <https://www.fultonclerk.org/DocumentCenter/View/1410/EX-PARTE-ORDER-OF-THE-JUDGE-8-29-2022>.

<sup>531</sup> Tamar Hallerman, Trump lawyer cites attorney-client privilege during grand jury testimony, THE ATLANTA JOURNAL-CONSTITUTION (Aug. 31, 2022), <https://www.ajc.com/politics/trump-lawyer-cites-attorney-client-privilege-during-grand-jury-testimony/BZCFT6OK6ZDDXBFJMZWJ6KHORY/>.

<sup>532</sup> Certificate of Material Witness Pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State, Codified in the State of Georgia as O.C.G.A. § 24-13-90 et seq., *In re* Special Purpose Grand Jury, No. 2022-EX000024 (Ga. Super. Ct. Aug. 22, 2022) (subpoena for Boris Epshteyn).

of January 6.<sup>533</sup> Epshteyn testified on September 29.<sup>534</sup> Additionally, Willis moved on the same day to secure testimony from Willie Lewis Floyd III, who previously served as the director of the advocacy group Blacks for Trump.<sup>535</sup> Though the details of their interactions are unclear, Floyd reportedly attempted to convince Ruby Freeman—the Atlanta election worker who, along with her daughter Shaye Moss, testified before the January 6 Committee about the abuse she received after a conspiracy theory about voter fraud went viral (see Section I.D)—that she faced legal jeopardy based on the (groundless) allegations at the heart of the theory.<sup>536</sup>

October brought additional developments in Willis’ investigation. Early in the month, the district attorney sought testimony from former U.S. House Speaker Newt Gingrich (R-GA), former National Security Advisor Michael Flynn, former White House attorney Eric Herschmann, and several other individuals proximal to the Trump White House.<sup>537</sup> On October 10, reports emerged that Cassidy Hutchinson, a former aide to Chief of Staff Mark Meadows who testified publicly before the January 6 Committee, was cooperating with Willis in the Georgia investigation.<sup>538</sup> Meadows, meanwhile, failed to appear for his testimony as ordered.<sup>539</sup> In late October, Meadows urged a judge in his residing state of South Carolina to reject Willis’ efforts to secure his

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<sup>533</sup> Adam Klasfeld, Ex-Trump Campaign Advisor and Pundit Boris Epshteyn Is a ‘Necessary and Material Witness’ to 2020 Election Probe, *Fulton County DA Says*, LAW & CRIME (Sept. 2, 2022), <https://lawandcrime.com/fulton-county-da-probe/ex-trump-campaign-advisor-and-pundit-boris-epshteyn-is-a-necessary-and-material-witness-to-2020-election-probe-fulton-county-da-says/amp/>.

<sup>534</sup> Tom Hamburger, Boris Epshteyn, lawyer to Trump, testifies before Georgia grand jury, *THE WASHINGTON POST* (Sept. 29, 2022), <https://www.washingtonpost.com/nation/2022/09/29/boris-epshteyn-georgia-trump/>.

<sup>535</sup> *Id.*; Certificate of Material Witness Pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State, Codified in the State of Georgia as O.C.G.A. § 24-13-90 et seq., *In re* Special Purpose Grand Jury, No. 2022-EX000024 (Ga. Super. Ct. Sept. 2, 2022) (subpoena for Willis Lewis Floyd III).

<sup>536</sup> Klasfeld, *supra* note 533.

<sup>537</sup> Kate Brumback, Flynn, Gingrich testimony sought in Georgia election probe, *AP NEWS* (Oct. 7, 2022), [https://apnews.com/article/2022-midterm-elections-donald-trump-georgia-presidential-atlanta-6f0b2c52a8315e7a61d4d8604bb3c53f?utm\\_source=homepage&utm\\_medium=TopNews&utm\\_campaign=position\\_06](https://apnews.com/article/2022-midterm-elections-donald-trump-georgia-presidential-atlanta-6f0b2c52a8315e7a61d4d8604bb3c53f?utm_source=homepage&utm_medium=TopNews&utm_campaign=position_06).

<sup>538</sup> Sara Murray & Zachary Cohen, First on CNN: Former White House aide cooperating with investigation of Trump effort to overturn election results, *CNN* (Oct. 10, 2022), <https://www.cnn.com/2022/10/10/politics/cassidy-hutchinson-cooperation-trump-investigation>.

<sup>539</sup> *Id.*

testimony.<sup>540</sup> The judge ruled from the bench, promptly rejecting Meadows' request and ordering him to testify before the Atlanta grand jury.<sup>541</sup> Reports also surfaced near the end of the month that Pat Cipollone, the former White House counsel, and Kelly Loeffler, the former Georgia Republican senator, had also testified before Willis' grand jury.<sup>542</sup>

As of this writing in November 2022, Willis' investigation continues. In September, Willis told *The Washington Post* that she was "pleased with where it [the investigation] is. I think we're moving along at a really good speed," noting that the probe would conclude its fact-finding and witness testimony stage by the end of 2022.<sup>543</sup> She further added that the allegations she and her team are investigating are "very serious" and that "people are facing prison sentences" if indicted and convicted by a grand jury.<sup>544</sup> She indicated that additional individuals were likely to become targets of the investigation as it proceeded, and that a decision on whether to call the former president to testify would likely be made in late autumn.<sup>545</sup>

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<sup>540</sup> Response to Georgia's Petition for Attendance of Out of State Witness, *Georgia v. Meadows*, No. 2022-CP-39-01085 (SCRCF Oct. 24, 2022), <https://www.documentcloud.org/documents/23183911-piimagedisplay-2>.

<sup>541</sup> Wu, *supra* note 514.

<sup>542</sup> Sara Murray, Zachary Cohen & Evan Perez, First on CNN: Former White House Counsel Pat Cipollone, former US Sen. Kelly Loeffler testify to grand jury in Georgia investigating 2020 election interference, CNN (Oct. 20, 2022), <https://www.cnn.com/2022/10/20/politics/kelly-loeffler-pat-cipollone-georgia-special-grand-jury/index.html>.

<sup>543</sup> Matthew Brown & Tom Hamburger, Georgia 2020 election inquiry may lead to prison sentences, prosecutor says, THE WASHINGTON POST (Sept. 15, 2022), <https://www.washingtonpost.com/national-security/2022/09/15/fani-willis-georgia-prison/>.

<sup>544</sup> *Id.*

<sup>545</sup> *Id.*



Willis' investigation is complemented by the ongoing January 6 Committee probe of Trump's conduct relating to the 2020 election. Indeed, in May 2022, investigators from Willis' team reportedly met with January 6 Committee investigators to share details of information uncovered by their respective investigations.<sup>546</sup> Details of further collaboration between the two teams were reported in October 2022.<sup>547</sup> We expect that congressional investigators have already or will in the near future unearth substantial information beyond what is mentioned here about Trump's efforts to subvert the 2020 presidential election, including in Georgia.<sup>548</sup>

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<sup>546</sup> Michael Isikoff & Daniel Klaidman, Georgia investigation into Trump's efforts to overturn 2020 election ramps up, YAHOO! NEWS (May 26, 2022), <https://news.yahoo.com/georgia-investigation-into-trumps-effort-to-overturn-2020-election-ramps-up-213735195.html>.

<sup>547</sup> Tamar Hallerman, Jan. 6 committee aids Fulton prosecutors in their investigation of Trump, THE ATLANTA JOURNAL-CONSTITUTION (Oct. 25, 2022), <https://www.ajc.com/politics/jan-6-committee-aids-fulton-prosecutors-in-their-investigation-of-trump/SZ6GIUKETZCMBIOA4E4JIQ4VAQ/>.

<sup>548</sup> Norman Eisen, Trump's lies will lead us to the truth, CNN (Aug. 29, 2021), <https://www.cnn.com/2021/08/29/opinions/trump-election-lies-voting-rights-eisen/index.html>.

### **III. Potential Crimes**

In Section III, we survey the relevant Georgia criminal statutes and analyze the possibility that Trump's conduct or that of his associates constituted a crime or crimes. In Section III.A, we focus on potential crimes in Title 21 of the Georgia Code dealing specifically with election offenses. These include four principal relevant criminal statutes: 1) solicitation to commit election fraud, Ga. Code Ann. § 21-2-604(a); 2) intentional interference with performance of election duties, Ga. Code Ann. § 21-2-597; 3) interference with primaries and elections, Ga. Code Ann. § 21-2-566; and 4) conspiracy to commit election fraud, Ga. Code Ann. § 21-2-603.

In addition, Trump and his associates' conduct trying to overturn the 2020 election results in Georgia may be sufficient to prove that they, individually or in concert, also committed crimes outside of the election title. These are analyzed in Section III.B and include a variety of possible offenses found in Title 16 of the Georgia Code, the general criminal title. Here too we look at five main possible charges: 1) making false statements, Ga. Code Ann. § 16-10-20; 2) false swearing, Ga. Code Ann. § 16-10-71; 3) influencing witnesses, Ga. Code Ann. § 16-10-93; 4) forgery in the first degree, Ga. Code Ann. § 16-9-1(b); and 5) criminal solicitation of crimes other than those covered by Ga. Code Ann. § 21-2-604(a), Ga. Code Ann. § 16-4-7. The general crime of solicitation under Georgia state law requires one or more additional crimes to be solicited, and we analyze several possibilities, including solicitation of violation of oath by a public officer, Ga. Code Ann. § 16-10-1; false statements and writings, Ga. Code Ann. § 16-10-20; false official certificates, Ga. Code Ann. § 16-10-8; false swearing, Ga. Code Ann. § 16-10-71; forgery, Ga. Code Ann. § 16-9-1; and computer trespass, Ga. Code Ann. § 16-9-93(b).

Finally, possible violations of one more major Title 16 crime, Georgia's RICO Act,<sup>549</sup> are the subject of Section III.C. The statute requires a "pattern" of misconduct,<sup>550</sup> as shown by violations of two or more crimes specified in the statute.<sup>551</sup> These predicate crimes can include committing or soliciting false statements, forgery, computer trespass, and influencing witnesses, and are analyzed in Section III.B.

The Fulton County district attorney has indicated that she is taking an "old school" approach to the evidence her team has gathered and will be looking at each element of each possible crime for each possible defendant to determine if she has sufficient evidence to pursue charges. Generally, in Georgia, a single set of facts may trigger criminal liability under multiple statutes based on the different elements of various crimes. In prosecutorial vernacular, this is called "charging in the alternative." Certain crimes may merge for the purpose of sentencing if the defendant is convicted but that would be for a judge to determine down the line. While it may appear repetitive, for the purposes of this report we have noted many instances in which the same conduct may implicate multiple crimes. However, we have highlighted the key distinctions in the different statutes.

#### **A. Possible Election Law Crimes**

##### **1. Criminal Solicitation to Commit Election Fraud (Ga. Code Ann. § 21-2-604(a))**

In 2011, Georgia amended its election laws to provide for the crime of solicitation of voter fraud.<sup>552</sup> This provision, Ga. Code Ann. § 21-2-604(a), contemplates both first-degree and second-degree criminal solicitation. A person engages in first-degree criminal solicitation to commit

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<sup>549</sup> Georgia's Racketeer Influenced and Corrupt Organizations (RICO) Act, Ga. Code Ann. § 16-14-1 et seq.

<sup>550</sup> Ga. Code Ann. § 16-14-4(a)-(c).

<sup>551</sup> Ga. Code Ann. § 16-14-3.

<sup>552</sup> Ga. Code Ann. § 21-2-604(a).

election fraud “when, with intent that another person engage in conduct constituting a felony under this article, he or she solicits, requests, commands, importunes, or otherwise attempts to cause the other person to engage in such conduct.”<sup>553</sup> A conviction for this offense carries a sentence of one to three years in prison.<sup>554</sup> A person engages in second-degree criminal solicitation to commit election fraud “when, with intent that another person engage in conduct constituting a misdemeanor under this article, he or she solicits, requests, commands, importunes, or otherwise attempts to cause the other person to engage in such conduct.”<sup>555</sup> A person convicted of second-degree criminal solicitation “shall be punished as for a misdemeanor.”<sup>556</sup> The punishment for a misdemeanor in Georgia is either “a fine not to exceed \$1,000” or “confinement...not to exceed 12 months, or both[.]”<sup>557</sup>

Georgia courts have not yet had occasion to definitively construe Section 21-2-604. However, this provision is modeled nearly word-for-word on Georgia’s general criminal solicitation statute (Ga. Code Ann. § 16-4-7).<sup>558</sup> Because Georgia courts look to “similar statutes” to address questions of statutory interpretation, we draw guidance from cases addressing Ga. Code Ann. § 16-4-7.<sup>559</sup>

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<sup>553</sup> Ga. Code Ann. § 21-2-604(a)(1).

<sup>554</sup> Ga. Code Ann. § 21-2-604(b)(1).

<sup>555</sup> Ga. Code Ann. § 21-2-604(a)(2).

<sup>556</sup> Ga. Code Ann. § 21-2-604(b)(2).

<sup>557</sup> Ga. Code Ann. § 17-10-3.

<sup>558</sup> Compare Ga. Code Ann. § 16-4-7 (“A person commits the offense of criminal solicitation when, with intent that another person engage in conduct constituting a felony, he solicits, requests, commands, importunes, or otherwise attempts to cause the other person to engage in such conduct.”). In Section IV.D, we explore whether Trump’s conduct constitutes an independent violation of the general criminal solicitation statute.

<sup>559</sup> Premier Health Care Invs., LLC v. UHS of Anchor, L.P., 310 Ga. 32, 43 (2020).

Starting with the plain text of the law, the offense of criminal solicitation under Section 21-2-604 can be broken down into three elements:

- a. Solicitation: The defendant must solicit, request, command, importune, or otherwise attempt to cause another person to engage in conduct.
- b. Intent: The defendant must intend that the other person engage in that conduct.
- c. Crime: That conduct must constitute a felony (or misdemeanor) under Georgia law.

We address each element in turn.

#### **a. Solicitation**

Looking to the text of the statute, the key question here is whether Trump solicited, requested, commanded, importuned, or otherwise attempted to cause someone else to engage in particular conduct.

The Georgia Supreme Court has long held that the terms “solicits, requests, commands’ and ‘importunes’ are all clearly understandable so that any person seeking to avoid violation of the law could do so.”<sup>560</sup> Solicit means “to approach with a request or plea.”<sup>561</sup> Request means “to ask for.”<sup>562</sup> Command means to “direct authoritatively” or “to order.”<sup>563</sup> Importune means “to request persistently, and sometimes irksomely.”<sup>564</sup> As for the catch-all phrase—“or otherwise

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<sup>560</sup> State v. Davis, 246 Ga. 761, 762 (1980).

<sup>561</sup> Merriam-Webster Dictionary (11th ed. 2003); *see also* New American Oxford Dictionary (3d ed. 2010) (solicit: to “ask for or try to obtain (something) from someone”); Cambridge Dictionary (4th ed. 2013) (solicit: “to ask for something in a persuasive and determined way”); Black’s Law Dictionary (11th ed. 2019) (solicitation: “The criminal offense of urging, advising, commanding, or otherwise inciting another to commit a crime”).

<sup>562</sup> Merriam-Webster Dictionary (11th ed. 2003); *see also* New American Oxford Dictionary (3d ed. 2010) (request: to “politely or formally ask for”); Cambridge Dictionary (4th ed. 2013) (request: “to ask for something politely or officially”).

<sup>563</sup> Black’s Law Dictionary (11th ed. 2019); *see also* Merriam-Webster Dictionary (11th ed. 2003) (command: “to direct authoritatively”); New American Oxford Dictionary (3d ed. 2010) (command: to “give an authoritative order”); Cambridge Dictionary (4th ed 2013) (command: “to give someone an order”).

<sup>564</sup> Black’s Law Dictionary (11th ed. 2019); *see also* Merriam-Webster (11th ed. 2003) (importune: “to press or urge with troublesome persistence”); New American Oxford Dictionary (3d ed 2010) (importune: to “harass (someone) persistently for or to do something”); Cambridge Dictionary (4th ed. 2013) (importune: “to make repeated, forceful requests for something, usually in a way that is annoying or causing slight problems”).

attempts to cause”<sup>565</sup>—the Georgia Supreme Court has construed that language as referring to cases where one person “creates a clear and present danger” of another person engaging in conduct.<sup>566</sup> That standard is satisfied if the solicited “acts are both likely and imminent as a result of the speech” in question.<sup>567</sup> In applying this solicitation standard, the courts’ focus “is directed not at the ears of the solicited and whether that person intends to commit the solicited acts, but at the words and intent of the solicitor, as shown by the words, the context, and other circumstances.”<sup>568</sup> Therefore, it is not a defense that the people solicited do not follow through with committing the requested act.<sup>569</sup>

Taken together, the statutory terms in Section 21-2-604 refer to the full gamut of circumstances in which a person seeks to induce another person to do something. They cover asking, directing, urging, demanding, prompting, etc. These are broad and commonsensical (rather than technical) terms.

At several points between Election Day 2020 and the Joint Session of Congress on January 6, 2021, the evidence shows that Trump engaged in conduct of this type. We will highlight four examples of behavior by the former president himself that merit particularly close attention and further investigation: 1) Trump’s call to Raffensperger to get him to “find 11,780” votes; 2) Trump’s call to Investigator Watson (if venue can be established in Fulton County); 3) Trump’s call to Governor Kemp to convince him to call a special session to appoint Trump electors; and 4) any evidence of Trump’s involvement in soliciting the participation of one or several of the false electors.

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<sup>565</sup> Ga. Code Ann. § 21-2-604(a).

<sup>566</sup> The “clear-and-present danger” gloss was designed to avoid potential First Amendment free speech violations. *State v. Davis*, 246 Ga. 761, 762 (1980) (“[W]e construe this language in conformity with the First Amendment and thereby give it a narrowing construction.”).

<sup>567</sup> *See, e.g., Monroe v. State Ct. of Fulton Cnty.*, 739 F.2d 568, 575 (11th Cir. 1984).

<sup>568</sup> *O’Kelly v. State*, 196 Ga. App. 860, 862 (1990); *see Rana v. State*, 304 Ga. App. 750 (2010) (citing *O’Kelly*).

<sup>569</sup> *O’Kelly*, 196 Ga. App. at 861–862; *see also English v. State*, 290 Ga. App. 378, 381 (2008).

Where the publicly known facts warrant, we will also analyze whether Trump affiliates like Giuliani, Powell, and others may be subject to criminal liability for their solicitous actions. This includes any evidence of Giuliani's solicitation of Governor Kemp separate and apart from the former president's entreaties, including Giuliani's multiple requests for members of the Georgia legislature to call a special session to overturn the will of the majority of voters. John Eastman's testimony before Georgia legislators and his requests for that body to overturn the election could also subject him to criminal liability for solicitation. Finally, while the investigation of Sidney Powell's solicitation of an Atlanta-based computer forensics firm to access voting data is still in its nascent stages as of this writing, the Fulton County district attorney could consider solicitation charges for this conduct if the location of the firm (particularly if that is where the call for services was received) establishes sufficient venue.

First, Trump's call to Secretary Raffensperger on January 2 appears to constitute solicitation. On that call, Trump asked—indeed, apparently demanded—that Raffensperger “find 11,780 votes.”<sup>570</sup> Trump urged Raffensperger to “give [him] a break” because he “only need[ed] 11,000 votes,” and emphasized that “it really is important that [Raffensperger and/or staff] meet tomorrow and work out on these numbers.”<sup>571</sup> When Raffensperger disagreed with Trump's false claims about voter fraud in Georgia's election, Trump threateningly warned that it would be “illegal” and “a big risk” if Raffensperger decided against “reporting” Trump's false claims.<sup>572</sup> Trump also insisted that Raffensperger's position that the election was not tainted by fraud was “very dangerous.”<sup>573</sup> These statements—all of which were designed to pressure Raffensperger to

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<sup>570</sup> Gardner & Firozi, *supra* note 2.

<sup>571</sup> Tim Darnell, READ: Transcript of Trump's phone call to Georgia secretary of state, THE ATLANTA JOURNAL-CONSTITUTION (Jan. 4, 2021), <https://www.ajc.com/news/nation-world/read-transcript-of-trumps-phone-call-to-georgia-secretary-of-state/IRLR3EXOMVFJFJIVYYUQ2C6QTM/>.

<sup>572</sup> *Id.*

<sup>573</sup> *Id.*

“find” a very specific number of Trump votes—appear to satisfy the first element of criminal solicitation under Section 21-2-604. It was a request made and at many times during the conversation spoken as a command from the president of the United States.

Second, Trump’s call to Chief Investigator Watson on December 23 may well have also constituted an act of solicitation and, if Watson was in Fulton County at the time of Trump’s call, the Fulton County DA could pursue charges. When Trump called her, Watson was overseeing an active inquiry into the issue of alleged signature mismatches.<sup>574</sup> On the call—confirmed by the publicly available recording<sup>575</sup>—Trump urged and pressured Watson to engage in specific conduct in her handling of the inquiry.<sup>576</sup> Trump urged Watson to go back “two years, as opposed to just checking you know one against the other.”<sup>577</sup> He also urged her to find “dishonesty” and “get to Fulton,” a heavily pro-Biden jurisdiction.<sup>578</sup> Finally, he solicited Watson to continue her investigation past Christmas but to conclude before January 6. While he made these requests, Trump told Watson how “important” her job was, emphasized that she would be praised for reaching the “right answer,”<sup>579</sup> and asked her to do “whatever [she] can do.”<sup>580</sup> This may have constituted solicitation of Watson to engage in particular conduct while overseeing the signature-mismatch inquiry.

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<sup>574</sup> McWhirter, *supra* note 249.

<sup>575</sup> Julia Jester, ‘You’ll be praised’: Audio of Trump call with Georgia elections investigator offers new details, NBC NEWS (Mar. 15, 2021, 8:34 AM), <https://www.nbcnews.com/politics/elections/you-ll-be-praised-audio-trump-call-georgia-elections-investigator-n1261159>.

<sup>576</sup> McWhirter, *supra* note 249.

<sup>577</sup> American Oversight, *supra* note 253.

<sup>578</sup> *Id.*; Election Night Reporting, Fulton County, Ga., President of The United States (last updated Nov. 20, 2020, 9:46:44 AM), <https://results.enr.clarityelections.com/GA/Fulton/105430/web.264614/#/detail/1>.

<sup>579</sup> Charles Davis, Trump pressured another Georgia elections official, Frances Watson, to uncover nonexistent voter fraud, BUSINESS INSIDER (Mar. 10, 2021), <https://www.businessinsider.com/transcript-trump-pressures-another-georgia-elections-official-to-find-fraud-2021-3>.

<sup>580</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.



Third, during a call on December 5, Trump solicited Governor Kemp to “help us out” and call for a special election in one instance and a special session of the state legislature in another in order to have electors appointed to support Trump.<sup>581</sup> Trump also reportedly requested that the governor call for a statewide audit of all signatures on mail-in ballots.<sup>582</sup> At a rally later that evening, and in several subsequent social media posts, Trump taunted Kemp with personal attacks and suggested the governor was failing his duty<sup>583</sup>—ostensibly to pressure Kemp into meeting Trump’s requests. This pattern of conduct could satisfy the initial statutory element for the crime of solicitation.

Fourth, the facts suggest that Trump was involved in soliciting 16 Georgia residents to serve as false electors by making and submitting fabricated electoral ballots to Congress and the National Archives stating that they were “duly elected and qualified.”<sup>584</sup> His involvement at a minimum came through his campaign and associates, and he likely had direct and personal contacts as well. Attorneys working on Trump’s behalf, including Giuliani, Ellis, and Eastman, all directly communicated with Georgia state legislators urging the state to submit an alternate slate of electors.<sup>585</sup> In fact, Giuliani met with Georgia legislators multiple times.<sup>586</sup> This conduct appears to fit the definition of solicitation. These attorneys were allegedly acting on behalf of, and with the air of authority of, Trump. They importuned legislators to take extralegal action.<sup>587</sup> Additionally, Trump campaign attorney Kenneth Chesebro outlined a strategy for the false electors to make

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<sup>581</sup> Rally Speech Transcript, *supra* note 174.

<sup>582</sup> Cohen, Morris & Hickey, *supra* note 16.

<sup>583</sup> Rally Speech Transcript, *supra* note 174; Gardner, Itkowitz & Dawsey, *supra* note 174.

<sup>584</sup> False Electors Certificates at 7.

<sup>585</sup> Stephen Fowler, Georgia grand jury subpoenas top Trump allies, including Giuliani and Eastman, NPR (July 5, 2022), <https://www.npr.org/2022/07/05/1109871416/grand-jury-subpoena-giuliani-eastman-graham>.

<sup>586</sup> Fowler, *supra* note 17; True the Vote, Georgia Senate Judiciary Subcommittee Hearing on Elections (Part 2), YOUTUBE (Dec. 5, 2020), <https://www.youtube.com/watch?v=c1o8-y5ou5Y>; Right Side Broadcasting Network, Georgia State Senate Meeting on 2020 Election Fraud, YOUTUBE (Dec. 30, 2020), [https://www.youtube.com/watch?v=u5ZP\\_HpBKos](https://www.youtube.com/watch?v=u5ZP_HpBKos).

<sup>587</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

counterfeit electoral ballots<sup>588</sup> and campaign staffer Robert Sinners provided instructions to those individuals.<sup>589</sup> During a rally on December 5, just days before the false electors met and signed their fabricated documentation, Trump bragged about being in direct contact with at least one of those false electors—State Senator Burt Jones. He stated: “I’ve become friendly with legislators that I didn’t know four weeks ago ... [W]e have a couple of them right here ... Burt Jones, I want to thank you, Burt, for being here.”<sup>590</sup> On the prescribed day that the genuine Electoral College met at the Georgia State Capitol, the false electors were instructed to tell security that they were there to meet with Jones or State Senator Brandon Beach, though Jones has since rejected the idea that he was a “‘point of contact’ for the gathering.”<sup>591</sup> The likelihood of Trump’s direct involvement here is further bolstered by evidence of Trump’s personal role in the implementation of the false elector effort within the states as detailed by the January 6 Committee in its fourth hearing. The Committee revealed that Trump personally contacted the head of the RNC and, on that call, had Eastman request assistance in gathering individuals to serve in the false-electors plan across states where litigation challenging the election outcome was pending, and otherwise was in direct contact with officials in the states.<sup>592</sup> There is therefore evidence that Trump was directly involved in the plan for the false electors to meet and submit ballot certificates purporting to cast votes for Trump and Pence. Given this background, a factfinder may be able to go even further to

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<sup>588</sup> Memorandum from Kenneth Chesebro to Judge James R. Troupis on the Real Deadline for Settling a State’s Electoral Votes (Nov. 18, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-memorandum-to-james-r.-troupis-attorney-for-trump-campaign-wisconsin-november-18-2020.pdf>; Memorandum from Kenneth Chesebro to Judge James R. Troupis on Statutory Requirements for December 14 Electoral Votes (Dec. 9, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-memorandum-to-james-r.-troupis-attorney-for-trump-campaign-wisconsin-december-9-2020.pdf>.

<sup>589</sup> Gardner et al., *supra* note 218.

<sup>590</sup> Donald J. Trump, Remarks at a Campaign Rally Prior to the Georgia State Senate Election Runoff in Valdosta, Georgia (Dec. 5, 2020) (transcript available in The American Presidency Project at the University of California, Santa Barbara), <https://tinyurl.com/s7yxup8f>.

<sup>591</sup> Gardner et al., *supra* note 218.

<sup>592</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

infer that Trump directly solicited the creation of the fabricated electoral ballots in Georgia—and to develop additional evidence beyond what is in the public record.

It should also be noted that at least two other acts could satisfy the statutory definition of criminal solicitation. The first is Giuliani entreating Georgia legislators to call a special session to appoint electors for Trump. The other is Trump’s after-the-fact admission of soliciting Governor Kemp to call for a special election which would have invalidated Biden’s victory. Note, however, that to meet the statutory definition of criminal solicitation, the underlying crime of making a false statement (Ga. Code Ann. § 16-10-20) would also have to be established. The viability of these possible charges is described in more detail below.

#### **b. Intent**

If Trump engaged in solicitation, the next question is whether he did so with the intent that the person he solicited actually carry out the solicited conduct. This is clear from the statutory text of Section 21-2-604, which requires only that an individual harbor “intent that another person engage in conduct constituting a felony.”<sup>593</sup>

Under black letter Georgia law, intent “can be inferred,” and the existence of intent is “a question of fact for the jury after considering all the circumstances surrounding the acts of which the accused is charged.”<sup>594</sup> In ascertaining intent for solicitation offenses, Georgia courts pay careful attention to the solicitor’s words, conduct, and surrounding context. For instance, a defendant who “importuned [an undercover officer] to get in the car to ‘ride around and do a [drug] deal’” had the requisite intent to be found guilty of criminal solicitation—even though he did not

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<sup>593</sup> Ga. Code Ann. § 21-2-604(a)(1). At least one court in Georgia has stated that solicitation requires intent for another “to commit a felony.” *Eng. v. State*, 290 Ga. App. 378, 380 (2008). But that case should not be read to heighten the intent requirement for criminal solicitation. In *Eng.*, the solicited conduct was murder, and so there was (and could be) no reasonable dispute that the solicited conduct was a felony.

<sup>594</sup> *Schlesselman v. State*, 332 Ga. App. 453, 455 (2015) (quoting *Collins v. State*, 276 Ga. App. 358, 623 S.E.2d 192 (2005)).

“set up the sale” or “negotiate the price.”<sup>595</sup> By contrast, a case where a defendant simply handed someone “a package that was purported to be drugs” without “asking [the third party] to engage in anything,” would be insufficient to show the requisite intent to solicit drug trafficking.<sup>596</sup>

Here, the intent element is likely satisfied for all four acts of solicitation described above: Trump’s call to Raffensperger; his call to Watson; his call to the governor; and his solicitation of the false electoral slates. There is no credible basis for concluding that Trump was joking or merely offering an abstract hypothetical suggestion about what might happen when he made his demands. Indeed, three of the four acts involve a call from Trump expressing a clear opinion to state officials about how they should (and should not) exercise the powers and duties of their offices—accompanied by a request (and at some points a demand and a threat) that they do what he asked them to do. Trump and his associates plainly intended that the targets of the requests do what was asked of them.

Prosecutors will also rely on the context surrounding each solicitation made to help establish the requestor’s requisite intent. As demonstrated by the January 6 Committee’s work, Trump and his associates crafted a multi-pronged plan to overturn the election results. This plan included the following:

1. Declare early victory before the vote count was tabulated and finalized.
2. Create uncertainty in the congressional certification of electoral votes by submitting a slate of false electors.

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<sup>595</sup> Forrester v. State, 255 Ga. App. 456, 458 (2002).

<sup>596</sup> Dimas v. State, 276 Ga. App. 245, 246 (2005).

3. Undermine the integrity of the election by advancing several disproven theories including:
  - i. Questioning the validity of signatures on mail-in ballots submitted in counties Biden won;
  - ii. Falsely claiming that suitcases of ballots—all, or the majority, of which were for Biden—were improperly counted; and
  - iii. Falsely claiming that the voting machines were hacked to give Biden the victory.
4. Pressure the governor and the Georgia legislature to use their authority to overturn the election results based on the theories above despite all of them being deemed unfounded; and
5. Pressure the Georgia secretary of state and his staff to find more votes for Trump to establish his non-existent win.

Each solicitation of a particular crime discussed below was part of this plan, and therefore, taken as a whole, could cause a factfinder to determine that sufficient intent existed for each charge.

On the Raffensperger call, for example, Trump reminded Raffensperger several times to find “11,000” votes and urged Raffensperger and/or his staff to “meet tomorrow and work out on all these numbers.”<sup>597</sup> He stated that failing to do so would pose a “big risk” to Raffensperger and his staff, invoking the specter of criminal liability.<sup>598</sup> Coming directly from Trump, the threat and the intent were unmistakable: he wanted Raffensperger to find enough votes to overturn the election results. Furthermore, Trump’s January 2 call to Raffensperger cannot be evaluated in isolation. Raffensperger had been the focus of a months-long pressure campaign from Trump and

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<sup>597</sup> Gardner & Firozi, *supra* note 2.

<sup>598</sup> *Id.*

his allies baselessly arguing that Raffensperger was covering up a treasonous conspiracy. As a result, Trump's supporters had engaged in a series of threatening behaviors directed toward Raffensperger and his family attempting to pressure him into complying with Trump's wishes or resigning.<sup>599</sup> Raffensperger's email and cell phone were made public, his wife received "sexualized" text messages, and his daughter-in-law's home was broken into.<sup>600</sup>

Similarly, Trump solicited Watson to thoroughly investigate pro-Biden strongholds in Georgia with an eye toward invalidating ballots based on, among other things, unfounded signature mismatches (using alternative procedures and timeframes that Trump described with specificity). These were not mere suggestions. In the context of the call, it is apparent that Trump intended that Watson conduct her investigation as he requested. That is why he provided so many details about how she should conduct her investigation; it is why he told her what she was doing was "so important;" it is why he emphasized that she would be praised if she reached the "right answer" in her investigation; and it is why he asked her to do "whatever [she] can do."<sup>601</sup> Moreover, Trump's requests to Watson were made the day after his chief of staff, Mark Meadows, took an unannounced trip to visit Watson where she was conducting her inquiry. Meadows showed up with his armed Secret Service detail and requested entry into the site.<sup>602</sup> It is implausible to suggest that Meadows' visit, followed by a call from the president, was not meant to be intimidating or persuasive. It is also implausible to suggest that Meadows' trip and the nature of the call did not give commanding, authoritative weight to Trump's requests. The fact that there was discussion by Meadows of "send[ing] some of the investigators in [Watson's] office in the words of one White

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<sup>599</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>600</sup> *Id.*

<sup>601</sup> American Oversight, *supra* note 253; Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>602</sup> Niese, *supra* note 242.

House aide a shitload of POTUS stuff, including coins, actual autographed MAGA hats, etc.,” is additional evidence that Trump’s intent was to curry favor and influence Watson’s conduct.<sup>603</sup>

The other two potential examples of solicitation—Giuliani’s entreaties to the state legislature<sup>604</sup> and Trump’s December 5 call to Kemp urging him to call a special legislative session<sup>605</sup>—also evince clear intent on Giuliani’s and Trump’s parts. Giuliani’s December 3 meeting with the Georgia Senate Judiciary Subcommittee came after a statewide recount confirmed Trump lost the state—and in the midst of a second recount that only confirmed the initial result.<sup>606</sup> His second meeting at the state capitol, on December 30, was three weeks after Raffensperger certified the results for a third time, once again confirming Trump’s loss.<sup>607</sup> Furthermore, the conduct Giuliani implored the state legislators to undertake—reconvening to appoint Trump electors despite Biden’s win—was plainly illegal on multiple levels. Giuliani, a lawyer, could hardly plead ignorance about the state election laws he and the Trump campaign were seeking to undermine.

The same evidence of intent largely applies to Trump’s December 5 call to Kemp. That call, in which Trump pushed the governor to call a special session of the legislature to switch the state’s electors from Biden to the then-president, also came after a statewide recount affirmed

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<sup>603</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>604</sup> Georgia House of Representatives, Governmental Affairs 12.10.20, YOUTUBE (May 5, 2022), <https://www.youtube.com/watch?v=9EfgETUKfsI>; True the Vote, Georgia Senate Judiciary Subcommittee Hearing on Elections (Part 2), YOUTUBE (Dec. 5, 2020), <https://www.youtube.com/watch?v=c1o8-y5ou5Y>; Right Side Broadcasting Network, LIVE: Georgia State Senate Holds Meeting on 2020 Election Fraud 12/30/20, YOUTUBE (Dec. 30, 2020), [https://www.youtube.com/watch?v=u5ZP\\_HpBKos&t=2s](https://www.youtube.com/watch?v=u5ZP_HpBKos&t=2s).

<sup>605</sup> Holmes & Stracqualursi, *supra* note 180.

<sup>606</sup> True the Vote, Georgia Senate Judiciary Subcommittee Hearing on Elections (Part 2), YOUTUBE (Dec. 5, 2020), <https://www.youtube.com/watch?v=c1o8-y5ou5Y>; Amanda Zoch, Georgia Completes Second Statewide Recount, NCSL (Dec. 9, 2020), <https://www.ncsl.org/research/elections-and-campaigns/georgia-completes-second-statewide-recount-magazine2020.aspx>.

<sup>607</sup> Right Side Broadcasting Network, LIVE: Georgia State Senate Holds Meeting on 2020 Election Fraud 12/30/20, YOUTUBE (Dec. 30, 2020), [https://www.youtube.com/watch?v=u5ZP\\_HpBKos&t=2s](https://www.youtube.com/watch?v=u5ZP_HpBKos&t=2s); Kate Brumback, Georgia again certifies election results showing Biden won, AP NEWS (Dec. 7, 2020), <https://apnews.com/article/election-2020-joe-biden-donald-trump-georgia-elections-4eeea3b24f10de886bcdeab6c26b680a>.

Biden's victory.<sup>608</sup> The votes had been cast and retallied; Trump had lost; and lawsuits challenging the results were floundering or soon-to-be dismissed.<sup>609</sup> Lacking any evidence that would confer upon him reasonable suspicion that the vote was fraudulent, Trump still pressed Kemp to unilaterally convene the legislature for the purpose of reversing Trump's loss.<sup>610</sup> Trump may have had that goal—election fraud via the changing of the results by the state legislature—in mind when he made the call to Kemp on December 5.

Trump's intent is only confirmed by reference to the broader circumstances in which these calls occurred. As described in detail above, Trump was unquestionably set on overturning the certification of the election results in Georgia. His full course of conduct from Election Day through January 6—as well as his actions preceding and following that time period—demonstrates his consistent intent to solicit, pressure, and threaten government officials to participate in plans to overturn an election that he lost. Trump has continued to make false statements about the Georgia election and malign Georgia officials up to the present time.<sup>611</sup> More than a year and a half after the election, in July 2022, Trump posted: “[m]y phone calls to Georgia were PERFECT.”<sup>612</sup>

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<sup>608</sup> Holmes & Stracqualursi, *supra* note 180; Press Release, Office of Georgia Secretary of State Brad Raffensperger, Historic First Statewide Audit of Paper Ballots Upholds Result of Presidential Race (Nov. 19, 2020), <https://sos.ga.gov/news/historic-first-statewide-audit-paper-ballots-upholds-result-presidential-race>.

<sup>609</sup> See, e.g., Philip Ewing, Trump Launches Broad Legal Gambit Paired With Moves To Raise Public Doubts On Results, NPR (Nov. 5, 2020), <https://www.npr.org/2020/11/05/931699984/trump-launches-broad-legal-gambit-paired-with-public-doubt-raising-on-results>; see also Mark Niesse & David Wickert, Judge dismisses lawsuit challenging Biden's win in Georgia, THE ATLANTA JOURNAL-CONSTITUTION (Dec. 7, 2020), <https://www.ajc.com/politics/breaking-judge-dismisses-lawsuit-challenging-bidens-win-in-georgia/UXSI5WUROJA4JHLTVTJ6UWNWOM/>.

<sup>610</sup> Holmes & Stracqualursi, *supra* note 180.

<sup>611</sup> See, e.g., Mark Moore, Trump insists he did 'NOTHING wrong' in calls to Georgia officials after 2020 vote, NEW YORK POST (July 7, 2022), <https://nypost.com/2022/07/07/trump-insists-he-did-nothing-wrong-in-calls-to-georgia-officials-after-2020-vote/>; Morris & Murray, *supra* note 27; Gardner & Firozi, *supra* note 2. Trump's comments at a September 25, 2021 Georgia rally asking Gov. Kemp to call a 'special election' to decertify Biden's win provide further evidence. Rally Speech Transcript, *supra* note 174; “[A]fter a crime has been committed, any attempt by a person who is subsequently accused of the crime to mislead the investigating officers is generally relevant and admissible, and any attempt by such person to obstruct an investigation of an issue is relevant on the trial of such issue.” Parker v. State, 181 Ga. App. 590 (1987) (quoting Moon v. State, 154 Ga. App. 312, 315(5), 268 S.E.2d 366 (1980)).

<sup>612</sup> Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (July 7, 2022, 8:32 AM), <https://truth-social.com/@realDonaldTrump/posts/108606072781135622>.



He also posted: “I did NOTHING wrong in Georgia, but others did. They CHEATED in the 2020 Presidential Election, and those are the ones that should be investigated (and prosecuted)!”<sup>613</sup>

Even though Trump’s calls to Raffensperger, Watson, and Carr failed, that only hardened his resolve to keep trying, as evidenced by his recurring calls to Georgia officials, his consistent attempts to get the U.S. Department of Justice to intervene, and his advancement of the false-electors plan.<sup>614</sup>

The intricacy of the plan by the Trump campaign to solicit and submit false electors also evidences Trump’s intent. Memos from Trump attorneys—Eastman,<sup>615</sup> Chesebro,<sup>616</sup> and Ellis<sup>617</sup>—all describe in detail how “alternate slate[s] of electors” could overturn the election and allow Trump to retain the presidency. In the weeks after the election, Trump personally called the head of the RNC and had Eastman ask for their help assembling groups of false electors in Georgia and other swing states that Trump had lost.<sup>618</sup> Emails from his staffers bluntly describe the purpose as being “so that ‘someone’ in Congress can make an objection when they start counting votes, and

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<sup>613</sup> Moore, *supra* note 611.

<sup>614</sup> Here’s every word from the 9th Jan. 6 committee hearing on its investigation, NPR (Oct. 13, 2022), <https://www.npr.org/2022/10/13/1125331584/jan-6-committee-hearing-transcript> (hereinafter “Ninth Jan. 6 Hearing Transcript”).

<sup>615</sup> First Memorandum from John Eastman on Jan. 6 Scenario (accessed Aug. 1, 2022), <https://www.cnn.com/2021/09/21/politics/read-eastman-memo/index.html>; Second Memorandum from John Eastman on January 6 Scenario (accessed Aug. 23, 2022), <https://www.washingtonpost.com/context/john-eastman-s-second-memo-on-january-6-scenario/b3fd2b0a-f931-4e0c-8bac-c82f13c2dd6f/>.

<sup>616</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80; Memorandum from Kenneth Chesebro to Judge James R. Troupis on the Real Deadline for Settling a State’s Electoral Votes (Nov. 18, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-memorandum-to-james-r.-troupis-attorney-for-trump-campaign-wisconsin-november-18-2020.pdf>; Memorandum from Kenneth Chesebro to Judge James R. Troupis on Statutory Requirements for December 14 Electoral Votes (Dec. 9, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-memorandum-to-james-r.-troupis-attorney-for-trump-campaign-wisconsin-december-9-2020.pdf>.

<sup>617</sup> Memorandum from Jenna Ellis to President Donald Trump on Constitutional Analysis of Vice President Authority for January 6, 2021 Electoral College Vote Count (Dec. 31, 2020), <https://www.politico.com/f/?id=0000017d-a4d0-dac5-abff-a5ddcf600000>; Memorandum from Jenna Ellis to Jay Sekulow on Vice President Authority in Counting Electors pursuant to U.S. Constitution and 3 U.S. Code §§ 5 and 15 (Jan. 5, 2020), <https://www.politico.com/f/?id=0000017d-a4d0-dac5-abff-a5ddcf600000>.

<sup>618</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

start arguing that the ‘fake’ votes should be counted.”<sup>619</sup> While much remains to be learned, and the district attorney is undoubtedly probing the facts, the pattern of emerging evidence suggests that Trump intended for the phony electors to do what they did, and indeed depended on it as a critical part of his plan to overturn the election.

There is ample public evidence that Trump, in fact, knew he lost the election and knew fraud claims were bogus. But it would be no defense under Georgia law for Trump to have genuinely believed that there was fraud. For purposes of criminal solicitation (and the other crimes discussed herein), it is legally irrelevant whether Trump thought he was the “true” winner: Winners and losers alike can run afoul of the criminal statutes we discuss. A loser who believes he is a winner has no special license under Georgia law to solicit state officials to engage in conduct constituting a crime. This issue is discussed further in Section IV.F.

### **c. Crime**

The final element of criminal solicitation under Section 21-2-604 asks whether the conduct that Trump solicited constituted a crime. In other words, if the people that Trump solicited did what he requested, would they have committed crimes? Here is where Georgia separates the degrees of the offense. If the solicited conduct constitutes a felony, the defendant has committed first-degree criminal solicitation; if the solicited conduct constitutes a misdemeanor, the defendant has committed second-degree criminal solicitation. As explained above, a person convicted of second-degree criminal solicitation “shall be punished as for a misdemeanor.”<sup>620</sup> The punishment for a misdemeanor in Georgia is either “a fine not to exceed \$1,000” or “confinement...not to

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<sup>619</sup> Haberman & Broadwater, *supra* note 201.

<sup>620</sup> Ga. Code Ann. § 21-2-604(b)(2).

exceed 12 months, or both[.]”<sup>621</sup> For purposes of the criminal solicitation statute, the relevant offenses are those housed in Article XV of the Georgia Election Code.

Based on our preliminary analysis of Trump’s conduct and Georgia law, a diverse array of criminal statutes may cover the conduct that Trump solicited. We will first address potential misdemeanor crimes to establish second-degree solicitation of election fraud. We will then consider felonies that would sustain a first-degree charge.

**(i) Possible Misdemeanors**

**a) Failure of Public or Political Officer to Perform Duty (Ga. Code Ann. § 21-2-596)**

Ga. Code Ann. § 21-2-596 provides as follows: “Any public officer or any officer of a political party or body on whom a duty is laid by this chapter [Title 21, Chapter 2] who willfully neglects or refuses to perform his or her duty shall be guilty of a misdemeanor.”

Under Title 21, Chapter 2, the secretary of state is entrusted with administering Georgia’s statewide elections and “shall perform” an enumerated list of duties—including “receiv[ing] from the superintendent the returns of primaries and elections,” “canvass[ing] and comput[ing] the votes cast for candidates,” and “perform[ing] ... other duties as may be prescribed by law.”<sup>622</sup> In light of this statutory language, it is clear that Raffensperger is an “officer ... on whom a duty is laid by this chapter.”<sup>623</sup> The critical question is therefore whether Raffensperger would have willfully neglected his duty—or failed to perform his duty—if he engaged in the conduct solicited by Trump.

We believe the answer to that question is “yes.” Courts have held that a “willful neglect” of official duties must be “a flagrant act or omission, an intentional violation of a known rule or

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<sup>621</sup> Ga. Code Ann. § 17-10-3(a)(1).

<sup>622</sup> Ga. Code Ann. § 21-2-50.

<sup>623</sup> Ga. Code Ann. § 21-2-596.

policy, or a continuous course of reprehensible conduct.”<sup>624</sup> If Raffensperger had engaged in the conduct that Trump solicited—namely, “finding” enough votes to flip the outcome of the election, publicly reporting unsubstantiated accusations of fraud to benefit Trump, and otherwise taking steps to undo or reverse the certification of the election results—that would surely have risen to the level of “willful neglect” of Raffensperger’s official duties. That includes his duties to “tabulate, compute, and canvass the votes cast for each slate of presidential electors,”<sup>625</sup> his duty to “certify the votes cast for all candidates,”<sup>626</sup> and his duties upon “receiving and computing the returns of presidential electors.”<sup>627</sup>

A similar analysis likely applies to Watson. Although an investigator in the office of the secretary of state does not have expressly enumerated statutory duties under Title 21, Chapter 2, a person who holds that position is likely bound to the same legal duties that govern the secretary of state, since investigators perform their job in furtherance of the duties and functions delegated by the secretary of state. For reasons similar to those given above, the acts that Trump solicited Watson to perform may well constitute the misdemeanor offense of willful neglect in performance of public duty. As noted above, if the call was received in Fulton County, then the Fulton County district attorney has jurisdiction to prosecute.

**b) Making a False Statement (Ga. Code Ann. § 21-2-560)**

Under Ga. Code Ann. § 21-2-560, “any person who shall make a false statement under oath or affirmation regarding any material matter or thing relating to any subject being investigated, heard, determined, or acted upon by any public official, in accordance with this chapter, shall be

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<sup>624</sup> Terry v. Houston Cnty. Bd. Of Educ., 178 Ga. App. 296, 299 (1986) (construing Ga. Code Ann. § 20-2-940, which provides for termination or suspension of teachers for “willful neglect of duties”).

<sup>625</sup> Ga. Code Ann. § 21-2-499.

<sup>626</sup> *Id.*

<sup>627</sup> Ga. Code Ann. § 21-2-502.

guilty of a misdemeanor.”<sup>628</sup> This prohibition on false statements is likely concerned primarily with members of the general public who may find themselves embroiled in an election investigation. But its language sweeps more broadly, covering any false statement under oath “regarding any material matter or thing relating to any subject being ... heard ... or acted upon by any public official.”<sup>629</sup>

There is little question that the accuracy of the 2020 election vote count was material to the matters being investigated, determined, and acted upon by Secretary Raffensperger. Therefore, the conduct Trump solicited from Raffensperger, Watson, and Governor Kemp, as well as Giuliani’s urgings to the Georgia legislature, would have been possibly criminal in nature under Georgia law because each person would have had to first lie about the actual outcome of the election and then either proclaim, certify, or otherwise affirm that lie as they took the official steps needed in order to effectuate the action solicited.

In his phone call to Watson, Trump repeatedly urged her to depart from the established procedures of her audit<sup>630</sup> and find the “dishonesty” that would overturn the Georgia election.<sup>631</sup> If she had yielded to Trump’s request and manufactured any “dishonesty,” she would have needed to make a false statement about the “accuracy, security, and reliability of the vote in Georgia.”<sup>632</sup> Moreover, that false statement would have been made in violation of an oath because Georgia law provides that “[a]ll persons who ... assist with [an] audit shall take and sign an oath that they will conduct the audit accurately and securely.”<sup>633</sup>

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<sup>628</sup> Ga. Code Ann. § 21-2-560.

<sup>629</sup> *Id.*

<sup>630</sup> Gardner, *supra* note 251.

<sup>631</sup> Morris & Murray, *supra* note 27.

<sup>632</sup> Press Release, Office of Georgia Secretary of State Brad Raffensperger, Secretary Raffensperger Launches Cobb County and Statewide Signature Match Audits (Dec. 14, 2020), <https://sos.ga.gov/news/secretary-raffensperger-launches-cobb-county-and-statewide-signature-match-audits>.

<sup>633</sup> Ga. Comp. R. & Regs. 183-1-15-.04 (2020), <https://rules.sos.ga.gov/gac/183-1-15#:-:text=be%20corrected%20accordingly,-.Rule%20183%2D1%2D15%2D>.

Similarly, in their January 2 phone call, Trump demanded that Raffensperger illegally alter the election outcome by “find[ing]” additional votes to validate Trump’s false claims of fraud and thereby allow him to claim victory in Georgia.<sup>634</sup> Effectuating these solicitations would have required Raffensperger to make false statements. By the time of Trump’s phone call on January 2, all ballots cast in Georgia were counted three times, and as Raffensperger testified before Congress, the “[t]hree counts, all remarkably close, ... showed that President Trump did come up short.”<sup>635</sup> Additionally, by the time of Trump’s call, the Cobb County absentee ballot signature audit that Trump had called Watson about had found “a 99.99% accuracy rate” and identified “[n]o fraudulent absentee ballots.”<sup>636</sup> Any statement by Raffensperger contrary to these vote counts and audit findings would have been false. As secretary of state, Raffensperger oversees all voting<sup>637</sup> in Georgia and is bound by his oath of office to “support the Constitution of the United States and the Constitution of Georgia.”<sup>638</sup> As with Watson, it is inarguable that the false statement Raffensperger would need to make in order to do as Trump wanted related to a “material matter ... relating to [a] subject being ... determined, or acted upon by [a] public official.”<sup>639</sup> Here, the material matter was the official vote tallies in Georgia’s 2020 presidential election.

Trump also wanted the matter to be acted upon by the joint session of the U.S. Congress on January 6, 2021. Moreover, the matter may have necessitated action by other officials in Georgia, including potentially the state legislature, the governor, and others should Raffensperger have made a statement that he had found votes to contradict the previously certified election

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<sup>634</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>635</sup> *Id.*

<sup>636</sup> Press Release, Office of Georgia Secretary of State Brad Raffensperger, 3rd Strike Against Voter Fraud Claims Means They’re Out After Signature Audit Finds No Fraud (Dec. 29, 2020), <https://sos.ga.gov/news/3rd-strike-against-voter-fraud-claims-means-theyre-out-after-signature-audit-finds-no-fraud>.

<sup>637</sup> The Office of the Georgia Secretary of State (accessed Aug. 4, 2022), <https://sos.ga.gov/>.

<sup>638</sup> Ga. Code Ann. §§ 45-3-12 to -13.

<sup>639</sup> Ga. Code Ann. § 21-2-560.

results. Therefore, Trump's demands of both Watson and Raffensperger, under Ga. Code Ann. § 21-2-560, would appear to constitute a criminal offense.

Additionally, in December, after the election had been certified, both Trump and Giuliani implored the governor and members of the Georgia legislature to call for a special session to appoint electors that would support Trump. Doing so, however, would have required each branch of government to adopt and make false statements about the existence of election fraud to justify their actions. Per the Constitution of the State of Georgia art. V, § 2, ¶ VII (a), in order to convene a special session, the governor must issue a "proclamation."<sup>640</sup> Under section (b) of the same article, the governor shall also issue a proclamation when three-fifths of the Georgia legislature "certif[ies] to the Governor in writing ... that in their opinion an emergency exists in the affairs of the state."<sup>641</sup> Executing the gubernatorial proclamation and legislative certification would likely include an oath or affirmation that would satisfy the statutory requirements, thereby satisfying the elements of the crime and creating potential criminal liability for any person soliciting these elected officials to make false statements about the 2020 election in the course of their duties.

Lastly, looking at the plain language of the documents signed by the false electors, prosecutors could find that each one made a false statement under oath or affirmation, thereby appearing to trigger criminal liability for Sinners, Chesebro, and others involved in soliciting the false electors to commit election fraud. In the documents addressed to Governor Kemp and ultimately submitted to the National Archives, the false electors state that they are "duly elected" and "certify" their votes for Trump and Pence as though they won the vote count in Georgia.<sup>642</sup> In fact, the false electors were not "duly elected" because, by the time the 16 Trump electors met on

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<sup>640</sup> Ga. Const. art. V, ¶ VII (a).

<sup>641</sup> Ga. Const. art. V, ¶ VII (b).

<sup>642</sup> False Electors Certificates at 7.

December 14, two recounts had confirmed Biden's win and Trump's loss in Georgia.<sup>643</sup> The document also includes the following language: "Witness the hands and seals of the undersigned as the duly elected and qualified Electors of the President and Vice President of the United States of America from the State of Georgia" and "(SEAL)" next to each false elector's signature.<sup>644</sup> Taken as a whole, the documents appear to contain false statements and were made under seal as evidence of an affirmation of the statements therein. Upon presenting evidence that Sinners and others solicited this conduct, all of the elements of criminal solicitation to commit election fraud by making false statements would be satisfied.

**c) Destroying, Defacing, or Removing Ballots (Ga. Code Ann. § 21-2-576 and Ga. Code Ann. § 21-2-576)**

Under Ga. Code Ann. § 21-2-576, it is a misdemeanor to "willfully destroy[] or deface[] any ballot or willfully delay[] the delivery of any ballots."<sup>645</sup> Similarly, under Ga. Code Ann. § 21-2-577, it is a misdemeanor to "remov[e] any ballot from any book of official ballots."<sup>646</sup> In his phone call to Watson, Trump suggested that it was her job to find "dishonesty" in Georgia's election, even though there is strong evidence that he knew there was no fraud that would have affected its outcome.<sup>647</sup> He solicited her to do "whatever she [could]" to find "dishonesty."<sup>648</sup> He also urged her to "get to Fulton," a heavily pro-Biden jurisdiction.<sup>649</sup> Trump pushed Watson to deviate from established protocol and urged her to go back "two years, as opposed to just checking you know one against the other" during the signature checks.<sup>650</sup> In essence, what Trump was

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<sup>643</sup> Brumback, *supra* note 15.

<sup>644</sup> False Electors Certificates at 7. For the false electors' defenses, see Electors Oppo. discussed at p. 51, n. 227 *supra*.

<sup>645</sup> Ga. Code Ann. § 21-2-576.

<sup>646</sup> Ga. Code Ann. § 21-2-577.

<sup>647</sup> American Oversight, *supra* note 253; Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>648</sup> American Oversight, *supra* note 253; Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>649</sup> American Oversight, *supra* note 253; Election Night Reporting, Fulton County., Ga., President of The United States, Clarity Elections (updated Nov. 20, 2020), <https://results.enr.clarityelections.com/GA/Fulton/105430/web.264614/#!/detail/1>.

<sup>650</sup> American Oversight, *supra* note 253.



requesting was for Watson to willfully destroy or remove official ballots in order to invalidate Biden's win in Georgia.

In Trump's January 2 phone call to Raffensperger, he pressed Raffensperger to disqualify thousands of votes he knew were cast legitimately.<sup>651</sup> Citing well-known conspiracy theories, Trump alleged that fraudulent Biden votes were smuggled into Atlanta's State Farm Arena inside suitcases and illegal votes were cast by dead people and convicted felons who are disenfranchised under Georgia law.<sup>652</sup> As explained above, and in Section I of this report, by the time Trump called Raffensperger on January 2, all ballots cast in Georgia were counted and validated three times, and as Raffensperger testified before Congress, the "[t]hree counts, all remarkably close, ... showed that President Trump did come up short."<sup>653</sup> Additionally, by the time of Trump's call, the Cobb County absentee ballot signature audit that Trump had called Watson about had found "a 99.99% accuracy rate" and identified "[n]o fraudulent absentee ballots."<sup>654</sup>

For Raffensperger to change the vote count by several thousand votes would necessarily entail him willfully destroying, defacing, or removing ballots from the books that had been thrice validated and thus overturning certified election results in favor of Trump. Trump's solicitation of Watson and Raffensperger to commit these acts was criminal in nature under Ga. Code Ann. § 21-2-576 and Ga. Code Ann. § 21-2-577. All these analyses require logical inferences in determining what officials would have needed to do in order to comply with Trump's solicitations, but these inferences are well supported by the facts and the law.

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<sup>651</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>652</sup> *Id.*

<sup>653</sup> *Id.*

<sup>654</sup> Press Release, Office of Georgia Secretary of State Brad Raffensperger, 3rd Strike Against Voter Fraud Claims Means They're Out After Signature Audit Finds No Fraud (Dec. 29, 2020), <https://sos.ga.gov/news/3rd-strike-against-voter-fraud-claims-means-theyre-out-after-signature-audit-finds-no-fraud>.

**(ii) Possible Felonies**

**a) Interference with Primaries and Elections (Ga. Code Ann. § 21-2-566)**

Under the Georgia Election Code—specifically, Ga. Code Ann. § 21-2-566—it is a felony to interfere with elections by engaging in one of eight enumerated acts:

Any person who:

- (1) Willfully prevents or attempts to prevent any poll officer from holding any primary or election under this chapter;
- (2) Uses or threatens violence in a manner that would prevent a reasonable poll officer or actually prevents a poll officer from the execution of his or her duties or materially interrupts or improperly and materially interferes with the execution of a poll officer's duties;
- (3) Willfully blocks or attempts to block the avenue to the door of any polling place;
- (4) Uses or threatens violence in a manner that would prevent a reasonable elector from voting or actually prevents any elector from voting;
- (5) Willfully prepares or presents to any poll officer a fraudulent voter's certificate not signed by the elector whose certificate it purports to be;
- (6) Knowingly deposits fraudulent ballots in the ballot box;

- (7) Knowingly registers fraudulent votes upon any voting machine;
- or
- (8) Willfully tampers with any electors list, voter's certificate, numbered list of voters, ballot box, voting machine, direct recording electronic (DRE) equipment, electronic ballot marker, or tabulating machine shall be guilty of a felony and, upon conviction thereof, shall be sentenced to imprisonment for not less than one nor more than ten years or to pay a fine not to exceed \$100,000.00, or both.

The acts that Trump solicited appear to most directly evoke paragraph (8), which (as noted) applies where a person “[w]illfully tampers with any electors list, voter’s certificate, numbered list of voters, ballot box, voting machine, direct recording electronic (DRE) equipment, electronic ballot marker, or tabulating machine.”<sup>655</sup> Looking to the statutory text, the felony of willful tampering under Section 21-2-566(8) has two elements: (i) tampering with the specified materials and (ii) willfulness. Although “tampering” is not defined in this provision, Georgia law elsewhere explains that tampering with evidence occurs when a person (with the intent to obstruct justice) “knowingly destroys, alters, conceals, or disguises physical evidence or makes, devises, prepares, or plants false evidence.”<sup>656</sup> That same definition of “tampers” would likely apply here. With respect to the requirement of willfulness, that term usually requires only that the person “intended to do the act prohibited by the statute”<sup>657</sup>—an interpretation of willfulness that Georgia courts have

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<sup>655</sup> Ga. Code Ann. § 21-2-566(8).

<sup>656</sup> Ga. Code Ann. § 16-10-94(a). Courts have generally held that a person commits an act of evidence tampering when he destroys or alters evidence by (for instance) “wiping the passenger side of the victim’s vehicle” and “bleaching and washing [defendant’s] clothing,” *see* *Brown v. State*, 288 Ga. 404, 405 (2010), or by throwing evidence in the trash, *see* *Thornton v. State*, 331 Ga. App. 191, *aff’d*, 298 Ga. 709 (2016).

<sup>657</sup> *Cox v. Garvin*, 278 Ga. 903, 906 (2005).

applied in the criminal context.<sup>658</sup> In some criminal cases, a requirement of willfulness has been interpreted as requiring actual knowledge of illegality, rather than mere intent to commit the prohibited act.<sup>659</sup>

Under these standards, Trump, Meadows, Chesebro, Sinners, and others involved in securing the false electors could be subject to criminal investigation for soliciting others to tamper with the legitimate electors list. The public record contains evidence that each of these individuals knew or should have known of the illegality of their actions. For example, recipients of Chesebro's December 9, 2020 memo were aware that "none of the Trump-Pence electors [were then] certified as having been elected by the voters of their State."<sup>660</sup> Likewise, those involved knew, or should have known, that the governor refused to ratify the false-electors list because doing so did not comport with the law, thereby cementing the fact that the plan was illegal. The illegitimacy of the process was also evident by the call for "secrecy and discretion" in Sinners' email to the false electors as well as his call for deceiving security guards in order to attend the clandestine meeting at the state capitol.<sup>661</sup> All of these actions were conducted to deliberately "prepare and plant" a false-electors list with the express intent to create uncertainty and interfere with certification of the election results.

In addition, the conduct that Trump solicited Raffensperger to undertake may qualify as felonious tampering with the ballots and related materials. When Trump demanded that

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<sup>658</sup> *Cawthorn v. State*, 350 Ga. App. 741, 748 n.30 (2019). Similarly, the Georgia Suggested Pattern Jury Instructions for criminal cases define "criminal intent" in "specific intent" cases as simply the intention to commit the act prohibited by statute, not an intention to violate the law or to violate a penal statute. Suggested Pattern Jury Instructions, Vol. II: Criminal Cases (4th ed.), § 1.41.10.

<sup>659</sup> *Kendall v. State*, 9 Ga. App. 794 (1911). *See also* *Terry v. Houston Cnty. Bd. Of Educ.*, 178 Ga. App. 296, 299 (1986) (interpreting "willful neglect of duty" as "an intentional violation of a known rule or policy, or a continuous course of reprehensible conduct").

<sup>660</sup> Memorandum from Kenneth Chesebro to Judge James R. Troupis on Statutory Requirements for December 14 Electoral Votes (Dec. 9, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-memorandum-to-james-r.-troupis-attorney-for-trump-campaign-wisconsin-december-9-2020.pdf>.

<sup>661</sup> Gardner et al., *supra* note 218. The false electors point out that in the event, the gathering ended up being disclosed.

Raffensperger “find 11,780 votes”—and referenced “300,000 fake ballots” and 5,000 ballots cast by “dead people”—Trump clearly solicited Raffensperger to either “find” additional Trump votes or to discard Biden votes on the pretext that they were “fake.”<sup>662</sup> His clear request was that Raffensperger alter the final vote tallies so Trump would appear to have won the election. For Raffensperger to engage in this conduct, he would unquestionably have had to alter actual voter data to “find” more Trump votes—whether by tampering with lists of voters, voting machines, ballot records, DRE equipment, tabulating machines, or voter/ballot data uploaded to the secretary of state’s website from tabulating machines and DRE equipment. This conduct would appear to qualify as an act of tampering with the specified materials under Section 21-2-566(8).

Moreover, this conduct likely would be willful under any applicable standard. Raffensperger surely would have intended to perform the specific acts in question, and as the chief elections officer in Georgia, he would have known that tampering with the election results in this manner was prohibited by law. Indeed, Raffensperger repeatedly expressed his view that Georgia had conducted “an accurate election”<sup>663</sup>—so any tampering by him intended to alter the vote tally and reverse the outcome would plainly have been willful.

It is possible that a similar analysis could apply to Trump’s acts of solicitation directed to Watson. He requested that she invalidate ballots on improper grounds. To the extent her conduct in doing so would have involved willful tampering “with any electors list, voter’s certificate, numbered list of voters, ballot box, voting machine, direct recording electronic (DRE) equipment, electronic ballot marker, or tabulating machine,”<sup>664</sup> it would have been criminal.

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<sup>662</sup> Gardner & Firozi, *supra* note 2.

<sup>663</sup> *Id.*

<sup>664</sup> Ga. Code Ann. § 21-2-566(8).

By the same token, if performing the specific acts that Trump solicited from Raffensperger and Watson would foreseeably have involved “[k]nowingly deposit[ing] fraudulent ballots in the ballot box” or “[k]nowingly register[ing] fraudulent votes upon any voting machine,”<sup>665</sup> those acts would also have been criminal under paragraphs (6) and (7) of Section 21-2-566.

In addition, as more information is learned about the unauthorized access and copying of voting machine data in Coffee County, particularly the specific methods used and any potential damage or impact on the machines, if venue can be established in Fulton County based on the calls to, or interaction with, the Atlanta-based firm orchestrating the access, Sidney Powell and others responsible for requisitioning the activity may be subject to criminal liability under this section of the election code or under the criminal code for computer trespass or computer invasion of privacy as discussed in more detail below.

**b) Counterfeit Ballots or Ballot Labels (Ga. Code Ann. § 21-2-575)**

Under Ga. Code Ann. § 21-2-575, “[a]ny person who makes, constructs, or has in his or her possession any counterfeit of an official ballot or ballot label shall be guilty of a felony.”<sup>666</sup> If Trump’s request that Raffensperger “find” 11,780 votes would foreseeably have involved the creation of false ballots, it would have been criminal in nature.

Separately, the Trump campaign’s request that individuals serve as alternate electors and sign and submit false ballot certificates also likely violates this criminal statute. There is no language in the statute to suggest that the term “official ballot” is limited to only a ballot used by a voter in a primary or general election. Counterfeiting an official ballot cast by electors voting on behalf of the state of Georgia in the Electoral College would seem to fall within the plain language

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<sup>665</sup> Ga. Code Ann. § 21-2-566(6), (7).

<sup>666</sup> Ga. Code Ann. § 21-2-575(a).

of the conduct prohibited by this criminal statute. Members of Trump's team almost certainly solicited individuals to violate this statute. Whether Trump can be proved to have committed the crime of soliciting the false electors to counterfeit ballots may turn on whether it can be inferred by a factfinder that Trump participated in the solicitation of any of the 16 individuals who submitted false certifications to engage in that conduct.<sup>667</sup> The evidence of Trump's personal involvement in the overall false electors effort is set forth throughout Section I and in particular in Section I.F.

**c) Fraudulent Entries; Unlawful Alteration or Destruction of Entries (Ga. Code Ann. § 21-2-562)**

Under Ga. Code Ann. § 21-2-562, it is a felony to willfully “insert[] or permit[] to be inserted any ... false statement, or ... fraudulent entry, list, ... oath, ... ballot, or other record or document authorized or required to be made, used, signed, returned, or preserved for any public purpose in connection with any primary or election.”<sup>668</sup> A person who “[a]lters materially or intentionally destroys any entry which has been lawfully made therein” also commits a felony.<sup>669</sup> If Trump's request that Raffensperger “find” 11,780 votes would foreseeably have involved the falsification, alteration, or destruction of entries in covered records, it would have been criminal in nature. While the unlawful entries referenced in Section 21-2-562 are generally records made before ballots are even cast—and are used to keep track of voter information and registration—from its plain language, the statute appears to be applicable to Trump's conduct.

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<sup>667</sup> See, e.g., *Eng. v. State*, 290 Ga. App. 378, 380, 659 S.E.2d 783, 786 (2008) (“Only a relatively overt statement or request intended to bring about action on the part of another person will bring a defendant within the solicitation statute.”).

<sup>668</sup> Ga. Code Ann. § 21-2-562(a)(1).

<sup>669</sup> Ga. Code Ann. § 21-2-562(a)(2). The area of law under Ga. Code Ann. § 21-2-562 is largely a blank slate. In contemplating the availability of criminal sanctions (including under Section 21-2-562) for a violation of the rules governing assisted voting procedures, the Supreme Court of Georgia reasoned that criminal sanctions were “not mere technicalities but...an integral part of preserving the sanctity of the voting process.” *McCranie v. Mullis*, 267 Ga. 416, 416, 478 S.E.2d 377, 378 (1996). Outside of this case, however, Georgia courts have yet to interpret this law.

Separately, there is also the evidence that the Trump campaign willfully solicited individuals to sign certificates appointing themselves as alternate electors for Trump and Pence. The ballot certificates that the Trump campaign requested be signed and submitted contained an unconditional certification that each of the individuals signing were “duly elected and qualified” electors authorized to cast votes in the Electoral College for the president and vice president of the United States on behalf of the state of Georgia.<sup>670</sup> Knowing that Georgia had certified Biden as the winner of the state’s 16 electoral votes, and knowing that the true elected and qualified electors were meeting on the floor of the state Senate, the false electors willfully signed and submitted ballot certificates containing these false statements in apparent violation of Georgia criminal law.

As explained above, individuals working with the Trump campaign appear to have solicited the false electors to make a false statement. And there is strong evidence that the false statement was willfully made, including because the language of the false statement was a point of contention in other states in which the Trump campaign requested that false electors engage in similar conduct. As explained above in Section III.A.1.a, there may still be a factual question as to the extent of Trump’s personal and direct solicitation of the false electors. However, there is evidence to infer Trump’s participation in soliciting others to commit this crime, and the district attorney is undoubtedly investigating whether additional evidence exists tying him specifically to the Georgia false electors and the creation of the false certificate.

**2. Intentional Interference with Performance of Election Duties (Ga. Code Ann. § 21-2-597)**

In addition to various acts of solicitation inviting officials to betray their legal duties in various ways, Georgia law also makes it a misdemeanor to engage in other conduct that “intentionally interferes with, hinders, or delays or attempts to interfere with, hinder, or delay any

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<sup>670</sup> False Electors Certificates at 7.



other person in the performance of any act or duty authorized or imposed by this chapter.”<sup>671</sup> As discussed above in Section III.A.1.c.i.a with reference to Ga. Code Ann. § 21-2-596, Georgia law charged Raffensperger (and likely Watson) with the performance of acts or duties relating to the election. Section 21-2-597 thus raises the key question of whether Trump intentionally acted to interfere with, hinder, or delay Raffensperger or Watson in the performance of their duties related to the lawful, regular administration of Georgia's election laws. The answer to that question is likely “yes.”

Trump led sustained attacks on the Georgia election while also recruiting his supporters to apply pressure on his behalf. Two U.S. senators publicly called for Raffensperger's resignation based on Trump's false claims of fraud,<sup>672</sup> and another U.S. senator personally called and appeared to pressure Raffensperger to adopt Trump's baseless claims.<sup>673</sup> A U.S. representative penned a letter to Raffensperger accusing him of unlawfully counting tens of thousands of ballots.<sup>674</sup> Trump supporters also engaged in threatening behavior toward Raffensperger.<sup>675</sup> As noted above, Raffensperger's email and cell phone were made public, his wife received “sexualized” text messages, and his daughter-in-law's home was broken into.<sup>676</sup> Additionally, Trump personally placed pressure on Raffensperger and Watson during calls to the Georgia officials as part of his efforts to interfere with the performance of their election duties.

Trump threatened Raffensperger during the January 2 call if he did not “find” enough votes to alter the outcome of the election and make false public statements incompatible with his statutory duties. Trump also warned Raffensperger during the call of the “big risk” he was taking

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<sup>671</sup> Ga. Code Ann. § 21-2-597.

<sup>672</sup> Levine & Arkin, *supra* note 137.

<sup>673</sup> Prokop, *supra* note 139.

<sup>674</sup> Thebault & Gardner, *supra* note 138.

<sup>675</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>676</sup> *Id.*

by not finding the 11,780 votes he needed to overturn Biden's legitimate victory in Georgia.<sup>677</sup> And on his call to Watson, Trump pressured her to vary from prescribed audit procedures, to alter the timeline of her investigation, and to target pro-Biden electoral strongholds (including Fulton County), further pressuring her by telling her she would be praised if she reached the "right answer."<sup>678</sup> The intentional acts and threats carried out by Trump and his supporters appear to be attempts to interfere with the official duties of Raffensperger and Watson, thereby violating Ga. Code Ann. § 21-2-597.

### **3. Interference with Primaries and Elections (Ga. Code Ann. § 21-2-566)**

As noted above in Section III.A.1.a, Sinners, Chesebro, and other organizers of the false-electors plan could face criminal liability for soliciting the alternate electors to make false statements under seal about Trump winning the election and claiming to be the duly elected electors vested with the power to cast votes in his favor in the 2020 election. The now publicly available evidence demonstrates that the organizers and the willing false electors devised and engaged in these actions with the deliberate intent to create uncertainty and prevent, or at least frustrate, Congress's ability to certify the election results. In doing so, the individuals could face criminal liability for interfering with primaries and elections under Ga. Code Ann. § 21-2-566 in addition to the possible crimes of criminal solicitation to commit election fraud (Ga. Code Ann. § 21-2-604(a)) and intentional interference with performance of election duties (Ga. Code Ann. § 21-2-597) mentioned above.

In pursuing these charges, the Fulton County district attorney would be able to present evidence that shows all involved recognized the improbability that the governor would ratify their deceptive appointments as required by statute, and, in the alternative, arranged to have a

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<sup>677</sup> *Id.*

<sup>678</sup> Jester, *supra* note 575.

clandestine meeting at the state capitol on the date prescribed in the law in an ill-fated attempt to validate their actions. In order to gain entrance to the capitol because of tight pandemic-related security measures, the organizers and false electors cloaked their actions in secrecy and encouraged deception if questioned by officers or others in the building.<sup>679</sup> Once gathered, the individuals affixed their seals and signatures to, and affirmed falsities within, a document that was part of a multistate effort to override the will of the majority of the voters and overturn the results of a free and fair election, both within the state of Georgia and nationally. In light of this evidence, each individual false elector and each person responsible for organizing and carrying out a part of this plan in Georgia could be charged with interfering with the election under Ga. Code Ann. § 21-2-566. However, because there is evidence that they acted in concert, they also could be charged with conspiracy to commit election fraud as described in the next section.

#### **4. Conspiracy to Commit Election Fraud (Ga. Code Ann. § 21-2-603)**

Under Ga. Code Ann. § 21-2-603, a person commits a conspiracy offense “when he or she conspires or agrees with another to commit a violation of this chapter.”<sup>680</sup> The statute further provides that “[t]he crime shall be complete when the conspiracy or agreement is effected and an overt act in furtherance thereof has been committed, regardless of whether the violation of this chapter is consummated.”<sup>681</sup>

This election-specific provision mirrors Georgia’s general conspiracy statute and is properly understood by reference to general conspiracy principles.<sup>682</sup> Thus, a conviction for conspiracy to commit election fraud requires proof of two fundamental elements: 1) an agreement

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<sup>679</sup> Gardner et al., *supra* note 218.

<sup>680</sup> Ga. Code Ann. § 21-2-603.

<sup>681</sup> *Id.*

<sup>682</sup> “A person commits the offense of conspiracy to commit a crime when he together with one or more persons conspires to commit any crime and any one or more of such persons does any overt act to effect the object of the conspiracy.” Ga. Code Ann. § 16-4-8.

to violate the election laws under Title 21, Chapter 2; and 2) an overt act in furtherance of that agreement. Importantly, “the type of agreement necessary to form a conspiracy is not the ‘meeting of the minds’ necessary to form a contract.”<sup>683</sup> Further, “[i]t is not necessary to prove an express agreement ... The state need only prove that two or more persons tacitly came to a mutual understanding to accomplish or to pursue a criminal objective.”<sup>684</sup> “[C]onduct which discloses a common design, may give rise to an inference of a conspiracy.”<sup>685</sup> Agreements between conspirators can be proven by direct and circumstantial evidence. Conspirators’ words and deeds can convince a jury a conspiracy existed for criminal purposes.<sup>686</sup>

Facts established in previous sections of this report are likely sufficient to establish that Trump and his allies conspired to commit election fraud in Georgia for conduct related to the 2020 presidential election, satisfying elements (1) and (2) for a conviction under Georgia law. There is strong evidence that Trump formed an agreement with Meadows, Giuliani, and potentially others, including Eastman and Ellis, “to interfere with, hinder, or delay” Raffensperger and Watson “in the performance of” their statutory duties relating to the administration of the election.<sup>687</sup> Giuliani, Ellis, and Eastman were actively engaged in Trump’s efforts targeting Georgia officials and appeared before the Georgia legislature in an effort to persuade them to nullify the election results.<sup>688</sup> All three appeared at the same Georgia Senate Judiciary Subcommittee hearing on December 3, 2020, to bolster Trump’s claims of fraud and attempt to persuade the legislators to

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<sup>683</sup> Kilgore v. State, 251 Ga. 291, 299 (1983).

<sup>684</sup> Duffy v. State, 262 Ga. 249, 250 (1992).

<sup>685</sup> *Id.*

<sup>686</sup> *Id.*

<sup>687</sup> Ga. Code Ann. § 21-2-597; see Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>688</sup> Evans, *supra* note 178; Reynolds, *supra* note 179; Claremont Institute, John Eastman Testimony During Georgia Senate Election Hearing, YOUTUBE (Dec. 4, 2020), [https://www.youtube.com/watch?v=IHt6UEc\\_tQ8](https://www.youtube.com/watch?v=IHt6UEc_tQ8); Chase Woodruff, Eastman, Ellis subpoenaed in connection with Trump’s election interference in Georgia, COLORADO NEWSLINE (July 6, 2022), <https://coloradonewsline.com/briefs/eastman-ellis-subpoenaed-trumps-election-georgia/>.

appoint alternative electors for Trump.<sup>689</sup> Trump, Meadows, Giuliani, Ellis, and Eastman all appear to have worked in concert on a plan with a common purpose and design to overturn Georgia's election results by placing pressure on state officials to engage in action outside their lawful authority and push conspiracy theories falsely suggesting a "rigged election."<sup>690</sup>

Meadows personally arranged Trump's calls with both Raffensperger and Watson,<sup>691</sup> and he actively participated in the call with Raffensperger where Trump asked him to "find" additional votes.<sup>692</sup> Trump campaign attorney Cleta Mitchell participated in the January 2 phone call with Trump and Raffensperger as well, and both Meadows and Mitchell sought to reinforce Trump's requests.<sup>693</sup> Notably, Cleta Mitchell is the same attorney who had originally reached out to Eastman in September 2020 to ask him to join a working group focused on levying post-Election Day challenges on Trump's behalf, and who emailed Eastman just after Election Day and asked him to prepare a memo outlining a strategy to overturn the election.<sup>694</sup>

The existence of a likely conspiratorial agreement between Meadows and Trump to interfere with Watson's work is further demonstrated by the fact that Meadows not only facilitated Trump's call with Watson in which Trump urged her to reach the "right answer" in her investigation,<sup>695</sup> but also showed up in person the day before in an unannounced visit to the site of the audit in Georgia with armed Secret Service agents, pulling her away from her inquiry to

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<sup>689</sup> Evans, *supra* note 178; Woodruff, *supra* note 688.

<sup>690</sup> Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Dec. 22, 2020, 10:29:24 AM), [thetrumparchive.com/?searchbox=%22Rigged+Election%21%22&results=1](https://thetrumparchive.com/?searchbox=%22Rigged+Election%21%22&results=1).

<sup>691</sup> Ryan Goodman & Juilee Shivalkar, The Chief of Staff and Schemes to Overturn 2020 Election, JUST SECURITY (Aug. 8, 2021), <https://www.justsecurity.org/77681/mark-meadows-timeline-the-chief-of-staff-and-schemes-to-overturn-2020-election/>.

<sup>692</sup> Gardner & Firozi, *supra* note 2.

<sup>693</sup> *Id.*

<sup>694</sup> Plaintiff's Brief In Support Of Privilege Assertions, Eastman v. Thompson, No.: 8:22-cv-00099-DOC-DFM (C.D. Cal. Mar. 9, 2022), <https://storage.courtlistener.com/recap/gov.uscourts.cacd.841840/gov.uscourts.cacd.841840.132.0.pdf>; Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>695</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

respond to him.<sup>696</sup> Trump’s calls to Watson and Raffensperger qualify as “overt acts” pursuant to an unlawful agreement with others in furtherance of objectives violative of Georgia law.<sup>697</sup> Forming these agreements with an objective of improperly pressuring or threatening state officials likely subjects Meadows, Giuliani, and Trump to liability under Ga. Code Ann. § 21-2-603.

Additionally, there are substantial facts in the previous sections of this report that indicate a conspiratorial agreement between Trump, Meadows, Giuliani, Ellis, Eastman, Chesebro, and possibly others, including the individually named alternative electors themselves, to commit election fraud through the false-electors plan. Each of these actors appears to have advocated, planned, or worked to implement actions to ensure that alternate slates of electors from Georgia and other battleground states that Trump lost were organized and sent to Congress. Documents show Meadows discussing the plan and admitting to having a team working on it.<sup>698</sup> As mentioned above, Giuliani, Ellis, and Eastman appeared before the Georgia state legislature advocating for extralegal action by officials with the goal of replacing the legitimate Biden electors with electors for Trump.<sup>699</sup> Chesebro’s agreement is evident through the memos he wrote articulating the mechanics of the plans and his efforts to identify and overcome potential obstacles that might

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<sup>696</sup> Niese, *supra* note 242; Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>697</sup> Based on the same facts, another theory of liability may come to mind—specifically, that Trump and his associates conspired to commit the crime of solicitation to commit election fraud under Section 21-2-604. We note, however, that this theory may suffer from a threshold defect. Under Georgia law, “[t]here exists no lesser criminal offense” for the crime of solicitation, “such as attempt to solicit a felony.” Eng. v. State, 290 Ga. App. 378, 380 (2008). Because solicitation, conspiracy, and attempt are all considered inchoate, or incomplete, crimes in Georgia (18 GA. JUR. 4), President Trump has a colorable argument that the crime of conspiracy to commit solicitation is not legally cognizable.

<sup>698</sup> House Select Committee to Investigate the January 6th Attack on the United States Capitol, House Report, Resolution Recommending That the House of Representatives Find Mark Randall Meadows in Contempt of Congress for Refusal to Comply With a Subpoena Duly Issued by the Select Committee to Investigate the January 6th Attack on the United States Capitol, <https://tinyurl.com/8wmya3hx> (hereinafter “House Report”).

<sup>699</sup> Evans, *supra* note 178; Reynolds, *supra* note 179; Claremont Institute, John Eastman Testimony During Georgia Senate Election Hearing, YOUTUBE (Dec. 4, 2020), [https://www.youtube.com/watch?v=IHt6UEc\\_tQ8](https://www.youtube.com/watch?v=IHt6UEc_tQ8); Woodruff, *supra* note 688.

inhibit the plan's success.<sup>700</sup> Eastman and Ellis also wrote memos indicating their agreement with the plan.<sup>701</sup> Trump and Eastman, together, called the RNC chairwoman to ask for logistical help effectuating this effort.<sup>702</sup> Taken together, these actions indicate an agreement to work on a plan with a common design.

There is strong evidence that Trump and his associates knew the objective of the plan was illegal. Greg Jacob, counsel to the vice president, testified that Eastman admitted in front of Trump that the plan outlined in his memos to use the alternate set of electors as a means for Vice President Pence to reject duly cast electoral votes or delay the electoral vote count at the Joint Session of Congress on January 6 was illegal.<sup>703</sup> According to Jacob's testimony, Eastman said it "would violate several provisions of the Electoral Count Act."<sup>704</sup> Eastman conceded that, if challenged in the Supreme Court, his plan would be unanimously rejected.<sup>705</sup> Chesebro wrote in an email to Giuliani that the chairwoman of the Arizona Republican Party, Kelli Ward, and Arizona State Senator Kelly Townsend, thought the false-electors plan "could appear treasonous."<sup>706</sup> Chesebro himself acknowledged in a December 9, 2020 memo that the strategy to organize Trump electors

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<sup>700</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80; Memorandum from Kenneth Chesebro to Judge James R. Troupis on the Real Deadline for Settling a State's Electoral Votes (Nov. 18, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-memorandum-to-james-r.-troupis-attorney-for-trump-campaign-wisconsin-november-18-2020.pdf>; Memorandum from Kenneth Chesebro to Judge James R. Troupis on Statutory Requirements for December 14 Electoral Votes (Dec. 9, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-memorandum-to-james-r.-troupis-attorney-for-trump-campaign-wisconsin-december-9-2020.pdf>.

<sup>701</sup> Memorandum from Jenna Ellis to President Donald Trump on Constitutional Analysis of Vice President Authority for January 6, 2021 Electoral College Vote Count (Dec. 31, 2020), <https://www.politico.com/f/?id=0000017d-a4d0-dac5-abff-a5ddcf600000>; First Memorandum from John Eastman on Jan. 6 Scenario (accessed Aug. 1, 2022), <https://www.cnn.com/2021/09/21/politics/read-eastman-memo/index.html>; Second Memorandum from John Eastman Memorandum on Jan. 6 Scenario (accessed Aug. 1, 2022), <https://www.washingtonpost.com/context/john-eastman-second-memo-on-january-6-scenario/b3fd2b0a-f931-4e0c-8bac-c82f13c2dd6f/>.

<sup>702</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>703</sup> Third Jan. 6 Hearing Transcript, *supra* note 106.

<sup>704</sup> *Id.*

<sup>705</sup> Eastman v. Thompson, Order Re: Privilege of Docs at 7.

<sup>706</sup> Maggie Haberman & Luke Broadwater, Arizona Officials Warned Fake Electors Plan Could 'Appear Treasonous', THE NEW YORK TIMES (Aug. 2, 2022), <https://www.nytimes.com/2022/08/02/us/politics/arizona-trump-fake-electors.html>.

was “somewhat dicey in Georgia” given state law.<sup>707</sup> Chesebro worried that because “Ga. Code Ann. § 21-2-12 ... suppl[ying] a mechanism for replacing one or more of the 16 electors” required ratification by the governor, it may present “a wrinkle” in their plan to falsely claim that the electors organized by the campaign have legitimacy if one or more needed to be replaced.<sup>708</sup> Chesebro also worried that “Ga. Code Ann. §21-2-11 ... requir[ing] that the electors ‘assemble at the seat of government of this state at 12:00 Noon’ on December 14” may also be an obstacle to their effort and questioned whether they actually needed to “meet in the Capitol Building” to bolster their plan to claim these false electors were legitimate.<sup>709</sup>

Some of the strongest evidence may be the fact that the chief White House lawyer warned some of the likely co-conspirators about the legality, or lack thereof, of the plan. Meadows’ aide Cassidy Hutchinson told the January 6 Committee that she heard White House Counsel Pat Cipollone tell Meadows, Giuliani, and a few of Giuliani’s associates that the plan to organize alternate electors was not legally sound.<sup>710</sup>

Nevertheless, on December 13, 2020, the day before the true members of the Electoral College would meet and cast their votes as required under the law, the Trump campaign emailed the group of would-be false electors instructions on how to gain access to the Georgia State Capitol Building and directed them to act covertly.<sup>711</sup> Participants in this plan worked aggressively through December 14, 2020, to gather 16 individuals to sign and submit false ballot certificates falsely asserting their status as “duly elected and qualified” electors for the state of Georgia to be counted

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<sup>707</sup> Memorandum from Kenneth Chesebro to Judge James R. Troupis on Statutory Requirements for December 14 Electoral Votes (Dec. 9, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-memorandum-to-james-r.-troupis-attorney-for-trump-campaign-wisconsin-december-9-2020.pdf>.

<sup>708</sup> *Id.*

<sup>709</sup> *Id.*

<sup>710</sup> Goodman, *supra* note 208.

<sup>711</sup> Gardner et al., *supra* note 218.



during the Joint Session of Congress on January 6, 2021.<sup>712</sup> Gathering the false electors and providing them with instructions are just two of many “overt acts” in furtherance of this apparent conspiracy.

**B. Potential Crimes Violating Other Sections of Georgia's Criminal Code**

**1. False Statements and Writings (Ga. Code Ann. § 16-10-20)**

Quite apart from any possible violations of the Elections Code in Title 21 discussed above, in Georgia, the crime of false statements can be committed when a person knowingly and willfully:

Falsifies, conceals, or covers up by any trick, scheme, or device a material fact; makes a false, fictitious, or fraudulent statement or representation; or makes or uses any false writing or document, knowing the same to contain any false, fictitious, or fraudulent statement or entry, in any matter within the jurisdiction of any department or agency of state government or of the government of any county, city, or other political subdivision.<sup>713</sup>

This statute is different from Ga. Code Ann. § 21-2-560 in that it does not require an oath and criminalizes *any* knowing and willful false statements in any matter within the jurisdiction of any state or local department or agency. It has been extended to apply to cases of using false statements outside of police investigations<sup>714</sup> and encompasses those made to state agencies.<sup>715</sup> While it is most commonly charged when civilians provide false statements to public officials during criminal investigations (e.g., in witness statements<sup>716</sup> or police interviews<sup>717</sup>), in fact it has

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<sup>712</sup> False Electors Certificates at 7.

<sup>713</sup> Ga. Code Ann. § 16-10-20. *See also* Tesler v. State, 295 Ga. App. 569 (2009).

<sup>714</sup> Law v. State, 349 Ga. App. 823 (2019).

<sup>715</sup> *See* Grant v. State, 226 Ga. App. 88 (1997) (holding that entities in the judicial branch as well as executive branch departments fall within the definition of the statute).

<sup>716</sup> Towns v. State, 357 Ga. App. 701 (2020).

<sup>717</sup> Watkins v. State, 191 Ga. App. 87 (1989).

a much broader sweep.<sup>718</sup> “The test for determining whether a matter falls within the jurisdiction of a state or local department or agency is whether the department or agency has the power to exercise authority in a particular situation.”<sup>719</sup> “The statute was intended to discourage the making of affirmatively false statements”<sup>720</sup> that deceive and harm the government in an effort to save the government time and resources of determining the truth.<sup>721</sup>

Prosecutors must establish that the defendant intended to make the false statement, and implicit in that intent is the knowledge of falsity.<sup>722</sup> Knowledge of falsity is a question for the jury and can be established even in cases where the defendant claims that the statements were truthful.<sup>723</sup> Courts in Georgia have determined that repeated false statements to different individuals combined with asking another to also lie to officials is sufficient evidence to establish willfulness.<sup>724</sup> Where the false statements are conveyed to the state or local agency via telephone, venue lies in the county in which telephone calls were received, even when the defendant is in a different jurisdiction.<sup>725</sup>

Trump may have committed the crime of false statements when he repeatedly told Secretary Raffensperger that he won the state of Georgia, as well as when he listed numerous unfounded allegations of election fraud and wrongdoing.<sup>726</sup> They included the assertion that there

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<sup>718</sup> *Sneiderman v. State*, 336 Ga. App. 153, 162 (2016) (“The term “jurisdiction” is not given a narrow or technical meaning as used in O.C.G.A. § 16-10-20 [and] ‘covers all matters confided to the authority of an agency or department...[and] mean[s] simply the power to act upon information when it is received.’” Quoting *Tesler v. State*, Ga. App. 569, 577 (2009)) (disapproved on other grounds).

<sup>719</sup> Robert E. Cleary, Jr., *Molnar’s Georgia Criminal Law: Crimes and Punishments* § 48-4 (2020-2021 ed.).

<sup>720</sup> *Watkins v. State*, 191 Ga. App. 87, 89 (1989).

<sup>721</sup> *Cleary*, *supra* note 719.

<sup>722</sup> *Byrd v. State*, 216 Ga. App. 316 (1995).

<sup>723</sup> *See Tidwell v. State*, 216 Ga. App. 8 (1994) (conviction upheld where jury found defendants intended to make false statements, despite defendants’ claims that statements were truthful).

<sup>724</sup> *Reeves v. State*, 346 Ga. App. 414 (2018).

<sup>725</sup> *Id.*

<sup>726</sup> Trump also made several false statements during his December 23, 2020 call to Investigator Watson that potentially could also satisfy the criminal elements of making false statements. Even if venue lies in Cobb County for this call, the Fulton DA’s ability to include the facts of this Watson call as an additional predicate act under Georgia’s RICO statute is discussed in Section III.C.

were “3,000 pounds” of shredded ballots; drop boxes “delivered late”; a particular “professional vote scammer and hustler” who purportedly destroyed no fewer than 18,000 of his votes; and “[t]he other thing, dead people.”<sup>727</sup> Such claims about Georgia had been widely debunked.<sup>728</sup> Indeed, Trump’s claims about widespread fraud, including in Georgia, were rejected by Attorney General Barr,<sup>729</sup> others at the DOJ investigating the matter,<sup>730</sup> and CISA Director Chris Krebs<sup>731</sup>—individuals who were part of the Trump administration—in the days and weeks prior to the January 2 call. They were also rejected by others in the Trump administration, as well as the Trump campaign and publicly.

Depending on the evidence ultimately revealed by the Fulton County district attorney’s office, additional charges could also be considered for any false statements potentially made by Trump during his December 5 call to Governor Kemp; by Rudy Giuliani during his appearance before the Georgia Senate and House on December 3, December 10, and December 30; by John Eastman during his appearance before the Georgia legislature on December 3; and by Mark Meadows and Cleta Mitchell during the January 2, 2021 call with Secretary Raffensperger and his team at the secretary of state’s office.<sup>732</sup> Each of these individuals was in Trump’s circle and would have received similar information from federal and state officials, either personally or through

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<sup>727</sup> Gardner & Firozi, *supra* note 2.

<sup>728</sup> See, e.g., Voter Protection Program, Georgia, Myths and Facts of the 2020 Presidential Election 5–10 (2021), <https://statesuniteddemocracy.org/wp-content/uploads/2021/01/000A-Myths-and-Facts-of-the-2020-Presidential-Election-20210113-FINAL.pdf>. That report alone debunks seven widely circulated myths about Georgia’s presidential election. Other public reporting has done the same.

<sup>729</sup> Balsamo, *supra* note 274.

<sup>730</sup> Jeremy Herb, Trump to DOJ last December: ‘Just say that the election was corrupt + leave the rest to me’, CNN (last updated July 31, 2021, 12:41 PM), <https://www.cnn.com/2021/07/30/politics/trump-election-justice/index.html>.

<sup>731</sup> Tim Reid, Former head of U.S. election security calls Trump team fraud allegations ‘farcical’, REUTERS (Nov. 27, 2020), <https://www.reuters.com/article/us-usa-election-krebs/former-head-of-u-s-election-security-calls-trump-team-fraud-allegations-farcical-idUSKBN28801G>.

<sup>732</sup> While Trump and his associates repeatedly made false statements in the press and via Twitter, and undoubtedly these were seen and received by Georgia officials, only statements that were made to those officials directly would satisfy the elements of the charge of false statements.

other means, including public media. They appear to have been privy to information making clear that the allegations of fraud and a Trump victory they were advancing were false.

With copies of the documents submitted by the false electors now available for public review, and with the false electors receiving target letters, it is also possible that each could be charged with a violation of the false statements statute. That is because each appears to have made false statements on material matters within the jurisdiction of state agencies (in this case, the Georgia secretary of state's and governor's offices), thereby establishing the elements of the possible crime. Each false elector signed a document that claimed he or she was duly elected and qualified (as a result of the vote count in Georgia) to cast votes for Trump and Pence in the 2020 election. In fact, none of them *were* duly elected for this purpose. Plus, because Biden won the popular vote, they were neither qualified nor legally allowed to vote for Trump. The integrity of the election and accuracy of the vote count were all matters material to the work being investigated, reviewed, and audited by the Georgia secretary of state on December 14, 2020, when the electors signed the document. The false electoral certificate or accompanying paperwork were addressed and transmitted to the secretary and the governor. While we do not know which statutes if any are identified in the target letters, the false statement statute seems like a possible fit. The false electors deny any wrongdoing, as detailed at p. 51, n. 227 *supra*. As the Fulton County district attorney continues to investigate, additional evidence may come to light regarding the innocence or culpability of some or all of those involved with this plan.

## **2. False Swearing (Ga. Code Ann. § 16-10-71)**

Under Title 16, a person “to whom a lawful oath or affirmation has been administered or who executes a document knowing that it purports to be an acknowledgment of a lawful oath or affirmation commits the offense of false swearing when, in any matter or thing other than a judicial

proceeding, he [or she] knowingly and willfully makes a false statement.”<sup>733</sup> The crime was redefined by the Georgia legislature in 1968 specifically to “broaden [the] general definition of false swearing so as to criminalize the making of certain false statements, regardless of whether an oath actually was administered by an official.”<sup>734</sup> In 2014, the Court of Appeals of Georgia held that “[u]nder this broad[] definition, one who executed a document with knowledge that his mere execution would ‘purport’ to be or would evince his ‘acknowledgment’ that the statements contained therein were being made under lawful oath or affirmation could be held accountable for false swearing.”<sup>735</sup> The crime differs from perjury because the statements it applies to can be made outside of judicial proceedings and need not be material to those non-judicial issues at the core of the legal dispute, and it does not require the administration of an oath (only that the execution of the document purports to be an acknowledgment of a lawful oath or affirmation).<sup>736</sup> The offense carries a penalty of a \$1,000 fine, one to five years in prison, or both.<sup>737</sup>

As noted above, the documents signed by the false electors include falsehoods about their role and authority in the 2020 election. Contrary to the wording in the document, the false electors also were not “duly elected” as the document claimed, and they were not qualified to cast ballots for Trump because the majority of the votes proved that Biden won the state. Additionally, the document evidences that each person was signing under their “hands and seals” with the notation “(SEAL)” next to each signature.<sup>738</sup> This language may indicate that each false elector

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<sup>733</sup> Ga. Code Ann. § 16-10-71.

<sup>734</sup> *Holland v. State*, 172 Ga. App. 444, 323 S.E.2d 632 (1984). *See also* *Finch v. State*, 326 Ga. App. 141, 142 (2014).

<sup>735</sup> *Finch*, 326 Ga. App. at 142–143 (quoting *Holland v. State*, 172 Ga. App. 444(1) (1984)).

<sup>736</sup> *Plummer v. State*, 90 Ga. App. 773 (1954).

<sup>737</sup> Ga. Code Ann. § 16-10-71.

<sup>738</sup> The question of whether the false electors’ signing of the documents in this manner would constitute an “oath or affirmation” within the meaning of Georgia’s false swearing statute is not easily answerable by looking to Georgia-specific authorities. Georgia law does not define the term explicitly, and the Georgia courts have yet to articulate a legal standard for determining whether an act constitutes an “oath or affirmation.” (cont’d next page)

“acknowledged” the false statements contained in the document. Given that an oath is not required to establish the crime and the fact that the documents contain several falsehoods, there is a substantial question about whether each elector could potentially be subjected to criminal liability for false swearing.<sup>739</sup>

Based on surveillance footage and public reporting from September 2022, one of the 16 false electors, Cathy Latham, could face a separate count of false swearing for her involvement in the inspection and copying of sensitive voter information in Coffee County on January 7, 2021. As discussed earlier, Latham appears to have coordinated and facilitated the SullivanStrickler team’s visit to the Coffee County election offices on January 7. In a sworn deposition in a related civil lawsuit in August 2022, Latham minimized her involvement in the SullivanStrickler visit, claiming that she “didn’t go into the office” that day and that she chatted on site for “five minutes at most” with a Trump affiliate.<sup>740</sup> According to *The Washington Post*, surveillance footage appears to contradict Latham’s under-oath claim, indicating that she spent at least four hours at the election headquarters in close contact with the SullivanStrickler team as they accessed and copied

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Other state courts, however, have endeavored to define these terms. Some Pennsylvania courts, for example, have said that “[w]hile an oath or affirmation may be made in private or before any lay person, it generally must be made before some public official authorized to accept such a statement in order to have any legal effect. *See Commonwealth v. Jones*, 245 Pa. Super. 487, 369 A.2d 733, 734–35 (1977) (“It is generally recognized ... that for legal purposes verification means confirmation of the truth of a statement by oath or affirmation’ and therefore, to verify inventory of items seized based on a search warrant, police officer must swear or affirm to correctness of inventory before the judge or magistrate who issued the warrant.”) *In re Contest of 2003 General Election for the Office of Prothonotary*, 578 Pa. 3, 16 (2004). That case did not involve a “seal” but nevertheless raises the question of whether the conduct here may be deemed to have occurred before some authorized official. We note that the certificates purport to be signed before the “Chairman, Electoral College of Georgia” and that Georgia law recognizes “the presiding officer of the college.” *See, e.g.*, Ga. Code Ann. § 21-2-12 (2021). While the publicly available information certainly does not support his legitimacy, that role may be relevant to the state of mind of those sealing and whether it rises to the level of an affirmation. Moreover, while the secretary of state, the governor, and federal officials were not physically present, the evidence may establish that the false electors understood the certificates might be placed before those officials for a review.

<sup>739</sup> *See, e.g.*, *Holland v. State*, 172 Ga. App. 444, 323 S.E.2d 632 (1984).

<sup>740</sup> *Brown & Swaine, supra* note 403.

information from poll pads and voting machines.<sup>741</sup> If that footage renders Latham's original account inaccurate, she may face an additional charge of false swearing.

### 3. Influencing Witnesses (Ga. Code Ann. § 16-10-93)

Turning back to the former president, another potential crime that Trump might be investigated for is Georgia's influencing-witnesses statute. It reaches behavior and intimidation exerted on individuals other than those called to testify in a court proceeding. Specifically, Ga. Code Ann. § 16-10-93(b) makes it unlawful for any person knowingly to use intimidation, threats, or misleading conduct as a means to "cause or induce any person to":

- (i) Withhold testimony or a record, document, or other object from an official proceeding;
- (ii) Alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding...<sup>742</sup>

"Official proceeding" includes one before "an agency of the executive, legislative, or judicial branches of government of this state or its political subdivisions or authorities."<sup>743</sup> The official proceeding need not be pending at the time of the offense,<sup>744</sup> and the prosecutor does not need to prove the defendant knew the circumstance of the proceeding or the role of the state employee in it.<sup>745</sup> Courts throughout the country recognize election certification as an official proceeding.<sup>746</sup>

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<sup>741</sup> *Id.*

<sup>742</sup> Ga. Code Ann. § 16-10-93(b).

<sup>743</sup> Ga. Code Ann. § 16-10-93(b)(3)(A).

<sup>744</sup> Ga. Code Ann. § 16-10-93(b)(3)(B).

<sup>745</sup> Ga. Code Ann. § 16-10-93(b)(3)(D).

<sup>746</sup> See *United States v. Montgomery*, 578 F. Supp. 3d 54 (2021); *United States v. Fitzsimmons*, No. 21-cr-158, 2022 WL 1698063 (D.D.C. May 26, 2022); *United States v. Williams*, No. 21-0618, 2022 WL 2237301 (D.D.C. June 22, 2022); *Eastman v. Thompson*, No. 8:22-cv-00099-DOC-DFM, 2022 WL 894256 (C.D. Cal. Mar. 28, 2022), 112 Fed. R. Serv. 3d 698.

Georgia code designates election certification as a duty of the secretary of state.<sup>747</sup> Georgia's secretary of state, Secretary Raffensperger, is an authority of the state's executive branch.<sup>748</sup>

Trump's call with Raffensperger was replete with inaccuracies and falsehoods about the election. These falsehoods provide a sufficient basis to investigate misleading conduct and intimidation under the statute. That is particularly true in light of Trump's insinuations that the secretary of state and his counsel were jeopardizing themselves by not uncovering the fraud, his claims that they were at "big risk" for insisting there was no criminality, and other aspects of the call. Moreover, the call raises the question of whether it was designed to induce the state officials to withhold over 11,000 validly counted votes from being counted in the election—either withholding a record or altering one under the statute.

#### **4. Forgery in the First Degree (Ga. Code Ann. § 16-9-1(b))**

In Georgia, a person commits the offense of first-degree forgery when "with the intent to defraud he or she knowingly makes, alters, or possesses any writing, other than a check, in a fictitious name or in such manner that the writing as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority and utters or delivers such writing."<sup>749</sup> In short, forgery in the first degree can be established by proving the following four elements of the crime: 1) knowingly making or possessing any writing; 2) in a manner that purports to have been made by authority that was not given; and 3) delivering that writing; 4) with the intent to defraud. The third element—delivery (or

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<sup>747</sup> Ga. Code Ann. § 21-2-499(b).

<sup>748</sup> The Three Branches of Georgia's State Government, GEORGIA.GOV, <https://georgia.gov/three-branches-georgias-state-government> (last visited Oct. 20, 2022).

<sup>749</sup> Ga. Code Ann. § 16-9-1.



utterance)—is what distinguishes first-degree forgery from the other statutory provisions. It is punishable as a felony with a maximum penalty of 15 years in prison.<sup>750</sup>

While forgery in the first degree does not require actual fraud or pecuniary damage, intent to defraud is an essential element of the crime; This scienter requirement is one of the ways the charge differs from making false statements and writings under either Title 16 or Title 21 and false swearing. Georgia courts have found that “[k]nowingly passing as genuine a forged instrument is evidence of the intent to defraud.”<sup>751</sup> In earlier cases, courts have also noted that “[w]here one executes an instrument, purporting on its face to be executed by him as the agent of the principal, he is not guilty of forgery, ... but merely a false and fraudulent assumption of authority.”<sup>752</sup> In more recent cases, intent to defraud has been proven, along with knowledge of the falsity, by direct or circumstantial evidence.<sup>753</sup>

The use of a fictitious name is not necessary to satisfy the second element of forgery in the first degree. The Georgia Court of Appeals has previously upheld a forgery conviction where the defendant had used his own name on fraudulent money orders based upon the fact that, as provided by a bank employee’s testimony, the bank had not given authority to the defendant to use its routing number on the money order. It found that “the use of a fictitious name is not an essential element of forgery in the first degree.” Rather, “[t]hat offense is defined as ‘knowingly mak[ing], alter[ing], or possess[ing] any writing, other than a check, in a fictitious name *or* in such manner of one who did not give such authority and utters or delivers such writing.’ OCGA § 16-9-1 (b) (emphasis

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<sup>750</sup> Ga. Code Ann. § 16-9-2.

<sup>751</sup> *Heard v. State*, 181 Ga. App. 803, 354 S.E.2d 11 (1987).

<sup>752</sup> *Morgan v. State*, 77 Ga. App. 164 (1948).

<sup>753</sup> *Rowan v. State*, 338 Ga. App. 733 (2016).

added).<sup>754</sup> Accordingly, a showing of a lack of authorization may also satisfy the second element of the statute.

There is substantial public evidence of forgery in the first degree with respect to the false electoral slates, although a final determination is, of course, for the prosecutor. In the instant case, each of the Georgia alternative electors signed certificates falsely certifying that they were “duly elected and qualified Electors for President and Vice President of the United States of America from the State of Georgia” when that was not in fact the case.<sup>755</sup> Prosecutors may determine that each elector intended to cast each of their respective so-called “ballots” for Trump and Pence with the apparent intent to defraud both the voters in Georgia and Congress when it certified the electors on January 6. The false electors contest this, asserting that they were simply preserving Trump’s position in the event litigation was successful, lawfully and on the advice of counsel.<sup>756</sup>

The evidence of bad intent by those involved in various aspects of the plan includes Sinners’ email calling for “secrecy and discretion”;<sup>757</sup> the encouragement to lie to security at Georgia’s State Capitol if questioned about their reason for being in the building, claiming the secrecy was necessary due to the COVID restrictions;<sup>758</sup> the Chesebro memo which acknowledged that none of the false electors were legitimately elected;<sup>759</sup> and the repeated statements from elected and appointed officials in state and federal government that Biden won an election unmarred by fraud.<sup>760</sup> The organizers of the false-electors plan also made clear that their intent was to create

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<sup>754</sup> Rogers v. State, 363 Ga. App. 794, 872 S.E.2d 770 (2022).

<sup>755</sup> False Electors Certificates at 7.

<sup>756</sup> For more about the false electors’ defenses, see Electors Oppo. discussed at p. 51, n. 227 *supra*.

<sup>757</sup> Gardner et al., *supra* note 218.

<sup>758</sup> *Id.*

<sup>759</sup> Memorandum from Kenneth Chesebro to Judge James R. Troupis on Statutory Requirements for December 14 Electoral Votes (Dec. 9, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-memorandum-to-james-r.-troupis-attorney-for-trump-campaign-wisconsin-december-9-2020.pdf>.

<sup>760</sup> Meredith McGraw, Trump’s election fraud claims were false. Here are his advisers who said so, POLITICO (June 13, 2022), <https://www.politico.com/news/2022/06/13/trumps-election-fraud-claims-were-false-here-are-his-advisers-who-said-so-00039346>.

sufficient uncertainty to interfere with Congress’s role in the process in hopes of securing a victory for Trump.<sup>761</sup> All of this evidence is relevant to the potential criminal liability of the parties involved.<sup>762</sup>

## 5. Criminal Solicitation (Ga. Code Ann. § 16-4-7)

In addition to the election-specific solicitation statute referenced in Section III.A.1 above, Georgia also maintains a general prohibition against criminal solicitation. Under Ga. Code Ann. § 16-4-7, “[a] person commits the offense of criminal solicitation when, with intent that another person engage in conduct constituting a felony, he solicits, requests, commands, importunes, or otherwise attempts to cause the other person to engage in such conduct.”<sup>763</sup> Georgia courts have construed this statute to reach “only a relatively overt statement or request intended to bring about action on the part of another person...”<sup>764</sup> And to be covered, the statement at issue must “create[] a clear and present danger that a felony will be committed, [as] the phrase ‘or otherwise attempts to cause such other person to engage in such conduct’ is construed as meaning ‘or otherwise creates a clear and present danger of such other person perpetrating a felony.’”<sup>765</sup> As noted above, completion of the act solicited is not required. Criminal solicitation of nonviolent felonies is punishable by up to three years in prison and is additive to other criminal charges rather than superseding them.<sup>766</sup>

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<sup>761</sup> Rosalind S. Helderman, Trump campaign documents show advisers knew fake-electoral plan was baseless, THE WASHINGTON POST (June 20, 2022), <https://www.washingtonpost.com/politics/2022/06/20/trump-documents-fake-electoral-plan/>.

<sup>762</sup> The Georgia Court of Appeals has previously upheld a forgery conviction where the defendant had used his own name, like the false electors, on fraudulent money orders; this was despite the fact that, as provided by a bank employee’s testimony, the bank had not given authority to the defendant to use its routing number on the money order. *Rogers v. State*, 363 Ga. App. 794, 872 S.E.2d 770 (2022).

<sup>763</sup> Ga. Code Ann. § 16-4-7.

<sup>764</sup> *State v. Davis*, 246 Ga. 761, 763, 272 S.E.2d 721 (1980).

<sup>765</sup> *Id.* at 763.

<sup>766</sup> Ga. Code Ann. § 16-4-7(b), (d).

As set forth above, there appear to be factual grounds to believe that Trump and his associates solicited conduct with an intent to change the election results in his favor. The applicability of the general criminal solicitation statute thus appears to turn on whether the acts that he or his associates solicited would have constituted felonies if performed by the person from whom he solicited them. For purposes of the general solicitation statute—unlike the election-specific solicitation statute—there is no requirement that the solicited offense be a felony under the Election Code. *Any* felony under Georgia law will suffice.

Here, we will discuss six potentially relevant felonies that may have been solicited, with the understanding that further factual development may strengthen or weaken reliance on these offenses, may support others, or may alter the analysis below.

**a. False Statements and Writings (Ga. Code Ann. § 16-10-20)**

Trump not only made potentially false statements to officials himself, as noted above in Section III.B.1, but he also may have solicited others to do so in contravention of the elements of that statute set forth above. For example, he requested that Raffensperger and Germany say that they found corrupt ballots and were recalculating the results.<sup>767</sup> Trump also asked Raffensperger to “work ... on these numbers,” which could be construed as a request that Raffensperger falsely report certain results. Indeed, Trump was aware that Georgia officials were ultimately responsible for reporting and certifying the results; it thus follows that Trump was soliciting false statements if he was asking others with official responsibility to report and certify his victory against the evidence that he did not, in fact, prevail.

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<sup>767</sup> Michael D. Shear & Stephanie Saul, Trump, in Taped Call, Pressured Georgia Official to ‘Find’ Votes to Overturn Election, THE NEW YORK TIMES (updated May 26, 2021), <https://www.nytimes.com/2021/01/03/us/politics/trump-raffensperger-call-georgia.html>.

Taken in context, these facts could help support a theory that Trump's statements constituted a request to make willful, known, and materially false statements regarding election-related matters within the jurisdiction of the office of the secretary of state, as established under Ga. Code Ann. § 16-10-71. If the elements of the false-statements statute are satisfied by the evidence the prosecution develops, the conduct Trump requested is criminal in nature for purposes of Trump's overarching solicitation liability.

As noted in Section III.B.1, Giuliani and Eastman face potential criminal liability for false statements made to the Georgia legislature in December 2020. The falsehoods espoused in these statements echoed the numerous disproven theories advanced by Trump and his campaign about fraud. It is unlikely that Giuliani, independent from the campaign, made arrangements to talk with the legislature; someone—possibly Trump personally or others in the campaign—requested that these men attend the hearings with the intent to advance the overall goal of the legislature overturning the election results. Anyone making this solicitous request could possibly be held accountable for criminally soliciting false statements.

Additionally, each of the 16 electors may face criminal liability for making false statements in the document that was ultimately delivered to Congress when they each claimed they were duly elected to cast votes for Trump in the Electoral College. Having established the underlying charge, the prosecutor could also look to charge any individuals, including Trump, Giuliani, Meadows, Eastman, Chesebro, Sinners, and others—potentially including individuals within the Trump campaign or at the Republican National Committee—who had a role in identifying, encouraging, and facilitating the signing of the documents that contained those falsehoods.

Specifically, Eastman and Chesebro authored memos which outlined the false-electors plan and its desired purpose, which was to create uncertainty in the congressional certification of the

electoral votes.<sup>768</sup> Trump publicly suggested that he had personal contact with Senator Burt Jones, one of the 16 false electors in Georgia, although the full content of their communications is not known.<sup>769</sup> If District Attorney Willis can establish that their conversations involved recruiting Jones or others to participate in the false-electors plot, then criminal liability for soliciting false statements may attach to the former president.

Trump personally called Ronna McDaniel, chairwoman of the RNC, and had Eastman not only describe the false-electors plan, but also ask for the RNC's assistance in gathering possible participants.<sup>770</sup> Testimony shows that the RNC complied with the request.<sup>771</sup> There has also been public reporting about Giuliani's level of engagement in ensuring that the plan was a success in Georgia.<sup>772</sup> Mark Meadows, aware of the plan from the start, was supportive and, while fielding several texts from other Republicans wanting to pursue the plan, said: "Yes, Have a team on it."<sup>773</sup> Additional investigation may be necessary to identify who specifically at the RNC acted on Trump's request and the extent of their involvement with the Georgia electors compared to other states in order for the district attorney to proceed. Similarly, with a court battle over his grand jury subpoena ongoing at the time of this writing, Meadows or others aware of his actions may provide more details about his level of engagement recruiting the false electors in Georgia.<sup>774</sup>

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<sup>768</sup> First Memorandum from John Eastman on Jan. 6 Scenario (last accessed Aug. 1, 2022), <https://tinyurl.com/8a3xubz2>; Second Memorandum from John Eastman on January 6 Scenario (accessed Aug. 23, 2022), <https://tinyurl.com/566xtz7s>; Memorandum from Kenneth Chesebro to Judge James R. Troupis on the Real Deadline for Settling a State's Electoral Votes (Nov. 18, 2020), <https://tinyurl.com/mryy6n6m>; Memorandum from Kenneth Chesebro to Judge James R. Troupis on Statutory Requirements for December 14 Electoral Votes (Dec. 9, 2020), <https://tinyurl.com/bdp3hhnr>.

<sup>769</sup> Donald J. Trump, Remarks at a Campaign Rally Prior to the Georgia State Senate Election Runoff in Valdosta, Georgia (Dec. 5, 2020) (transcript available in The American Presidency Project at the University of California, Santa Barbara), <https://tinyurl.com/s7yxup8f>; Here's every word from the 8th Jan. 6 committee on its investigation, NPR (July 22, 2022), <https://www.npr.org/2022/07/22/1112138665/jan-6-committee-hearing-transcript>.

<sup>770</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>771</sup> *Id.*

<sup>772</sup> Fausset & Hakim, *supra* note 4.

<sup>773</sup> Blake, *supra* note 215.

<sup>774</sup> Cheney, *supra* note 517; Murray & Cohen, *supra* note 538.

Trump campaign operatives in Georgia, including Sinners and others, could potentially face liability—and not only for their roles in recruiting the false electors. That culpability could also extend to their facilitation of the clandestine meeting where the documents were signed, as well as the documents' delivery to the National Archives in time to frustrate the congressional certification on January 6.

Without the planning, recruitment, and execution of the above individuals, the 16 false electors in Georgia may never have started down the path of submitting documents that contained false statements. As a result, the orchestrators mentioned above have potentially exposed themselves to criminal liability for the acts of soliciting false statements as a part of the plot to overturn the 2020 election results.

**b. Forgery in the First Degree (Ga. Code Ann. § 16-9-1(b))**

As noted above, the alleged orchestrators of the false-electors plan, including Chesebro and Sinners, and possibly Eastman, Meadows, and others based on the evidence, might face charges for solicitation of forgery in the first degree. In addition, testimony from the January 6 hearings demonstrated that Trump faces possible criminal liability for this charge as well. Consistent with the elements of solicitation, publicly available information indicates that each of the foregoing individuals played a role in devising a proposal for and/or recruiting the 16 false electors to participate in the plan. Potential liability is greatest for those who allegedly planned for and organized the false electors to sign documents that falsely certified that they were the “duly elected” electors for Trump—misrepresenting the will of the majority of the voters in the state.<sup>775</sup>

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<sup>775</sup> Second Memorandum from John Eastman on January 6 Scenario (last accessed Aug. 23, 2022), <https://www.washingtonpost.com/context/john-eastman-s-second-memo-on-january-6-scenario/b3fd2b0a-f931-4e0c-8bac-c82f13c2dd6f/>; Memorandum from Kenneth Chesebro to Judge James R. Troupis on Statutory Requirements for December 14 Electoral Votes (Dec. 9, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-memorandum-to-james-r.-troupis-attorney-for-trump-campaign-wisconsin-december-9-2020.pdf>; Gardner et al., *supra* note 218.

Furthermore, the evidence demonstrates Trump was directly involved in securing his campaign's adoption of the false-electors plan, shared that plan with the RNC leadership, and requested their assistance in finding alternate electors in the various states, including Georgia, that would adopt and affirm falsehoods contained in the implementing documents.<sup>776</sup>

The signatories and those soliciting the making of these documents—including the former president—knew they contained false information, as demonstrated by Chesebro's December 9 memo.<sup>777</sup> The certificates were then delivered to the National Archives for the express purpose of defrauding Congress as it performed its official function of certifying the 2020 election, thereby possibly satisfying the additional criminal element required for forgery in the first degree. The fact that all parties avoided seeking ratification of the alternative slate by the governor,<sup>778</sup> as required by statute,<sup>779</sup> and the absence of language on the document suggesting the appointments were conditioned upon Biden electors being deemed invalid, make it implausible that the parties were mistakenly operating under a false assumption of authority.<sup>780</sup> Conditional language was missing in most states where false electoral slates were produced, with the exception of Pennsylvania and New Mexico.<sup>781</sup> It could also be argued that the requisite intent to defraud and knowledge of falsity were further evidenced by Chesebro's and Sinner's respective demands for deception and secrecy surrounding the signing of false electoral certificates at the state capitol.<sup>782</sup> As further evidence

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<sup>776</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>777</sup> Memorandum from Kenneth Chesebro to Judge James R. Troupis on Statutory Requirements for December 14 Electoral Votes (Dec. 9, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-memorandum-to-james-r.-troupis-attorney-for-trump-campaign-wisconsin-december-9-2020.pdf>.

<sup>778</sup> *Id.*

<sup>779</sup> 3 U.S.C. § 15.

<sup>780</sup> False Electors Certificates at 7.

<sup>781</sup> *Id.*

<sup>782</sup> Memorandum from Kenneth Chesebro to Judge James R. Troupis on Statutory Requirements for December 14 Electoral Votes (Dec. 9, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/06/january-6-clearinghouse-kenneth-chesebro-memorandum-to-james-r.-troupis-attorney-for-trump-campaign-wisconsin-december-9-2020.pdf>; Gardner et al., *supra* note 216.



comes to light from witnesses about what happened behind the closed doors of that meeting, the Fulton County district attorney may gain even more probative evidence to support this charge.

**c. Violation of Oath by a Public Officer (Ga. Code Ann. § 16-10-1)**

Under Ga. Code Ann. § 16-10-1, “Any public officer who willfully and intentionally violates the terms of his oath as prescribed by law shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years.”<sup>783</sup> Georgia law requires public officials to take an oath to “support the Constitution of the United States and of this state[.]”<sup>784</sup> To prove the crime of violation of oath of office, “the State must prove that the defendant was actually administered an oath, that the oath was ‘prescribed by law,’ and that the officer violated the terms of that oath.”<sup>785</sup> Public officials have been indicted for violation of oath of office for a variety of reasons, some as tangentially related to the function of the office as charging personal expenses to state-supplied credit cards.<sup>786</sup> Other indictments have included a coroner’s failure to investigate deaths while receiving payment for his work,<sup>787</sup> and an officer’s acts of abuse against prison inmates.<sup>788</sup> Government employees who do not take an oath, or other government officials who take an oath different from the one statutorily proscribed in Ga. Code Ann. § 45-3-1, cannot be prosecuted under Ga. Code Ann. § 16-10-1.<sup>789</sup>

The governor, attorney general, secretary of state and members of the state legislature all took the statutory oath outlined in Ga. Code Ann. § 45-3-1 upon assuming office. In deciding whether unelected officials, such as Watson and some of the 16 false electors, are “public

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<sup>783</sup> Ga. Code Ann. § 16-10-1.

<sup>784</sup> Ga. Code Ann. § 45-3-1.

<sup>785</sup> Reynolds v. State, 334 Ga. App. 496, 499 (2015).

<sup>786</sup> United States v. Stevens, No. 1:18-CR-160-SCJ-JKL, 2018 WL 6596457 (N.D. Ga. Aug. 28, 2018) (report and recommendation adopted), No. 1:18-CR-160-SCJ, 2018 WL 6190676 (N.D. Ga. Nov. 28, 2018).

<sup>787</sup> Fortner v. State, 350 Ga. App. 226 (2019).

<sup>788</sup> State v. O’Neal, 352 Ga. App. 228 (2019), *cert. denied*, (Apr. 20, 2020).

<sup>789</sup> McDuffie v. Perkerson, 178 Ga. 230 (1933). *See also* Robert E. Cleary, Kurtz Criminal Offenses and Defenses in Georgia (2022 ed.).

officials,” the Georgia Supreme Court has said it is important to consider whether “the warrant to exercise powers is conferred, not by a contract, but by the law ... The essential thing is that in some way or other the officer is identified with the government.”<sup>790</sup>

The conduct that Trump reportedly solicited—the alteration of the results of a free and fair election—likely constitutes a violation of the oath that Raffensperger swore. His calls to Watson and Carr may also implicate this rule (assuming, as prescribed by statute, Watson swore an oath consistent with the statutorily prescribed one for public officials or otherwise could be deemed to be an officer identified with the government).<sup>791</sup> With respect to Carr, Trump requested that Georgia’s top lawyer engage in dereliction of duty—and a betrayal of his obligations to the people of Georgia—by willfully refusing to defend the lawful certification of the state’s electoral outcome at the Supreme Court of the United States. Similarly, Trump pressuring Governor Kemp to exceed his legal authority to hold a special session contrary to his gubernatorial oath may give rise to additional charges under this code section.

As a state senator, Burt Jones<sup>792</sup> took an oath to uphold the U.S. and Georgia constitutions. As noted above, he potentially faces criminal liability for false statements, false swearing, and forgery in the first degree as one of the 16 false electors who affixed his “hand and seal” to a document falsely indicating he and others were duly elected to cast electoral votes for Trump in the 2020 election. The available evidence indicates that the false-electors plan did not originate in Georgia and certainly not with Jones.<sup>793</sup> Therefore, Jones would likely need to have been

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<sup>790</sup> *McDuffie v. Perkerson*, 178 Ga. 230 (1933) at 235 (quoting Wyman's Administrative Law, 163 § 44).

<sup>791</sup> Oath of District Attorney Investigator, Prosecuting Attorneys’ Council of Georgia, Rev. Dec. 2012, [https://pacga.org/wp-content/uploads/2019/01/Oath\\_of\\_DAI.pdf](https://pacga.org/wp-content/uploads/2019/01/Oath_of_DAI.pdf).

<sup>792</sup> As of this writing, there is little information about whether any of the other 16 false electors could be deemed “public officers” and potentially trigger additional criminal liability for those soliciting them to violate a statutory oath. As more evidence is gained about their status, employment or roles, additional analysis will need to be done about additional possibilities for criminal liability.

<sup>793</sup> Blake, *supra* note 215.

approached by Trump or campaign operatives in order to be brought into the fold in order to participate in the plan. Any actions, including possibly those by the former president personally, Giuliani, Meadows, Eastman, Chesebro, members of the RNC, Sinners, or others, to recruit Jones could satisfy the statutory elements of solicitation to violate oath of office.

**d. False Official Certificates and Writings (Ga. Code Ann. § 16-10-8)**

Under Ga. Code Ann. § 16-10-8, “An officer or employee of the state ... authorized by law to make or give a certificate or other writing who knowingly makes and delivers such a certificate or writing containing any statement which he knows to be false shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years.”<sup>794</sup> The crime is distinguishable from committing false statements and writings in that the actor must be an officer or employee of the state.<sup>795</sup>

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<sup>794</sup> Ga. Code Ann. § 16-10-8.

<sup>795</sup> Georgia courts have not articulated a clear-cut, applicable definition of “officer of the state”; however, they have provided multiple interpretations of the term within the specific meanings of other state statutes that may be helpful here. First, in *Wood v. State*, 219 Ga. 509, 513 (1963) the court held that municipal officers were not officers of the state: “Under the uniform rule of strict construction, a penal statute cannot be expanded by implication to make it include any officer except an officer of the State and therefore it does not include municipal officers.” In *State v. Harber*, 198 Ga. App. 170, 171 (1990), within the meaning of Ga. Code Ann. § 17-5-20 (which provided that “[a] search warrant may be issued only upon the application of an officer of this state or its political subdivisions charged with the duty of enforcing the criminal laws”), the court defined “officer of this state” as “one who has been authorized by the State to enforce its criminal laws and who has received certification pursuant to the Georgia Peace Officer Standards & Training Act.” In *Thornton v. State*, 851 S.E.2d 564, 568 (2020), the court held that a Department of Natural Resources (DNR) game warden was an officer of the state because DNR is a state department: “We readily conclude that a DNR game warden is among the officers identified in the first part of OCGA § 40-13-30. DNR is a department of the state government, and inasmuch as they are classified as ‘a unit of peace officers’ within DNR, see OCGA § 27-1-16 (a), game wardens undoubtedly are ‘officer[s] of this state’ for purposes of OCGA § 40-13-30.” In *Perry v. State*, 118 Ga. App. 22, 23–24 (1968), the court applied a similarly narrow interpretation of the phrase in determining whether Georgia state patrol persons were “officers of the state”: “The Department of Public Safety is a part of the executive branch of the State. Code Ann. § 92A-101. The Georgia State Patrol is a division of that Department. Code Ann. § 92A-201. Their duties include patrolling highways, preventing, detecting and investigating criminal acts, arresting those charged with committing criminal offenses, and safeguarding the lives and property of the public; thus, they are ‘officers of the State’ within the meaning of Code Ann. § 26-4102. Cf. *Gibbs v. State*, 109 Ga. App. 102 (135 S.E.2d 595).” The court in *Sams v. Olah*, 225 Ga. 497, 504 (1969) offered a broader interpretation of the phrase that hinged on an obligation to the public, holding that lawyers are “in a sense” officers of the state: “The lawyer stands in a unique position in our society. He is by virtue of the practice of his profession an officer of the court. *Platen v. Byck*, 50 Ga. 245, 248; *Bibb County v. Hancock*, 211 Ga. 429, 438 (86 S.E.2d 511). In *Gordon v. Clinkscales*, 215 Ga. 843, 845, 846 (114 S.E.2d 15), this court quoted with approval from 7 CJS 708, Attorney and Client, § 4 b, as follows: ‘The right to practice law is not a natural or constitutional right, nor an absolute right or a

While this statute is general and not confined to election-related matters, the secretary of state is, as discussed in Section III.A.1.c.i.a, authorized by law to issue writings and certificates respecting the results of a presidential election. As noted above, Trump's entreaties to Raffensperger to "find" 11,780 votes in his favor in an effort to overturn the election would have required the secretary, as an officer of the state, to decertify (or issue a certified document or other writing disputing the prior certification) and then recertify the election. This most likely would have required the delivery to state and congressional officials of a new certified document—that contained statements about Trump winning the popular vote which Raffensperger knew to be false. To the extent that the governor had a role in certifying the election, Trump's requests for him to use his authority as governor to overturn the will of the voters and appoint special electors for Trump would presumably also have required submission of a document that contained falsehoods about the election results. In both instances, the facts could be sufficient to charge the former president with solicitation of false certificates.<sup>796</sup>

**e. False Swearing (Ga. Code Ann. § 16-10-71)**

In addition to looking at the possible solicitation of Raffensperger and Germany to make false statements, prosecutors could investigate a charge of solicitation of false swearing against Trump for requesting that the officials execute documents to overturn the election results based on those false statements. The Georgia Code states:

A person to whom a lawful oath or affirmation has been administered or who executes a document knowing that it purports

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right de jure, but is a privilege or franchise.' It also quoted with approval from 7 CJS 706, Attorney and Client, § 4 a, as follows: 'An attorney does not hold an office or public trust, in the constitutional or statutory sense of that term, but is an officer of the court. He is, however, in a sense an officer of the state, with an obligation to the courts and to the public no less significant than his obligation to his clients. The office of attorney is indispensable to the administration of justice and is intimate and peculiar in its relation to, and vital to the well-being of, the court.'"

<sup>796</sup> Ga. Code Ann. § 16-10-8.

to be an acknowledgment of a lawful oath or affirmation commits the offense of false swearing when, in any matter or thing other than a judicial proceeding, he knowingly and willfully makes a false statement.<sup>797</sup>

Punishment includes up to a \$1,000 fine, one to five years in prison, or both.<sup>798</sup> The crime is broader than perjury in three ways: 1) it applies to false statements made in situations other than judicial proceedings; 2) the false statement need not be material;<sup>799</sup> and 3) the crime does not require the administration of an oath, only that the execution of the document purports to be an acknowledgment of a lawful oath or affirmation.<sup>800</sup>

Trump's January 2 phone call contained repeated requests and thinly veiled attempts to intimidate Raffensperger and Germany in an effort to get them to knowingly and willfully make a false statement claiming that fraud and wrongdoing existed during the election when it, in fact, did not. Trump pressed them to "give him a break" and "find 11,780 votes" that he needed to win the state's election. By the time of the call, Raffensperger had already certified the election results 43 days earlier on November 20, 2020.<sup>801</sup> In fact, the call happened only four days before Congress was scheduled to certify the election results in a joint session on January 6.

One way for Raffensperger to accommodate Trump's request would have been for him to execute a document containing false information about the vote count to overturn the November 20 certification and the December 7 recertification. While Raffensperger and Germany took an oath upon assuming their respective positions in the secretary of state's office, those oaths would

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<sup>797</sup> Ga. Code Ann. § 16-10-71(b).

<sup>798</sup> *Id.*

<sup>799</sup> *Plummer v. State*, 90 Ga. App. 773 (1954).

<sup>800</sup> *Holland v. State*, 172 Ga. App. 444 (1984); *Finch v. State*, 326 Ga. App. 141 (2014).

<sup>801</sup> Office of Georgia Secretary of State Brad Raffensperger, November 2020 General Election Results, <https://results.enr.clarityelections.com/GA/107231/web.264614/#/summary>; Haney, *supra* note 80.

not be material to establishing this charge. “[T]he offense of false swearing is defined to include signing documents that purport to be an acknowledgment of a lawful oath, regardless of whether an oath had actually been administered by an official. Under this broad[] definition, one who executed a document with knowledge that his mere execution would ‘purport’ to be or would evince his ‘acknowledgment’ that the statements contained therein were being made under lawful oath or affirmation could be held accountable for false swearing.”<sup>802</sup> If Raffensperger had executed sworn election documentation based on the erroneous vote counts described by Trump, he would have been guilty of false swearing because the document would have constituted his acknowledgment that the statements in the document were made under oath or affirmation. And because “only a relatively overt statement or request intended to bring about action on the part of another person will bring a defendant within the statute,” Trump’s repeated requests of Raffensperger allow investigation of the crime of solicitation of false swearing.<sup>803</sup>

Furthermore, as outlined previously, there is a substantial question whether each of the 16 false electors might face criminal liability for false swearing based on affixing their “hands and seals” to the document that falsely stated they were duly elected and qualified to cast votes for Trump in the 2020 election, when in fact Biden had won the state’s electoral votes. With sufficient evidence that each signature and seal constituted an affirmation of the falsities contained in the document, the Fulton County district attorney might potentially satisfy the “oath or affirmation” element of the crime and pursue charges for false swearing using all of the facts and circumstances outlined in Section III.B.5.c. above.

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<sup>802</sup> Finch v. State, 326 Ga. App. 141 (2014) (quoting Holland v. State, 172 Ga. App. 444 (1984)).

<sup>803</sup> State v. Davis, 246 Ga. 761, 762–763(2), 272 S.E.2d 721 (1980). Determination of whether this offense may apply requires interviewing personnel in the secretary’s office, and possibly outside experts, and reviewing all of the possible documentation which would have been required.

**f. Computer Trespass (Ga. Code Ann. § 16-9-93(b)) and Computer Invasion of Privacy (Ga. Code Ann. § 16-9-93(c))**

As more information is learned about the Trump campaign's and Sidney Powell's solicitation of a computer forensics team to access and copy data on the Dominion voting machines in Coffee County, the prosecutor may be able to develop viable charges against those involved provided the Fulton County district attorney can establish venue in Atlanta. Those might take the form of charging solicitation of violations of the relevant computer trespass and invasion statutes, charging violation of those underlying statutes themselves, or both. The facts are continuing to evolve rapidly as we write. With these caveats, we briefly outline the possible offenses here.

Computer trespass is codified in Ga. Code Ann. § 16-9-93(b). That provision prohibits the use of “a computer or computer network with knowledge that such use is without authority and with the intention of: (1) Deleting or in any way removing, either temporarily or permanently, any computer program or data from a computer or computer network; (2) Obstructing, interrupting, or in any way interfering with the use of a computer program or data; or (3) Altering, damaging, or in any way causing the malfunction of a computer, computer network, or computer program, regardless of how long the alteration, damage, or malfunction persists.”<sup>804</sup> Computer invasion of privacy is when “[a]ny person who uses a computer or computer network with the intention of examining any ... personal data relating to any other person with knowledge that such examination is without authority.”<sup>805</sup> Both charges are punishable by a fine up to \$50,000 and 15 years in prison.<sup>806</sup>

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<sup>804</sup> Ga. Code Ann. § 16-9-93(b); *see also* Kinslow v. State, 860 S.E.2d 444, 448–51 (Ga. 2021) (holding that “‘obstruct’ often means to stop or block the passage of something” including by “stop[ping] the flow of data altogether”; that “‘[i]nterrupt’ can mean to inflict more of a temporary stoppage,” including a temporary or intermittent stoppage of data; and that “‘interfering’ with the use of data requires proof that a person engaged in a level of interference that hindered the use of data”).

<sup>805</sup> Ga. Code Ann. § 16-9-93(c).

<sup>806</sup> Ga. Code Ann. § 16-9-93(h)(1).

Even as Georgia switched to paper ballots in 2020 as a means to back up the computer tabulations in elections,<sup>807</sup> the integrity of data contained on the voting and other machines was central to Trump's unfounded insistence that he won the election.<sup>808</sup> As Georgia courts have made clear, the alteration of important government records is a paradigm case—unauthorized use of a computer network can support a criminal prosecution.<sup>809</sup>

Trump's plan to overturn the election results involved attacking the integrity of Dominion's voting machines. On multiple occasions, Trump personally tweeted about and made statements advancing false allegations about the Dominion voting machines being hacked.<sup>810</sup> These untrue statements were echoed by many campaign operatives, including Giuliani, Powell, and others, both inside and outside Georgia.<sup>811</sup> Possibly in pursuit of evidence to justify these false claims, Sidney Powell hired and directed SullivanStrickler, an Atlanta-based computer forensics firm, to access the computers in select states, including Georgia.<sup>812</sup> Whether or not charges are ultimately filed under the computer trespass or invasion of privacy subparts of the Georgia Computer Systems Crime Act, DA Willis has signaled through her latest round of grand jury subpoenas her interest in these events. She appears to be inquiring about the genesis of this plan and the extent to which Trump personally, or through his campaign operatives, directed the computer intrusions.<sup>813</sup> Two

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<sup>807</sup> Jason Braverman, 'Election security is our top priority': Georgia to get new verified paper ballot system, 11ALIVE (July 29, 2019), <https://www.11alive.com/article/news/local/elections-is-our-top-priority-georgia-to-get-new-verified-paper-ballot-system/85-ec7ae4b2-78da-4e02-b6e1-869529495a30>.

<sup>808</sup> For more, reference Box 2 in Section I.D.

<sup>809</sup> Cf. *Countryman v. State*, 355 Ga. App. 573, 586 (2020) (subdivision (a) of computer crime statute, which prohibits unauthorized use of computers to appropriate another's property, was violated when National Guard employee altered her own grades in the government's computer system to render her eligible for certain financial assistance).

<sup>810</sup> Larson, *supra* note 155; *see also* Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Nov. 12, 2020, 11:34:00 AM), <https://www.thetrumparchive.com/?searchbox=%22dominion%22&results=1>; Donald J. Trump (@realDonaldTrump), THE TRUMP TWITTER ARCHIVE (Dec. 15, 2020, 12:21:43 AM), <https://www.thetrumparchive.com/?searchbox=%22dominion%22&results=1>.

<sup>811</sup> Larson, *supra* note 155.

<sup>812</sup> Brown et al., *supra* note 395.

<sup>813</sup> Petition for Certification of Need for Testimony Before Special Purpose Grand Jury Pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State, O.C.G.A. § 24-13-90 et seq., *In re* Special Purpose



key facts the district attorney's continued investigation may reveal are: 1) how the forensics firm became connected to Cathy Latham, one of the 16 false electors and a former GOP chairwoman of Coffee County,<sup>814</sup> and 2) who in the Trump campaign may have facilitated that connection.

In order to successfully pursue computer trespass charges involving the Dominion machines, in addition to meeting the venue requirements, prosecutors would also have to establish that access was obtained without authority. Ga. Code Ann. § 21-2-32 expressly affords the secretary of state the authority to examine, or re-examine, any voting machines either pursuant to his own discretion or upon the request of any person or organization. Initial reports suggested that Paul Maggio, SullivanStrickler's chief operations officer, and others may have somehow obtained consent from local elections officials in Coffee County to access the voting machines. But Latham, who opened the doors to the building for Maggio and other SullivanStrickler employees, testified that she recalled making only a brief stop at the elections office on January 7, 2021.<sup>815</sup> Latham has also testified that she did not know what Scott Hall, one of the people let into the elections office with Maggio, was doing in Coffee County. Secretary Raffensperger has referred to the breach as "the unauthorized access to the equipment that former Coffee County election officials allowed in violation of Georgia law."<sup>816</sup>

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Grand Jury, 2022-EX-000024 (Ga. Super. Ct. Aug. 25, 2022) (subpoena for James Waldron), <https://www.fulton-clerk.org/DocumentCenter/View/1402/CERTIFICATE-OF-MATERIAL-WITNESS-JAMES-PHIL-WALDRON>; Petition for Certification of Need for Testimony Before Special Purpose Grand Jury Pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State, O.C.G.A. § 24-13-90 et seq., *In re* Special Purpose Grand Jury, 2022-EX-000024 (Ga. Super. Ct. Aug. 25, 2022) (subpoena for Sidney Powell), <https://www.fulton-clerk.org/DocumentCenter/View/1408/PETITION-FOR-CERTIFICATION-SIDNEY-KATHERINE-POWELL>.

<sup>814</sup> Cohen & Morris, *supra* note 403.

<sup>815</sup> Emma Brown & Jon Swaine, Election deniers repeatedly visited Ga. county office at center of criminal probe, video shows, THE WASHINGTON POST (Sept. 6, 2022), <https://www.washingtonpost.com/investigations/2022/09/06/coffee-county-georgia-breach-logan/>.

<sup>816</sup> *Id.*; Richard Fausset, Georgia Official Says County's Voting Equipment Will Be Replaced, THE NEW YORK TIMES (Sept. 23, 2022), <https://www.nytimes.com/2022/09/23/us/coffee-county-georgia-election.html>.

Once lack of proper authority is established, prosecutors would also need to establish that accessing and copying information from the voting machines constitutes a prohibited removal of, or interference with, information in violation of the statute even in the absence of creating any other interference or damage to the machine. As details are revealed, prosecutors may rely on the fact that the machines ultimately had to be replaced by the secretary of state's office as a result of interference solicited and ordered by the Trump campaign.<sup>817</sup> Finally, depending on the available facts, the Fulton County district attorney may want to consider investigating the alternative crime of computer invasion of privacy. That could be reviewed based on the Trump campaign's intent to examine personal data—private voting information—without proper authority to do so.

**C. Georgia's RICO Act (Ga. Code Ann. § 16-14-1 et seq.)**

When people think of RICO—the acronym for the Racketeer Influenced and Corrupt Organization Act—they conjure an image of a Mafia boss overseeing a vast organized crime ring.<sup>818</sup> To be sure, RICO statutes were enacted with organized crime in mind, but over the past half-century, federal and state RICO laws have been used more broadly to target criminal enterprises engaged in various patterns of criminal conduct. As we described above, Trump's multifaceted and sustained effort to subvert the count and certification of the election in Georgia may include a host of distinct state crimes. As such, prosecution under Georgia's RICO law may be available and appropriate.

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<sup>817</sup> Amy Gardner, Emma Brown & Jon Swaine, Georgia to replace voting machines in Coffee County after alleged security breach, THE WASHINGTON POST (Sept. 23, 2022), <https://www.washingtonpost.com/investigations/2022/09/23/coffee-county-georgia-election-machines/>.

<sup>818</sup> So, *supra* note 244.

Georgia's General Assembly enacted the state's RICO law in 1980 after determining "that a severe problem is posed in this state by the increasing sophistication of various criminal elements and the increasing extent to which the state and its citizens are harmed as a result of the activities of these elements."<sup>819</sup> The statute makes it a crime to engage in a pattern of racketeering activity to acquire or maintain an enterprise or property, or to participate in an enterprise through a pattern of racketeering activity.<sup>820</sup> It also makes it a crime to conspire to do either.<sup>821</sup>

At its heart, the statute requires the existence of an "enterprise" and a "pattern of racketeering activity."<sup>822</sup> An "enterprise" is not limited to a purely criminal organization. In Georgia, it has been used to hold defendants accountable for a host of different criminal schemes, including attempts by candidates to seek or maintain elected office<sup>823</sup> and, famously in Georgia, a scheme by officials to facilitate cheating on standardized tests.<sup>824</sup> In the context of a public office, the prosecution must show "an interrelated pattern of activity by and through the [public] office."<sup>825</sup>

The "pattern of racketeering activity" element is defined by a list of conduct—predicate state crimes—that can qualify together as a pattern.<sup>826</sup> The statute is broader than its federal counterpart. It lists over 40 predicate crimes or acts under state and federal law that constitute "racketeering activity" to trigger the statute's application.<sup>827</sup> One of the ways the Georgia statute

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<sup>819</sup> Ga. Code Ann. § 16-14-2.

<sup>820</sup> Ga. Code Ann. § 16-14-4(a)–(b).

<sup>821</sup> Ga. Code Ann. § 16-14-4(c).

<sup>822</sup> Ga. Code Ann. § 16-14-4(b).

<sup>823</sup> *See* *Dorsey v. State*, 615 S.E.2d 512 (Ga. 2005).

<sup>824</sup> Chelsea J. Carter, Grand jury indicts 35 in Georgia school cheating scandal, CNN (Mar. 29, 2013, 10:55 PM), <https://www.cnn.com/2013/03/29/us/georgia-cheating-scandal/index.html>.

<sup>825</sup> *Dorsey v. State*, 615 S.E.2d 512 (Ga. 2005).

<sup>826</sup> "'Racketeering activity' means to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit any crime which is chargeable by indictment' under certain specified categories of laws. Ga. Code Ann. §§ 16-14-3(9)(A)(i) through (xxxviii). These are the qualifying crimes, known as predicate offenses." *Dorsey v. State*, 615 S.E.2d 512 (Ga. 2005).

<sup>827</sup> Ga. Code Ann. § 16-14-3.

is more expansive than the federal RICO provisions is that attempt, solicitation, coercion, and intimidation of another to commit one of the predicate offenses can be included as predicate acts of racketeering activity.<sup>828</sup> This is true even when such crimes are not able to be indicted separately.<sup>829</sup>

Winning a RICO case requires establishing that a defendant, with the requisite intent, committed at least two related predicate acts. In interpreting the venue provisions of Georgia's RICO statute contained in Ga. Code Ann. § 16-14-11, courts have concluded that "at least one of the predicate acts for the RICO charge must have been committed in the county in which the criminal proceeding is brought."<sup>830</sup> To be sure, acts that do not directly facilitate the RICO charge can still be considered related and included in the charging document,<sup>831</sup> and the state need not prove every predicate act charged as long as the defendant is found to have committed at least two predicates enumerated in the indictment.<sup>832</sup> The criminal penalties upon conviction for RICO alone may include up to 20 years in prison and a fine.<sup>833</sup> Defendants may receive separate sentences for both the RICO violation and the underlying predicate crimes—that is, prosecutors can charge both the individual crimes and the RICO scheme as a whole.<sup>834</sup>

Depending on the precise facts as developed in the Fulton County investigation, it is our belief that under Section 16-14-4(b) the Trump campaign may be a potential "enterprise" that could be subject to prosecution for purposes of the RICO statute.

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<sup>828</sup> Ga. Code Ann. § 16-14-3(9)(A).

<sup>829</sup> *Dorsey v. State*, 615 S.E.2d 512 (Ga. 2005).

<sup>830</sup> *Davitte v. State*, 238 Ga. App. 720, 725 (1999). *See also* *Chancey v. State*, 256 Ga. 415, 432–433(6) (1986); *Dover v. State*, 192 Ga. App. 429, 432–433(2) (1989).

<sup>831</sup> *Dorsey*, 615 S.E.2d at 519.

<sup>832</sup> *Id.* at 518. *See also* *Redford v. State*, 710 S.E.2d 197, 200 (Ga. Ct. App. 2011).

<sup>833</sup> Ga. Code Ann. § 16-14-5.

<sup>834</sup> *Dorsey*, 615 S.E.2d at 535; *Drewry v. State*, 201 Ga. App. 674, 675–676(3) (1991).

In addition, given the independent but connected activities of Trump's campaign advisors and operatives, others within his circle both inside and outside Georgia could also be ensnarled in a RICO indictment focusing on attempts to overturn the state's election. Our analysis suggests that a RICO indictment could center upon the following charges as predicate acts:

- 1) false statements and writings;
- 2) solicitation of false statements and writings;
- 3) influencing witnesses;
- 4) forgery in the first degree;
- 5) solicitation of forgery in the first degree; and
- 6) solicitation of computer trespass and/or computer invasion of privacy (as crimes included in the Georgia Computer Systems Crime Act).

Proving at least two of the charges, in any combination of possible defendants, could meet the element of a pattern of racketeering activity. In an attempt to cogently lay out the possible charges and possible defendants, we analyze the potential charges first against Trump and then against some of his affiliates: Giuliani, Eastman, Sinners, and the false electors. Others like Chesebro, Meadows, Powell, Latham, and Mitchell may also face criminal liability, but that would depend, in part, on the district attorney's discretion in how broadly she desires to cast the RICO net and the strength of evidence to support those charges. Even without formal charges, they could be named in a RICO indictment in terms of how their actions, including at the direction of Trump, furthered his plan to remain in office.

### **1. Possible RICO Charges Against Trump**

In Section III.B, we discussed a number of Georgia state crimes for which Trump may be liable based on his engagement with Raffensperger on the January 2 call. The following are enumerated as available predicate offenses under the RICO statute: 1) false statements and

writings; 2) solicitation of false statements and writings; 3) solicitation of false swearing; 4) influencing witnesses; and 5) solicitation of computer trespass (as a crime included in the Georgia Computer Systems Crime Act). Proving Trump committed at least two of these offenses could meet the element of a pattern of racketeering activity, and venue could be established based on Trump's January 2 call to Raffensperger (assuming the call was received by the state officials while they were in Fulton County). This nexus might also be sufficient for the district attorney to add RICO charges for making false statements to Trump's call to Investigator Watson and for any inducements meant to influence her in a way that constitutes a violation of the influencing-witnesses statute, even if the call was received in Cobb County instead of Fulton County.

In addition, if it can be demonstrated that Trump directly, or through his campaign with his knowledge and direction, recruited the Georgia false electors and had them knowingly sign documents that were false, his actions may also establish separate predicate acts of soliciting false statements for a RICO charge. Similarly, if it can be established that those recruitment efforts solicited individuals to commit forgery in the first degree and deliver to Georgia and federal officials, including Congress documents that purport to give the signers authority as "duly elected" (when in fact they had no such authority), Willis could pursue additional predicate acts under RICO. She could rely on the fact that the false electors met at the state capitol in Fulton County to establish sufficient venue for the charges.<sup>835</sup>

This would not be Georgia's first RICO prosecution involving public officials, predicate acts like these, or both combined. The Georgia Supreme Court upheld the RICO conviction of former state Labor Department head Sam Caldwell and expressly rejected the idea that RICO "was not intended to apply ... to an elective office holder seeking reelection."<sup>836</sup> Rather, a RICO

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<sup>835</sup> Gardner et al., *supra* note 218.

<sup>836</sup> Caldwell v. State, 253 Ga. 400, 402 (1984).

prosecution based on predicate acts like “false statements” and “false swearing” by a public official seeking reelection—similar to crimes that Trump could well have engaged in or solicited—validly formed the basis of a RICO prosecution.<sup>837</sup> Nor would it matter if any, or even all, of the relevant predicate acts were misdemeanors, as the Georgia courts have expressly upheld RICO convictions based exclusively, or in part, on misdemeanor predicate acts.<sup>838</sup> Finally, as the facts may emerge to show that others worked in concert with Trump to effectuate his plan in violation of federal statutes, a RICO conspiracy charge under Section 16-14-4(c) may also be available.

## 2. Possible RICO Charges Against Trump's Affiliates

As noted above, Rudy Giuliani potentially faces criminal liability for false statements as he continued to lie about the existence of fraud and outlined debunked conspiracy theories during each of the three appearances he made in front of committees in the Georgia legislature.<sup>839</sup> There is an extensive record of both Georgia and federal officials—including Attorney General Barr, officials at the Department of Homeland Security in charge of election security, and others—who repeatedly told Giuliani and the former president that their claims were untrue. Yet Giuliani continued to spout falsehoods in public proceedings and in front of public officials despite having information otherwise, evincing sufficient intent under the statute.<sup>840</sup> Prosecutors could point to this disregard of the truth as a means to help establish intent in violation of the statute. The venue requirement for this RICO charge could be established by the fact that Giuliani personally

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<sup>837</sup> *Id.* at 401; *see also* Dorsey v. State, 615 S.E.2d 512, 540 (Ga. 2005) (upholding RICO conviction of elected sheriff, including where predicate acts included solicitation).

<sup>838</sup> Glenn v. State, 282 Ga. 27, 28 n.2 (2007) (upholding RICO conviction based exclusively on repeated commission of misdemeanor crime of making illegal payday loans).

<sup>839</sup> Georgia House of Representatives, Governmental Affairs 12.10.20, YOUTUBE (May 5, 2022), <https://tinyurl.com/y9v692w4>; True the Vote, Georgia Senate Judiciary Subcommittee Hearing on Elections (Part 2), YOUTUBE (Dec. 5, 2020), <https://www.youtube.com/watch?v=c1o8-y5ou5Y>; Right Side Broadcasting Network, LIVE: Georgia State Senate Holds Meeting on 2020 Election Fraud 12/30/20, YOUTUBE (Dec. 30, 2020), <https://tinyurl.com/39m5h6he>.

<sup>840</sup> McGraw, *supra* note 760.

appeared before the legislative bodies at the state capitol in Fulton County, just up the street from the district attorney's office.

In addition, Giuliani's entreaties for the Georgia legislature to convene for a special session to overturn the election would likely have required members of the legislature to falsely state that Trump won the election in the documents and procedures needed to effectuate the special session. As a result, Giuliani could be criminally liable for soliciting those false statements or writings. Lastly, Giuliani's misconduct and his use of name-calling, admonitions to the legislators of the risk of jail time for not recognizing the nonexistent fraud, and other intimidation could rise to the level of influencing witnesses in violation of Ga. Code Ann. § 16-10-93.<sup>841</sup> With sufficient proof, any actions by Giuliani establishing the charges of soliciting false statements and influencing witnesses could qualify as additional predicate acts, thereby potentially creating additional criminal liability for Giuliani under Georgia's RICO statute.

Turning to others who may have committed RICO predicates, John Eastman also appeared with Giuliani during at least one of the Georgia legislative hearings. Eastman advanced the Trump campaign's falsehoods and conspiracy theories about nonexistent fraud, such as there being allegedly 66,000 under-aged voters in the election. He stated to the state legislators that they had a duty to "adopt a slate of electors [themselves]."<sup>842</sup> For all the reasons mentioned before that establish Eastman knew or should have known his statements were untruthful, the district attorney could investigate him for false statements.<sup>843</sup> In addition, as an alleged primary orchestrator of the false-electors plan, Eastman could possibly be charged with 16 counts of soliciting forgery in the

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<sup>841</sup> Right Side Broadcasting Network, Georgia State Senate Meeting on 2020 Election Fraud, YOUTUBE (Dec. 30, 2020), [https://www.youtube.com/watch?v=u5ZP\\_HpBKos](https://www.youtube.com/watch?v=u5ZP_HpBKos).

<sup>842</sup> Claremont Institute, John Eastman Testimony During Georgia Senate Election Hearing, YOUTUBE (Dec. 4, 2020), [https://www.youtube.com/watch?v=IHt6UEc\\_tQ8](https://www.youtube.com/watch?v=IHt6UEc_tQ8).

<sup>843</sup> Aaron Blake, All the Jan. 6 evidence that Trump and Co. knew their plot was corrupt, THE WASHINGTON POST (June 18, 2022), <https://www.washingtonpost.com/politics/2022/06/18/evidence-january-6-plot-corrupt/>.



first degree (one for each elector sought) and 16 counts of soliciting false statements if the evidence collected by the district attorney establishes his connection to the selection of the individuals in Georgia. Sinners, who based on the evidence known thus far, was directly involved in instructing the 16 individuals, could face an identical number of charges of solicitation to commit forgery in the first degree and solicitation of false statements as well. It should be noted that each of the 16 electors could also possibly be charged with a single count of forgery in the first degree as well as a charge of making false statements, depending on the development of the facts.<sup>844</sup>

Each such charge for Giuliani, Eastman, Sinners, and all 16 electors described herein could count as a separate predicate act under Georgia's RICO statute. Given that the plot was consummated by the false electors signing the fraudulent documents at the state capitol in Atlanta, Willis could establish sufficient venue upon which criminal liability for other charges could attach.

Based on public reports that Sidney Powell placed a call to the Atlanta-based forensics firm to access the voting machines in Coffee County,<sup>845</sup> Willis may be able to establish sufficient venue to include RICO charges against her for solicitation of computer trespass and/or computer invasion of privacy. That possibility would depend on whether there is sufficient evidence that Powell was involved in committing one other predicate act that furthered the campaign's plan to overturn the election results. Similarly, reports that Cathy Latham provided the forensics team access to the building in Coffee County where the voting machines were held could result in her being charged with aiding or abetting any computer trespass or computer invasion of privacy charges under RICO after the district attorney establishes sufficient venue based on her involvement as one of the 16 false electors.<sup>846</sup>

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<sup>844</sup> For the false electors' defenses, see Electors Oppo. at p. 51, n. 227 of this report.

<sup>845</sup> Cohen & Morris, *supra* note 403.

<sup>846</sup> *Id.*

In sum, because the “list of offenses incorporated into Georgia RICO is extensive,” that powerful statute has been a commonly used tool for Georgia prosecutors.<sup>847</sup> Several of the potential crimes we have enumerated could form the basis for such a prosecution. We believe that a RICO charge presents a unique mechanism by which Georgia prosecutors can hold Trump accountable for his entire plan. The Fulton County district attorney will have a great deal of discretion in deciding which crimes, or which combination thereof, to include as predicate acts under the RICO statute (a process that will undoubtedly be helped by the presence on her team of RICO expert John E. Floyd). Moreover, the state is free to offer other facts and potential crimes even if they are not charged as part of the indictment. Thus, whether or not the state opts for the simpler route of including only the most direct violations of the law, the full plan might be charged to include acts and events relating to Georgia even though they occurred outside of Georgia, such as the termination of a senior Homeland Security official and pressure brought to bear on the Department of Justice.<sup>848</sup>

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<sup>847</sup> John E. Floyd, *RICO State by State: A Guide to Litigation Under the State Racketeering Statutes* 7 (2nd ed. 2011).

<sup>848</sup> Benner, *supra* note 284.

#### IV. Defenses

In the event that Trump were to face state law criminal charges in Georgia, he would undoubtedly raise federal constitutional defenses to liability. Those defenses likely would include assertions of immunity by virtue of his status as a former president; claims that his conduct was protected by the First Amendment; accusations of selective or retaliatory prosecution; and an insistence that his conduct is shielded from liability because he truly believed his own claims of widespread election fraud. Based on our review of the public record concerning Trump's conduct—and our understanding of relevant constitutional principles—we believe that these constitutional defenses would be meritless.

##### A. Trump Does Not Enjoy Immunity from Prosecution Based on His Conduct While President

If Georgia prosecutors file charges against Trump, he will surely argue that he is immune from prosecution because he was in office while the challenged conduct occurred. To that end, he may cite the U.S. Supreme Court case, *Nixon v. Fitzgerald*, which held that presidents (including former presidents) are absolutely immune from civil liability for acts committed in the course of performing their official duties.<sup>849</sup> He can be expected to say that the principle is the same in criminal cases and indeed, even more compelling because criminal penalties can be more severe. He will likely also cite another Supreme Court decision, *In re Neagle*, which recognized an immunity from state criminal prosecution based on the Supremacy Clause, where a federal marshal killed an unarmed man who the marshal thought was about to attack a Supreme Court justice.<sup>850</sup> In fact, neither of these cases or their progeny would assist Trump.

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<sup>849</sup> *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

<sup>850</sup> *In re Neagle*, 135 U.S. 1 (1890).

Absolute immunity under *Nixon* for a president while in office does not extend to conduct beyond the “outer perimeter” of the president’s “official responsibility.”<sup>851</sup> Instead, as the Supreme Court later explained in *Clinton v. Jones*, in the context of civil litigation, the *Nixon* case recognized a “functional” immunity focused on “the nature of the function performed, not the identity of the actor who performed it.”<sup>852</sup> Thus, “[w]ith respect to acts taken in his ‘public character’—that is, official acts—the President may be disciplined principally by impeachment, not by private lawsuits for damages. But he is otherwise subject to the laws for his purely private acts.”<sup>853</sup>

The *Nixon* case noted that “[t]here is a lesser public interest in actions for civil damages than ... in criminal prosecutions,”<sup>854</sup> and criminal liability is what was at issue in *Neagle*. There the Court recognized an immunity based on the Supremacy Clause for federal officials who become the subject of a state criminal prosecution. The federal official is not immune from state criminal prosecution “simply because of his office and his purpose,”<sup>855</sup> but instead must meet two conditions: 1) the federal official must have been engaged in conduct authorized by federal law or the Constitution; and 2) the official must have done no “more than what was necessary and proper” to effectuate his federal duty.<sup>856</sup> In other words, a federal officer must actually act pursuant to federal authority, and their conduct must bear an objectively reasonable relationship to achieving a federal goal. The U.S. Court of Appeals for the 11th Circuit—like every other court to consider the question—has additionally recognized that an officer who acts out of “any personal interest, malice, actual criminal intent, or for any other reason than to do his duty” will have no entitlement

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<sup>851</sup> *Nixon*, 457 U.S. at 756.

<sup>852</sup> *Clinton v. Jones*, 420 U.S. 681, 694–95 (1997).

<sup>853</sup> *Id.* at 696.

<sup>854</sup> *Nixon*, 457 U.S. at 37.

<sup>855</sup> *Baucom v. Martin*, 677 F.2d 1346, 1350 (11th Cir. 1982).

<sup>856</sup> *Id.* at 1350.

to this Supremacy Clause immunity first recognized in *Neagle*.<sup>857</sup> Because Supremacy Clause immunity is a rarely invoked doctrine, we have included an appendix to this report in which we provide a thorough explanation of the legal standard, its history, and its potential applications.

**Box 6: There Is No Colorable Defense Under the Supremacy Clause**

Beginning with *Neagle*, the Supreme Court defined the doctrine of Supremacy Clause immunity in a series of cases between 1890 and 1920. Taken together, Supreme Court and 11th Circuit precedent provide that Trump would need to make three key showings to successfully raise a Supremacy Clause immunity defense to criminal prosecution in Georgia.

First, Trump would need to demonstrate that he was acting pursuant to either an express grant of authority or an implied grant “growing out of the Constitution” and “the nature of the government under the Constitution.”

Second, from an objective point of view, he would need to demonstrate that he did only what was necessary to pursue a valid federal objective.

Finally, he would need to prove that he acted with proper subjective motivation—such as his belief that his actions were closely related to pursuing a legitimate federal objective—and not an improper one—such as his own personal political gain. An improper subjective motivation could be understood as either nullifying his authority in the presence of self-interest or criminal intent, or as defeating the reasonableness of his conduct.

Trump’s Supremacy Clause immunity defense would be unpersuasive at any step of this analysis. First, no statute authorized him to interfere in Georgia’s ballot-counting process, and his attempt to force a state to take action to keep him in power was, if anything, directly contrary to the constitutional structure. Second, his actions bore no objectively reasonable relationship to the accomplishment of any valid federal objective or the enforcement of any federal statute. Finally, Trump’s subjective intentions fail to establish immunity in any formulation. There is no evidence demonstrating that he believed his own claims of fraud, and there is substantial evidence that he should not (and would not) have believed them. The context and the content of his statements to Georgia officials provide overpowering evidence that he acted in a self-interested manner, rather than in furtherance of a federal goal. For all these reasons, there would be no merit to an argument by Trump that he is shielded by Supremacy Clause immunity.

For a comprehensive survey of all the cases nationally addressing this issue, see Appendix A.

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<sup>857</sup> *Id.*

Trump's conduct targeting the Georgia election plainly does not remotely qualify for any form of immunity. Simply put, the president has no role to play in counting or tabulating ballots—or certifying results—in presidential elections. As one federal judge recently found in a related context while denying absolute immunity, “President Trump cites no constitutional provision or federal statute that grants or vests in the President (or the Executive Branch) any power or duty with respect to the Certification of the Electoral College vote ... That is because there is none.”<sup>858</sup>

Instead, the Constitution assigns primary responsibility in this field to the states: Article II provides that “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors” who will vote on the president.<sup>859</sup> State legislative processes, rather than any presidential function, are thus central to the presidential election process. In its limited provisions empowering the federal government to play a role in such elections, the Constitution entrusts only Congress, not the president, with the power to count electoral ballots under the Twelfth Amendment. Similarly, the main federal statute in this field—the Electoral Count Act—does not contemplate any role for the president in counting or tabulating ballots or certifying results.<sup>860</sup> Every relevant constitutional and statutory provision cuts against the notion that a president has any official duty that could conceivably have been implicated by a phone call to state officials threatening them if they did not “find” enough votes to alter the outcome of the election.

Because neither the Constitution nor applicable federal statutes vest the president with any official responsibility here, Trump's repeated interference with the administration of the Georgia election took him far beyond the outer perimeter of his office (and past the scope of authorized official acts). There are good, self-evident reasons why our legal system does not give the sitting

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<sup>858</sup> *Thompson v. Trump*, No. 21-cv-00400, 2022 WL 503384, at \*14 (D.D.C. Feb. 18, 2022).

<sup>859</sup> U.S. Const. art. II, § 1, cl. 2.

<sup>860</sup> Electoral Count Act of 1887, 24 Stat. 373, 3 U.S.C. §§ 5–6, 15.

president a role in counting, tabulating, or certifying the election for his successor—an election in which he may be a candidate. Any claim that Trump threatened Raffensperger, solicited Watson, or was involved in the creation of a false electoral slate claiming victory in Georgia in furtherance of official federal business, rather than in pursuit of personal political gain, will not stand. Such a claim offends the Constitution's structural safeguards against electoral self-dealing, as well as its prohibitions against making any single person or official the judge of their own case.

To be sure, Trump may assert, per the Take Care Clause of the Constitution, that his power to “take Care that the Laws be faithfully executed” required him (as the nation's chief law enforcement officer) to ensure the integrity of the presidential election. But that argument would fail. First, it conflicts with the design of the Constitution, which plainly and prudently denies the president a role in the counting, tabulation, and certification processes that Trump targeted. Second, it reflects a blatant misapplication of the statutes and constitutional provisions that the president is charged with enforcing, none of which supports interventions of the kind that Trump undertook: There is no basis for concluding that Trump acted in official furtherance of federal election laws (including voter fraud statutes) when he solicited and threatened a state official to find the exact number of votes necessary to alter the election outcome in his favor or helped promote false electors. Third, it misses the fact that Trump was acting not only as the president, but also as a candidate for the very office on which he fixated. Fourth, it ignores the reported facts surrounding his calls to Kemp, Raffensperger, Watson, and others, as well as any push to coordinate the submission of the false electoral slate, all of which powerfully establish a decidedly personal, unofficial motivation for his interference. Fifth, it fails to account for the complete absence of historical or precedential support for the notion that phone calls or efforts like those at issue here are properly within the office of the president. Finally, it misdescribes the Take Care

Clause: Because “the President’s Take Care Clause duty [] does not extend to government officials over whom he has no power or control,” there is no legal authority “that would support [the] assertion that merely exhorting non-Executive Branch officials to act in a certain way is a responsibility within the scope of the Take Care Clause.”<sup>861</sup>

At bottom, Trump was not acting within the scope of his official duties when he targeted the Georgia election, including his role in the false-electors plan and his call to the secretary of state in Georgia, soliciting him to “find” the exact number of votes necessary for Trump to win the election, and threatening him if he failed to do so.<sup>862</sup>

### **B. The Possibility of Removal to Federal Court Is No Obstacle to Prosecution**

In the event that Trump faces criminal charges in Fulton County, he likely will attempt to remove the prosecution to federal court. It is highly unusual for a state criminal prosecution to face the prospect of removal. But under Section 1442(a), “any officer ... of the United States” may remove to federal court a criminal action brought against them in state court if the prosecution is “for or relating to any act under color of such office.”<sup>863</sup> This law is “designed to provide federal officials with a federal forum in which to raise defenses arising from their official duties.”<sup>864</sup> To remove a case, the federal official must file a notice of removal in the federal district court, which has jurisdiction over the removal question. After removal occurs, the state authorities—in this case the prosecutor—who filed the case have the option of filing a motion to remand.

Under Section 1442(a), removal is authorized if the defendant is an “officer of the United States” and has “raise[d] a colorable federal defense.”<sup>865</sup> The requirement of a “colorable federal

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<sup>861</sup> Thompson v. Trump, No. 21-cv-00400, 2022 WL 503384, at \*14 (D.D.C. Feb. 18, 2022).

<sup>862</sup> Gardner & Firozi, *supra* note 2.

<sup>863</sup> 28 U.S.C. § 1442(a).

<sup>864</sup> Farm City Insurance Co. v. Johnson, 190 F. Supp. 2d 1232, 1235 (D. Kan. 2002).

<sup>865</sup> Mesa v. California, 489 U.S. 121 (1989); Jefferson County v. Acker, 527 U.S. 423 (1999).



defense” has been given a “broad reading” and does not require the defendant to prove the “ultimate validity” of his defense “at the time of removal.”<sup>866</sup> Trump’s main “colorable federal defense” would likely be the immunity issues discussed above. If prosecutors were to file a motion to remand the case to state court, they would address those issues at the outset of the litigation, prior to discovery, and with a standard asking only whether Trump’s contentions are “colorable.”

Trump’s position should fail even under that forgiving standard. As the Supreme Court made clear in *Mesa v. California*, not all removal efforts under Section 1442(a) are meritorious.<sup>867</sup> If prosecutors seek a remand, they have two compelling arguments available to them. The first and strongest is that Trump’s conduct does not implicate any colorable defense.

Under those principles, the district attorney has a strong argument that President Trump should not be afforded immunity because neither the Constitution nor applicable federal statutes vest the president with any authority or responsibility to interfere with the administration of the Georgia election. Specifically, the district attorney could argue that President Trump’s statements to Secretary Raffensperger—which allegedly urged the secretary to “find” the exact number of votes necessary for Trump to win the election,<sup>868</sup> and threatened the secretary if he failed to do so—rank as personal acts that fall far outside the “outer perimeter” of his presidential duties.<sup>869</sup> The same is true of Trump’s involvement in the fake elector plan. In support of that position, the district attorney could cite Judge Amit Mehta’s recent decision denying absolute immunity in *Thompson v. Trump*, where he observed that “President Trump cites no constitutional provision or federal statute that grants or vests in the President (or the Executive Branch) any power or duty

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<sup>866</sup> See *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398, 400 (5th Cir. 1998) (citing *Murray v. Murray*, 621 F.2d 103, 107 (5th Cir. 1980); then quoting *Willingham v. Morgan*, 395 U.S. 402, 407 (1969)); *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424 (11th Cir. 1996) (holding that “defense need only be plausible; its ultimate validity is not to be determined at the time of removal”).

<sup>867</sup> *Mesa*, 489 U.S. at 121.

<sup>868</sup> *Gardner & Firozi*, *supra* note 2.

<sup>869</sup> See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982); *Clinton v. Jones*, 520 U.S. 681, 693 (1997).

with respect to the Certification of the Electoral College vote ... That is because there is none.”<sup>870</sup>

The district attorney could also cite *Trump v. Vance*, where the Supreme Court recently held that presidents can be subject to criminal subpoenas even during their tenure in office.<sup>871</sup> Taken together, these cases support the conclusion that former presidents should not enjoy immunity from state criminal process when they act outside the scope of their official duties.

But there is a second possibility that merits further exploration. It is that the statutory text does not expressly cover the president as an “officer ... of the United States” for purposes of removal.<sup>872</sup> The phrase “officer [] of the United States” is a term of art with constitutional foundation: Under the Appointments Clause, the president is vested with authority to appoint “all ... Officers of the United States,” and the Constitution elsewhere refers separately to the president as distinct from the “Officers” he appoints.<sup>873</sup> Invoking this distinction, prosecutors could argue on textualist grounds that Section 1442(a) does not cover Trump, even though that outcome may seem counterintuitive from a policy perspective (since the major purpose of this statute is to afford a federal forum for the resolution of federal defenses).<sup>874</sup>

In all events, even if Trump successfully removed the case and a motion to remand were denied, the prosecution could continue in federal court. In assessing whether to remand, a judge would decide only whether Trump has “colorable” federal defenses. A finding of “colorable” defenses is very different than a finding that those defenses are meritorious, an issue that would ordinarily be litigated and adjudicated independently. Of course, if the prosecution did unfold in

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<sup>870</sup> *Thompson v. Trump*, No. 21-cv-00400, 2022 WL 503384, at \*14 (D.D.C. Feb. 18, 2022).

<sup>871</sup> *See Trump v. Vance*, 140 S. Ct. 2412 (2020).

<sup>872</sup> 28 U.S.C. § 1442(a)(1).

<sup>873</sup> U.S. Const. art. II, § 2; Josh Blackman & Seth Barrett Tillman, *Is the President an ‘officer of the United States’ for Purposes of Section 3 of the Fourteenth Amendment*, 15(1) N.Y.U. J.L. & LIBERTY 1 (2021).

<sup>874</sup> Patricia A. Rauh, *To Remove or Not to Remove: A Look at the Federal Officer Removal Statute*, AMERICAN BAR ASSOCIATION (Apr. 21, 2022), [https://www.americanbar.org/groups/gpsolo/publications/gpsolo\\_ereport/2022/april-2022/to-remove-or-not-remove-look-federal-officer-removal-statute/](https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2022/april-2022/to-remove-or-not-remove-look-federal-officer-removal-statute/); Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution, Part I: An Introduction*, 61(3) S. TEX. L. REV. 309 (2021), <http://dx.doi.org/10.2139/ssrn.3890400>.

federal court, prosecutors would be well advised to hire (or to otherwise seek counsel from) lawyers with experience trying criminal cases in the Northern District of Georgia.

### **C. Prosecuting President Trump Would Not Violate the First Amendment**

President Trump may contend that prosecuting him for statements he made to Raffensperger, Watson, Kemp, and other Georgia officials, or in connection with the false-electors plan, violates his free speech rights under the First Amendment. Any such contentions would be meritless, for two core reasons.

First, it is black letter law that “speech integral to criminal conduct, such as ‘fighting words, threats, and solicitations,’ remains categorically outside” the protection of the First Amendment.<sup>875</sup> The Supreme Court influentially articulated this principle in *Giboney v. Empire Storage & Ice Company* and has reaffirmed it many times since then.<sup>876</sup> On that basis, courts have repeatedly upheld laws criminalizing solicitation, conspiracy, and the like—the very types of offenses that Trump could potentially be charged with under Georgia’s criminal code.<sup>877</sup> Indeed, the Georgia Supreme Court has previously considered and rejected a First Amendment challenge to the state’s general criminal solicitation statute (and properly narrowed the law in so doing).<sup>878</sup>

Second, Trump was not engaged in core political speech. Instead, he was engaged in furtive, post-election phone calls with senior state officials for the purpose of soliciting and threatening these officials in their counting and tabulation of votes (and in their certification of the election results). Something similar may have occurred with respect to the false-electors plan.

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<sup>875</sup> *United States v. Williams*, 553 U.S. 285, 297 (2008); *United States v. Bibbs*, No. 15 CR 578 (N.D. Ill. Sept. 8, 2016) (citing *United States v. Williams*, 553 U.S. 285, 297 (2008)).

<sup>876</sup> *Giboney v. Empire Storage & Ice Company*, 336 U.S. 490, 498 (1949); *Williams*, 553 U.S. at 297; *United States v. Stevens*, 559 U.S. 460, 468–69 (2010).

<sup>877</sup> *See, e.g., United States v. Petrovic*, 701 F.3d 849, 855 (8th Cir. 2012); *United States v. Coss*, 677 F.3d 278, 289 (6th Cir. 2012); *United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010); *United States v. Bly*, 510 F.3d 453, 458 (4th Cir. 2007).

<sup>878</sup> *State v. Davis*, 246 Ga. 761, 761–62 (1980).

Under these circumstances, the application of Georgia's criminal laws should pass muster under any level of scrutiny. Georgia has compelling interests in upholding the integrity of its electoral process, protecting its citizens' right to vote, thwarting fraud and corruption, prohibiting false statements and witness tampering, and requiring its officials to uphold their oaths of office. Applying Georgia's criminal and election codes to Trump's conduct would be properly tailored to advance those interests, which would be fatally undermined if candidates and current officeholders could freely engage in those proscribed activities.

**D. Prosecuting Trump Would Not Amount to Retaliatory or Selective Prosecution**

Trump may seek to evade criminal liability by asserting that he has been unfairly singled out. As a matter of constitutional law, any such argument would fail.<sup>879</sup>

**1. Selective Prosecution**

To prove selective prosecution based on political affiliation, Trump would have to demonstrate that the prosecution had “a discriminatory effect and was motivated by a discriminatory purpose.”<sup>880</sup> A discriminatory effect must be established by “show[ing] that similarly situated individuals ... were not prosecuted.”<sup>881</sup> Trump will not be able to do so. To begin, there are no similarly situated persons. Courts have held “[a] ‘similarly situated’ person in

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<sup>879</sup> At the outset, we note that there is an open question as to the proper remedy for a retaliatory or selective prosecution claim. In particular, it is unclear whether it is appropriate to raise an allegation of retaliatory or selective prosecution as a basis for dismissal in a criminal case, or instead, whether such claims must be pursued as civil claims under 42 U.S.C. § 1983. *See, e.g.,* Nieves v. Bartlett, 139 S. Ct. 1715 (2019) (claim brought by defendants in criminal prosecution for alleged First Amendment violation); Reichle v. Howards, 566 U.S. 658, 666 (2012) (plaintiff brought retaliatory arrest claim under § 1983). We do not delve into that complex question here because, regardless of the remedy, President Trump's claims would fail on the merits.

<sup>880</sup> *United States v. Armstrong*, 517 U.S. 456, 470 (1996). *Armstrong* was a case about selective prosecution on the basis of race, but criminal defendants have also alleged selective prosecution under the Fifth and Fourteenth Amendments on the basis of political affiliation. *See Walker v. United States*, No. CV109-036, 2012 WL 902797 (S.D. Ga. Mar. 5, 2012) (applying *Armstrong* standard); *United States v. Scrushy*, No. 2:05CR119-MEF, 2012 WL 139259 (M.D. Ala. Jan. 18, 2012) (same).

<sup>881</sup> *Armstrong*, 517 U.S. at 457 (first citing *Oyler v. Boles*, 368 U.S. 448, 456, 82 S. Ct. 501, 505–06, 7 L.Ed.2d 446 (1962); then citing *Ah Sin v. Wittman*, 198 U.S. 500 (1905)).

the selective prosecution analysis is one who engaged in the same type of conduct as the defendant ‘and against whom the evidence was as strong or stronger than against the defendant.’”<sup>882</sup> But no one is similarly situated with the outgoing president. There are no other individuals who could wield such enormous power and influence to have engaged in a similar course of conduct. As such, the only appropriate comparator here would be another president who has sought to influence the outcome of an election in Georgia. In the 234-year history of this country, there is no person who has engaged, or allegedly engaged, in such an elaborate course of conduct to overturn an election.

For a claim of “unlawful selective prosecution” to be successful, the defendant must also “show that his prosecution represent[ed] an intentional and purposeful discrimination which [was] deliberately based upon an unjustifiable standard, such as race, religion, or other arbitrary classification.”<sup>883</sup> It is highly unlikely that Trump will be able to demonstrate that the purpose of his prosecution would be based upon an intent to discriminate because of an unjustifiable or arbitrary classification, such as his political affiliation, rather than his course of conduct, by possibly suggesting Willis—a Democrat—is only pursuing a case out of a desire for partisan advantage. That argument would be exceedingly difficult as many of the individuals, such as Governor Kemp, Secretary of State Raffensperger, and others, who have provided evidence against Trump, or who stood up to Trump and thwarted his unlawful conduct, share Trump’s political affiliation. A prosecution is “presumed to be motivated solely by proper considerations” unless the defendant can “a substantial showing to the contrary.”<sup>884</sup>

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<sup>882</sup> *United States v. Cannon*, 987 F.3d 924, 937 (11th Cir. 2021), *cert. denied sub nom*; *Holton v. United States*, 211 L. Ed. 2d 132, 142 S. Ct. 283 (2021) (quoting *United States v. Smith*, 231 F.3d 800, 807 (11th Cir. 2000)).

<sup>883</sup> *Wallace v. State*, 299 Ga. 672, 674, 791 S.E.2d 836, 838–39 (2016) (quoting *Coe v. State*, 274 Ga. 265, 267(3) (a), 553 S.E.2d 784 (2001)).

<sup>884</sup> *United States v. Hastings*, 126 F.3d 310, 313 (4th Cir. 1997) (citing *Armstrong*, 517 U.S. at 477, 116 S. Ct. at 1486; *United States v. Mezzanatto*, 513 U.S. 196, 210, 115 S. Ct. 797, 805–06, 130 L.Ed.2d 697 (1995)).

Trump may try to argue that the Georgia Supreme Court has, at least for the purposes of some issues in criminal trials, considered individuals “similarly situated ... if they are charged with the same crime or crimes.”<sup>885</sup> As explained above, that is not the governing standard for selective prosecution claims under the Equal Protection Clause. Yet even if it were, Trump still could not show the requisite differential treatment: His crimes involved a magnitude and severity of wrongdoing that make productive comparison all but impossible.

In February 2021, the Georgia secretary of state's office issued a statement mentioning the 14 “most noteworthy” cases of election fraud “bound over for prosecution.”<sup>886</sup> Of these, three cases were about violations that went beyond an individual vote (many of the violators were felons who allegedly voted despite being ineligible to do so under Georgia law).<sup>887</sup> One of these cases involved the New Georgia Project, an organization committed to registering voters of color and advancing civil rights.<sup>888</sup> Another involved a canvasser for the Coalition for the People's Agenda, “an umbrella organization of human rights, civil rights, labor, women's, youth, and peace and justice groups” that advocates for criminal justice reform and voting rights, among other causes.<sup>889</sup> At least two of the three cited cases involving larger-scale voter fraud were for organizations at the opposite end of the ideological spectrum from President Trump. Based on this evidence, Trump would not be able to prove that he has been unconstitutionally targeted for selective prosecution.

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<sup>885</sup> *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 274 (2008).

<sup>886</sup> Press Release, Office of Georgia Secretary of State Brad Raffensperger, State Election Board Refers Voter Fraud Cases for Prosecution (accessed Oct. 28, 2022), <https://sos.ga.gov/news/state-election-board-refers-voter-fraud-cases-prosecution-0>.

<sup>887</sup> *Id.*

<sup>888</sup> See The New Georgia Project, About, THE NEW GEORGIA PROJECT, <https://newgeorgiaproject.org/about>.

<sup>889</sup> The Georgia Coalition for the People's Agenda, Mission & History, THE PEOPLE'S AGENDA, <https://thepeoplesagenda.org/about-us>.

## 2. Retaliatory Prosecution

To establish a retaliatory prosecution claim, Trump would have to “plead and prove the absence of probable cause for the underlying criminal charge.”<sup>890</sup> A final determination of probable cause (that is, that it is more likely than not that he committed the charged offenses) must come after the charging decision is made and (if charges are filed) the state’s evidence is in the public record. Still, we already have the tape of the Raffensperger conversation, the false electoral slate paperwork, the considerable evidence regarding Georgia presented by the January 6 Committee, and much more. Trump’s publicly reported conduct already appears well on the way to clearing the threshold of probable cause for prosecution, and we have explained why at considerable length. It is worth noting that we have seen no public evidence whatsoever suggesting that any charges against him would be in retaliation for his political viewpoints. Indeed, the district attorney’s office should not initiate charges against President Trump unless it independently concludes (after a thorough and fair investigation of the facts and law) that there is probable cause to indict him for each crime.

### **E. Trump’s Potential Claim That He Honestly Believed He Won the Election in Georgia Will Not Negate His Intent**

As discussed earlier in Section III.A.1, Trump may argue that he did not have the requisite criminal intent to be convicted because he honestly believed that he had won the election in Georgia, so he could not have intended to solicit election fraud or any related crime. Instead, he would say, he was merely intending for state officials to use their authority over tabulating votes and certifying vote totals to ensure that the “true” result would emerge. That defense is implausible and, in any event, would be insufficient to defeat his prosecution.

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<sup>890</sup> *Nieves v. Bartlett*, 139 S. Ct. 1715, 1723 (2019); *see Hartman v. Moore*, 547 U.S. 250 (2006); *DeMartini v. Town of Gulf Stream*, 942 F.3d 1277 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 660 (2020).

Former prosecutors and other experts essentially agree that proving criminal intent poses one of the biggest legal challenges to holding Trump accountable for his role in the attacks on the 2020 election.<sup>891</sup> *Mens rea*, Latin for “guilty mind,” is required to convict. This generally means that the offender must have acted purposely, knowingly, recklessly, or negligently in committing the criminal act.

It is tempting, in assessing Trump’s state of mind, to focus on whether he genuinely believed his assertion that the presidential election was “stolen”—that he had beaten Joe Biden and that therefore his subsequent efforts were merely a justifiable means to set things right. If prosecutors can prove that he did know that he lost the election—that it was not “stolen” from him—that would go a long way toward clearing that criminal-intent hurdle. As discussed throughout Section I, the January 6 Committee has amassed evidence that Trump knew he had lost. Numerous Trump aides and lawyers have attested to this before the committee. There is no denying that Trump’s awareness that he lost when he did all the acts that could be alleged as crimes, is a fact of great practical importance to the jury and the prospect of any prosecution. That is true even though the required criminal intent under the relevant statutes does not actually depend on what Trump believed about the election.

Even if, contrary to the overwhelming evidence, Trump genuinely believed that he had won, he still had no legal right to use forged electoral certificates, to pressure election officials in Georgia to “find 11,780 votes” that did not exist, or to engage in other extralegal means to try to hold onto power. That includes pressuring the vice president to assume powers he did not have. State and federal criminal laws prohibit these things. Vigilante justice is against the law, even if

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<sup>891</sup> This and the following paragraphs on Trump’s intent are adapted from an editorial written by one of the authors of this report, Norman Eisen. See Ryan Goodman, Norman Eisen & Barbara McQuade, Did Trump believe his big lie? It’s irrelevant to proving his guilt, THE WASHINGTON POST (June 22, 2022), <https://www.washingtonpost.com/outlook/2022/06/22/criminal-intent-trump-raffensperger-rusty-bowers/>.



one (wrongly) believes they are a victim. First, soliciting state officials to violate their oaths of office in administering elections is a clear state crime across the country, including in Georgia, as discussed in Section III.A.1. And Trump did not merely solicit Georgia Secretary of State Brad Raffensperger to “find 11,780 votes.” Raffensperger wrote in his book, *Integrity Counts*, that he considered Trump to have been making a “threat” to do him harm,<sup>892</sup> and he expanded on that in his testimony before the January 6 Committee.<sup>893</sup> Nor would Trump’s subjective beliefs permit him to become enmeshed in plans for false electoral certificates that do not meet the legal predicates for issuance or distribution. These acts are criminal even if Trump somehow nurtured a belief that a fair count of the votes would have made him the winner.

#### **F. Georgia’s Pardon Power Poses No Impediment to Criminal Prosecution**

Because the Constitution does not afford him with any defense, Trump might try to seek a preemptive pardon for any crimes related to the 2020 presidential election and thereby cut short a criminal suit against him. But this option is unavailable. As discussed below, it is possible that, at one point, the governor of Georgia had the power to grant preemptive pardons. But the power to pardon in Georgia has since shifted away from the governor to the Board of Pardons and Paroles. All the same, there is no case law on which Trump can rely to support an argument that the Board of Pardons and Paroles can grant him preemptive clemency.

Two cases decided on the same day in 1871 demonstrate the views of the Georgia Supreme Court regarding the governor’s historic pardon power. In *Dominick v. Bowdoin*,<sup>894</sup> and *Grubb v. Bullock*,<sup>895</sup> the court held that the governor had the power to issue pardons before conviction. The

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<sup>892</sup> Joseph Choi, Raffensperger: Trump request to ‘find’ votes was a threat, THE HILL (Nov. 2, 2021), <https://thehill.com/homenews/state-watch/579679-raffensperger-trump-request-to-find-votes-was-a-threat/>; Brad Raffensperger, *Integrity Counts* (Simon & Schuster 2021).

<sup>893</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

<sup>894</sup> *Dominick v. Bowdoin*, 44 Ga. 357 (1871).

<sup>895</sup> *Grubb v. Bullock*, 44 Ga. 379 (1871).

*Dominick* court noted that the language in the Georgia Constitution granting the governor the power to pardon was not limited to “after conviction.”<sup>896</sup> It also noted that the governor’s pardon power could be traced to a historical tradition of executive pardons that were not limited by the requirement of conviction.<sup>897</sup> The court held that “[t]o give a different construction to the words used in [the] State Constitution would be to overrule the authority of the Courts of Great Britain, and that of the Supreme Court of the United States” because nothing “would authorize a different construction, as to the power of the Governor of a State from that of a *President* or *King*.”<sup>898</sup> In *Grubb*, the court once again confirmed its view of gubernatorial pardon power but somewhat qualified it. It held that for a preemptive pardon to have any force, it must be “accepted by the accused” who must offer a “confession of ... guilt.”<sup>899</sup>

In both cases, two judges disputed the court’s holding. Judge McCay in *Dominick* stated in a concurrence that he was “not prepared ... to decide the question ... as to the power of the Governor, under the Constitution of 1868, to pardon before final conviction.”<sup>900</sup> Judge Warner, concurring in *Grubb*, disagreed in stronger terms. He stated that “the Governor had no legal power or authority, under the Constitution of this State, to grant a pardon before trial and conviction of the defendant for the offense with which he was charged.”<sup>901</sup>

Regardless, the Constitution of 1868, under which *Dominick* and *Grubb* were decided, is no longer in force. In 1976, the state of Georgia repositioned the pardon power within a Board of

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<sup>896</sup> *Dominick*, 44 Ga. at 359–60.

<sup>897</sup> *Id.* at 361–62.

<sup>898</sup> *Id.* at 362.

<sup>899</sup> *Grubb*, 44 Ga. at 379.

<sup>900</sup> *Dominick v. Bowdoin*, 44 Ga. 357, 366 (1871) (McCay, J., concurring).

<sup>901</sup> *Grubb v. Bullock*, 44 Ga. 379, 383 (1871) (Warner, J., concurring).

Paroles and Pardons.<sup>902</sup> The 1983 revision of the Constitution retained this structure.<sup>903</sup> Both points raised by the court in *Dominick* and *Grubb* are nullified by these revisions.

First, *Dominick* noted that the Constitution of 1868 had removed the phrase “after conviction” from the earlier Constitution, implying that a limit on the Governor’s power was meant to be excised.<sup>904</sup> But the current Georgia Constitution once again says that the Board “shall be vested with the power ... to grant reprieves, pardons, and paroles, ... after conviction.”<sup>905</sup> Based on *Dominick*’s reasoning, this implies that the Board is once again limited as the governor was prior to 1868. Second, the court based its holding on the executive nature of the governor’s role, and its similarity to presidents and kings.<sup>906</sup> This, too, would not apply to the Board, which is an appointed five-member committee that is envisioned as “independent” of the political branches.<sup>907</sup>

Accordingly, Trump will not be able to secure a pardon to prevent the state of Georgia from prosecuting him under state law. No case squarely holds that the Board of Paroles and Pardons can grant preemptive pardons, because the language in the Georgia Constitution is unequivocal: The Board may only grant pardons “after conviction.”<sup>908</sup>

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<sup>902</sup> Charron v. State Bd. of Pardons & Paroles, 319 S.E.2d 453, 454 (Ga. 1984); Ga. Const. art. IV, § 2, ¶1.

<sup>903</sup> Charron, 319 S.E.2d at 454.

<sup>904</sup> *Dominick*, 44 Ga. at 359–60.

<sup>905</sup> Ga. Const. art. IV, § 2, ¶2.

<sup>906</sup> *Dominick v. Bowdoin*, 44 Ga. 357, 363 (1871).

<sup>907</sup> Charron v. State Bd. of Pardons & Paroles, 319 S.E.2d 453, 455 (Ga. 1984); Ga. Const. art. IV, § 2, ¶1.

<sup>908</sup> Ga. Const. art. IV, § 2, ¶2.

## Conclusion

President Trump lost the 2020 election in Georgia by a margin of nearly 12,000 votes, and that outcome was confirmed and certified by the duly designated election officials in the state, with Republican Secretary of State Raffensperger and Republican Governor Kemp at the top of the process.<sup>909</sup> Those officials formally certified the result 17 days after the election following a hand recount of all ballots cast, which altered the original count by only a few hundred votes. That result was recertified by Raffensperger on December 7.<sup>910</sup>

Notwithstanding the absence of any facts suggesting irregularity or any reason to question the result thus certified, the Georgia electoral process and vote count was subjected to sustained assault by the ex-president and his supporters. Trump led that effort as part of his repeated insistence that the conclusion of an overall Biden victory was “a fraud on the American public.”<sup>911</sup> This drumbeat of lies about the electoral outcome began before Election Day, as Trump hinted starting in the summer of 2020 that he could only lose if the election were fraudulent and withheld any commitment to recognize any electoral result that went against him.<sup>912</sup> While his claims of fraud applied to the nation as a whole and were quite specific in the context of several other states that Trump had also hoped to carry, his efforts to change the certified result in Georgia were unusually intense and recurring, and involved Trump personally in acts that have been documented to a substantial extent.

Trump's attack specifically directed at the Georgia outcome was multifaceted and began even as the vote count was still underway. It was echoed by several U.S. senators<sup>913</sup> and by his

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<sup>909</sup> Moore, *supra* note 58.

<sup>910</sup> Greenwood, *supra* note 90.

<sup>911</sup> Dale, *supra* note 12.

<sup>912</sup> Sonmez, *supra* note 108.

<sup>913</sup> Gardner, Hamburger & Dawsey, *supra* note 21.

legal team, led by Rudy Giuliani.<sup>914</sup> It also became the grist for a barrage of lawsuits brought by Trump lawyers or by allies, legal actions which over time trafficked in bizarre conspiracy theories that were discredited by the courts in which they were filed. At the center of this effort were Trump's personal attempts to overturn the Georgia result by altering the conduct of state officials charged with the ultimate responsibility to honestly oversee the administration and certification of the election and by arranging for a false electoral certificate to be fabricated and sent to Congress and the National Archives.

As recounted at length in Section I, evidence indicates that the actions which he took personally included various telephone and in-person conversations, all after the results had already been certified, in which he:

- On December 5, urged Governor Kemp to help change the outcome through several actions and attacked Kemp that same day at a rally for his failure to act;<sup>915</sup>
- Urged Georgia's Republican Attorney General Chris Carr not to oppose a lawsuit filed December 7 by the State of Texas in the U.S. Supreme Court, seeking to change the electoral outcome in certain states;<sup>916</sup>
- Directed plans for false electors (including personally seeking the assistance of Republican National Committee Chairwoman Ronna McDaniel to orchestrate a multi-state effort) which resulted in his campaign coordinating a meeting of 16 individuals to convene on December 14 as presidential electors and to issue a false electoral certificate claiming Trump's victory in Georgia;<sup>917</sup>

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<sup>914</sup> Evans, *supra* note 178.

<sup>915</sup> Gardner, Itkowitz & Dawsey, *supra* note 174.

<sup>916</sup> Cohen, Morris & Hickey, *supra* note 16.

<sup>917</sup> Goodman, *supra* note 208.

- On December 23, urged the chief investigator in Raffensperger's office, Frances Watson, to find dishonesty in connection with electoral complaints her office was then investigating;<sup>918</sup>
- Engaged in various communications with officials of the U.S. Department of Justice in an unsuccessful effort to induce the department to intervene to influence a change in the result as certified in Georgia;<sup>919</sup>
- On January 2, during an hour-long call with Secretary of State Raffensperger, urged him to “find 11,780 votes which is one more than we have because we won the state,” and observed that it was “a big risk to you [Raffensperger]” and “very dangerous” to insist that there was “no criminality” in the administration of the Georgia election.<sup>920</sup>

It is a tribute to the integrity of the Georgia state officials, whom Trump implored to effectively abandon their public trust, that none of them succumbed to Trump's efforts to change the outcome of the election. But that fact—which was critical to achieving the ultimate certification of the election by Congress on January 6—does not alter the nature of the conduct that Trump personally engaged in. Nor does it alter the nature or importance of Georgia's interest in policing and punishing conduct such as his.

In our federal system of government which the framers put in place, the states are assigned a singular role in the conduct of elections, including those for senators, congresspersons, and the president. While the federal government has an after-the-fact role in policing violations of fair and honest voting procedures, it has long been clear that the actual administration and counting of

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<sup>918</sup> Morris & Murray, *supra* note 27.

<sup>919</sup> Benner, *supra* note 284.

<sup>920</sup> Gardner & Firozi, *supra* note 2.

votes, for federal as well as state offices, is the responsibility of the states. Thus, the state interest in conducting a fair election, and in making sure that the votes are tallied fairly in accord with the rules established by the states, is preeminent, in that the state is the entity primarily responsible for ensuring that the accurate result is achieved—even where an election of the president is concerned.

It is therefore not at all surprising or odd that, in the face of conduct like that addressed in this report, one of the primary investigative and enforcement efforts presently underway is being pursued at the state level—here, as detailed in Section II, by the district attorney of Fulton County. It is the heart of the state government and the locale whose vote tally would have been most substantially corrupted if the problematic activities of Trump and his allies had succeeded. Given the primacy of state responsibility, it is also not surprising that the state of Georgia has an array of statutes that seem well-tailored to address the conduct at issue.

As discussed in Section III, the statutes that can be brought to bear (depending, of course, on the specific evidence unearthed by the special grand jury) include several specifically focused on efforts to disrupt the state's performance of its responsibilities to conduct elections. They are solicitation of conduct by officials that would amount to election fraud; intentional interference with an election official's performance of election-related duties; interference with primaries and elections; and conspiracy, meaning an agreement among multiple people to engage in electoral fraud. Other possible statutory violations include an array of general prohibitions not limited to conduct affecting elections, but rather focused on more broadly applicable duties encompassing election misconduct of the kind here alleged, such as false statements in connection with official matters, attempts to influence witnesses or to influence government officials in improper ways, solicitation of action violative of public officer oaths, and several other provisions. Finally, consideration may be given to criminal action under the Georgia RICO Act, since violations of a

number of the statutes referenced above constitute predicate acts that are the essential building blocks in developing a prosecution under that statute.

In addition to the affirmative evidence of a remarkable, concerted effort, including intense and direct activities by Trump himself to alter the outcome of the Georgia presidential election, any possible criminal action must of course be assessed in light of the counterarguments and legal defenses that Trump might offer. We discussed those issues in Section IV above. We explained that the lead argument for the defense is likely to be the claim that Trump cannot be second-guessed in court for things he did as president. But substantial authority establishes that this broad-based immunity from liability at most extends to actions taken by the president that fall somewhere within the scope of his lawful duties. The facts and law are clear—given the responsibility of the state of Georgia to oversee and certify the election, and the absence of any presidential responsibility in determining that outcome—that Trump's efforts to twist the arms of various state officials to change the outcome in his favor and have a false electoral slate claiming his victory were well outside the scope of his responsibilities.

Section IV also addressed other likely defenses, including claims that Trump's conduct was permissible because he truly believed his own claims of widespread election fraud and that he had in fact really won the election; that his conduct was protected by the First Amendment; and that the prosecution is invalid as an instance of selective or retaliatory prosecution. Based on our review of the public record concerning Trump's conduct—and our understanding of relevant constitutional and legal principles—we explain why we believe that these defenses would fail. We also recognize that one cannot predict with certainty the effect of such assertions upon the deliberations of a jury.



Beyond analyzing the publicly available facts and the law, it is not our purpose to say what will or should happen as a result of the Fulton County investigation now underway. The public trust of prosecutors, like that of election officials, is a key element of our system of government, and to advance that trust, those officials are charged with unique powers of investigation, as well as the ultimate judgment whether, in light of all the evidence and circumstances, a criminal prosecution is warranted by the law and the facts. Among other considerations limiting the certainty of any conclusions one might draw from this report is the fact that criminal investigations are conducted in secret, for the benefit of all concerned. Thus, we are not privy to the evidence that may have been unearthed by the state investigators, beyond the information in the public record, which is the entire basis of the discussion offered here. We therefore do not make any ultimate judgment or prediction of the outcome of the investigation or the actions the district attorney should or will take.

One core value that prosecutors should elevate—indeed, a foundational principle of our American rule of law system to be protected at all times—is the notion that our laws apply equally to everyone and that no person is above them.<sup>921</sup> If the kind of conduct alleged against the president—substantial wrongdoing to secure personal political advantage—would result in the investigation and prosecution of others, then the former holder of our nation's highest office should not get a pass. Neither should those associated with him who were embroiled in the same alleged misconduct.

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<sup>921</sup> This paragraph and the ones that follow are adapted from another report by some of the authors analyzing the former president's criminal liability for other acts in another jurisdiction. Norman Eisen, Donald Ayer, E. Danya Perry & John R. Cuti, *New York State's Trump Investigation: An analysis of the reported facts and applicable law*, GOVERNANCE STUDIES AT BROOKINGS (June 28, 2021), <https://www.brookings.edu/research/new-york-states-trump-investigation-an-analysis-of-the-reported-facts-and-applicable-law/>.

Of course, in making her charging decisions, the district attorney cannot ignore the fact that Trump was a political candidate of a different political party than her own. He and others have already argued, and will surely continue to do so as the investigation accelerates, that a prosecution (if any) is an act of partisan revenge.<sup>922</sup> That is undoubtedly part of the reason that, with respect to possible federal charges against Trump,<sup>923</sup> President Biden has left the matter to Attorney General Merrick Garland and the Department of Justice.<sup>924</sup> While some will claim political retaliation no matter the circumstances of a prosecution of an ex-president, there is no doubt that a state prosecutor is one step removed from the political fray since she does not serve at the pleasure of the sitting president by whom Donald Trump was defeated. She and her colleagues in the district attorney's office oversee the jurisdiction where Trump made perhaps his most egregious—and most well-documented—assault upon the 2020 election. It is a powerful advantage of the American system of federalism that state authorities are available to address the unusual and indeed unique circumstances of this case.

Prosecutors, including the Fulton County district attorney, must always engage in a thorough and fair investigation of the facts and law to independently determine if there is probable cause to bring charges against specific people for specific crimes. This report is in no way trying to interfere with that solemn duty. Furthermore, we appreciate that prosecutors must take great care when considering charges against former public officials and those associated with them. At the same time, they must also avoid judging the high and mighty, and those who have held

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<sup>922</sup> Wise, *supra* note 434.

<sup>923</sup> Laurence H. Tribe, Barbara McQuade & Joyce White Vance, Here's a roadmap for the Justice Department to follow in investigating Trump, THE WASHINGTON POST (Aug. 5, 2021), <https://www.washingtonpost.com/opinions/2021/08/05/heres-roadmap-justice-department-follow-investigating-trump/>; Donald Ayer & Norman Eisen, Trump's conduct needs a federal investigation, CNN (last updated Aug. 20, 2021), <https://www.cnn.com/2021/08/20/opinions/trump-conduct-needs-federal-investigation-ayer-eisen/index.html>.

<sup>924</sup> Andrew Solender, White House Says 'Independent' DOJ Will Decide on Criminally Prosecuting Trump, FORBES (Feb. 10, 2021), <https://tinyurl.com/m7x4vdk8>.

positions of great political and social power, by some different standard of liability that makes prosecution much less likely. It is a high principle and familiar refrain of our criminal justice system that “No one is above the law.”<sup>925</sup> For that reason, the Fulton County investigation of Donald Trump and his associates is important to the nation’s future. We await its outcome.

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<sup>925</sup> *Trump v. Vance*, 140 S. Ct. 2412, 2432 (2020) (Kavanaugh, J., concurring in the judgment); *see id.* at 2420 (“Since the earliest days of the Republic, ‘every man’ has included the President of the United States.”).

## About the Authors

**Donald Ayer** is a former prosecutor, an appellate lawyer, and law professor. He has served since 2006 as an adjunct professor teaching a course in Supreme Court Litigation at Georgetown Law School and has also taught at the law schools of Stanford, Duke, and New York University. For 29 years, ending in 2018, he was a partner in the Washington, D.C. office of Jones Day, engaged in Supreme Court and appellate practice. Before entering private practice in 1990, Ayer spent ten years in the United States Department of Justice, including two presidential appointments. He worked in California, first as an assistant United States attorney, and from 1981–1986 as United States attorney in Sacramento. In 1986 he moved to Washington as principal deputy solicitor general under Solicitor General Charles Fried, during the final three years of the Reagan administration. In 1989, after briefly joining Jones Day, he was appointed by President George H.W. Bush and served as deputy attorney general from 1989–1990. Ayer has argued 19 times in the U.S. Supreme Court, more than 70 cases in the intermediate appellate courts, and has also been lead counsel in approximately 20 jury trials. He received an A.B., with Great Distinction, from Stanford in 1971, an M.A. in American History from Harvard in 1973, and his J.D. from Harvard in 1975, where he was articles editor of the Harvard Law Review. He clerked for Judge Malcolm R. Wilkey of the U.S. Court of Appeals for the D.C. Circuit, and for Justice William H. Rehnquist. He previously served as president of the American Academy of Appellate Lawyers and of the Edward Coke Appellate Inn of Court and is presently a member of the Council of the American Law Institute and chair of the Publications Committee of the Supreme Court Historical Society. His former firm, Jones Day, has been publicly reported to represent the Trump campaign. While at the firm, he did not work on any matter for that or any other Trump-related entity or receive any related confidential client information. No such confidential information has been utilized in the preparation of this report, which is entirely based upon publicly available sources.

**Noah Bookbinder** is the president and CEO of Citizens for Responsibility and Ethics in Washington (CREW). Prior to joining CREW, he served from 2013 to 2015 as director of the Office of Legislative and Public Affairs at the United States Sentencing Commission. Before that, Bookbinder served as chief counsel for Criminal Justice for the United States Senate Judiciary Committee, where he worked from 2005 to 2013. From 1999 to 2005, Bookbinder worked as a trial attorney for the United States Department of Justice's Public Integrity Section. He has taught about prosecuting public corruption as an adjunct professor at George Washington University Law School and Howard University School of Law. He graduated from Yale University and Stanford Law School and served as a law clerk to United States District Judge Douglas Woodlock. He and CREW have filed legal complaints and written on several of the issues covered in this report, including complaints asking the Department of Justice to investigate Donald Trump, Mark Meadows, and Jeffrey Clark in connection with efforts to overturn the 2020 election. CREW's complaints and reports can be found at [citizensforethics.org](http://citizensforethics.org).

**Ambassador Norman Eisen (ret.)** is a senior fellow in Governance Studies at Brookings. He served in the White House from 2009 to 2011 as special counsel and special assistant to President Barack Obama for ethics and government reform, was the U.S. Ambassador to the Czech Republic from 2011 to 2014, and served as special counsel to the House Judiciary Committee for the Trump impeachment and trial from 2019 to 2020. Before that, he was a partner in the D.C. law firm Zuckerman Spaeder, where he practiced law from 1991 to 2009. He is the author of *A Case for the American People: The United States v. Donald J. Trump* (Crown 2020) and *The Last Palace: Eu-*

*rope's Turbulent Century in Five Lives and One Legendary House* (Crown 2018), the co-author of *States United: A Survival Guide for Our Democracy* and the editor of *Overcoming Trumpery: How to Restore Ethics, the Rule of Law, and Democracy* (Brookings 2022) and *Democracy's Defenders: U.S. Embassy Prague, the Fall of Communism in Czechoslovakia, and Its Aftermath* (Brookings 2020). Eisen received his J.D. from Harvard Law School in 1991 and his B.A. from Brown University in 1985, both with honors. He is the co-founder and former chair of Citizens for Responsibility and Ethics in Washington (CREW) and the co-founder and executive chair of the States United Democracy Center and States United Action. In that capacity, Ambassador Eisen is co-counsel in the case brought against militia groups and their members who were involved in the January 6, 2021 assault on the U.S. Capitol. *See* Complaint, District of Columbia v. Proud Boys International L.L.C., et al, No. 21-cv-3267 (D.D.C. Dec. 12, 2021), ECF #1. He has also participated in bar complaints against attorneys who allegedly participated in the attempted overturn of the election. *See, e.g.*, Letter from States United Democracy Center to George S. Cardona, Chief Trial Counsel of the State Bar of California, Re: Request for Investigation of John C. Eastman, Ca. State Bar No. 193726 (Oct. 4, 2021), [statesuniteddemocracy.org/wp-content/uploads/2021/10/10.4.21-FINAL-Eastman-Cover-Letter-Memorandum.pdf](https://statesuniteddemocracy.org/wp-content/uploads/2021/10/10.4.21-FINAL-Eastman-Cover-Letter-Memorandum.pdf); Letter from States United Democracy Center and Lawyers Defending American Democracy to Hamilton P. Fox, III, Disciplinary Counsel for the District of Columbia Court of Appeals, Re: Request for Investigation of John Charles Eastman (Aug. 11, 2022), [https://statesuniteddemocracy.org/wp-content/uploads/2022/08/08.11.22\\_States-United-LDAD\\_Complaint-to-DC-ODC-re-John-Eastman\\_Final.pdf](https://statesuniteddemocracy.org/wp-content/uploads/2022/08/08.11.22_States-United-LDAD_Complaint-to-DC-ODC-re-John-Eastman_Final.pdf); Letter to District of Columbia Court of Appeals' Office of Disciplinary Counsel Re: Jeffery Clark's Professional Conduct (Oct. 5, 2021), <https://ldad.org/wp-content/uploads/2021/10/DC-Ethics-Complaint-Against-Jeffrey-Clark.pdf>; States United Democracy Center's Letter to Colorado's Attorney Regulation Counsel Jessica E. Yates Re: Request for Investigation of Jenna L. Ellis (also known as Jenna Lynn Rives), Colorado Registration Number 44026 (May 4, 2022), <https://statesuniteddemocracy.org/wp-content/uploads/2022/05/2022.05.04-Jenna-Ellis-complaint-cover-letter.pdf>; Letter from Lawyers Defending American Democracy to the Attorney Grievance Committee of the Supreme Court of the State of New York Re: Professional Responsibility Investigation of Kenneth John Chesebro, Registration No. 4497913 (Oct. 12, 2022), <https://int.nyt.com/data/documenttools/ethics-complaint-against-kenneth-chesebro/dd035b3fcaffbbab/full.pdf>. He also served as co-counsel in the amicus briefs filed by States United in the U.S. District Court, 11th Circuit, and the Supreme Court, respectively, in the cases arising out of Senator Lindsey Graham's effort to evade his Fulton County grand jury subpoena. *See* Motion for Leave to File Brief as Amici Curiae in Opposition to United States Senator Lindsey Graham's Expedited Motion to Quash, Fulton County Special Purpose Grand Jury v. Graham, No. 1:22-cv-03027-LMM (N.D. Ga. Aug. 4, 2022), <https://acrobat.adobe.com/link/review?uri=urn:aaid:scds:US:9327dcd7-4b7c-38eb-94db-6bba88ece1b7>; Unopposed Motion By Former Federal Prosecutors As Amici Curiae For Leave To File Amended Amicus Brief In Opposition To Appellant Lindsey Graham's Supplement To Emergency Motion To Stay District Court's Order And Enjoin Select Grand Jury Proceedings Pending Appeal, Fulton County Special Purpose Grand Jury v. Graham, No. 22-12696 (11th Cir. Oct. 7, 2022), <https://statesuniteddemocracy.org/wp-content/uploads/2022/10/10-07-2022-Amended-Amicus-Brief-by-Former-Federal-Prosecutors.pdf>; Motion of Former Federal Prosecutors for Leave to File Brief as Amici Curiae in Opposition to Emergency Application for Stay and Injunction Pending Appeal Without 10 Days' Notice and in Paper Format, Graham v. Fulton County Special Purpose Grand Jury, No. 22A337 (S. Ct. Oct. 27, 2022), <https://statesuniteddemocracy.org/resources/lindsey-grahams-stay-fulton-county/>. States United's activities are more fully described on its website. States

United Democracy Center, <https://statesuniteddemocracy.org/>. Eisen also does legal work at his pro bono law firm Eisen PLLC, where information about his publicly reported cases can be found. About Eisen PLLC, Norman Eisen, <https://www.normaneisen.com/eisen-llc>. He is a CNN legal analyst and has been profiled in *The Washington Post*, *The Wall Street Journal*, *New York Magazine*, *Politico*, and *Tablet*. Eisen was an inspiration for the character of the crusading lawyer Deputy Kovacs in the 2014 film “The Grand Budapest Hotel.”

**Gwen Keyes Fleming** is a former district attorney for the Stone Mountain Judicial Circuit (DeKalb County) in Georgia. This document is the result of her personal experience gained from serving as a prosecutor in Georgia for 17 years and does not represent the views of her clients or her firm. Fleming spent nearly 25 years in public service enforcing various state and federal laws. Early in her career she served as both an assistant solicitor-general and an assistant district attorney in DeKalb and Fulton Counties in Georgia. In these roles, Fleming tried well over a hundred cases to verdict. She won elected office in 1998, thereby becoming the first African American and first female solicitor-general in DeKalb County. In 2004, when Fleming won elected office to become the district attorney of DeKalb County, she became the first African American and first female to hold that role. During her tenure as DA, Fleming led her team in prosecuting thousands of violent felonies, spearheaded a prosecutorial apprentice program, and created the county's first Public Integrity Unit in order to properly investigate and hold elected and appointed officials responsible for their criminal actions. In 2010, President Obama appointed Fleming as the first African American female regional administrator for the U.S. Environmental Protection Agency (EPA) in Region 4 (Southeast Region). In this role, she implemented and enforced violations of environmental laws in eight southeastern states and six federally recognized tribes. In 2013, she was appointed to serve as EPA's chief of staff. In 2015, Fleming was appointed as the principal legal advisor (general counsel) for Immigration and Customs Enforcement (ICE) within the Department of Homeland Security. In this role, she supervised ICE investigators around the country pursuing cybercrimes, financial crimes, child exploitation, and human rights violations. Fleming graduated from Douglass College at Rutgers University and received her J.D. from Emory University's School of Law.

**Colby Galliher** is a research analyst and project coordinator in the Governance Studies program at Brookings. Prior to joining Brookings, he worked as a program assistant in the Eurasia Center at the Atlantic Council. He is a contributor to *Overcoming Trumpery: How to Restore Ethics, Law, and Democracy* (Brookings 2022) and has written on topics including ethics and rule of law in democratic governance, corruption and electoral politics, and climate- and energy-related issues for CNN, Slate, Brookings, and others. Galliher received his B.A., *cum laude*, in Politics from Bates College in Lewiston, Maine in 2018.

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**Joshua Matz** is a partner at Kaplan Hecker & Fink LLP. His practice includes constitutional law, civil rights, and Supreme Court and appellate litigation. In 2020, Joshua represented the Commonwealth of Pennsylvania in defending its certification of the results of the 2020 presidential election at the U.S. Supreme Court. He also filed numerous briefs defending the certification of election results in other jurisdictions—and he now represents the Center for Tech and Civic Life

in defending against a federal lawsuit filed in Colorado challenging the integrity of the 2020 presidential election. His other representations include E. Jean Carroll in her defamation lawsuit against Donald J. Trump, and the plaintiffs in a class action consumer fraud lawsuit against Trump, his adult children, and the Trump Organization. In February 2021, Joshua took a leave of absence from the firm to serve as impeachment counsel to the House Judiciary Committee for the second Senate trial of President Trump; he previously served among counsel to the House Judiciary Committee for the first impeachment and trial of President Trump. Joshua holds a BA (magna cum laude) from the University of Pennsylvania, an MSt (with distinction) from Oxford University, and a J.D. (magna cum laude) from Harvard Law School. Following law school, Joshua clerked for Judge J. Paul Oetken of the Southern District of New York, Judge Stephen Reinhardt of the 9th Circuit Court of Appeals, and Justice Anthony M. Kennedy of the United States Supreme Court. He has co-authored two books and numerous articles on American constitutional law with Harvard Law Professor Laurence H. Tribe, and he is an adjunct professor of law at Georgetown Law School. In January 2021, Joshua was commissioned by Governor Andy Beshear as a Kentucky Colonel—the Commonwealth's highest honor—for successfully defending Governor Beshear's COVID-19 public health measures at the Supreme Court.

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## APPENDIX A: Further Discussion of Supremacy Clause and Absolute Immunity

The Justice Department’s OLC has long opined that presidents are categorically immune from criminal prosecution during their tenure in office.<sup>926</sup> Trump may seek to extend this principle by asserting that his status as a former president renders him wholly immune from criminal prosecution based on acts he committed during his tenure in office.

Any such argument would be mistaken. Indeed, Trump himself admitted as much while serving in office. As the 2nd Circuit noted in *Trump v. Vance*: “[T]he President concedes that his immunity lasts only so long as he holds office and that he could therefore be prosecuted after leaving office.”<sup>927</sup> The Supreme Court also noted this concession by Trump in reviewing (and affirming) the 2nd Circuit’s decision: “[T]he President is not seeking immunity from the diversion occasioned by the prospect of future criminal *liability*. Instead he concedes—consistent with the position of the Department of Justice—that state grand juries are free to investigate a sitting President with an eye toward charging him after the completion of his term.”<sup>928</sup>

Trump’s concession was appropriate. By providing that presidents removed from office through impeachment “shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law,” the Constitution *expressly* contemplates the criminal prosecution of former presidents for misconduct in office.<sup>929</sup> This is consistent with the framers’ design. Alexander Hamilton thus affirmed in *Federalist* No. 69 that a president who had been removed would “be liable to prosecution and punishment in the ordinary course of law.”<sup>930</sup> Gouverneur

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<sup>926</sup> See *A Sitting President’s Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222 (Oct. 16, 2000); Memorandum from Robert G. Dixon, Jr., Assistant Att’y Gen., Office of Legal Counsel, Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office (Sept. 24, 1973).

<sup>927</sup> *Trump v. Vance*, 941 F.3d 631, 644 (2d Cir.), *aff’d*, 140 S. Ct. 2412 (2020).

<sup>928</sup> *Trump v. Vance*, 140 S. Ct. 2412, 2426–27 (2020).

<sup>929</sup> U.S. Const. art. I, § 3, cl. 7.

<sup>930</sup> *The Federalist* No. 69 (Alexander Hamilton); see also *The Federalist* No. 77 (Alexander Hamilton) (A President is “at all times liable to impeachment, trial, dismissal from office . . . and to the forfeiture of life and estate by subsequent prosecution in the common course of law.”).

Morris similarly noted that a president could face a criminal trial “after the trial of the impeachment.”<sup>931</sup>

More recent sources support the same conclusion. In 2000, when OLC restated its view that sitting presidents are not subject to criminal prosecution, it emphasized that “an immunity from prosecution for a sitting President would not preclude such prosecution once the President’s term is over or [the President] is otherwise removed from office by resignation or impeachment.”<sup>932</sup> This analysis was consistent with modern presidential conduct. In 1974, for instance, President Gerald Ford pardoned President Richard Nixon “for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974.”<sup>933</sup> That pardon would not have been necessary if Nixon could not be prosecuted after leaving office for misconduct committed while in office. Decades later, President Bill Clinton entered into an agreement with a special prosecutor where Clinton accepted a five-year suspension of his law license and paid a \$25,000 fine to avoid potential criminal prosecution after he left office.<sup>934</sup> This agreement, too, presumed the possibility that Clinton could face criminal prosecution as a former president for acts committed while in office. As Senator Minority Leader Mitch McConnell stated after voting to acquit Trump during the second impeachment trial, “We have a criminal justice system in this country. We have civil litigation. And former presidents are not immune from being held accountable by either one.”<sup>935</sup>

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<sup>931</sup> 2 Records of the Federal Convention of 1787, at 500 (Max Farrand ed., 1974).

<sup>932</sup> A Sitting President’s Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222 (Oct. 16, 2000).

<sup>933</sup> Proclamation No. 4311, 88 Stat. 2502 (Sept. 8, 1974).

<sup>934</sup> David Stout, Clinton Reaches Deal to Avoid Indictment and to Give Up Law License, THE NEW YORK TIMES (Jan. 19, 2001), <https://www.nytimes.com/2001/01/19/politics/clinton-reaches-deal-to-avoid-indictment-and-to-give-up-law-license.html>.

<sup>935</sup> See U.S. News Staff, READ: McConnell Speech After Trump’s Impeachment Trial Acquittal, U.S. NEWS (Feb. 14, 2021, 11:36 AM), <https://www.usnews.com/news/politics/articles/2021-02-14/read-mcconnell-speech-after-trumps-impeachment-trial-acquittal>.

Judicial precedent further supports this conclusion. In *United States v. Nixon* and in *Vance v. Trump*, the Supreme Court held that presidents can be subject to criminal subpoenas even during their tenure in office.<sup>936</sup> It follows from the considerations discussed in these opinions that *former* presidents (who do not face a press of official business) can likewise be subject to criminal process.

**A. Trump's Conduct Targeting the Georgia Election Is Not Shielded from Criminal Prosecution by Supremacy Clause Immunity**

Even if it were provable beyond a reasonable doubt that Trump violated a Georgia criminal statute, he likely would argue that he is immune from state prosecution by virtue of so-called "Supremacy Clause immunity." The Supreme Court first developed this doctrine in *In re Neagle*<sup>937</sup> and has since elaborated on it in a series of rulings. The 11th Circuit, for its part, explored Supremacy Clause immunity at length in *Baucom v. Martin*.<sup>938</sup> And many other federal courts have analyzed Supremacy Clause immunity in ways that complement *Baucom*'s reasoning.

Under these precedents, Trump could not establish a valid claim of Supremacy Clause immunity. To prevail, Trump would need to satisfy a two-step inquiry. First, he would have to show that he was acting pursuant to a valid federal authority. Second, he would have to show that his actions were "necessary and proper." This second step, in turn, would require Trump to make two independent showings. First, Trump would have to demonstrate that it was objectively reasonable to believe his actions had a close relationship to a legitimate federal objective. Second, Trump would have to prove he subjectively intended to engage in conduct reasonably calculated

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<sup>936</sup> *United States v. Nixon*, 418 U.S. 683 (1974) (federal authority); *Trump v. Vance*, 140 S. Ct. 2412 (2020) (state authority).

<sup>937</sup> *In re Neagle*, 135 U.S. 1 (1890).

<sup>938</sup> *Baucom v. Martin*, 677 F.2d 1346 (11th Cir. 1982).

to further a legitimate federal interest, rather than a personal or corrupt interest. As should now be clear—and as we will explain below—Trump's likely arguments would fail at every step.

## **B. Background Legal Principles of Supremacy Clause Immunity**

The Supreme Court defined the doctrine of Supremacy Clause immunity in a series of cases between 1890 and 1920. Broadly speaking, the Court defined the immunity as existing in two scenarios. First (and not relevant here), federal officers are immune from state criminal laws when those laws operate in a field where the federal government has plenary authority. That means states cannot regulate the federal government's administration of its own facilities or set licensing requirements that would limit federal workers' ability to do their jobs in the state. Outside of this narrow set of cases, states are presumptively free to establish generally applicable laws, so a federal officer who claims immunity under the Supremacy Clause bears the burden of demonstrating that the nature of their specific actions entitles them to such immunity. That analysis has two steps. First, the officer must show that they were acting within the scope of their federally granted authority. Second, they must demonstrate that their actions were necessary and proper to achieve their federal objective—both objectively speaking and by reference to their subject intent.

### **1. Supreme Court Decisions Regarding Supremacy Clause Immunity**

The first and most influential case defining Supremacy Clause immunity is *In re Neagle*.<sup>939</sup> *Neagle* involved a federal marshal (David Neagle) who shot and killed a California judge (David Terry) to protect a Justice of the U.S. Supreme Court (Stephen Field). Terry had attacked Field during a train ride. It was later discovered that Terry had been unarmed during the altercation; this discovery led a state sheriff to arrest Neagle and charge him with murdering Terry.<sup>940</sup>

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<sup>939</sup> *In re Neagle*, 135 U.S. 1 (1890).

<sup>940</sup> *Id.* at 2, 52–53.

*Neagle* raised two questions, both pertinent here. First, although the federal marshal claimed to be immunized because he was acting under his federal authority, there was no statute that specifically authorized him to protect Justice Field. The Court asked whether, in the absence of such specific statutory authority, the Supremacy Clause could prevent the operation of a state's criminal law.<sup>941</sup> Second, the Court sought to ascertain the general circumstances in which actions by a federal officer were cloaked with immunity against the operation of state criminal law.<sup>942</sup>

On the first issue, despite the absence of any express statutory authorization for a federal marshal to use deadly force in defense of a Justice, the Court looked to both the Constitution and federal statutes to find that *Neagle* was acting under federal authority when he protected Field. For the constitutional element, the Court explained first that it was “incontrovertible” that the federal government could “by means of physical force...execute...the powers and functions that belong to it.”<sup>943</sup> Within that general authority, it was the task of the executive to protect the various arms of the federal government that might be obstructed from accomplishing federal objectives. In this case, that included the power to “take measures for the protection of a judge” who otherwise would be prevented from performing their duties.<sup>944</sup> This power grew “out of the Constitution itself” and was “implied by the nature of the government under the Constitution.”<sup>945</sup>

After concluding that there was constitutional authority for executive officers to protect judges through physical force, the Court shifted to a statutory analysis. There, it noted that a federal statute granted marshals “the same powers, in executing the laws of the United States, as the sheriffs...in such State may have, by law, in executing the laws thereof.”<sup>946</sup> California law

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<sup>941</sup> *Id.* at 58.

<sup>942</sup> *Id.* at 69–70.

<sup>943</sup> *Id.* at 60.

<sup>944</sup> *Id.* at 67.

<sup>945</sup> *Id.* at 64.

<sup>946</sup> *Id.* at 68.

authorized sheriffs to “preserve the peace,” and California’s Penal Code stated that homicide was “justifiable” if “resisting any attempt to murder any person.”<sup>947</sup> Because it would have been “the duty of a sheriff, if one had been present...to prevent the murder” of Justice Field, the Supreme Court reasoned that the federal statute necessarily authorized a federal marshal to do so as well.

This concluded the Court’s analysis of the first issue: whether the marshal’s conduct had in fact been authorized under federal law. The Court then moved on to a second question: whether the marshal’s specific actions, examined in context, were closely bound to their federal objective such that it would be justifiable to nullify an otherwise applicable state criminal law. Here, the Court limited the boundaries of the marshal’s Supremacy Clause immunity by requiring that he have done “no more than what was necessary and proper for him to do” to protect Justice Field.<sup>948</sup> There was both a subjective and objective element to this stage of analysis. The Court required not only that Neagle show “belief” that Terry would likely have killed Field unless he intervened, but it also required that his belief be “well-founded.”<sup>949</sup> Under the circumstances, the Court agreed that his actions were “the only means of preventing the death” of the Justice, and so he had immunity.<sup>950</sup>

The next case to apply *Neagle* carved out a separate narrow exception to the general applicability of state criminal laws to federal officers. *Ohio v. Thomas*<sup>951</sup> held that there are limits on a state’s powers to pass laws imposing conditions on the exercise of a federal officer’s duties. *Thomas* involved the manager of a federal veteran’s home who purchased oleomargarine to serve in the dining hall. The purchase of the oleomargarine was specifically sanctioned by Congress,

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<sup>947</sup> *Id.* at 68–69.

<sup>948</sup> *Id.* at 75.

<sup>949</sup> *Id.* at 75–76.

<sup>950</sup> *Id.* at 76.

<sup>951</sup> *Ohio v. Thomas*, 173 U.S. 276 (1899).



which had allocated funds for it. A state law required restaurants serving oleomargarine to post signs informing their patrons, but the manager refused to do so. When he was prosecuted for failing to comply with state law, the Supreme Court held him immune because the “furnishing [of] food to the inmates of the home...[as] approved by the officers of the home, by the board of managers and by Congress” was an area where “the police power of the State has no application.”<sup>952</sup> In short, the state could not set a condition (namely, the posting of signs) which the federal officer had to affirmatively satisfy before being able to perform actions obligated by his federal responsibilities.

One year later, in *Boske v. Comingore*,<sup>953</sup> the Court again upheld a claim of Supremacy Clause immunity—this time following a straightforward application of *Neagle*'s two-part analysis. In *Boske*, a federal tax collector was subject to a federal regulation explicitly prohibiting him from disclosing tax records even if ordered to do so by a state court. The regulation even laid out the required course of conduct if such a state court order should issue: The collector was to “appear in court...and respectfully decline to produce the records called for.”<sup>954</sup> When a tax collector did exactly that and was prosecuted for it, the Court held him to be immune from prosecution.<sup>955</sup> Both *Neagle* questions required that result. His actions were within the scope of his authority because the regulation applied to him only because of his official position. And the necessary and proper nature of his conduct in furtherance of that federal role was dictated by relevant federal regulations.

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<sup>952</sup> *Id.* at 283.

<sup>953</sup> *Boske v. Comingore*, 177 U.S. 459 (1900).

<sup>954</sup> *Id.* at 461.

<sup>955</sup> *Id.* at 470.

In contrast, the Court denied immunity in *Drury v. Lewis*,<sup>956</sup> where it also clarified the second prong of the *Neagle* standard. In *Drury*, an officer who was tasked with investigating the theft of copper from a military construction site shot the thief while in pursuit. But accounts of the events differed. The officer claimed that he had given the thief a warning and fired as a last resort when the thief still attempted to flee. Other witnesses described it differently: They insisted that there had been no warning and the thief had already surrendered when the shot was fired.<sup>957</sup> Based on this factual dispute, the Court sent the case back to the state court for resolution of the factual disparity. But it also added context to the application of the “necessary and proper” standard from *Neagle*. As the Court emphasized, for an officer’s violation of state law to be objectively reasonable—and thus covered by Supremacy Clause immunity—their reasons for violating state law must be “extraordinary” and the case must present “exceptional facts.”<sup>958</sup> Otherwise, federal courts should not “interfere[]...with the regular course of justice in...state court.”<sup>959</sup>

The final case in which the Court explicitly evaluated a Supremacy Clause immunity defense is *Johnson v. Maryland*.<sup>960</sup> *Johnson* returned to the issue from *Thomas*: Areas where states implicitly have no power to regulate. The case dealt with a federal postal worker who was fined by a state for driving without a state driver’s license. Writing for the Court, Justice Holmes reiterated that “an employee of the United States does not secure a general immunity from state law while acting in the course of his employment.”<sup>961</sup> But he framed the applicability of state criminal law as having two exceptions. First, under *Neagle*, if an officer is both “acting under” federal authority and properly “in pursuance of” a federal objective, they may be immune by virtue

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<sup>956</sup> *Drury v. Lewis*, 200 U.S. 1 (1906).

<sup>957</sup> *Id.* at 3.

<sup>958</sup> *Id.* at 7.

<sup>959</sup> *Id.*

<sup>960</sup> *Johnson v. Maryland*, 254 U.S. 51 (1920).

<sup>961</sup> *Id.* at 56.

of the Supremacy Clause if they violate a state criminal law.<sup>962</sup> Second, a state law that purports to require a federal employee to “desist from performance” of their federal duties “until they satisfy a state officer upon examination that they are competent” would not be held to apply.<sup>963</sup> Based on this second exception, the Court held that a state could not require every federal officer whose duties required driving to first receive a state certification that they were competent to drive.

Supreme Court precedent thus identifies two categories of cases where Supremacy Clause immunity applies. The first category—which is not relevant here—concerns state laws that seek to control federal administration. For instance, a state cannot criminalize the manner in which the federal government feeds its soldiers or administers its facilities. Nor can it require federal employees to satisfy state licensing requirements before they perform basic functions of their jobs. In *Thomas*, the federal officer would have been prohibited from using products that had been specifically authorized by congressional appropriation unless he first satisfied state signage requirements. In *Johnson*, the postal worker would have been forbidden from delivering the mail, his core federal duty, until he affirmatively sought permission to drive from the state government. In both cases, the Court held that using state criminal law to impose such prior conditions on the performance of federal duties was outside of the constitutional scope of a state’s power.

Beyond this narrow limit, states are generally empowered to regulate, and federal officials can invoke Supremacy Clause immunity only if they make two showings. First, they must prove that their conduct fell within the scope of their official responsibilities. *Neagle* shows that this can require both constitutional validity and statutory authorization. Second, their actions must have been a necessary and proper means to satisfy their federal obligations. This step requires both an objective and a subjective showing. In the three cases where the Court reached the “necessary and

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<sup>962</sup> *Id.* at 57.

<sup>963</sup> *Id.*

proper” prong, it applied the requirement nearly literally. In *Neagle*, the marshal’s actions were actually necessary because his duty was “the protection of a judge” and Neagle’s actions were “the only means of preventing the death” of Justice Field.<sup>964</sup> In *Boske*, the federal tax collector was instructed by federal regulation on how to respond to state court requests for tax documents, and he did exactly that. And in *Drury*, where the soldier’s actions accomplished his orders to apprehend the thief, but went beyond what was necessary, the Court denied immunity. Reading these cases together, the final stage of *Neagle*’s framework requires an objectively close fit between means and ends, as well as proof of a subjective purpose to act in furtherance of federal objectives.

## 2. The Test for Supremacy Clause Immunity in the 11th Circuit

Lower courts have decided Supremacy Clause immunity cases by relying on *Neagle* and its progeny. They first ask whether the federal officer who is claiming immunity was acting under federal authority when he was alleged to have committed the state law crime. Second, they ask whether the officer did no more than what was necessary and proper to perform their federally obligated duties. In this latter prong, there is both a subjective and objective element.

The 11th Circuit’s formulation parallels that analysis. In *Baucom v. Martin*,<sup>965</sup> the court immunized an FBI agent who was charged with bribery by the state of Georgia. The attempted bribe was part of a sting operation: The goal was to prosecute a Georgia district attorney for accepting the bribe and dismissing gambling charges against a third party. But instead, after accepting the money, the district attorney had the informant arrested for attempted bribery. He then brought charges against the FBI agent who had arranged for the bribe to be offered.<sup>966</sup>

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<sup>964</sup> *In re Neagle*, 135 U.S. 1, 67, 76 (1890).

<sup>965</sup> *Baucom v. Martin*, 677 F.2d 1346 (11th Cir. 1982).

<sup>966</sup> *Id.* at 1347–48.

Like *Neagle*, *Baucom* began its analysis by asking whether the officer acted under federal authority. In addressing this question, which is described above as *Neagle*’s first prong, *Baucom* asked not only whether there was an affirmative grant of authority, but also whether the officer acted with an appropriate state of mind. In framing the inquiry that way, *Baucom* reasoned that the agent’s authority could be negated if there was evidence that they acted out of “personal interest, malice, actual criminal intent, or for any other reason than to do [their] duty as [they] saw it.”<sup>967</sup> This approach is fairly derived from the Supreme Court’s “well-founded belief” standard.<sup>968</sup> While the 2nd,<sup>969</sup> 6th,<sup>970</sup> 9th,<sup>971</sup> and 10th<sup>972</sup> Circuits address the federal officer’s subject motivation under *Neagle*’s second prong—which concerns whether the officer’s actions were necessary and proper to achieve a federal objective—this is a distinction without a difference. In practice, any federal officer who fails to show a subjective belief that their actions were reasonably necessary to perform their federal duties will also evince “personal interest” or other intent separate from “to do [their] duty as [they] saw it.”<sup>973</sup> Thus, a personal or corrupt motive always defeats immunity—and in the 11th Circuit, it does so under the first prong of *Neagle*’s analytical framework.

As *Baucom* confirmed, this still leaves the second prong, which the 11th Circuit approaches by asking whether an officer’s actions were objectively necessary and proper. To structure that inquiry, *Baucom* recognized several relevant factors. First, whether the means chosen by the officer were “per se unlawful.”<sup>974</sup> Second, whether the officer followed a “recognized” course of action that was “commonly utilized” under the circumstances.<sup>975</sup> And finally, whether the chosen

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<sup>967</sup> *Id.* at 1350.

<sup>968</sup> *Neagle*, 135 U.S. at 76.

<sup>969</sup> *New York v. Tanella*, 374 F.3d 141, 147 (2d Cir. 2004).

<sup>970</sup> *Kentucky v. Long*, 837 F.2d 727, 744 (6th Cir. 1988).

<sup>971</sup> *Clifton v. Cox*, 549 F.2d 722, 728 (9th Cir. 1977).

<sup>972</sup> *Wyoming v. Livingston*, 443 F.3d 1211, 1220 (10th Cir. 2006).

<sup>973</sup> *Baucom v. Martin*, 677 F.2d 1346, 1350 (11th Cir. 1982).

<sup>974</sup> *Id.* at 1350.

<sup>975</sup> *Id.*

means were the product of necessity because there were “no better alternative[s]” available “to fit the circumstances.”<sup>976</sup> *Baucom* summarized its analysis by stating that violations of state criminal law for federal purposes “must be the rare exception” and in every instance must be “clearly seen to be reasonable, necessary, and proper.”<sup>977</sup> The court applied these factors to the circumstances at hand by noting that undercover informants were a lawful and common means to combat some types of crime that were otherwise nearly impossible to prosecute.<sup>978</sup> Based on that reasoning, and given the absence of any corrupt motive, it upheld the grant of immunity.

### 3. Significant Decisions from Other Federal Circuits

Other circuits have framed the analysis along the same lines. Despite some variation, the factors that are most often dispositive in these cases are consistent. First, courts decline to grant immunity if the facts of the federal officer's violation are in dispute, particularly when those facts bear on an officer's state of mind. Second, and relatedly, courts place significant weight on the good faith of the federal officers: If courts are certain that the officer was genuinely trying to do no more than their duty, they tend to grant immunity, but they often deny immunity when there is evidence of self-serving action or wantonness. Finally, courts are more lenient when split-second decisionmaking is required because of imminent danger to the officer or third parties. This again relates to state of mind: Courts are more willing to believe an officer genuinely believed their actions were necessary when they believed that they had to act immediately or risk disaster.

Two cases in the 2nd Circuit illustrate how courts apply these factors. In one case, the court granted immunity to a Drug Enforcement Administration (DEA) officer who shot an unarmed (but physically larger) assailant when the victim reached for the officer's gun during an attempted arrest

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<sup>976</sup> *Id.* at 1351.

<sup>977</sup> *Id.*

<sup>978</sup> *Id.* at 1350–51.

that had devolved into a fistfight.<sup>979</sup> In the other case, the court denied immunity to an FBI informant who had pled guilty to fraud and grand larceny but subsequently claimed he was acting under federal authority.<sup>980</sup> There, whether the petitioner “was acting on behalf of the United States when he engaged in the fraudulent loan transactions and, if he was, whether he was doing only what he reasonably believed was necessary for the fulfillment of his duties” turned on disputed facts.<sup>981</sup> For example, while the FBI acknowledged that they had a “working relationship” with the informant, they did not agree that they had authorized “[him] to perform the acts for which [he] was prosecuted.”<sup>982</sup> Because there was no “peculiar urgency” requiring intervention, and because those facts went to key issues, the court held that those facts should be determined by the trial court.<sup>983</sup>

The 4th Circuit’s cases illustrate the same pattern. The court granted immunity to a military officer who caused a fatal car crash while driving with a blood alcohol percentage over the legal limit. The officer had been ordered by a superior to drive an injured soldier to a military hospital when his superior knew that he had consumed alcohol. Other parties also testified that he had been driving normally and safely until the accident.<sup>984</sup> In contrast, the court denied immunity in *Birsch v. Tumbleson*,<sup>985</sup> where it allowed state officials to prosecute federal game wardens who shot two hunters who were hunting out of season. There, the facts of the shooting were disputed. While the wardens claimed they confronted the hunters first and were shot at before returning fire, other witnesses claimed they laid in wait and fired without warning as they saw the hunters. The court held that “save in cases of manifest urgency,” factual questions that could affect the application of

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<sup>979</sup> *New York v. Tanella*, 374 F.3d 141, 144 (2d Cir. 2004).

<sup>980</sup> *Whitehead v. Senkowski*, 943 F.2d 230 (2d Cir. 1991).

<sup>981</sup> *Id.* at 235–36.

<sup>982</sup> *Id.* at 235.

<sup>983</sup> *Id.*

<sup>984</sup> *Maryland v. DeShields*, 829 F.2d 1121, at \*1 (4th Cir. 1987).

<sup>985</sup> *Birsch v. Tumbleson*, 31 F.2d 811 (4th Cir. 1929).

immunity should be resolved by a “trial on the merits.”<sup>986</sup> Because the conduct of the wardens was not “reasonably free from doubt,” the court denied immunity.<sup>987</sup>

The 4th Circuit also addressed Supremacy Clause immunity in a pair of cases where this immunity doctrine was raised as the basis for federal officer removal. In *North Carolina v. Ivory*,<sup>988</sup> the court denied a petition for removal premised on Supremacy Clause immunity. There, a marine caused an accident while driving in a military convoy. Because there was no “exigency stemming from the duties of military service” that justified the violation of state law, the court found his claim of immunity to be meritless.<sup>989</sup> Similarly, in *North Carolina v. Cisneros*,<sup>990</sup> the court again denied removal based on Supremacy Clause immunity to a marine who caused a vehicular collision. Once again, the lack of an exigency was dispositive. Although the marine contended that his brakes had failed, and he therefore could not have stopped before entering the intersection, the court held that this type of exigency was irrelevant to a federal officer immunity claim, although it could support “a state defense of justification or excuse.”<sup>991</sup> For Supremacy Clause immunity, the exigency would need to “inhere[] in the very nature and object of the federal duty at issue.”<sup>992</sup>

The 5th Circuit’s cases give significant weight to the court’s ability to clearly discern the federal officer’s subjective motivations—in other words, his good-faith pursuit of federal (and not personal) objectives. For example, the court granted immunity to an FBI agent who accidentally discharged a firearm and shot a suspect when the suspect knocked him down during a chase.<sup>993</sup> The court held that the attempted arrest was justified by probable cause, which was enough to

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<sup>986</sup> *Id.* at 814.

<sup>987</sup> *Id.*

<sup>988</sup> *North Carolina v. Ivory*, 906 F.2d 999 (4th Cir. 1990).

<sup>989</sup> *Id.* at 1003.

<sup>990</sup> *North Carolina v. Cisneros*, 947 F.2d 1135 (4th Cir. 1991).

<sup>991</sup> *Id.* at 1140.

<sup>992</sup> *Id.*

<sup>993</sup> *Texas v. Kleinert*, 855 F.3d 305 (5th Cir. 2017).



satisfy the requirement for the presence of sufficient federal authority.<sup>994</sup> And it pointedly noted that there was no indication that the officer had acted “out of personal interest” in judging his actions to be necessary and proper.<sup>995</sup> In contrast, the court denied immunity in *Isaac v. Googe*<sup>996</sup> to an attorney who was indicted for barratry but who claimed that the offense was committed while he was acting as an officer of the court. The claim was based on the defendant’s employment as attorney for the court-appointed receiver of a bankrupt company.<sup>997</sup> But the court held that in becoming the attorney for parties with conflicting interests, he “did not [act] in pursuance of a law of the United States.”<sup>998</sup> Because the alleged conduct was “beyond the scope of [his] employment” and “foreign to the performance...of any duty he owed,” immunity was not warranted.<sup>999</sup>

The 6th Circuit granted immunity in *Kentucky v. Long*,<sup>1000</sup> where an FBI agent was charged with authorizing an informant to commit several burglaries. The officer had not received authorization from his superiors to instruct the informant to commit crimes, but he was still in compliance with internal department guidance on the use of informants.<sup>1001</sup> The Court framed its decision to grant immunity as “a narrow one,” highlighting that when a defendant raises a “threshold defense of [Supremacy Clause] immunity,” the state cannot respond “merely by way of allegations.”<sup>1002</sup> Instead, the 6th Circuit emphasized, the state must respond with “an evidentiary showing sufficient...to raise a genuine factual issue whether the federal officer was acting pursuant

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<sup>994</sup> *Id.* at 316–17.

<sup>995</sup> *Id.* at 317.

<sup>996</sup> *Isaac v. Googe*, 284 F. 269, 270 (5th Cir. 1922).

<sup>997</sup> *Id.*

<sup>998</sup> *Id.*

<sup>999</sup> *Id.*

<sup>1000</sup> *Kentucky v. Long*, 837 F.2d 727 (1988).

<sup>1001</sup> *Id.* at 740.

<sup>1002</sup> *Id.* at 752.

to the laws of the United States and was doing no more than what was necessary and proper.”<sup>1003</sup> Because Kentucky had failed to do so, the lower court’s dismissal was warranted.

The 8th Circuit’s cases emphasize whether an officer was pressed into split-second decision-making. The court granted immunity to an FBI agent who shot an unarmed woman during a raid of a home because he “in good faith, believed that his life and the lives of those for whose presence he felt responsible were in danger” after an unknown party fired a shot at him.<sup>1004</sup> But the 8th Circuit denied immunity to federal officers in *Castle v. Lewis* who fired at a fleeing car “to disable it” and unintentionally killed a smuggler.<sup>1005</sup> There, the court held that the officers had failed to make three independent showings necessary for their requested relief: First, that they “had reasonable cause to believe and honestly did believe” that a crime was being committed; second, that they “honestly and with reason believed” that it was necessary to fire at the car to affect the arrest; and third, that allowing the trial process to proceed would “seriously interfere with the enforcement of the laws of the United States or with the operations of its government.”<sup>1006</sup>

In *Wyoming v. Livingston*, the 10th Circuit focused not only on whether an officer believed their actions were reasonable, but also on whether they could reasonably have thought that they were not violating state law.<sup>1007</sup> There, the court granted immunity to officers of the United States Fish and Wildlife Service (USFWS) who were charged with trespassing on private land when they collared a pack of wolves. On the question of federal authority, the court noted that regulations “d[id] not merely authorize, but impose[d] an obligation on the USFWS to monitor wolves.”<sup>1008</sup> For *Neagle*’s second prong, the subjective element was not in dispute: All parties acknowledged

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<sup>1003</sup> *Id.*

<sup>1004</sup> *Reed v. Madden*, 87 F.2d 846, 851 (8th Cir. 1937).

<sup>1005</sup> *Castle v. Lewis*, 254 F. 917 (8th Cir. 1918).

<sup>1006</sup> *Id.* at 921.

<sup>1007</sup> *Wyoming v. Livingston*, 443 F.3d 1211 (10th Cir. 2006).

<sup>1008</sup> *Id.* at 1227.

that the officers had believed that they were on federal land at the time.<sup>1009</sup> And the court's objective inquiry turned on the officers' reasonable attempts to discern whether they were on private land.<sup>1010</sup>

The 9th Circuit has issued many of the most detailed cases concerning Supremacy Clause immunity. In an early case, *Clifton v. Cox*,<sup>1011</sup> the court granted immunity to an agent of the Bureau of Narcotics and Dangerous Drugs who was charged with murder after shooting a fleeing suspect who he mistakenly thought had just shot another agent. The court framed the necessary and proper inquiry as turning on the objectively reasonableness of the agent's mistake and whether he "otherwise act[ed] out of malice or with some criminal intent."<sup>1012</sup> Because the agent had been mistaken but "honest and reasonable" in his belief, immunity was proper.<sup>1013</sup>

But in two cases that followed *Clifton*, the 9th Circuit denied officers' claims of Supremacy Clause immunity. In the first, the officer's good-faith pursuit of federal objectives was brought into doubt. In *Morgan v. California*,<sup>1014</sup> the court allowed the state to continue prosecuting two agents of the Drug Enforcement Administration who had been under the influence of alcohol when they threatened a third party with a gun and then struck him. The court held that the district court had abused its discretion in granting a writ of habeas corpus because "material facts...were in dispute" about what had occurred and there was no "peculiar urgency" demanding the officers' intervention.<sup>1015</sup> For example, the officers had stated at one point that they had been "en route for drinks at the Police Academy," but at another point they said that they were "on their way to meet

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<sup>1009</sup> *Id.* at 1228.

<sup>1010</sup> *Id.* at 1229.

<sup>1011</sup> *Clifton v. Cox*, 549 F.2d 722 (9th Cir. 1977).

<sup>1012</sup> *Id.* at 728.

<sup>1013</sup> *Id.* at 729.

<sup>1014</sup> *Morgan v. California*, 743 F.2d 728 (9th Cir. 1984).

<sup>1015</sup> *Id.* at 733.

with an informant.”<sup>1016</sup> It was also possible that the officers had initiated the altercation because they themselves had caused a car accident with the victim and they were attempting to avoid blame. Given that it was unclear whether the officers were “in pursuit of official duties” or merely seeking their own personal and corrupt ends, the court found immunity to be inappropriate.<sup>1017</sup>

Finally, the *en banc* 9th Circuit denied immunity to an FBI sniper in *Idaho v. Horiuchi*.<sup>1018</sup> The court’s discussion of Supremacy Clause immunity in that case is particularly comprehensive, although the opinion was eventually vacated for unrelated reasons. Despite its lack of precedential weight, Judge Kozinski’s opinion offers a complete survey of the law of Supremacy Clause immunity as it stood in 2001 and remains a reliable guide to the law in this field today.

*Horiuchi* arose when an FBI sniper fired at a man walking behind an open cabin door during a standoff with a militant group in Idaho. The sniper’s bullet passed through the door and a woman standing behind it before reaching its intended target.<sup>1019</sup> Idaho brought charges against the sniper for killing the woman; the officer responded by invoking Supremacy Clause immunity.

The denial of immunity in *Horiuchi* was based on the existence of factual inconsistencies—particularly concerning the sniper’s thoughts and perceptions. The court’s opinion meticulously analyzed the factual assertions made by the parties to determine whether a version of the facts was possible in which immunity would not have been warranted. The court ultimately identified six factual disputes that could be resolved in a manner that would defeat immunity.<sup>1020</sup> Much of the court’s analysis sought to distinguish the sniper’s *actual* reasoning behind his actions from *post-hoc* rationalizations designed to immunize him from prosecution. For example, the sniper testified

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<sup>1016</sup> *Id.*

<sup>1017</sup> *Id.* at 734.

<sup>1018</sup> *Ohio v. Horiuchi*, 253 F.3d 359 (9th Cir.), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001).

<sup>1019</sup> *Id.* at 363.

<sup>1020</sup> *Id.* at 369–74.

that he initially fired at one of the victims because he thought the man might shoot at a passing police helicopter. But he later equivocated about the helicopter's location and whether such a shot would have been possible. Citing discrepancies like this one, the court noted that on plausible versions of the facts, the sniper's actions would be unjustified, and immunity would not vest.<sup>1021</sup>

Although there are minor variations in the language courts have used to describe the standard for Supremacy Clause immunity, the factors that determine the outcomes of the cases are consistent. Most significantly, evidence that a federal officer might not have been acting solely to accomplish their federal duty generally precludes a claim of Supremacy Clause immunity. So, too, does a credible factual dispute on that point. And while courts are more forgiving of an officer's intentions when presented with cases involving split-second, life-or-death decisions, they more carefully scrutinize an officer's motives when there are circumstantial considerations indicating bad faith or when the officer had substantial time in which to formulate his course of conduct. This last point is consistent with doctrines like qualified immunity, in which courts are also likely to grant immunity when officers are forced to act in split-second emergencies,<sup>1022</sup> but more reluctant to do so when officers make considered judgments to take actions that end up being illegal.<sup>1023</sup>

### **C. Application to Trump's Actions**

If Trump were to raise a Supremacy Clause defense to criminal prosecution in Georgia, Supreme Court and 11th Circuit precedent define three key questions. First, whether Trump was acting pursuant to either an express grant of authority or an implied grant "growing out of the Constitution" and "the nature of the government under the Constitution."<sup>1024</sup> Second, from an objective point of view, did Trump do only what was necessary to pursue a valid federal objective.

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<sup>1021</sup> *Id.* at 369.

<sup>1022</sup> *See* *Kisela v. Hughes*, 138 S. Ct. 1148 (2018).

<sup>1023</sup> *See* *Taylor v. Riojas*, 141 S. Ct. 52 (2020); *Hope v. Pelzer*, 536 U.S. 730 (2002).

<sup>1024</sup> *In re Neagle*, 135 U.S. 1, 64 (1890).

Finally, did Trump act with an improper subjective motivation—e.g., his own personal political gain. This last element could be understood as either nullifying his authority in the presence of self-interest or criminal intent (*see Baucom*), or as defeating the reasonableness of his conduct.

Trump's claim of entitlement to Supremacy Clause immunity would be unpersuasive at any step of this analysis. First, no statute authorized him to interfere in Georgia's ballot-counting process, and his attempt to force a state to take action to keep him in power was, if anything, directly contrary to the constitutional structure. Second, his actions bore no objectively reasonable relationship to the accomplishment of any valid federal objective or the enforcement of any federal statute. Finally, Trump's subjective intentions fail to establish immunity in any formulation. There is no evidence demonstrating that he believed his own claims of fraud, and there is substantial evidence that he should not (and would not) have believed them. More important, the context and the content of his statements to Georgia officials provide overpowering evidence that he acted in a self-interested manner, rather than in furtherance of a federal goal. For all these reasons, there would be no merit to an argument by Trump that he is shielded by Supremacy Clause immunity.

**1. Trump Did Not Act Pursuant to an Express Grant of Authority or One Implied in the Constitution Itself**

If a court were to find that Trump was not acting under federal authority when he attempted to influence the results of the presidential election in Georgia, that would be a sufficient ground to deny any claim to Supremacy Clause immunity. To be sure, Trump might seek to ground his acts in various federal authorities, but none would provide support. First, he might argue that the power to oversee federal elections—and, thus, to contact, question, and even cajole or pressure state officials—is contained in his constitutional responsibility to “take care that the laws be faithfully

executed,”<sup>1025</sup> or in the “executive power.”<sup>1026</sup> Second, he could claim that his power to oversee federal elections is inherent in the structure of the Constitution because it requires him to protect federal institutions. Finally, he might argue that federal election fraud statutes<sup>1027</sup> grant him authority as the law-enforcer-in-chief to step in when states may have violated federal law. We will consider each of these possibilities in turn; we conclude that none withstands scrutiny.

To start, an argument based on the Vesting Clause and Take Care Clause would lack any merit, since those clauses do not authorize the president to threaten state election officials or to demand that they find enough votes to sway the outcome of a presidential election. The Vesting Clause has generally been understood to imply presidential powers of removal and supervision vis-à-vis other federal officials, as well as a range of foreign affairs powers and other authorities originally within the executive power of the federal government.<sup>1028</sup> But it has never been held to vest presidents with a role in the certification or administration of presidential elections at the state level—functions that are reserved by the text of the Constitution for state officials and Congress.

The Take Care Clause would prove equally unhelpful to Trump. Generally, this clause has been interpreted as a statement of the executive’s role in the tripartite constitutional structure, rather than as a specific grant of authority to the president.<sup>1029</sup> Where courts have treated the Take Care Clause as a source of unenumerated powers, they have generally looked to other enumerated authorities and historical practice in defining such authority.<sup>1030</sup> No other enumerated power and no historical tradition supports an argument that a president’s functions include threatening state

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<sup>1025</sup> U.S. Const. art. II, § 3.

<sup>1026</sup> U.S. Const. art. II, § 1.

<sup>1027</sup> *See, e.g.*, 52 U.S.C. § 20511(2)(B).

<sup>1028</sup> Cf. *United States v. Arthrex*, 141 S. Ct. 1970, 1988 (2021); *see also* *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020); *Zivotofsky v. Kerry*, 576 U.S. 1, 35 (2015).

<sup>1029</sup> Cf. *Medellin v. Texas*, 552 U.S. 491 (2008) (“This authority allows the President to execute the laws, not make them.”).

<sup>1030</sup> *In re Neagle*, 135 U.S. 1, 63–65 (1890).

officials (and soliciting them to act in violation of state law) in administering and certifying presidential elections. To be sure, the executive branch plays an important role in ensuring the integrity and fairness of the nation's elections, and in enforcing federal criminal law, but there is no basis in precedent or history for a claim that the president has free-ranging power to personally investigate, solicit, and threaten state officials in presidential elections. If anything, the structure of federal law *undermines* such an argument, since Congress has granted power to United States attorneys—rather than to the president—to indict people for crimes.<sup>1031</sup> And historians have shown that the Take Care Clause was originally understood not as an all-purpose grant of unenumerated power, but rather as a limitation on the president—specifically, a limitation grounded in fiduciary duties to act in good faith and to avoid using his office for private gain.<sup>1032</sup> In light of that history, the Take Care Clause would repudiate, rather than authorize, Trump's conduct in Georgia.

Lacking any argument grounded in more specific clauses, Trump might contend that his authority to interfere with Georgia's election processes was somehow implied by the structure of the Constitution. While a similar "implied powers" argument prevailed in *Neagle*, the premise of that case was that denying federal marshals the power to protect judges from assassination would have threatened the federal government itself.<sup>1033</sup> That premise is inapplicable here. If anything, the federal government—and our constitutional structure—would be imperiled if presidents could use their authority to interfere with presidential elections by cajoling, soliciting, and threatening state officials. The most significant checks on a president's power are the ability of the electorate to unseat him and the ability of Congress to impeach and remove him. But these would be vitiated if presidents could directly influence not only their own elections but also those of senators and

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<sup>1031</sup> 28 U.S.C. § 547 (describing duties and powers of United States Attorneys).

<sup>1032</sup> See Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, Faithful Execution and Article II, 132 HARV. L. REV. 2117–2121 (2019).

<sup>1033</sup> *Neagle*, 135 U.S. at 63–65, 86.



representatives. For that reason, the Constitution gives the responsibility of appointing presidential electors to state officials, and to Congress, with no role in the process reserved to the president.<sup>1034</sup> This constitutional structure obviously precludes, rather than authorizes, presidential interference in presidential elections—particularly when the sitting president is also a candidate in the election.

The Supreme Court acknowledged that the Constitution does not allow federal officers to exercise such direct control over the checks on their own power in *Nixon v. United States*.<sup>1035</sup> There, the Court held that it lacked the power to decide questions regarding the impeachments of judges, despite its general mandate to interpret the Constitution and laws of the United States.<sup>1036</sup> The Court held that because impeachment is a “constitutional check” on the judiciary, allowing judges to exercise power over the impeachment process would “eviscerate” the intent of the framers to place limits on judicial power.<sup>1037</sup> In short, the alternative was constitutionally impermissible because it placed power over a process “in the hands of the same body that the...process is meant to regulate.”<sup>1038</sup> The conceptual basis for the holding of *Nixon* dates back to the familiar common law maxim that “[n]o man can be judge in his own case.”<sup>1039</sup> This principle is woven through major provisions of the Constitution<sup>1040</sup> and further confirms that constitutional structure does not support any claim of presidential authority to supervise or interfere with presidential elections.

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<sup>1034</sup> U.S. Const. art. II, § 1; U.S. Const. amend. XII.

<sup>1035</sup> *Nixon v. United States*, 506 U.S. 224 (1993).

<sup>1036</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

<sup>1037</sup> *Nixon*, 506 U.S. at 235.

<sup>1038</sup> *Id.*

<sup>1039</sup> *Dr. Bonham’s Case*, 77 Eng. Rep. 638, 654 (1610) (Coke, C.J.).

<sup>1040</sup> See Akhil Reed Amar, *America’s Unwritten Constitution* 3–7 (2012) (explaining that, despite the plain text to the contrary, the vice president cannot preside over a Senate trial following their own impeachment).

Because the Constitution did not authorize his conduct, Trump might claim that he acted in furtherance of statutory authority. But this claim would fail. Federal law expressly prohibits candidates in elections from attempting to influence the results of those elections through illicit means.<sup>1041</sup> And Trump's efforts to sway the Georgia vote count had no relationship to any specific federal statute. Although various federal laws criminalize the casting and tabulating of fraudulent ballots,<sup>1042</sup> at no point during his phone calls with Georgia officials did Trump even hint that he was acting in an enforcement role. Nor could he plausibly make that claim: The authority to enforce election laws does not include authority to threaten state officials with untoward consequences if they do not "find" additional ballots sufficient to sway the outcome of an election. There is a line between enforcing elections laws and threatening state officials for personal gain, and whereas federal statutory law authorizes the former, it offers no warrant or authority for the latter.

The relationship between Trump's actions and the enforcement of federal election fraud statutes is not just attenuated: It is nonexistent. First, the federal role in enforcing those statutes is narrower than it is with other federal criminal laws. As the Department of Justice's manual on *Federal Prosecution of Election Offenses*<sup>1043</sup> makes clear, the federal law enforcement role as it regards election fraud is limited to "prosecution, not intervention."<sup>1044</sup> Furthermore, Trump's

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<sup>1041</sup> Cf. 18 U.S.C. § 595 (prohibiting federal employees from "interfering with, or affecting" federal elections); 18 U.S.C. § 594 (prohibiting intimidation, threats, or coercion for the purpose of interfering with a person's right to vote); 18 U.S.C. § 592 (prohibiting any federal official from sending armed men to the vicinity of open polling places); 52 U.S.C. § 10102 (prohibiting military interference with state election procedures).

<sup>1042</sup> The most relevant federal laws are 52 U.S.C. § 20511(2)(B), which makes it a crime to "tabulat[e]...ballots that are known...to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held" and 18 U.S.C. § 241, which makes it unlawful to "conspire to injure...any person...in the free exercise or enjoyment of any right...secured...by the Constitution." The latter has been held to encompass conspiracies to commit various forms of election fraud. *See* *Ryan v. United States*, 99 F.2d 864 (8th Cir. 1938) (failing to count valid votes); *United States v. Saylor*, 322 U.S. 385 (1944) (stuffing a ballot box with forged ballots).

<sup>1043</sup> U.S. Dep't of Just., *Federal Prosecution of Election Offenses* (Richard C. Pilger, ed., 8th ed. 2017) (hereinafter "DOJ Election Prosecution Manual").

<sup>1044</sup> *Id.* at 8.

actions had no bearing on the enforcement of any specific provision of any election fraud statute, regardless of how one views the role of the federal government in enforcing the statutes. Federal statutes prohibit crimes such as stuffing ballot boxes,<sup>1045</sup> willfully tabulating votes one knows to be fraudulent,<sup>1046</sup> and voting while knowing one is ineligible to do so.<sup>1047</sup> But no statute prohibits certifying the winner of an election where another candidate would have won absent any fraud. This is because “[i]t is the states that have primary authority to ensure that...the candidate who received the most valid votes is certified as the winner” of an election.<sup>1048</sup> While the federal government may act to deter future election fraud, “this...is achieved by...[the] prosecution of... election fraud—not through interference with the process itself.”<sup>1049</sup> As a result, and based on historical practice, the executive branch “does not have a role in determining which candidate won a particular election”<sup>1050</sup> Instead, such issues are “for the candidates to litigate in the courts.”<sup>1051</sup>

To understand the chasm between Trump’s actions and the enforcement of federal election fraud statutes, one need only consider that Trump’s actions may have violated the very statutes he would be contending he tried to enforce. On his call with Watson, Trump insisted that she should depart from established audit procedures and apply a stricter standard to well-known Democratic strongholds.<sup>1052</sup> On his call with Raffensperger, he suggested that Raffensperger’s denial of his election fraud claims might be “dangerous” for him and asked him to manufacture nonexistent ballots to guarantee him victory.<sup>1053</sup> In both cases, if the target of his coercion had done what he had asked, it would have had no remedial effect on any existing violation of any federal election

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<sup>1045</sup> 18 U.S.C. §§ 241–242.

<sup>1046</sup> 52 U.S.C. § 20511.

<sup>1047</sup> 18 U.S.C. § 1015.

<sup>1048</sup> DOJ Election Prosecution Manual, *supra* note 1043, at 8.

<sup>1049</sup> *Id.* at 9.

<sup>1050</sup> *Id.* at 84.

<sup>1051</sup> *Id.*

<sup>1052</sup> Davis, *supra* note 579.

<sup>1053</sup> Gardner & Firozi, *supra* note 2.

fraud statute. But they likely would have been violating at least two of those statutes themselves, by conspiring with him to deprive Georgia citizens of their rights to have their votes faithfully counted and adhered to.<sup>1054</sup>

For these reasons, federal law did not authorize Trump's conduct and he cannot lay claim to Supremacy Clause immunity. In other words, Trump's argument would fail at *Neagle's* first step. The 11th Circuit in *Baucom* merged this inquiry with an assessment of the federal official's subjective motivations. We address that issue below and demonstrate that it affords yet another basis to deny immunity. But before doing so, we turn to *Neagle's* second prong, which concerns the objective reasonableness of the means undertaken to achieve an asserted federal goal.

## **2. Trump's Actions Had No Objectively Reasonable Relationship to His Federal Duties**

The next step of the *Neagle* analysis asks whether the officer's actions were a necessary and proper means to accomplish their federal objective. Trump could not satisfy this standard.

To satisfy the objective prong of the necessary and proper requirement, precedent demands a close fit between a federal objective and an officer's chosen means. For example, in *Neagle*, where the Court held that the federal marshal's intervention was the only means of saving Justice Fields' life, the Court granted immunity.<sup>1055</sup> But in *Drury*, where a soldier followed orders to apprehend a thief but did so by shooting him, the Court held that he could be prosecuted because the violation of state law was not necessary to achieving his objective.<sup>1056</sup> Other lower courts have generally taken *Drury* at its word. Where officers appeared to have acted in reasonable belief that their own lives or those of third parties may be in danger, courts accept that they were doing only

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<sup>1054</sup> See 18 U.S.C. § 241; *United States v. Classic*, 313 U.S. 299 (1941).

<sup>1055</sup> *In re Neagle*, 135 U.S. 1, 75–76 (1890).

<sup>1056</sup> *Drury v. Lewis*, 200 U.S. 1, 8 (1906).

what they thought was necessary.<sup>1057</sup> Similarly, where a military officer who had consumed alcohol was following orders to drive a soldier to the hospital, the court agreed that he could reasonably have thought he was doing what he was required to do to achieve his purpose.<sup>1058</sup> But even when officers do appear to be pursuing federal goals, if they cannot show that they were specifically obligated to violate the law, no immunity attaches. Thus, the officers in *Castle* who fired at a fleeing car were not immune because they could not show that it was reasonable to believe that it was necessary to fire at the car to arrest the suspect.<sup>1059</sup> And the game warden in *Birsch* was not immune unless he could show that he had been fired upon by the hunters before he returned fire.<sup>1060</sup>

The factors applied to this analysis by the 11th Circuit in *Baucom* only make Trump's claim more difficult to sustain. There, the court asked three questions: whether the officer's chosen means were *per se* unlawful; whether other avenues were available to achieve the federal objective; and whether the officer used a common and accepted technique in pursuing their goal.<sup>1061</sup> While each factor is independent under *Baucom*, the question that they seek to answer is the same: whether it was objectively reasonable for an officer to believe that their actions were tightly bound to a legitimate federal objective. Here, each element points to Trump's continued liability.

First, threatening a state election official to violate their duty and "find" votes is *per se* unlawful. In *Baucom*, the 11th Circuit compared the federal goal (catching a public official susceptible to bribery) to the chosen means (using undercover police informants in stings).<sup>1062</sup> Because using undercover police informants in stings was not generally an illegal means to catch

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<sup>1057</sup> *New York v. Tanella*, 374 F.3d 141, 144 (2d Cir. 2004); *Reed v. Madden*, 87 F.2d 846, 851 (8th Cir. 1937).

<sup>1058</sup> *Maryland v. DeShields*, 829 F.2d 1121, at \*7 (4th Cir. 1987).

<sup>1059</sup> *Castle v. Lewis*, 254 F. 917, 921 (8th Cir. 1918).

<sup>1060</sup> *Birsch v. Tumbleson*, 31 F.2d 811 (4th Cir. 1929).

<sup>1061</sup> *Baucom v. Martin*, 677 F.2d 1346, 1350–51 (11th Cir. 1982).

<sup>1062</sup> *Id.* at 1350–51.

criminals, this factor cut in the FBI agent's favor.<sup>1063</sup> Applying the same analysis here, Trump's purported goal was to ensure the integrity of the presidential election in Georgia. But the means that he chose—including soliciting and threatening state officials to find additional votes and to alter their ballot processing and administration practices—would be illegal in any context. In the 11th Circuit's analysis, this makes it unlikely that his chosen method was necessary and proper.

Second, many alternative (and lawful) avenues exist to ensure the fair counting of votes and compliance with law in federal elections, which cuts against the conclusion that committing a crime was necessary to achieve this goal. In *Baucom*, the court noted that bribery, like the drug trade, could be difficult to prosecute without the use of creative subterfuge like undercover agents.<sup>1064</sup> Because the federal government had an interest in disincentivizing corruption, and it would be nearly impossible to do so if the only method of catching corrupt officials was by relying on those who bribed them to turn them in, the court accepted that the FBI agent's means were necessary. But the same is not true of voter fraud. A great body of federal and state law criminalizes election-related misconduct—and the government has been successful in bringing prosecutions.<sup>1065</sup> There are no factors here that would make those alternatives particularly “difficult” or “vexing” such that they would justify a departure from legal and procedural norms.<sup>1066</sup> That is particularly obvious in this case because Trump pursued so many different avenues to challenge the election results (and Georgia undertook so many attempts to ensure their accuracy and integrity).

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<sup>1063</sup> *Id.*

<sup>1064</sup> *Id.*

<sup>1065</sup> Judith Browne Dianis, Five Myths about Voter Fraud, THE WASHINGTON POST (Oct. 7, 2011), [https://www.washingtonpost.com/opinions/five-myths-about-voter-fraud/2011/10/04/gIQAkjoYTL\\_story.html](https://www.washingtonpost.com/opinions/five-myths-about-voter-fraud/2011/10/04/gIQAkjoYTL_story.html).

<sup>1066</sup> *Baucom v. Martin*, 577 F.2d 1346, 1350 (11th Cir. 1982).

Third, Trump’s actions were not a “recognized technique” that is “commonly utilized”<sup>1067</sup> to enforce federal election law; rather they were unprecedented in the history of the nation’s elections. Looking again to *Baucom*, undercover informants and stings were a time-tested and legally sanctioned way of catching criminals who would otherwise have escaped prosecution. The commonplace nature of the chosen means again suggested that an officer could reasonably believe that those means were necessary and proper.<sup>1068</sup> The same is not true for Trump’s calls to Georgia state officials. Constitutional structure and centuries of presidential conduct militate decisively against such conduct; there is no established practice of federal officials exerting pressure on state officials to alter election results (let alone of presidents doing so in presidential elections).

In addition, the Department of Justice’s own manual on the enforcement of election fraud statutes precisely demonstrates the impropriety of Trump’s chosen means. The manual makes clear that federal officials should avoid “interference with the process” through which states conduct elections.<sup>1069</sup> Any investigation “must be conducted in a way that minimizes the likelihood that the investigation itself may become a factor in the election.”<sup>1070</sup> To operationalize this, investigations “should not...[commence] until the election in question has been concluded, its results certified, and all recounts and election contests concluded.”<sup>1071</sup> The overarching policy concern is that the federal government should not in any way influence the actual results of an election—which would be intruding on an area of primarily state authority.<sup>1072</sup> In short, the executive branch “does not have a role in determining which candidate won a particular election.”<sup>1073</sup> Far from being a “commonly utilized” or “recognized technique,” Trump’s actions

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<sup>1067</sup> *Id.*

<sup>1068</sup> *Id.*

<sup>1069</sup> DOJ Election Prosecution Manual, *supra* note 1043, at 8–9.

<sup>1070</sup> *Id.*

<sup>1071</sup> *Id.* at 84.

<sup>1072</sup> *Id.* at 11.

<sup>1073</sup> *Id.* at 84.

were directly contrary to established practice and documented procedures for the circumstances in which he was operating.

Trump cannot satisfy the high bar presented by the objective prong of the Supremacy Clause immunity analysis. While precedent requires something close to an actual obligation to violate state law, Trump's actions were at best a superfluous means to pursue federal objectives and at worst they were directly contrary to well-established federal laws and interests. Based on this analysis alone, a court should dismiss Trump's claim to Supremacy Clause immunity.

### **3. Trump Cannot Show That He Subjectively Believed that His Actions Were Closely Related to Pursuing a Legitimate Federal Objective**

Trump's subjective intentions would also provide a sufficient ground to reject his claim to Supremacy Clause immunity. Most federal circuits introduce this element in the second prong of the analysis, requiring that an official's chosen means be both objectively and subjectively reasonable.<sup>1074</sup> The 11th Circuit asks the question earlier, holding that a federal officer is not acting under their federal authority when they act out of "personal interest, malice, [or with] actual criminal intent."<sup>1075</sup> Trump's claim to immunity could be defeated based on these requirements in three different ways. First, if it is shown that Trump did not actually believe that he had won the election (in which case he could not have subjectively believed he was acting in furtherance of any legitimate objective). Second, regardless of whether he believed that he had won the election, if Trump solicited parties to commit election fraud while intending that they actually do so (since *Baucom* held that immunity does not attach to acts undertaken with "malice" or "criminal intent"). Finally, if Trump was acting out of personal interest rather than to further the interest of the federal

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<sup>1074</sup> *Kentucky v. Long*, 837 F.2d 727, 745 (6th Cir. 1988).

<sup>1075</sup> *Baucom v. Martin*, 677 F.2d 1346, 1350 (11th Cir. 1982).



government (again under *Baucom* and numerous additional precedents). There is ample evidence to establish each of these three points, any of which would be sufficient to deny Trump immunity.

For Trump's actions to have been subjectively reasonable, he would have had to believe that they were closely related to the enforcement of federal law. Looking to *Drury*, courts have been reluctant to grant federal officers immunity where a factual dispute exists that could affect the immunity analysis.<sup>1076</sup> This has been especially true when the factual question is about the federal officer's perception or belief.<sup>1077</sup> Trump's belief in his own claims presents such a factual dispute that a court would have to resolve before granting him immunity, since there is powerful evidence that Trump was repeatedly informed by reputable officials and staff that his claims were baseless. If Trump knew his claims were false—or if there is a credible factual dispute on this point—it would not be proper to dismiss criminal charges based on Supremacy Clause immunity.

Trump was presented with proof that each of his claims of election fraud was false. This occurred so often, and so conclusively, that it would have been exceedingly unreasonable for him to have maintained<sup>1078</sup> his belief that he actually won.<sup>1079</sup> Trump was told repeatedly that no significant voter fraud had occurred and that he legitimately lost the election. He heard this from high-ranking officials at the Department of Justice,<sup>1080</sup> officials in the Georgia government,<sup>1081</sup> and even data scientists<sup>1082</sup> who worked for his campaign. DOJ officials specifically told Trump that the claims he made on his call to Raffensperger about ballots being smuggled in suitcases were

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<sup>1076</sup> *Drury v. Lewis*, 200 U.S. 1, 3–7 (1906).

<sup>1077</sup> *See Idaho v. Horiuchi*, 253 F.3d 359, 369–74 (9th Cir. 2001).

<sup>1078</sup> Jesse Byrnes, Barr told Trump that theories about stolen election were 'bulls—': report, THE HILL (Jan. 18, 2021), <https://thehill.com/homenews/administration/534672-barr-told-trump-that-theories-about-stolen-election-were-bulls-report>.

<sup>1079</sup> Gardner & Firozi, *supra* note 2.

<sup>1080</sup> First Jan. 6 Hearing Transcript, *supra* note 84.

<sup>1081</sup> Second Jan. 6 Hearing Transcript, *supra* note 74.

<sup>1082</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80.

false.<sup>1083</sup> Their assertion to that effect was supported by the unedited video of the office where the supposed fraud occurred, which conclusively proved that standard procedures had been followed.<sup>1084</sup> That video was in Trump's possession and his attorneys admitted in court that they had seen it in its entirety.<sup>1085</sup> Trump's attorneys even tried to argue in court that they had not factually asserted that any fraud had occurred, perhaps to avoid personal liability for making statements that were supported by no legitimate evidence.<sup>1086</sup> According to Raffensperger, Trump's claim about suitcases filled with illegal ballots was possible only because his team selectively edited video footage to fit his claims of impropriety.<sup>1087</sup> These circumstances are the tip of the iceberg and constitute powerful cause to believe that Trump did not subjectively believe his own claims.

That inference is also supported by the fact that Trump also knowingly lied about the Department of Justice's own investigative efforts. At one point, Attorney General Bill Barr sat down with Trump and went through every claim of fraud that he had raised and explained why it was incorrect and how it had been debunked.<sup>1088</sup> Despite these in-depth conversations, Trump insisted to the public that the DOJ had declined to investigate allegations of fraud at all, stating on television that they were "missing in action."<sup>1089</sup> And even though he had been told by DOJ officials that they had investigated and found no evidence of fraud, Trump still pressured them to

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<sup>1083</sup> *In re* Giuliani, 197 A.D.3d 1, 4 (N.Y. App. Div. 2021) (per curiam) (“[R]espondent acknowledged that he had viewed the surveillance videos in their entirety.”).

<sup>1084</sup> Lisa Lerer, Giuliani in Public: “It’s a Fraud.” Giuliani in Court: “This is Not a Fraud Case.”, THE NEW YORK TIMES (Nov. 18, 2020), <https://www.nytimes.com/2020/11/18/us/politics/trump-giuliani-voter-fraud.html>.

<sup>1085</sup> *In re* Giuliani, 197 A.D.3d 1, 4 (N.Y. App. Div. 2021) (per curiam) (“[R]espondent acknowledged that he had viewed the surveillance videos in their entirety.”).

<sup>1086</sup> Lerer, *supra* note 1084.

<sup>1087</sup> Brad Raffensperger, Integrity Counts (Simon & Schuster 2021) (“Giuliani and his team selectively sliced and diced the video and conjured up a false narrative to fit his disinformation campaign. The deliberate deceit worked.”).

<sup>1088</sup> Byrnes, *supra* note 1078.

<sup>1089</sup> Interview: Maria Bartiromo Interviews Donald Trump on Fox News—November 29, 2020, FACTBA.SE (accessed July 20, 2022), <https://factba.se/transcript/donald-trump-interview-fox-news-sunday-morning-futures-maria-bartiromo-november-29-2020>.

sign a letter stating that the opposite was true and threatened to fire them if they would not.<sup>1090</sup> Here, too, Trump's lies about the existence and conclusions of DOJ investigations cannot be reconciled with an honest belief that fraud had actually occurred. When Trump spoke with Raffensperger and Watson, he did not support his claims of fraud with mistaken facts or beliefs; rather he did so with false evidence that his team manufactured and lies that could not have been unknown to him. His behavior in those calls is itself evidence that he did not believe the claims that he was making.

An independent reason why Trump could not claim Supremacy Clause immunity is that he acted with a mental state inconsistent with such a defense. In *Baucom*, the 11th Circuit held immunity to apply partially because the undercover FBI agent lacked the *mens rea* for the predicate state offense.<sup>1091</sup> Although he intended for the state prosecutor to accept his bribe, he did not intend for the goal of the bribery plan to be accomplished; he instead intended to catch the prosecutor accepting a bribe and vindicate important law enforcement interest (a goal consistent with Supremacy Clause immunity). Like *Baucom*, other cases have indicated that the existence of true criminal intent would ordinarily negate Supremacy Clause immunity.<sup>1092</sup> This separates cases where a federal officer happens to complete the *actus reus* of a crime while performing an official duty from cases where a party intends to, and does, commit a crime while happening to be a federal officer. It is also supported by the intuition that a strong showing of merit on the underlying criminal charge creates a presumption that the means chosen were improper. States do not ordinarily criminalize conduct that the federal government has a legitimate interest in pursuing; even more rarely do they criminalize such acts with a mental state of *knowing* or *corrupt* purpose.

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<sup>1090</sup> Fifth Jan. 6 Hearing Transcript, *supra* note 282.

<sup>1091</sup> *Baucom v. Martin*, 677 F.2d 1346, 1348 (11th Cir. 1982) (“In any event, it is claimed, the agent’s acts in the bribery scheme could not constitute a state criminal violation because criminal intent was lacking.”).

<sup>1092</sup> *Clifton v. Cox*, 549 F.2d 722, 728 (9th Cir. 1977).

Laws criminalizing election fraud fall into the category of prohibitions that the federal government and its officers have no legitimate interest in violating. A violation of the Georgia statute criminalizing solicitation to commit election fraud requires intent that the solicited party engage in the solicited conduct.<sup>1093</sup> In a situation like *Baucom*, where a federal officer purported to solicit the fraud but did not actually intend for it to occur, a federal defendant would not be guilty of a violation. But here, there is evidence that Trump did have the requisite criminal intent for a violation of the Georgia statute, and this establishes as a matter of law that his actions were outside the scope of Supremacy Clause immunity. Unlike the FBI agent in *Baucom*, Trump intended for Raffensperger and Watson to take specific steps to secure him an illegitimate election victory. This is evident in both the calls themselves and his broader course of conduct concerning the certification of the 2020 election. That evidence not only bears on the merits of a criminal case against Trump, but also on the viability of a defense to charges under the Supremacy Clause.

Indeed, Trump's behavior during his phone calls to Raffensperger and Watson makes clear that he intended that they fully carry out his directions and twist the election results in his favor. Trump told Watson she would be "praised" if she found that he had won the election and asked that she apply a more stringent signature requirement to Fulton county, a Democratic stronghold.<sup>1094</sup> When Trump demanded that Raffensperger "find" 11,780 votes and turn the election results in his favor, he accompanied his demand with threats and cajoling.<sup>1095</sup> He listed specific instances of alleged fraud to try to convince Raffensperger to do what he was asking, despite the fact that each had already been refuted to him by DOJ officials.<sup>1096</sup> He repeated false

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<sup>1093</sup> Ga. Code § 21-2-604.

<sup>1094</sup> Davis, *supra* note 579.

<sup>1095</sup> Gardner & Firozi, *supra* note 2.

<sup>1096</sup> *Id.*

assertions about fraud in other states and claimed that those results would also be overturned.<sup>1097</sup> He was accompanied by another federal official who also asked that the election be overturned.<sup>1098</sup> He called federal and state officers who had investigated and found no wrongdoing “dishonest or incompetent.”<sup>1099</sup> He told Raffensperger he should do whatever he needed to ensure Trump won because he was a Republican.<sup>1100</sup> He said that officials who were denying his claims would fail to get reelected.<sup>1101</sup> And he threatened Raffensperger by telling him that it was “very dangerous” for him to say that fraud had not occurred.<sup>1102</sup> This conduct evidences a corrupt mental state apparently sufficient to substantiate charges under Georgia law and sufficient to defeat Supremacy Clause immunity under federal law.

Trump’s broader course of conduct regarding the 2020 presidential election also shows that he genuinely desired that anyone with the power to do so influence the results in his favor, regardless of what the ballots showed. Outside of Georgia, Trump and others working for him contacted officials in multiple states to encourage them to overturn their election results.<sup>1103</sup> Trump repeatedly exhorted the vice president to (unlawfully) refuse to certify the election in Biden’s favor.<sup>1104</sup> He incited an armed mob and aimed it at the Capitol during the certification process, again in an attempt to halt the transfer of power.<sup>1105</sup> Throughout this period, close advisors, elections officials, and his legal counsel informed him that he had legally and legitimately lost the

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<sup>1097</sup> *Id.* (describing alleged fraud in Pennsylvania and Michigan).

<sup>1098</sup> *Id.* (showing statement by Mark Meadows repeating Trump’s claim that “not every vote or fair vote and legal vote was counted”).

<sup>1099</sup> *Id.*

<sup>1100</sup> *Id.*

<sup>1101</sup> *Id.* (“[P]eople are so angry in Georgia, I can’t imagine he’s ever getting elected again.”).

<sup>1102</sup> *Id.*

<sup>1103</sup> Fourth Jan. 6 Hearing Transcript, *supra* note 80 (describing phone call to Speaker of the Arizona House of Representatives Rusty Bowers).

<sup>1104</sup> Third Jan. 6 Hearing Transcript, *supra* note 106 (“The former president wanted Pence to reject the votes and either declare Trump the winner or send the votes back to the states to be counted again.”).

<sup>1105</sup> Sixth Jan. 6 Hearing Transcript, *supra* note 275 (describing testimony from Cassidy Hutchinson in which she states that Trump knew members of the crowds had weapons and still encouraged them to march to the Capitol).

election, but he nevertheless persisted in seeking to retain power and to pressure officials to submit.<sup>1106</sup>

Still another distinct reason why Trump could not invoke Supremacy Clause immunity is that he was acting in furtherance of his personal, political benefit, rather than in furtherance of any federal interest. In every published appellate case involving a credible basis to believe that the defendant was acting in furtherance of personal or corrupt motives, the court has declined to uphold Supremacy Clause immunity. In *Googe*, for instance, the 5th Circuit denied immunity to an attorney who impermissibly took on clients but claimed he was acting as an officer of the court; it reasoned that his actions were “foreign” to “any duty he owed,” and were instead solely for his own benefit.<sup>1107</sup> In *Morgan*, the 9th Circuit denied immunity to Drug Enforcement Administration officers who menaced a civilian and claimed they were acting in their official capacity; it reasoned that they may have caused the traffic accident and sought to shift blame for it.<sup>1108</sup> The 5th Circuit<sup>1109</sup> and the 11th Circuit<sup>1110</sup> have both noted the absence of any possible “personal interest” in cases where they granted Supremacy Clause immunity to federal officer defendants. Similarly, the 8th Circuit and 9th Circuit also relied on officers’ “good faith”<sup>1111</sup> belief in the necessity of their actions and the absence of any possible “malice”<sup>1112</sup> in granting immunity to officers.

Here, there is compelling evidence that Trump was acting primarily in his own interest, and not solely in the interest of the federal government, when he asked Georgia officials to declare him the victor of a presidential election. In fact, Trump did not even pretend during his phone calls to Raffensperger and Watson that he was doing otherwise. In both calls, he did not even mention

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<sup>1106</sup> Byrnes, *supra* note 1078.

<sup>1107</sup> *Isaac v. Googe*, 284 F. 269, 270 (5th Cir. 1922).

<sup>1108</sup> *Morgan v. California*, 743 F.2d 728, 734 (9th Cir. 1984).

<sup>1109</sup> *Texas v. Kleinert*, 855 F.3d 305, 317 (5th Cir. 2017).

<sup>1110</sup> *Baucom v. Martin*, 677 F.2d 1346, 1350 (11th Cir. 1982).

<sup>1111</sup> *Reed v. Madden*, 87 F.2d 846, 851 (8th Cir. 1937).

<sup>1112</sup> *Clifton v. Cox*, 549 F.2d 722, 728 (9th Cir. 1977).

the possibility of fraud in the concurrent congressional election, in which Democrats flipped a district that had previously been held by Republicans.<sup>1113</sup> He did not raise questions about any local or state elections, or about any other ballots that may have been tainted by the fraud that he insisted had occurred, and he did not ask that Georgia officials “find” ballots concerning those elections. Instead, he focused solely and squarely on the presidential race—and, more particularly, on his demand that the Georgia election be decided in his favor. Trump thus made clear what his interest was on the call: personal victory. He said explicitly, “I need 11,000 votes,” and he asked Raffensperger to “[g]ive me a break.”<sup>1114</sup> He told Raffensperger, “I just want to find 11,780 votes.”<sup>1115</sup> This was “one more” than he would have needed to declare that “we won the state.”<sup>1116</sup> And Trump was joined on this call not by DOJ lawyers, but instead by private counsel, one of whom filed lawsuits against Georgia on behalf of “Donald J. Trump, in his capacity as a candidate for President of the United States.”<sup>1117</sup> In the same vein, during Trump’s call with Watson, he also repeatedly referred to himself in his personal capacity as the party who would benefit. He said, “[t]he people of Georgia are so angry at what happened to me,” congratulated himself by noting that “I hear I’m about 96 percent” with Georgia law enforcement officers, and said, “I won Georgia.”<sup>1118</sup>

Given all these facts—which are only cast in starker relief by the broader circumstances of his conduct concerning the 2020 presidential election—there is a credible and compelling basis to conclude that Trump acted in furtherance of personal rather than federal interests on his calls with Georgia officials. Trump therefore cannot satisfy the stringent good-faith requirements of

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<sup>1113</sup> Georgia House Election Results, POLITICO (Jan. 6, 2021), <https://www.politico.com/2020-election/results/georgia/house/>.

<sup>1114</sup> Gardner & Firozi, *supra* note 2.

<sup>1115</sup> *Id.*

<sup>1116</sup> *Id.*

<sup>1117</sup> See Complaint at 1, Trump v. Kemp, 511 F. Supp. 3d 1325 (N.D. Ga. 2021) (No. 1:20-CV-5310-MHC).

<sup>1118</sup> American Oversight, *supra* note 253.

Supremacy Clause immunity, which is only granted when the federal officer is unambiguously acting only in the interest of the federal government. Federal officers do not enjoy constitutional immunity for actions that they take in their own personal interest, regardless of whether they are candidates for public office. The standard for the president, if anything, would be higher, as he has a unique constitutional obligation to act in the government's interest and to not use his powers for his own benefit.<sup>1119</sup> Trump's goal in attempting to coerce Raffensperger and Watson was to have the Georgia election decided in his favor. But just as Congress "has no cognizable interest in the identity of its members,"<sup>1120</sup> the office of the president has no official interest in who prevails in a presidential election, and the Presidency does not vest its occupant with any distinct federal interest in ensuring his own reelection. It is the responsibility of the states, not the president, to "ensure...that the candidate who received the most valid votes is certified as the winner."<sup>1121</sup> Regardless of whether Trump believed his false claims of fraud, or if he exhibited the requisite mental state for a criminal conviction, Trump can be denied immunity based solely on this fact: When he contacted Raffensperger and Watson, he acted as a losing presidential candidate, not as the president.

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Trump's argument that he should be immunized from state prosecution for his attempts to influence the presidential election in Georgia would be defeated at every step of the immunity analysis. Trump would first have to demonstrate that he was acting under federal authority when he stepped into a state election process in which neither the Constitution nor any statute gives him any role, and which is specifically designed to be a check on the president's power. He would next

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<sup>1119</sup> See Kent et al., *supra* note 1032, at 2117–21.

<sup>1120</sup> Virginia House of Delegates v. Bethune Hill, 139 S. Ct. 1945, 1955 (2019).

<sup>1117</sup> DOJ Election Prosecution Manual, *supra* note 1043, at 8.



have to show that the specific actions for which he was indicted, including using veiled threats while insisting that Georgia officials manufacture fraudulent votes in his favor, were necessary means by which the federal government had to achieve its objectives. And he would have to make three independent showings about his state of mind. First, that it is beyond question that he believed his own claims despite near-universal rebuttal by close associates and experts. Second, that he lacked the mental state requisite for the underlying criminal offense because he did not actually intend for any Georgia official to follow his directions. And finally, that he was acting solely for the benefit of the federal government and not to further his own interests when he asked state officers to declare him the winner of an election that he had legitimately lost at the polls. None of these showings are possible, and his claim to immunity would consequently be denied.

## APPENDIX B: Key People

### A

**Stacey Abrams**, former Democratic candidate for governor of Georgia. Lost to Governor Brian Kemp in the 2018 and 2022 Georgia gubernatorial races. Was named in Trump's attacks on Georgia officials' handling of election procedures and ballots.

**Ali Alexander**, conservative activist. Among the proposed guests for the "Stop the Steal" rally at the Ellipse, alarming "Stop the Steal" planner Katrina Pierson.

### B

**Steven Bannon**, former Trump advisor. Stated that Trump was going to "declare victory. But that doesn't mean he's a winner... He's just gonna say he's a winner."

**John Banzhaf III**, law professor at The George Washington University Law School. Filed a complaint to Georgia Secretary of State Brad Raffensperger that prompted the opening of a "fact finding and administrative" probe by Raffensperger's office.

**William "Bill" Barr**, former attorney general of the United States under the Trump administration. Testified in front of the January 6 Committee about Trump's requests to the Department of Justice regarding his claims of election fraud. Resigned in 2020 due to disagreement with Trump over the merit of his fraud claims.

**Joseph "Joe" R. Biden**, 46th president and former vice president of the United States. Won the 2020 presidential election in the state of Georgia by a margin of 11,779 votes.

**Andrew "Andy" Biggs**, United States congressman (R-AZ). Along with Donald Trump Jr., among the first to discuss the false-electors plan with Trump Chief of Staff Mark Meadows.

**Patrick Byrne**, former CEO of Overstock.com. Reportedly met with Trump on December 18, 2020, along with attorneys Sidney Powell and Rudy Giuliani, to discuss alternative strategies to contest the election, including directing the secretary of defense to use the military to seize voting machines or appointing Powell as special counsel to oversee seizures and prosecutions.

### C

**Alex Cannon**, former Trump campaign attorney. Tasked with assessing alleged election fraud. Testified that he told Trump Chief of Staff Mark Meadows in mid-to-late November 2020 that he was not finding any evidence that would be sufficient to change the results in key states and that Meadows appeared to accept his conclusion.

**Michael Carlson**, Georgia prosecutor. Member of District Attorney Fani Willis' investigative team.

**Christopher Carr**, Georgia attorney general. Received a call from Trump on December 8, 2020, warning him against interfering with a pending election lawsuit filed by Texas.

**Elizabeth "Liz" Cheney**, United States congresswoman (R-WY). Vice chair of the January 6 Committee.

**Kenneth Chesebro**, former Trump campaign attorney. Wrote a series of memos arguing that the Trump campaign should organize its own electors in the swing states that Trump had lost. Acknowledged in a December 9, 2020 memo that the strategy to organize Trump electors was "somewhat dicey in Georgia" given state law.

**Bobby Christine**, former United States attorney for the Southern District of Georgia and then the state's Northern District. He took over after then-United States Attorney

BJay Pak resigned. Christine later confirmed that his office found no substance behind the Trump-supported election fraud claims.

**Pasquale “Pat” Cipollone**, former White House counsel under the Trump administration. Told Trump attorney Rudy Giuliani and his associates that the plan to organize false electors was not legally sound. Testified before the January 6 Committee that he attempted to discourage Trump and his outside legal team from further steps to overturn the 2020 election.

**Jeffrey Clark**, former assistant attorney general for the Environment and Natural Resources Division and acting assistant attorney general for the Civil Division under the Trump administration. Was involved in Trump's efforts to use the Department of Justice to overturn the 2020 election results, including in Georgia. Trump reportedly planned to elevate Clark to the role of acting attorney general.

**Justin Clark**, former Trump campaign attorney. Testified before the January 6 Committee that he argued with Trump campaign attorney Kenneth Chesebro about the false-electors plan and that he told Chesebro it was illegal.

**Doug Collins**, former United States congressman (R-GA). Appointed by Trump to lead the campaign's vote recount operation in Georgia.

**Kenneth “Ken” Cuccinelli**, former deputy secretary of the Department of Homeland Security (DHS) under the Trump administration. Trump called Cuccinelli on December 31, 2020, about using his authority at DHS to seize voting machines.

## D

**Richard Donoghue**, former deputy attorney general of the United States under the Trump administration. Participated in multiple calls and conversations about election fraud claims in Georgia and defended the accuracy of the election outcome. Testified before the January 6 Committee.

**Mike Dugan**, Georgia State Senate majority leader. Trump directed his supporters to pressure Dugan to “demand a vote on decertification” of electors.

## E

**John Eastman**, Trump attorney. Outlined the memos that were central to the false-electors plan. Testified before the Georgia State Senate Judiciary Subcommittee in an attempt to convince them to appoint alternate electors. His conduct concerning the 2020 election has been called “likely criminal” by a federal judge.

**Jenna Ellis**, former Trump campaign attorney. Participated in meetings at the Georgia state legislature with Trump attorney Rudy Giuliani. Authored memos explaining how former Vice President Mike Pence could refuse to certify some states' electoral votes.

**Steven Engel**, former assistant attorney general in the Office of Legal Counsel under the Trump administration. Participated in the January 3, 2020 meeting between Trump, top Department of Justice officials, and White House counsel officials over the threats to replace then-Acting Attorney General Jeffrey Rosen with then-Assistant Attorney General Jeffrey Clark.

**Boris Epshteyn**, former Trump campaign aide. Allegedly helped coordinate the false-electors plan in Georgia and elsewhere. Testified before the Fulton County grand jury on September 29, 2022.

**F**

**John E. Floyd**, Atlanta-based attorney. Member of District Attorney Fani Willis' investigative team.

**Willie Lewis Floyd III**, former director of Blacks for Trump. Allegedly attempted to convince Georgia elections worker Ruby Freeman that she would face legal issues over the allegations that she committed election fraud in Atlanta on election night. Testified before the Fulton County grand jury.

**Michael "Mike" Flynn**, former national security advisor under Trump. Met with Trump on December 18, 2020 along with attorneys Sidney Powell and Rudy Giuliani, and former Overstock.com CEO Patrick Byrne to discuss options for challenging election results, including using the military to seize voting machines and appointing Powell as special counsel to oversee seizures and prosecutions.

**Ruby Freeman**, Georgia elections worker and mother of Shaye Moss. Was verbally attacked by Trump and others who claimed that she committed election fraud in Atlanta. Testified about her experience before the January 6 Committee.

**Jordan Fuchs**, deputy secretary of state of Georgia. Spoke with Trump Chief of Staff Mark Meadows during Meadows' visit to chief investigator in the Georgia secretary of state's office Frances Watson's audit site in Cobb County.

**G**

**Merrick Garland**, attorney general of the United States. Appointed by President Joe Biden in 2021.

**Ryan Germany**, general counsel in the Georgia secretary of state's office. Was on the January 2, 2021 call between Trump, Georgia Secretary of State Brad Raffensperger, and Trump Chief of Staff Mark Meadows. Defended Georgia's results against Trump's and Meadows' claims of fraud.

**Rudolph "Rudy" Giuliani**, former mayor of New York City and Trump attorney. Participated in multiple conversations with Georgia elections officials in an attempt to overturn the 2020 election results in the state. Testified on three separate occasions before committees in the Georgia state legislature.

**Lindsey Graham**, United States senator (R-SC). Called Georgia Secretary of State Brad Raffensperger on November 13, 2020, to supposedly discuss recount procedures. According to Raffensperger, Graham, at that time the chairman of the Senate Judiciary Committee, reportedly asked about election workers possibly having a "political bias" against Trump and whether Raffensperger's office had the power to disqualify all mail-in ballots in counties where the rate of non-matching signatures was high. Subpoenaed by District Attorney Fani Willis for testimony before the Fulton County grand jury; as of this writing, the U.S. Supreme Court has denied his emergency motion to quash the subpoena.

**H**

**Scott Hall**, pro-Trump businessman. Arranged travel for the SullivanStrickler team that copied voting information in Coffee County. Seen on surveillance footage being escorted along with the SullivanStrickler team into the county's elections office by Cathy Latham, former GOP chairwoman of Coffee County.

**Eric Herschmann**, former White House attorney under the Trump administration. Testified before the January 6 Committee that he warned then-Assistant Attorney General Jeffrey Clark of the legal risks in delivering the draft letter to Georgia officials.

Refuted, in his testimony, the allegations that the Dominion voting systems had been hacked.

**Jody Hice**, United States congressman (R-GA). Subpoenaed by District Attorney Fani Willis for testimony before the Fulton County grand jury.

**Alex Holder**, British documentarian. Had intimate access to the Trump White House. Subpoenaed by District Attorney Fani Willis for testimony before the Fulton County grand jury.

**Cassidy Hutchinson**, former White House aide to Trump Chief of Staff Mark Meadows. Testified before the January 6 Committee and provided information on Meadows' role in the plan to organize alternate electors.

## J

**Greg Jacob**, former counsel to former Vice President Mike Pence. Testified before the January 6 Committee that Trump attorney John Eastman had admitted in front of Trump that the plan to reject the 2020 presidential results and delay the vote count on January 6, 2021, was illegal.

**Alex Jones**, host of the *Infowars* radio program. Spearheaded a pro-Trump protest at the Georgia State Capitol in November 2020. Publicly supported Trump's claims of election fraud through *Infowars*. Among the proposed guests for the "Stop the Steal" rally at the Ellipse.

**Burt Jones**, Georgia state senator and 2022 lieutenant governor-elect (R). Participated in the false-electors plan as one of the false electors. In a court challenge, secured the removal of District Attorney Fani Willis as investigator in his case due to a conflict of interest stemming from her participation in a fundraising event for his Democratic opponent in Georgia's 2022 lieutenant governor race.

## K

**Brian Kemp**, Georgia governor. Received a call from Trump on December 5, 2020, requesting that he overturn the Georgia election results by both auditing mail-in ballot signatures and calling a special session of the state legislature. Subpoenaed by Fulton County grand jury, but a judge granted his request to delay testimony until after the November 2022 election.

**Bernard "Bernie" Kerik**, former investigator for Trump attorney Rudy Giuliani. Allegedly investigated election fraud and later conceded through counsel that he could not find any conclusive proof of voter fraud that would have altered the 2020 election outcome.

**Christopher Krebs**, former director of the Cybersecurity and Infrastructure Security Agency (CISA). Fired by Trump after rejecting the former president's claims of widespread fraud in the 2020 presidential election.

**Ken Klukowski**, former attorney at the Department of Justice who worked under then-Assistant Attorney General Jeffrey Clark. Assisted Clark in drafting the proposed letter to Georgia officials about election fraud.

**Jared Kushner**, son-in-law of Donald Trump. Was questioned along with Trump Chief of Staff Mark Meadows by then-United States Attorney General Bill Barr about how far Trump would take his fraud claims. Suggested, along with Meadows, that they were working to get Trump to be more realistic.

**L**

**Cathy Latham**, former GOP chairwoman of Coffee County. Participated in the false-electors plan as one of the false electors. Allegedly involved in the SullivanStrickler plan to access information from voting machines in Coffee County.

**Kelly Loeffler**, former United States senator (R-GA). Called for Georgia Secretary of State Brad Raffensperger to resign on November 9, 2020.

**M**

**Paul Maggio**, chief operations officer at SullivanStrickler. Spent hours allegedly handling and copying information from the Coffee County voting machines.

**Leigh Martin May**, United States district judge. Presiding over Senator Lindsey Graham's (R-SC) court fight to quash District Attorney Fani Willis' subpoena for his testimony.

**Robert McBurney**, judge on Georgia's 5th Superior Court District, Atlanta Circuit. Ruled against the Georgia false electors' challenges to District Attorney Fani Willis' subpoenas. Issued a ruling that disqualified Willis from investigating Georgia State Senator Burt Jones (R) as part of her investigation of the false electors.

**Ronna Romney McDaniel**, chairwoman of the Republican National Committee (RNC). Received a call from Trump and Trump attorney John Eastman asking her personally to help with the false-electors plan. Testified before the January 6 Committee, stating that the RNC provided requested assistance by the Trump campaign to help "them reach out [to potential electors] and assemble them."

**Mark Meadows**, former chief of staff for Trump. Was reportedly intimately involved in the plan to organize false electors and Trump's attempts to overturn the 2020 election results more generally. Subpoenaed by District Attorney Fani Willis for testimony before the Fulton County grand jury.

**Christopher Miller**, former acting United States secretary of defense. Investigated the "Italygate" conspiracy theory pushed by Trump Chief of Staff Mark Meadows.

**Jason Miller**, senior aide to the Trump campaign. Testified that he told Trump on election night that it was too early to declare victory because votes were still being counted, but that Trump ended up taking advice from his attorney, Rudy Giuliani, to declare victory on election night. Testified that in the days after the election, Trump was clearly told by the campaign's lead data analyst, Matt Oczkowski, that he had lost the election.

**Cleta Mitchell**, Trump campaign attorney. Asked Trump attorney John Eastman to participate in an "Election Integrity Working Group" that would help the Trump campaign prepare for "anticipated post-election litigation." Was involved in the January 2, 2021 call between Trump and Georgia Secretary of State Brad Raffensperger. Subpoenaed by District Attorney Fani Willis for testimony before the Fulton County grand jury.

**Matt Morgan**, Trump campaign attorney. Testified before the January 6 Committee that he objected to and took action to ensure he had "zero" responsibility for the false-electors plan.

**Shaye Moss**, former Fulton County election worker. Was verbally attacked in public claims by Trump and his allies that she committed election fraud in Atlanta. Testified about her experience before the January 6 Committee.

**O**

**Matt Oczkowski**, former lead data strategist for the Trump campaign. According to Trump campaign senior aide Jason Miller, told Trump in the days after Election Day that he was on track to lose the 2020 presidential election.

**P**

**Byung Jin “BJay” Pak**, former United States attorney for the Northern District of Georgia. Resigned on January 4, 2021, after then-Deputy Attorney General Richard Donoghue informed him that Trump was likely to fire him because Trump was displeased with him, believing him to be a “Never Trumper.”

**Michael “Mike” Pence**, former vice president of the United States. Was pressured by Trump and his allies to use his ministerial role during the January 6, 2021 congressional certification of electoral votes to reject electoral slates signifying Joe Biden’s victory.

**Jim Penrose**, former intelligence officer. With Trump-affiliated attorney Sidney Powell, allegedly arranged to have upfront retainers paid to SullivanStrickler to access information on Coffee County voting machines.

**David Perdue**, former United States senator (R-GA). Called for Georgia Secretary of State Brad Raffensperger to resign on November 9, 2020.

**James Richard “Rick” Perry**, former secretary of the Department of Energy under the Trump administration. Texted Trump Chief of Staff Mark Meadows on November 4, 2020, proposing to have the Georgia legislature send supportive electors to Congress and the National Archives regardless of the election’s outcome.

**Scott Perry**, United States congressman (R-PA). Introduced Trump to then-Assistant Attorney General Jeffrey Clark.

**Patrick Philbin**, former deputy White House counsel. Participated in the January 3, 2020 meeting between Trump, top Department of Justice officials, and White House Counsel officials over the threats to replace then-Acting Attorney General Jeffrey Rosen with then-Assistant Attorney General Jeffrey Clark.

**Katrina Pierson**, former spokeswoman for the Trump campaign. Helped plan the “Stop the Steal” rally in Washington, D.C. Raised concerns with Trump Chief of Staff Mark Meadows over “Stop the Steal” speakers.

**Sidney Powell**, attorney affiliated with the Trump legal team. Hired and directed SullivanStrickler, a computer forensics firm, to collect data from Dominion voting machines in Coffee County.

**R**

**Brad Raffensperger**, secretary of state of Georgia. Participated in a roughly hour-long call with Trump on January 2, 2021, in which Trump repeatedly insisted that he had won the state of Georgia by “hundreds of thousands of votes,” listed conspiracy theories allegedly explaining his loss, and ultimately threatened Raffensperger to reverse the election outcome by demanding he “find 11,780 votes” to be deemed fraudulent and tossed out. Consistently defended the outcome of the 2020 election and refused to accommodate Trump’s demands.

**David Ralston**, Georgia state representative (R) and former speaker of the Georgia House of Representatives. Testified before the Fulton County grand jury and confirmed Trump’s personal and direct requests for a special session by the state legislature to address his claims of voter fraud.

**Jeffrey Rosen**, former acting attorney general of the United States under the Trump administration. Participated in multiple calls and conversations about election fraud claims in Georgia and resisted pressure from Trump, then-Assistant Attorney General Jeffrey Clark, and others to use the Department of Justice to back Trump's claims. Testified before the January 6 Committee.

S

**Robert Sinners**, former Trump campaign election operations director. Emailed instructions to the Georgia false electors about how to meet at the Georgia State Capitol on December 14, 2020.

**Bill Stepien**, former Trump campaign manager. Had warned Trump in advance of the "red mirage" and the expected delay in the tallying of mail-in ballots. Along with senior Trump campaign aide Jason Miller, told Trump on election night that it was too early to declare victory.

**Gabriel Sterling**, chief operating officer in the Georgia secretary of state's office. Subpoenaed by and testified before the Fulton County grand jury. Testified before the January 6 Committee.

**Chris Stirewalt**, former *Fox News* politics editor. Testified before the January 6 Committee about the "red mirage" and the expected delay in the tallying of mail-in ballots.

T

**Donald J. Trump**, former president of the United States. Attempted to flip the results of the 2020 presidential election by, among other things, using the Department of Justice to assist his efforts, pressuring then-Vice President Mike Pence to reject electoral slates signifying Biden's election at the January 6, 2021 joint session of Congress, and leaning on Republican state legislators and officials to unilaterally award him their electoral votes. Lost the state of Georgia by 11,779 votes.

**Donald Trump, Jr.**, son of former President Donald Trump. Along with Congressman Andy Biggs (R-AZ), among the first to discuss the false-electors plan with Trump Chief of Staff Mark Meadows.

W

**James "Phil" Waldron**, cyber researcher. Assisted Sidney Powell and Trump's legal team with their vote-flipping efforts.

**Frances Watson**, former chief investigator in the Georgia secretary of state's office. While conducting a small-scale audit of mail-in ballots in Cobb County, received a call from Trump on December 23, 2020, during which Trump tried to convince her to find "dishonesty" in the election results in an attempt to overturn the election.

**Fani Willis**, district attorney of Fulton County. Elected to her post in 2020. Announced on February 10, 2021, the launch of an investigation into Trump and allies' post-election conduct in Georgia. Career prosecutor with experience successfully prosecuting RICO crimes.

**Lin Wood**, attorney and prominent Trump ally. Joined Trump-affiliated attorney Sidney Powell in attempting multiple legal challenges to election results in Georgia and other states.



## APPENDIX C: Chronology of Key Dates

**July 19, 2020:** Trump declines to agree in advance to accept the results of the 2020 election in an interview with *Fox News* host Chris Wallace, saying “Look, you—I have to see. No, I’m not going to just say ‘yes.’ I’m not going to say ‘no.’ And I didn’t last time, either.”

**August 17, 2020:** At a campaign stop in Oshkosh, Wisconsin, Trump asserts that “the only way we’re going to lose this election is if this election is rigged.”

**September 3, 2020:** Trump campaign lawyer Cleta Mitchell asks attorney John Eastman to participate in an “Election Integrity Working Group” to help the campaign prepare for “anticipated post-election litigation.” Eastman begins conducting legal research and coordinating with other Trump advisors and supporters.

**September 23, 2020:** After being asked at a White House press conference if he would commit to ensuring a peaceful transfer of power, Trump says, “We’re going to have to see what happens.” He also reiterates his claims about widespread fraud related to mail-in ballots.

**October 12, 2020:** Georgia voters begin casting their ballots in early voting.

**October 31, 2020:** Over 3.9 million Georgians have voted either in person or by mail.

**November 1, 2020:** *Axios* reports that Trump had told associates that he will declare victory on election night if it looks like he’s “ahead.”

**November 3, 2020:** Election Day. Mail-in ballots must be received at Georgia voting centers by 7 p.m. to be counted.

**November 4, 2020:** Trump singles out Georgia in a post-midnight statement at the White House, saying, “It’s also clear that we have won Georgia...They’re never gonna catch us. They can’t catch us.” He claims victory in Georgia and other battleground states for his campaign.

**November 4, 2020:** The Trump campaign and the Georgia Republican Party file a joint lawsuit in Chatham County alleging that a Republican poll watcher had “witnessed absentee ballots that had not been properly processed apparently mixed into a pile of absentee ballots that was already set to be tabulated” after the absentee ballot-receipt deadline of 7 p.m. on Election Day.

**November 5, 2020:** Cleta Mitchell emails John Eastman, asking him to write a memorandum outlining a legal strategy to overturn the election.

**November 5, 2020:** The Chatham County Superior Court summarily dismisses the Chatham County lawsuit, citing a lack of evidence that the ballots in question had arrived after the 7 p.m. deadline.

**November 6, 2020:** Trump tweets about Georgia, asking “Where are the missing military ballots in Georgia? What happened to them?” (Subsequent analysis by news agencies confirmed that allegations of “missing military ballots” were baseless.)

**November 9, 2020:** U.S. Senators Kelly Loeffler (R-GA) and David Perdue (R-GA) call for Georgia Secretary of State Brad Raffensperger to resign over his handling of the 2020 election.

**November 10, 2020:** Congressman Doug Collins (R-GA), appointed by Trump to lead his campaign's recount operation in Georgia, repeats Trump's claims of fraud in interviews and sends a letter to Brad Raffensperger baselessly alleging the unlawful counting of “tens of thousands of ballots.”

**November 11, 2020:** Raffensperger announces a discretionary hand recount of Georgia's 4.9 million-plus ballots cast.

**November 11, 2020:** Four Georgia Republican voters file a federal lawsuit seeking the exclusion of all votes in a set of Georgia counties that voted for President Joe Biden by significant margins. (They later withdraw the case voluntarily on November 16, 2020.)

**November 13, 2020:** U.S. Senator Lindsey Graham (R-SC) calls Brad Raffensperger to supposedly discuss recount procedures. According to Raffensperger, Graham, at that time the chairman of the Senate Judiciary Committee, asks him to clarify Georgia's signature-matching law for absentee ballots. Graham then asks about election workers possibly having a “political bias” against Trump and whether Raffensperger's office has the power to disqualify all mail-in ballots in counties with high rates of non-matching signatures.

**November 13, 2020:** Trump targets Raffensperger and Georgia Governor Brian Kemp in a tweet: “Georgia Secretary of State, a so-called Republican (RINO), won't let the people checking the ballots see the signatures for fraud. Why? Without this the whole process is very unfair and close to meaningless. Everyone knows that we won the state. Where is @BrianKempGA?”

**November 13, 2020:** Conservative attorney and Trump ally Lin Wood files a federal lawsuit attacking the consent decree signed by Raffensperger and several Democratic groups in March 2020. The decree had added an additional step to the signature-verification process for absentee ballots and standardized the process of notifying voters if their ballots were rejected for signature-matching issues. Wood's suit claims the decree is unlawful and argues that absentee ballots should be excluded from the state's vote count.

**November 13, 2020:** Trump-affiliated attorney Sidney Powell tells *Fox Business Network* that “I can hardly wait to put forth all the evidence we have collected on Dominion.”

**November 16, 2020:** Brad Raffensperger announces that Georgia counties had rejected a total of 2,011 mail-in ballots, out of more than 1.3 million cast in that manner, because of signature-matching issues.

**November 17, 2020:** Trump fires the director of the Cybersecurity and Infrastructure Security Agency, Chris Krebs, after his agency describes the 2020 election as “the most secure in American history.”

**November 18, 2020:** A pro-Trump protest spearheaded by rightwing activist Ali Alexander and far-right radio show host Alex Jones takes place at the Georgia State Capitol.

**November 19, 2020:** *The Associated Press* calls the election in Georgia for Joe Biden, concluding that Biden had received 49.51 percent of the vote to Trump's 49.25 percent.

**November 19, 2020:** Trump falsely claims in a tweet that Georgia has rejected “[a]lmost ZERO ballots” in the 2020 election. (Georgia Secretary of State Brad Raffensperger had previously announced on November 16 that 2,011 mail-in ballots had been rejected.)

**November 20, 2020:** Kemp and Raffensperger formally certify the state's election results after an initial recount initiated by Raffensperger confirms Biden's victory in the state.

**November 21, 2020:** The Trump campaign requests a second recount in Georgia.

**December 1, 2020:** U.S. Attorney General Bill Barr tells an *Associated Press* reporter, “we have not seen fraud on a scale that could have effect a different outcome in the election,” angering Trump.

**December 3, 2020:** Trump's legal team, including his personal lawyer Rudy Giuliani and campaign attorney Jenna Ellis, appear before Republicans on Georgia's Senate Judiciary Subcommittee to request that state legislators appoint an alternate slate of electors for Trump. John Eastman testifies remotely and pushes the same message as Giuliani and Ellis.

**December 4, 2020:** U.S. Attorney for the Northern District of Georgia BJay Pak receives a request from Bill Barr “to try to substantiate” Giuliani's claims that video footage from election night purportedly showed poll workers at the State Farm Arena in Atlanta bringing out a “suitcase” of illegitimate ballots from beneath a table and adding them to the official vote count. (An investigation by the FBI and Pak's office into the allegation eventually finds that the “suitcase” was an official ballot lockbox containing legitimate ballots.)

**December 5, 2020:** Trump calls Kemp to solicit his aid in a plan to overturn the election results. Trump urges the governor to convene a special session of the legislature so state lawmakers can appoint an alternate slate of electors for Trump and asks Kemp to order a statewide audit of all signatures on mail-in ballots. Kemp denies both requests.

**December 6, 2020:** Trump Chief of Staff Mark Meadows emails Trump campaign senior aide Jason Miller, telling Miller, “[w]e just need to have someone coordinating the electors for states.”

**December 7, 2020:** The Georgia recount requested by the Trump campaign is completed, finding Biden received 49.5 percent of the vote to Trump's 49.26 percent. Raffensperger formally recertifies the election results in favor of Biden.

**December 8, 2020:** Trump calls Georgia Attorney General Chris Carr, warning him not to interfere with a Supreme Court lawsuit filed by Texas Attorney General Ken Paxton seeking to overturn the 2020 election results.

**December 9, 2020:** Trump campaign attorney Kenneth Chesebro acknowledges in a memorandum that the strategy to organize a false slate of Trump electors is "somewhat dicey in Georgia" given state law.

**December 10, 2020:** Rudy Giuliani appears before the Georgia House Governmental Affairs Committee, where he presents a video that he claims shows voter fraud relating to suitcases filled with ballots.

**December 13, 2020:** Trump campaign Election Operations Director Robert Sinners emails instructions to the false electors in Georgia, requesting that they act covertly when they meet the following day to produce the false electoral slate.

**December 14, 2020:** Georgia's legitimate electors cast their electoral votes for Biden. Concurrently, 16 individuals coordinated by the Trump campaign sign a certificate falsely certifying that they were "duly elected and qualified Electors" and casting their "ballots" for Trump and Vice President Mike Pence.

**December 14, 2020:** Brad Raffensperger announces "a signature match audit in Cobb County and an additional statewide signature match audit." Raffensperger states that the audit is solely to provide confidence in the state's elections.

**December 14, 2020:** Bill Barr resigns, effective December 23, 2020, after Trump becomes dissatisfied with Barr's unwillingness to direct the DOJ to back Trump's claims of election fraud. Trump elevates then-Deputy Attorney General Jeffrey Rosen to acting attorney general.

**December 15, 2020:** In an Oval Office meeting, Trump pressures Rosen, soon-to-be acting attorney general, and Richard Donoghue, soon-to-be acting deputy attorney general, to have the DOJ back lawsuits challenging Trump's defeat. Trump suggests that the DOJ send a letter to Georgia officials claiming that the department had discovered "significant concerns" affecting the state's election results.

**December 15, 2020:** Attorney Ken Klukowski, who ultimately helps Assistant Attorney General Jeffrey Clark draft such a letter to Georgia officials, joins the DOJ on the same day as Trump's meeting with Rosen and Donoghue.

**December 18, 2020:** Trump meets with former National Security Advisor Michael Flynn, Rudy Giuliani, Sidney Powell, and former Overstock.com CEO Patrick Byrne to discuss

options for challenging election results, including using the military to seize voting machines and appointing Powell as special counsel to oversee voting machine seizures and fraud-related prosecutions.

**December 21, 2020:** Trump targets Kemp, Raffensperger, and Lieutenant Governor Geoff Duncan in a tweet: “Governor @BrianKempGA and his puppet @GeoffDuncanGA, together with the Secretary of State of Georgia, are very slow on Signature Verification, and won’t allow Fulton County to be examined. What are these RINOS hiding? We will easily win Presidential State race....”

**December 22, 2020:** Congressman Scott Perry (R-PA), who had previously met with Trump about unsubstantiated claims of voter fraud, returns to the White House and introduces Trump to Assistant Attorney General Jeffrey Clark. The visit violates policies governing contact between DOJ officials and the White House.

**December 22, 2020:** Mark Meadows makes an unscheduled visit, reportedly joined by an entourage of Secret Service agents, to the site of the small-scale signature audit in Cobb County. Meadows attempts to observe the review of signatures but is not allowed in the examination room. He meets with Georgia Deputy Secretary of State Jordan Fuchs and Chief Investigator Frances Watson, and collects their contact information, “including their cell phone numbers.”

**December 23, 2020:** Meadows coordinates a call between Trump and Frances Watson, a day after his own meeting with Watson in Cobb County. Trump tells Watson that he won the 2020 election and urges her to uncover “dishonesty” that would overturn the results and to find the “right answer” in her audit. Trump also insists that Watson finish her audit before “a very important date”—apparently referencing January 6, 2021, when Congress would certify Biden’s win.

**December 23, 2020:** Bill Barr’s resignation takes effect.

**December 24, 2020:** Jeffrey Rosen and Richard Donoghue become acting attorney general and acting deputy attorney general, respectively.

**Circa December 25, 2020:** John Eastman authors his first memorandum proposing methods by which Trump may remain in office. The memorandum calls for Vice President Mike Pence to refuse to certify electoral votes from Georgia and other swing states during the Joint Session of Congress on January 6, 2021.

**December 28, 2020:** Jeffrey Clark emails Rosen and Donoghue the draft letter to Georgia officials claiming that the department had discovered “significant concerns” bearing on the state’s election results and recommends that the Georgia General Assembly convene a special session to “deliberate on the matter” and consider sending an alternate slate of electors to Congress. Rosen and Donoghue rebuff Clark’s proposal.

**December 28, 2020:** Bernie Kerik, an associate of Rudy Giuliani, writes to Mark Meadows that Trump's team could "do all the investigations we want later" but that "if the President plans on winning, it's the legislators that have to be moved."

**December 29, 2020:** The Cobb County signature-match audit—first announced on December 14—concludes with no fraud uncovered and finds a 99.99 percent accuracy rate in its check of signature matches on mail-in ballots.

**December 30, 2020:** Giuliani and other Trump affiliates appear again before Georgia's Senate Judiciary Subcommittee. Giuliani repeats claims of widespread election fraud and encourages state legislators to change the outcome of the election.

**December 31, 2020:** According to Donoghue's testimony before the January 6 Committee, Trump summons Rosen and Donoghue to an Oval Office meeting in which Trump pushes for the Department of Justice to support the appointment of a special counsel to investigate election fraud.

**January 1, 2021:** Trump retweets a message from his campaign directing his supporters to contact Georgia House Speaker David Ralston and Senate Majority Leader Mike Dugan to demand an immediate vote on decertification of the Georgia election results.

**January 1, 2021:** Mark Meadows sends multiple emails to Acting Attorney General Rosen, which include a request for Rosen to send Jeffrey Clark to Fulton County. Rosen does not send Clark.

**January 1, 2021:** Fani Willis takes office as the Fulton County district attorney after her election victory in November 2020.

**January 2, 2021:** At around 3 p.m., Trump calls Brad Raffensperger. On the call, Trump insists that he had won the state of Georgia, lists conspiracy theories allegedly explaining his loss, and ultimately threatens Raffensperger to reverse the election outcome. Trump specifically presses Raffensperger to "find 11,780 votes" to be deemed fraudulent and tossed out.

**January 2, 2021:** Jeffrey Clark tells Rosen and Donoghue that Trump is prepared to fire them and elevate Clark to acting attorney general. Clark says he will turn down Trump's offer if Rosen and Donoghue agree to sign the draft letter to Georgia officials recommending that they consider sending an alternate slate of electors to Congress. Rosen and Donoghue refuse.

**January 3, 2021:** Eastman writes a second memorandum, further mapping out a plan to allow Trump to remain in office. The memorandum includes a list of conduct by states where Biden won, or officials in those states, that Eastman suggests is illegal and thus justifies the false-electors plan. Eastman claims that, specifically in Georgia, the plan is justified by the secretary of state's supposed changes to signature-verification

requirements, the “targeted” use of “portable ‘polling places,’” and the refusal of the state judiciary to assign a judge to hear a December 4, 2020, Trump campaign election lawsuit.

**January 3, 2021:** Clark informs Rosen that he is accepting Trump’s offer to replace Rosen. Rosen requests a meeting with Trump to discuss the topic. In a meeting that evening between Trump, Clark, Rosen, Donoghue, and other senior DOJ and White House Counsel officials, Rosen reaffirms that he will not direct the DOJ to take steps to overturn the election. Donoghue tells Trump that “hundreds and hundreds” of other DOJ officials will resign if Trump replaces Rosen with Clark. Trump eventually relents on elevating Clark and sending the letter to the Georgia legislature but calls Donoghue later that night about “a truck supposedly full of shredded ballots in Georgia that [is] in the custody of an ICE agent,” according to Donoghue’s testimony before the January 6 Committee.

**January 3, 2021:** Donoghue informs BJay Pak that Trump is likely to fire Pak. Pak resigns the next day, citing “unforeseen circumstances.”

**January 4, 2021:** While speaking at a rally in Dalton, Georgia, in support of Georgia’s Republican Senate candidates, Kelly Loeffler and David Perdue, Trump restates the false claim that “there is no way we lost Georgia,” urging Mike Pence to help him overturn the 2020 election results.

**January 4, 2021:** Responding to a reporter’s question, District Attorney Fani Willis describes the recording of the January 2, 2021 call between Trump and Raffensperger as “disturbing,” stating that she and her team would “enforce the law without fear or favor.”

**January 6, 2021:** A pro-Trump rally in Washington, D.C., becomes an attack on the U.S. Capitol, resulting in five lives lost, hundreds of police injured, and over 800 prosecutions (and counting) of those involved in the insurrection. After the rioters are cleared, Congress certifies Biden’s election victory.

**January 7, 2021:** Eastman contacts White House attorney Eric Herschmann to discuss “dealing with Georgia” in a potential appeal. Herschmann rebuffs Eastman’s attempts to discuss Georgia.

**January 7, 2021:** A team of employees from SullivanStrickler, a Georgia-based computer forensics firm hired by Sidney Powell, accesses and copies data from voting machines in Coffee County’s elections office, as seen on recovered surveillance footage and described in public reporting. One of Georgia’s 16 false electors and former local Republican Party leader, Cathy Latham, allegedly coordinates the visit.

**January 11, 2021:** Acting U.S. Attorney for the Northern District of Georgia Bobby Christine, BJay Pak’s successor, states in a staff call “there’s just nothing to” the various Trump-supported fraud claims that Christine’s office was investigating.

**February 8, 2021:** Brad Raffensperger announces that his office is opening an investigation into Trump’s attempts to interfere with Georgia’s electoral processes.

**February 10, 2021:** District Attorney Fani Willis announces the launch of a criminal investigation into Trump's and others' attempts to overturn the 2020 election results in Georgia. Willis sends letters to Georgia officials who were in some way privy to election-reversal efforts by Trump, or his principal allies, requesting that they preserve any records that may be relevant to her investigation.

**February 12, 2021:** Willis confirms that her investigation will encompass both Trump's conduct and that of his allies.

**Early March 2021:** Investigators in Willis' office appear before a grand jury to secure subpoenas for relevant evidence and witness testimony.

**Late April 2021:** Reports emerge that Willis' investigators are growing frustrated with a purported lack of cooperation from Raffensperger's staff.

**January 20, 2022:** Willis sends a letter to the chief judge of the Fulton County Superior Court requesting that a special purpose grand jury be impaneled to issue subpoenas and hear witness testimony relevant to her investigation.

**January 24, 2022:** The Fulton County Superior Court grants Willis' request for a special purpose grand jury.

**January 29, 2022:** In a speech in Texas, Trump tells his supporters to take action and protest in Atlanta and elsewhere, and describes prosecutors investigating him, including Willis, as "radical, vicious, [and] racist."

**January 30, 2022:** Citing security concerns based on Trump's comments urging supporters to take action in response to criminal investigations of his conduct, Willis asks the FBI to take steps to protect the Fulton County Courthouse.

**April 18, 2022:** Willis tells reporters she will delay witness testimony until after June 1, 2022, to preempt claims that her efforts were designed to "influence the outcome of [the then] upcoming" May 24, 2022 primary elections.

**May 2, 2022:** The Fulton County Superior Court impanels Willis' special purpose grand jury consisting of 23 Georgians, with a term of one year.

**June 1, 2022:** Georgia's 16 false electors receive grand jury subpoenas, ordering them to testify in Atlanta.

**June 15, 2022:** Gabe Sterling, chief operating officer in the Georgia secretary of state's office, testifies before the Fulton County grand jury.



**June 27, 2022:** Georgia legislators contest Willis' subpoenas, claiming that representatives have "privilege and immunity protections" under Georgia's state constitution for actions and meetings taken as part of their official duties.

**June 28, 2022:** Willis' special grand jury subpoenas British documentarian Alex Holder, who had intimate access to the Trump White House.

**July 6, 2022:** Lindsey Graham announces his legal challenge to the subpoena issued to him by Willis.

**July 12, 2022:** Kenneth Chesebro is subpoenaed by Willis' special grand jury.

**July 15, 2022:** Reporting indicates that Georgia's 16 false electors received target letters from Willis, notifying them that they are targets of her investigation.

**July 19, 2022:** 11 of the 16 false electors file a motion in the Fulton County Superior Court to quash Willis' subpoenas.

**July 25, 2022:** U.S. District Judge Leigh Martin May denies Congressman Jody Hice's (R-GA) motion to quash Willis' subpoena.

**July 25, 2022:** Judge Robert McBurney issues a ruling disqualifying Willis from criminally investigating Georgia State Senator Burt Jones (R), who served as one of the 16 false electors.

**July 25, 2022:** Brian Kemp is scheduled to deliver a "sworn recorded statement" to Willis' office. The statement is not recorded as scheduled.

**August 4, 2022:** Kemp is subpoenaed to testify before Willis' special grand jury.

**August 15, 2022:** Judge May denies Lindsey Graham's request to quash Willis' subpoena. Graham's lawyers announce he plans to appeal the decision.

**August 15, 2022:** Rudy Giuliani's legal team is informed that he is a target of Willis' investigation and may face criminal charges.

**August 16, 2022:** Jenna Ellis is ordered by a judge in the state of Colorado, where she resides, to appear before the Fulton County grand jury on August 25, 2022.

**August 17, 2022:** Graham files an appeal of the district court's ruling to the U.S. Court of Appeals for the 11th Circuit. and files an emergency motion to stay the district court's order pending his appeal.

**August 17, 2022:** Rudy Giuliani testifies for roughly six hours before the Fulton County grand jury.

**August 17, 2022:** Kemp's legal team files a motion in the Fulton County Superior Court to delay his testimony before the grand jury scheduled for the next day.

**August 17, 2022:** A New Mexico state judge rules that John Eastman, a Santa Fe resident, must testify before Willis' grand jury on August 30, 2022.

**August 21, 2022:** The U.S. Court of Appeals for the 11th Circuit sends the decision on Lindsey Graham's subpoena challenge back to the district court, tasking Judge May with reconsidering or modifying the subpoena. However, the appeals court puts the subpoena on hold while both parties would further flesh out their arguments in the district court.

**August 22, 2022:** Judge May sets a series of deadlines for Lindsey Graham to identify what in the subpoena from Willis he wishes for the court to address.

**August 22, 2022:** Judge Robert McBurney grants Willis' motion to compel testimony from Boris Epshteyn, an aide to Trump's reelection campaign and a conservative commentator.

**August 23, 2022:** Willis calls Kemp's delay of his testimony before the grand jury "wholly without merit," with a hearing to determine the validity of Kemp's motion to delay set for August 25, 2022.

**August 25, 2022:** Kemp's hearing about the validity of his motion to delay his testimony before Willis' grand jury concludes without a clear decision on whether Kemp would be forced to testify.

**August 25, 2022:** Willis' grand jury subpoenas Mark Meadows, Sidney Powell, and cyber researcher James Waldron.

**August 25, 2022:** Kenneth Chesebro files a motion in the Fulton County Superior Court to block a subpoena requiring him to testify before Willis' grand jury on August 30, 2022.

**August 25, 2022:** Jenna Ellis testifies before the Fulton County grand jury.

**August 29, 2022:** A Fulton County Superior Court judge rules that Kemp must testify before the grand jury. However, the judge grants Kemp's request to appear after the November 8, 2022 midterm elections.

**August 29, 2022:** The presiding judge of the Fulton County Superior Court rejects Chesebro's motion to block his subpoena, requiring him to testify before Willis' grand jury.

**August 30, 2022:** Eastman appears before the grand jury, reportedly pleading the Fifth Amendment repeatedly.

**August 30, 2022:** Chesebro appears before Willis' grand jury, reportedly pleading the Fifth Amendment throughout his session.

**September 1, 2022:** Judge May orders Lindsey Graham to testify before the grand jury, sending the matter back to the U.S. Court of Appeals for the 11th Circuit to continue its review.

**September 13, 2022:** Willis tells *The Washington Post* in an interview that she is “pleased with where it [the investigation] is. I think we’re moving along at a really good speed,” noting that the probe will conclude its fact-finding and witness testimony stage by the end of 2022.

**September 29, 2022:** Epshteyn testifies before Willis’ special grand jury.

**October 3, 2022:** A court order signed by Judge McBurney reveals that Willis is seeking search warrants in the case and places relevant documents under seal.

**October 7, 2022:** Willis files petitions in court seeking to compel testimony from Michael Flynn, Eric Herschmann, former U.S. House Speaker Newt Gingrich (R-GA), and two others following the November midterm election.

**October 10, 2022:** *CNN* reports that Cassidy Hutchinson, a former aide to Chief of Staff Mark Meadows who testified publicly before the January 6 Committee, is cooperating with Willis’ investigation.

**October 20, 2022:** *CNN* reports that Pat Cipollone and Kelly Loeffler have testified before the Fulton County grand jury in recent months.

**October 20, 2022:** A three-judge panel of the 11th Circuit rejects Graham’s request to fully quash Willis’ subpoena.

**October 21, 2022:** Graham files an emergency application with the Supreme Court to stay the district court’s order compelling Graham to testify before the grand jury.

**October 24, 2022:** Supreme Court Justice Clarence Thomas orders a stay of the lower court’s order that Graham testify.

**October 26, 2022:** A South Carolina state judge orders Mark Meadows, a resident of Pickens County, South Carolina, to testify before Willis’ grand jury.

**November 1, 2022:** The full Supreme Court denies Graham’s emergency motion for a stay and injunction of the lower court’s order that he testify before the grand jury, vacating Justice Thomas’ order.

## APPENDIX D: Transcript of January 2nd, 2021 Trump-Raffensperger Call

*The call from which the below transcript is derived was reported by The Washington Post on January 3, 2021, one day after the call occurred. The transcript was published by The Washington Post on January 5, 2021, three days after the call occurred.*

Speaking on the call:

- Donald J. Trump, former president of the United States.
  - Mark Meadows, former White House Chief of Staff for President Trump. Was reportedly involved in the plan to organize alternate electors and Trump's attempts to overturn the 2020 election results more generally.
  - Cleta Mitchell, Trump lawyer. Forwarded an email to Meadows with “key points” about the fake-electors plot.
  - Kurt Hilbert, lawyer for former President Trump.
- Brad Raffensperger, Secretary of State of Georgia.
  - Ryan Germany, general counsel in Raffensperger's office.

**Meadows:** Ok. Alright. Mr. President, everyone is on the line. This is Mark Meadows, the chief of staff. Just so we all are aware. On the line is secretary of state, and two other individuals. Jordan and Mr. Germany with him. You also have the attorneys that represent the president, Kurt and Alex and Cleta Mitchell—who is not the attorney of record but has been involved—myself and then the president. So Mr. President, I'll turn it over to you.

**Trump:** OK, thank you very much. Hello Brad and Ryan and everybody. We appreciate the time and the call. So we've spent a lot of time on this and if we could just go over some of the numbers, I think it's pretty clear that we won. We won very substantially in Georgia. You even see it by rally size, frankly. We'd be getting 25-30,000 people a rally and the competition would get less than 100 people. And it never made sense.

But we have a number of things. We have at least 2 or 3—anywhere from 250-300,000 ballots were dropped mysteriously into the rolls. Much of that had to do with Fulton County, which hasn't been checked. We think that if you check the signatures—a real check of the signatures going back in Fulton County you'll find at least a couple of hundred thousand of forged signatures of people who have been forged. And we are quite sure that's going to happen.

Another tremendous number. We're going to have an accurate number over the next two days with certified accountants. But an accurate number but its in the 50s of thousands— and that's people that went to vote and they were told they can't vote because they've already been voted for. And it's a very sad thing. They walked out complaining. But the number's large. We'll have it for you. But it's much more than the number of 11,779 that's—The current margin is only 11,779. Brad, I

think you agree with that, right? That's something I think everyone—at least that's a number that everyone agrees on.

But that's the difference in the votes. But we've had hundreds of thousands of ballots that we're able to actually—we'll get you a pretty accurate number. You don't need much of a number because the number that in theory I lost by, the margin would be 11,779. But you also have a substantial numbers of people, thousands and thousands who went to the voting place on November 3, were told they couldn't vote, were told they couldn't vote because a ballot had been put on their name. And you know that's very, very, very, very sad.

We had, I believe it's about 4,502 voters who voted but who weren't on the voter registration list, so it's 4,502 who voted but they weren't on the voter registration roll which they had to be. You had 18,325 vacant address voters. The address was vacant and they're not allowed to be counted. That's 18,325.

Smaller number—you had 904 who only voted where they had just a P.O.—a post office box number—and they had a post office box number and that's not allowed. We had at least 18,000—that's on tape we had them counted very painstakingly—18,000 voters having to do with [name]. She's a vote scammer, a professional vote scammer and hustler [name]. That was the tape that's been shown all over the world that makes everybody look bad, you me and everybody else.

Where they got—number one they said very clearly and it's been reported they said there was a major water main break. Everybody fled the area. And then they came back, [name] and her daughter and a few people. There were no Republican poll watchers. Actually, there were no Democrat poll watchers, I guess they were them. But there were no Democrats, either and there was no law enforcement. Late in the morning, they went early in the morning they went to the table with the black robe, the black shield and they pulled out the votes. Those votes were put there a number of hours before the table was put there. I think it was, Brad you would know, it was probably eight hours or seven hours before and then it was stuffed with votes.

They weren't in an official voter box, but they were in what looked to be suitcases or trunks, suitcases but they weren't in voter boxes. The minimum number it could be because we watched it and they watched it certified in slow motion instant replay if you can believe it but slow motion and it was magnified many times over and the minimum it was 18,000 ballots, all for Biden.

You had out-of-state voters. They voted in Georgia but they were from out of state, of 4,925. You had absentee ballots sent to vacant, they were absentee ballots sent to vacant addresses. They had nothing on them about addresses, that's 2,326.

And you had drop boxes, which is very bad. You had drop boxes that were picked up. We have photographs and we have affidavits from many people.

I don't know if you saw the hearings, but you have drop boxes where the box was picked up but not delivered for three days. So all sorts of things could have happened to that box including, you know, putting in the votes that you wanted. So there were many infractions and the bottom line is, many, many times the 11,779 margin that they said we lost by—we had vast I mean the state is in turmoil over this.

And I know you would like to get to the bottom of it, although I saw you on television today and you said that you found nothing wrong. I mean, you know, And I didn't lose the state, Brad. People have been saying that it was the highest vote ever. There was no way. A lot of the political people said that there's no way they beat me. And they beat me. They beat me in the...As you know, every single state...we won every state. We one every statehouse in the country. We held the Senate which is shocking to people, although we'll see what happens tomorrow or in a few days.

And we won the House, but we won every single statehouse and we won Congress, which was supposed to lose 15 seats, and they gained, I think 16 or 17 or something. I think there's a now difference of five. There was supposed to be a difference substantially more. But politicians in every state, but politicians in Georgia have given affidavits or are going to that, that there was no way that they beat me in the election that the people came out, in fact, they were expecting to lose and then they ended up winning by a lot because of the coattails. And they said there's no way that they've done many polls prior to the election. There was no way that they won. Ballots were dropped in massive numbers. And we're trying to get to those numbers and we will have them.

They'll take a period of time. Certified. But but they're massive numbers. And far greater than the 11,779.

The other thing, dead people. So dead people voted and I think the number is close to 5,000 people. And they went to obituaries. They went to all sorts of methods to come up with an accurate number and a minimum is close to about 5,000 voters.

The bottom line is when you add it all up and then you start adding, you know, 300,000 fake ballots. Then the other thing they said is in Fulton County and other areas. And this may or may not...because this just came up this morning that they are burning their ballots, that they are shredding, shredding ballots and removing equipment. They're changing the equipment on the Dominion machines and, you know, that's not legal.

And they supposedly shredded I think they said 300 pounds of, 3,000 pounds of ballots. And that just came to us as a report today. And it is a very sad situation.

But Brad, if you took the minimum numbers where many, many times above the 11,779 and many of those numbers are certified, or they will be certified but they are certified. And those are numbers that are there that exist. And that beat the margin of loss, they beat it, I mean by a lot and people should be happy to have an accurate count instead of an election where there's turmoil.

I mean there's turmoil in Georgia and other places. You're not the only one I mean we have other states that I believe will be flipping to us very shortly. And this is something that—You know, as an example, I think it in Detroit, I think there's a section a good section of your state actually, which we're not sure so we're not going to report it yet. But in Detroit, we had, I think it was, 139 percent of the people voted. That's not too good.

In Pennsylvania, they had well over 200,000 more votes than they had people voting. And uh that doesn't play too well, and the legislature there is, which is Republican, is extremely activist and angry. I mean, there were other things also that were almost as bad as that. But, uh, they had as an example, in Michigan, a tremendous number of dead people that voted. I think it was I think, Mark, it was 18,000. Some unbelievably high number, much higher than yours, you were in the 4-5,000 category.

And that was checked out laboriously by going through, by going through the obituary columns in the newspapers.

So I guess with all of it being said, Brad, the bottom line and provisional ballots, again, you know, you'll have to tell me about the provisional ballots, but we have a lot of people that were complaining that they weren't able to vote because they were already voted for. These are great people.

And, you know, they were shellshocked. I don't know if you call that provisional ballots. In some states we had a lot of provisional ballot situations where people were given a provisional ballot because when they walked in on November 3 and they were already voted for.

So that's it. I mean, we have many many times the number of votes necessary to win the state. And we won the state and we won it very substantially and easily and we're getting, we have, much of this is a very, you know they're certified, far more certified than we need. But we're getting additional numbers certified, too. And we're getting pictures of dropboxes being delivered and delivered late. Delivered three days later, in some cases, plus we have many affidavits to that effect.

**Meadows:** So Mr. President, if I might be able to jump in and I'll give Brad a chance. Mr. Secretary, obviously there is, there are allegations where we believe that not every vote or fair vote and legal vote was counted and that's at odds with the representation from the secretary of state's office.

What I'm hopeful for is there some way that we can we can find some kind of agreement to look at this a little bit more fully. You know the president mentioned Fulton County.

But in some of these areas where there seems to be a difference of where the facts seem to lead, and so Mr. Secretary, I was hopeful that, you know, in the spirit of cooperation and compromise is there something that we can at least have a discussion to look at some of these allegations to find a path forward that's less litigious?

**Raffensperger:** Well, I listened to what the president has just said. President Trump, we've had several lawsuits and we've had to respond in court to the lawsuits and the contentions. Um, we don't agree that you have won. And we don't—I didn't agree about the 200,000 number that you'd mentioned. And I can go through that point by point.

What we have done is we gave our state Senate about one and a half hours of our time going through the election issue by issue and then on the state House, the government affairs committee, we gave them about two and a half hours of our time, going back point by point on all the issues of contention. And then just a few days ago we met with our U.S. congressmen, Republican

congressmen, and we gave them about two hours of our time talking about this past election. Going back, primarily what you've talked about here focused in on primarily, I believe, is the absentee ballot process. I don't believe that you're really questioning the Dominion machines. Because we did a hand retally, a 100 percent retally of all the ballots and compared them to what the machines said and came up with virtually the same result. Then we did the recount, and we got virtually the same result. So I guess we can probably take that off the table.

I don't think there's an issue about that. What you—

**Trump:** Well, Brad. Not that there's not an issue, because we have a big issue with Dominion in other states and perhaps in yours. But we haven't felt we needed to go there. And just to, you know, maybe put a little different spin on what Mark is saying, Mark Meadows, uh, yeah we'd like to go further, but we don't really need to. We have all the votes we need.

You know, we won the state. If you took, these are the most minimal numbers, the numbers that I gave you, those are numbers that are certified, your absentee ballots sent to vacant addresses, your out-of-state voters 4,925. You know when you add them up, it's many more times, it's many times the 11,779 number. So we could go through, we have not gone through your Dominion. So we can't give them blessing. I mean, in other states, we think we found tremendous corruption with Dominion machines but we'll have to see.

But we only lost the state by that number, 11,000 votes, and 779. So with that being said, with just what we have, with just what we have we're giving you minimal, minimal numbers. We're doing the most conservative numbers possible, we're many times, many, many times above the margin. And so we don't really have to, Mark, I don't think we have to go through...

**Meadows:** Right

**Trump:** Because, what's the difference between winning the election by two votes and winning it by half a million votes. I think I probably did win it by half a million. You know, one of the things that happened Brad, is we have other people coming in now from Alabama and from South Carolina and from other states, and they're saying it's impossible for you to have lost Georgia. We won. You know in Alabama, we set a record, got the highest vote ever. In Georgia, we set a record with a massive amount of votes. And they say it's not possible to have lost Georgia.

And I could tell you by our rallies. I could tell you by the rally I'm having on Monday night, the place, they already have lines of people standing out front waiting. It's just not possible to have lost Georgia. It's not possible. When I heard it was close I said there's no way. But they dropped a lot of votes in there late at night. You know that, Brad. And that's what we are working on very, very stringently. But regardless of those votes, with all of it being said, we lost by essentially 11,000 votes and we have many more votes already calculated and certified, too.

And so I just don't know, you know, Mark, I don't know what's the purpose. I won't give Dominion a pass because we found too many bad things. But we don't need Dominion or anything else. We have won this election in Georgia based on all of this. And there's nothing wrong with saying that, Brad. You know I mean, having the correct—the people of Georgia are angry. And these numbers are going to be repeated on Monday night. Along with others that we're going to have by that time which are much more substantial even. And the people of Georgia are angry, the



people of the country are angry. And there's nothing wrong with saying, you know, um, that you've recalculated. Because the 2,236 in absentee ballots. I mean, they're all exact numbers that were done by accounting firms law firms, etc. and even if you cut 'em in half, cut 'em in half and cut 'em in half, again, it's more votes than we need.

**Raffensperger:** Well Mr. President, the challenge that you have is, the data you have is wrong. We talked to the congressmen and they were surprised.

But they—I guess there was a person Mr. Braynard who came to these meetings and presented data and he said that there was dead people, I believe it was upward of 5,000. The actual number were two. Two. Two people that were dead that voted. So that's wrong. There were two.

**Trump:** Well Cleta, how do you respond to that? Maybe you tell me?

**Mitchell:** Well, I would say Mr. Secretary, one of the things that we have requested and what we said was, if you look, if you read our petition, it said that we took the names and birth years and we had certain information available to us. We have asked from your office for records that only you have and so we said there is a universe of people who have the same name and same birth year and died.

But we don't have the records that you have. And one of the things that we have been suggesting formally and informally for weeks now is for you to make available to us the records that would be necessary—

**Trump:** But Cleta, even before you do that, and not even including that, that's why hardly even included that number, although in one state we have a tremendous amount of dead people. So I don't know—I'm sure we do in Georgia, too. I'm sure we do in Georgia too.

But, um, we're so far ahead. We're so far ahead of these numbers, even the phony ballots of [name], known scammer. You know the Internet? You know what was trending on the Internet? "Where's [name]?" Because they thought she'd be in jail. "Where's [name]?" It's crazy, it's crazy. That was. The minimum number is 18,000 for [name], but they think it's probably about 56,000, but the minimum number is 18,000 on the [name] night where she ran back in there when everybody was gone and stuffed, she stuffed the ballot boxes. Let's face it, Brad, I mean. They did it in slow motion replay magnified, right? She stuffed the ballot boxes. They were stuffed like nobody had ever seen them stuffed before.

So there's a term for it when it's a machine instead of a ballot box, but she stuffed the machine. She stuffed the ballot—each ballot went three times they were showing: Here's ballot No 1. Here it is second time, third time, next ballot.

I mean, look. Brad. We have a new tape that we're going to release. It's devastating. And by the way, that one event, that one event is much more than the 11,000 votes that we're talking about. It's uh, you know. That one event was a disaster. And it's just, you know, but it was, it was something, it can't be disputed. And again we have a version that you haven't seen but it's magnified. It's magnified and you can see everything. For some reason they put it in three times, each ballot, and I don't know why. I don't know why three times. Why not five times, right? Go ahead.

**Raffensperger:** You're talking about the State Farm video. And I think it's extremely unfortunate that Rudy Giuliani or his people, they sliced and diced that video and took it out of context. The next day we brought in WSB-TV and we let them show, see the full run of tape and what you'll see, the events that transpired are nowhere near what was projected by, you know—

**Trump:** But where were the poll watchers, Brad? There were no poll watchers there. There were no Democrats or Republicans. There was no security there.

It was late in the evening, late in the, early in the morning, and there was nobody else in the room. Where were the poll watchers and why did they say a water main broke, which they did and which was reported in the newspapers? They said they left. They ran out because of a water main break, and there was no water main. There was nothing. There was no break. There was no water main break. But we're, if you take out everything, where were the Republican poll watchers, even where were the Democrat poll watchers, because there were none.

And then you say, well, they left their station, you know, if you look at the tape, and this was, this was reviewed by professional police and detectives and other people, when they left in a rush, everybody left in a rush because of the water main, but everybody left in a rush. These people left their station.

When they came back, they didn't go to their station. They went to the apron, wrapped around the table, under which were thousands and thousands of ballots in a box that was not an official or a sealed box. And then they took those. They went back to a different station. So if they would have come back, they would have walked to their station and they would have continued to work. But they couldn't do even that because that's illegal, because they had no Republican poll watchers. And remember, her reputation is deva—she's known all over the Internet, Brad. She's known all over.

I'm telling you, "Where's [name]" was one of the hot items...[name] They knew her. "Where's [name]?" So Brad, there can be no justification for that. And I you know, I give everybody the benefit of the doubt. But that was—and Brad, why did they put the votes in three times? You know, they put 'em in three times.

**Raffensperger:** Mr. President, they did not put that. We did an audit of that and we proved conclusively that they were not scanned three times.

**Trump:** Where was everybody else at that late time in the morning? Where was everybody? Where were the Republicans? Where were the security guards? Where were the people that were there just a little while before when everyone ran out of the room. How come we had no security in the room? Why did they run to the bottom of the table? Why do they run there and just open the skirt and rip out the votes? I mean, Brad. And they were sitting there, I think for five hours or something like that, the votes. But they just all happened to run back and go, you know, Brad...

**Raffensperger:** Mr. President, we'll send you the link from WSB.

**Trump:** I don't care about the link. I don't need it. Brad, I have a much better link—

**Mitchell:** I will tell you. I've seen the tape. The full tape. So has Alex. We've watched it. And what we saw and what we've confirmed in the timing is that. They made everybody leave, we have sworn affidavits saying that. And then they began to process ballots. And our estimate is that there were roughly 18,000 ballots. We don't know that. If you know that...

**Trump:** It was 18,000 ballots but they used each one three times.

**Mitchell:** Well, I don't know about that.

**Trump:** I do think because we had ours magnified out. Each one magnified out is 18 times three

**Mitchell:** I've watched the entire tape.

**Trump:** Nobody can make a case for that, Brad. Nobody. I mean, look, you'd have to be a child to think anything other than that. Just a child. I mean you have your never Trumper...

**Mitchell:** How many ballots, Mr. Secretary, are you saying were processed then?

**Raffensperger:** We had GBI...investigate that.

**Germany:** We had our—this is Ryan Germany. We had our law enforcement officers talk to everyone who was who was there after that event came to light. GBI was with them as well as FBI agents.

**Trump:** Well, there's no way they could—then they're incompetent. They're either dishonest or incompetent, okay?

**Mitchell:** Well, what did they find?

**Trump:** There's only two answers, dishonesty or incompetence. There's just no way. Look. There's no way. And on the other thing, I said too, there is no way. I mean, there's no way that these things could have been you know, you have all these different people that voted but they don't live in Georgia anymore. What was that number, Cleta? That was a pretty good number too.

**Mitchell:** The number who have registered out of state after they moved from Georgia. And so they had a date when they moved from Georgia, they registered to vote out of state. And then it's like 4,500, I don't have that number right in front of me.

**Trump:** And then they came back in and they voted.

**Mitchell:** And voted. Yeah.

**Trump:** I thought that was a large number, though. It was in the 20s. The point is...

**Germany:** We've been going through each of those as well and those numbers that we got that Ms. Mitchell was just saying, they're not accurate. Every one we've been through, are people that lived in Georgia, moved to a different state, but then moved back to Georgia legitimately. And in many cases—

**Trump:** How many people do that? They moved out and then they said, "Ah, to hell with it I'll move back." You know, it doesn't sound like a very normal...you mean, they moved out, and what, they missed it so much that they wanted to move back in? It's crazy.

**Germany:** This is they moved back in years ago. This was not like something just before the election. So there's something about that data that, it's just not accurate.

**Trump:** Well, I don't know, all I know is that it is certified. And they moved out of Georgia and they voted. It didn't say they moved back in Cleta, did it?

**Mitchell:** No, but I mean, we're looking at the voter registration. Again, if you have additional records, we've been asking for that, but you haven't shared any of that with us. You just keep saying you investigated the allegations.

**Trump:** But, Cleta, a lot of it you don't need to be shared. I mean, to be honest, they should share it. They should share it because you want to get to an honest election.

I won this election by hundreds of thousands of votes. There's no way I lost Georgia. There's no way. We won by hundreds of thousands of votes. I'm just going by small numbers when you add them up they're many times the 11,000. But I won that state by hundreds of thousands of votes. Do you think it's possible that they shredded ballots in Fulton County? Because that's what the rumor is. And also that Dominion took out machines. That Dominion is really moving fast to get rid of their, uh, machinery.

Do you know anything about that? Because that's illegal, right?

**Germany:** This is Ryan Germany. No, Dominion has not moved any machinery out of Fulton County.

**Trump:** But have they moved the inner parts of the machines and replaced them with other parts?

**Germany:** No.

**Trump:** Are you sure, Ryan?

**Germany:** I'm sure. I'm sure, Mr. President.

**Trump:** What about, what about the ballots. The shredding of the ballots. Have they been shredding ballots?

**Germany:** The only investigation that we have into that—they have not been shredding any ballots. There was an issue in Cobb County where they were doing normal office shredding, getting rid of old stuff, and we investigated that. But this is stuff from, you know, from you know past elections.

**Trump:** I don't know. It doesn't pass the smell test because we hear they're shredding thousands and thousands of ballots and now what they're saying, "Oh, we're just cleaning up the office." So I don't think they're cleaning.

**Raffensperger:** Mr. President, the problem you have with social media, they—people can say anything.

**Trump:** Oh this isn't social media. This is Trump media. It's not social media. It's really not it's not social media. I don't care about social media. I couldn't care less. Social media is Big Tech. Big Tech is on your side. I don't even know why you have a side, because you should want to have an accurate election. And you're a Republican.

**Raffensperger:** We believe that we do have an accurate election.

**Trump:** No, no you don't. No, no you don't. You don't have. Not even close. You're off by hundreds of thousands of votes. And just on the small numbers, you're off on these numbers and these numbers can't be just—well, why won't?—Okay. So you sent us into Cobb County for signature verification, right? You sent us into Cobb County, which we didn't want to go into. And you said it would be open to the public. And we could have our - So we had our experts there they weren't allowed into the room. But we didn't want Cobb County. We wanted Fulton County. And you wouldn't give it to us. Now, why aren't we doing signature—and why can't it be open to the public?

And why can't we have professionals do it instead of rank amateurs who will never find anything and don't want to find anything? They don't want to find, you know, they don't want to find anything. Someday you'll tell me the reason why, because I don't understand your reasoning, but someday you'll tell me the reason why. But why don't you want to find?

**Germany:** Mr. President, we chose Cobb County—

**Trump:** Why don't you want to find... What?

**Germany:** Sorry, go ahead.

**Trump:** So why did you do Cobb County? We didn't even request—we requested Fulton County, not Cobb County. Go ahead, please. Go ahead.

**Germany:** We chose Cobb County because that was the only county where there's been any evidence submitted that the signature verification was not properly done.

**Trump:** No, but I told you. We're not, we're not saying that.

**Mitchell:** We did say that.

**Trump:** Fulton County. Look. Stacey, in my opinion, Stacey is as dishonest as they come. She has outplayed you...at everything. She got you to sign a totally unconstitutional agreement, which is a disastrous agreement. You can't check signatures. I can't imagine you're allowed to do harvesting, I guess, in that agreement. That agreement is a disaster for this country. But she got you somehow to sign that thing and she has outsmarted you at every step.

And I hate to imagine what's going to happen on Monday or Tuesday, but it's very scary to people. You know, where the ballots flow in out of nowhere. It's very scary to people. That consent decree is a disaster. It's a disaster. A very good lawyer who examined it said they've never seen anything like it.

**Raffensperger:** Harvesting is still illegal in the state of Georgia. And that settlement agreement did not change that one iota.

**Trump:** It's not a settlement agreement, it's a consent decree. It even says consent decree on it, doesn't it? It uses the term consent decree. It doesn't say settlement agree. It's a consent decree. It's a disaster.

**Raffensperger:** It's a settlement agreement.

**Trump:** What's written on top of it?

**Raffensperger:** Ryan?

**Germany:** I don't have it in front of me, but it was not entered by the court, it's not a court order.

**Trump:** But Ryan, it's called a consent decree, is that right? On the paper. Is that right?

**Germany:** I don't. I don't. I don't believe so, but I don't have it in front of me.

**Trump:** OK, whatever, it's a disaster. It's a disaster. Look. Here's the problem. We can go through signature verification and we'll find hundreds of thousands of signatures, if you let us do it. And the only way you can do it, as you know, is to go to the past. But you didn't do that in Cobb County. You just looked at one page compared to another. The only way you can do a signature verification is go from the one that signed it on November whatever. Recently. And compare it to two years ago, four years ago, six years ago, you know, or even one. And you'll find that you have many different signatures. But in Fulton, where they dumped ballots, you will find that you have many that aren't even signed and you have many that are forgeries.

OK, you know that. You know that. You have no doubt about that. And you will find you will be at 11,779 within minutes, because Fulton County is totally corrupt and so is she, totally corrupt. And they're going around playing you and laughing at you behind your back, Brad, whether you know it or not, they're laughing at you and you've taken a state that's a Republican state, and you've made it almost impossible for a Republican to win because of cheating, because they

cheated like nobody's ever cheated before. And I don't care how long it takes me, you know, we're going to have other states coming forward—pretty good.

But I won't...this is never...this is...We have some incredible talent said they've never seen anything...Now the problem is they need more time for the big numbers. But they're very substantial numbers. But I think you're going to find that they—by the way, a little information, I think you're going to find that they are shredding ballots because they have to get rid of the ballots because the ballots are unsigned. The ballots are corrupt, and they're brand new and they don't have a seal and there's the whole thing with the ballots. But the ballots are corrupt.

And you are going to find that they are—which is totally illegal, it is more illegal for you than it is for them because, you know what they did and you're not reporting it. That's a criminal, that's a criminal offense. And you can't let that happen. That's a big risk to you and to Ryan, your lawyer. And that's a big risk. But they are shredding ballots, in my opinion, based on what I've heard. And they are removing machinery and they're moving it as fast as they can, both of which are criminal finds. And you can't let it happen and you are letting it happen. You know, I mean, I'm notifying you that you're letting it happen. So look. All I want to do is this. I just want to find 11,780 votes, which is one more than we have because we won the state.

And flipping the state is a great testament to our country because, cause you know, this is—it's a testament that they can admit to a mistake or whatever you want to call it. If it was a mistake, I don't know. A lot of people think it wasn't a mistake. It was much more criminal than that. But it's a big problem in Georgia and it's not a problem that's going away. I mean, you know, it's not a problem that's going away.

**Germany:** Mr President, this is Ryan. We're looking into every one of those things that you mentioned.

**Trump:** Good. But if you find it you've got to say it, Ryan.

**Germany:** ...Let me tell you what we are seeing. What we're seeing is not at all what you're describing, these are investigators from our office, these are investigators from GBI, and they're looking and they're good. And that's not what they're seeing. And we'll keep looking, at all these things.

**Trump:** Well, you better check the ballots because they are shredding ballots, Ryan. I'm just telling you, Ryan. They're shredding ballots. And you should look at that very carefully. Because that's so illegal. You know, you may not even believe it because it's so bad. But they're shredding ballots because they think we're going to eventually get...because we'll eventually get into Fulton. In my opinion it's never too late....So, that's the story. Look, we need only 11,000 votes. We have are far more than that as it stands now. We'll have more and more. And. Do you have provisional ballots at all, Brad? Provisional ballots?

**Raffensperger:** Provisional ballots are allowed by state law.

**Trump:** Sure, but I mean, are they counted or did you just hold them back because they, you know, in other words, how many provisional ballots do you have in the state?

**Raffensperger:** We'll get you that number.

**Trump:** Because most of them are made out to the name Trump. Because these are people that were scammed when they came in. And we have thousands of people that have testified or that want to testify when they came in they were probably going to vote on November 3. And they were told I'm sorry, you've already been voted for, you've already voted. The women, men started screaming, No. I proudly voted til November 3. They said, I'm sorry, but you've already been voted for and you have a ballot and these people are beside themselves. So they went out and they filled in a provisional ballot, putting the name Trump on it.

And what about that batch of military ballots that came in. And even though I won the military by a lot, it was 100 percent Trump. I mean 100 percent Biden. Do you know about that? A large group of ballots came in. I think it was to Fulton County and they just happened to be 100 percent for Trump—for Biden, even though Trump won the military by a lot, you know, a tremendous amount. But these ballots were 100 percent for Biden. And, do you know about that? A very substantial number came in, all for Biden. Does anybody know about it?

**Mitchell:** I know about it, but—

**Trump:** OK, Cleta, I'm not asking you Cleta, honestly. I'm asking Brad. Do you know about the military ballots that we have confirmed now. Do you know about the military ballots that came in that were 100 percent, I mean 100 percent for Biden. Do you know about that?

**Germany:** I don't know about that, I do know that we have when military ballots come in, it's not just military, it's also military and overseas citizens. The military part of that does generally go Republican. The overseas citizen part of it generally goes very Democrat. This was a mix of 'em.

**Trump:** No, but this was. That's OK. But I got like 78 percent in the military. These ballots were all for...They didn't tell me overseas. Could be overseas too, but I get votes overseas too, Ryan, you know in all fairness. No they came in, a large batch came in and it was, quote, 100 percent for Biden. And that is criminal. You know, that's criminal. OK. That's another criminal, that's another of the many criminal events, many criminal events here.

Oh, I don't know, look Brad. I got to get...I have to find 12,000 votes and I have them times a lot. And therefore, I won the state. That's before we go to the next step, which is in the process of right now. You know, and I watched you this morning and you said, uh, well, there was no criminality.

But I mean, all of this stuff is very dangerous stuff. When you talk about no criminality, I think it's very dangerous for you to say that.

I just, I just don't know why you don't want to have the votes counted as they are. Like even you when you went and did that check. And I was surprised because, you know...the check...And we found a few thousand votes that were against me. I was actually surprised because the way that check was done, all you're doing is you know, recertifying existing votes and, you know, and you were given votes and you just counted them up and you still found 3,000 that were bad. So that was sort of surprising that it came down to three or five I don't know. Still a lot of votes. But you have to go back to check from past years with respect to signatures. And if you check with Fulton



County, you'll have hundreds of thousands because they dumped ballots into Fulton County and the other county next to it.

So what are we going to do here folks? I only need 11,000 votes. Fellas, I need 11,000 votes. Give me a break. You know, we have that in spades already. Or we can keep it going but that's not fair to the voters of Georgia because they're going to see what happened and they're going to see what happened. I mean, I'll, I'll take on to anybody you want with regard to [name] and her lovely daughter, a very lovely young lady, I'm sure. But, but [name]...I will take on anybody you want. And the minimum, there were 18,000 ballots but they used them three times. So that's, you know, a lot of votes...and that one event...And they were all to Biden, by the way, that's the other thing we didn't say. You know, [name], the one thing I forgot to say which was the most important. You know that every single ballot she did went to Biden. You know that, right? Do you know that, by the way, Brad?

Every single ballot that she did through the machines at early, early in the morning, went to Biden. Did you know that, Ryan?

**Germany:** That's not accurate, Mr. President.

**Trump:** Huh. What is accurate?

**Germany:** The numbers that we are showing are accurate.

**Trump:** No, about [name]. About early in the morning, Ryan. When the woman took, you know, when the whole gang took the stuff from under the table, right? Do you know, do you know who those ballots, who they were made out to, do you know who they were voting for?

**Germany:** No, not specifically.

**Trump:** Did you ever check?

**Germany:** We did what I described to you earlier—

**Trump:** No no no—did you ever check the ballots that were scanned by [name], a known political operative and balloteer. Did ever check who those votes were for?

**Germany:** We looked into that situation that you described.

**Trump:** No, they were 100 percent for Biden. 100 percent. There wasn't a Trump vote in the whole group. Why don't you want to find this, Ryan? What's wrong with you? I heard your lawyer is very difficult, actually, but I'm sure you're a good lawyer. You have a nice last name. But, but I'm just curious why wouldn't, why do you keep fighting this thing? It just doesn't make sense. We're way over the 17,779, right? We're way over that number and just if you took just [name], we're over that number by five, five or six times when you multiply that times three.

And every single ballot went to Biden, and you didn't know that, but, now you know it. So tell me, Brad, what are we going to do? We won the election and it's not fair to take it away from us

like this. And it's going to be very costly in many ways. And I think you have to say that you're going to reexamine it and you can reexamine it, but reexamine it with people that want to find answers, not people that don't want to find answers. For instance, I'm hearing Ryan that he's probably, I'm sure a great lawyer and everything. But he's making statements about those ballots that he doesn't know. But he's making them with such—he did make them with surety. But now I think he's less sure because the answer is they all went to Biden and that alone wins us the election by a lot. You know, so.

**Raffensperger:** Mr. President, you have people that submit information and we have our people that submit information. And then it comes before the court and the court then has to make a determination. We have to stand by our numbers. We believe our numbers are right.

**Trump:** Why do you say that? I don't know. I mean, sure, we can play this game with the courts, but why do you say that? First of all they don't even assign us a judge. They don't even assign us a judge. But why wouldn't you—Hey Brad, why wouldn't you want to check out [name] ? And why wouldn't you want to say, hey, if in fact, President Trump is right about that, then he wins the state of Georgia, just that one incident alone without going through hundreds of thousands of dropped ballots. You just say, you stick by, I mean I've been watching you, you know, you don't care about anything. "Your numbers are right." But your numbers aren't right. They're really wrong and they're really wrong, Brad. And I know this phone call is going nowhere other than, other than ultimately, you know—Look ultimately, I win, okay?

**Mitchell:** Mr. Secretary...

**Trump:** Because you guys are so wrong. And you treated this. You treated the population of Georgia so badly. You, between you and your governor, who was down at 21, he was down 21 points. And like a schmuck, I endorsed him and he got elected, but I will tell you, he is a disaster. And he knows, I can't imagine that people are so angry in Georgia, I can't imagine he's ever getting elected again I'll tell you that much right now. But why wouldn't you want to find the right answer, Brad, instead of keep saying that the numbers are right? Cause those numbers are so wrong?

**Mitchell:** Mr. Secretary, Mr. President, one of the things that we have been, Alex can talk about this, we talked about it, and I don't know whether the information has been conveyed to your office, but I think what the president is saying, and what we've been trying to do is to say, look, the court is not acting on our petition. They haven't even assigned a judge. But the people of Georgia and the people of America have a right to know the answers. And you have data and records that we don't have access to. And you keep telling us and making public statements that you investigated this and nothing to see here. But we don't know about that. All we know is what you tell us. What I don't understand is why wouldn't it be in everyone's best interest to try to get to the bottom, compare the numbers, you know, if you say, because—to try to be able to get to the truth because we don't have any way of confirming what you're telling us. You tell us that you had an investigation at the State Farm Arena. I don't have any report. I've never seen a report of investigation. I don't know that is. I've been pretty involved in this and I don't know. And that's just one of like, 25 categories. And it doesn't even, and as I, as the president said, we haven't even

gotten into the Dominion issue. That's not part of our case. It's not part of our, we just didn't feel as though we had any way to be able to develop—

**Trump:** No, we do have a way but I don't want to get into it. We found a way in other states excuse me, but we don't need it because we're only down 11,000 votes so we don't even need it. I personally think they're corrupt as hell. But we don't need that. Because all we have to do Cleta is find 11,000-plus votes. So we don't need that. I'm not looking to shake up the whole world. We won Georgia easily. We won it by hundreds of thousands of votes. But if you go by basic simple numbers, we won it easily, easily. So we're not giving Dominion a pass on the record. We just, we don't need Dominion, because we have so many other votes that we don't need to prove it any more than we already have.

**Hilbert:** Mr. President and Cleta, this is Kurt Hilbert, if I might interject for a moment. Um Ryan, I would like to suggest just four categories that have already been mentioned by the president that have actually hard numbers of 24,149 votes that were counted illegally. That in and of itself is sufficient to change the results or place the outcome in doubt. We would like to sit down with your office and we can do it through purposes of compromise and just like this phone call, just to deal with that limited category of votes. And if you are able to establish that our numbers are not accurate, then fine. However, we believe that they are accurate. We've had now three to four separate experts looking at these numbers.

**Trump:** Certified accountants looked at them.

**Hilbert:** Correct. And this is just based on USPS data and your own secretary of state's data. So that's what we would entreat and ask you to do, to sit down with us in a compromise and settlements proceeding and actually go through the registered voter IDs and registrations. And if you can convince us that that 24,149 is inaccurate, then fine. But we tend to believe that is, you know, obviously more than 11,779. That's sufficient to change the results entirely in of itself. So what would you say to that, Mr. Germany?

**Germany:** Kurt, um I'm happy to get with our lawyers and we'll set that up. That number is not accurate. And I think we can show you, for all the ones we've looked at, why it's not. And so if that would be helpful, I'm happy to get with our lawyers and set that up with you guys.

**Trump:** Well, let me ask you, Kurt, you think that is an accurate number. That was based on the information given to you by the secretary of state's department, right?

**Hilbert:** That is correct. That information is the minimum most conservative data based upon the USPS data and the secretary of state's office data that has been made publicly available. We do not have the internal numbers from the secretary of state. Yet, we have asked for it six times. I sent a letter over to Mr...several times requesting this information, and it's been rebuffed every single time. So it stands to reason that if the information is not forthcoming, there's something to hide. That's the problem that we have.

**Germany:** Well, that's not the case sir. There are things that you guys are entitled to get. And there's things that under the law, we are not allowed to give out.

**Trump:** Well, you have to. Well, under the law you're not allowed to give faulty election results, OK? You're not allowed to do that. And that's what you done. This is a faulty election result. And honestly, this should go very fast. You should meet tomorrow because you have a big election coming up and because of what you've done to the president—you know, the people of Georgia know that this was a scam. And because of what you've done to the president, a lot of people aren't going out to vote and a lot of Republicans are going to vote negative because they hate what you did to the president. Okay? They hate it. And they're going to vote. And you would be respected. Really respected, if this thing could be straightened out before the election. You have a big election coming up on Tuesday. And therefore I think that it is really important that you meet tomorrow and work out on these numbers. Because I know Brad that if you think we're right, I think you're going to say, and I'm not looking to blame anybody. I'm just saying you know, and, you know, under new counts, and under uh, new views, of the election results, we won the election. You know? It's very simple. We won the election. As the governors of major states and the surrounding states said, there is no way you lost Georgia, as the Georgia politicians say, there is no way, you lost Georgia. Nobody. Everyone knows I won it by hundreds of thousands of votes. But I'll tell you it's going to have a big impact on Tuesday if you guys don't get this thing straightened out fast.

**Meadows:** Mr. President. This is Mark. It sounds like we've got two different sides agreeing that we can look at these areas and I assume that we can do that within the next 24 to 48 hours to go ahead and get that reconciled so that we can look at the two claims and making sure that we get the access to the secretary of state's data to either validate or invalidate the claims that have been made. Is that correct?

**Germany:** No, that's not what I said. I'm happy to have our lawyers sit down with Kurt and the lawyers on that side and explain to my him, here's, based on what we've looked at so far, here's how we know this is wrong, this is wrong, this is wrong, this is wrong, this is wrong.

**Meadows:** So what you're saying, Ryan, let me let me make sure...so what you're saying is you really don't want to give access to the data. You just want to make another case on why the lawsuit is wrong?

**Germany:** I don't think we can give access to data that's protected by law. But we can sit down with them and say—

**Trump:** But you're allowed to have a phony election? You're allowed to have a phony election right?

**Germany:** No sir.

**Trump:** When are you going to do signature counts, when are you going to do signature verification on Fulton County, which you said you were going to do, and now all of a sudden you're not doing it. When are you doing that?

**Germany:** We are going to do that. We've announced—

**Hilbert:** To get to this issue of the personal information and privacy issue, is it possible that the secretary of state could deputize the lawyers for the president so that we could access that information and private information without you having any kind of violation?

**Trump:** Well, I don't want to know who it is. You guys can do it very confidentially. You can sign a confidentiality agreement. That's OK. I don't need to know names. But we go the information on this stuff that we're talking about. We got all that information from the secretary of state.

**Meadows:** Yeah. So let me let me recommend, Ryan, if you and Kurt would get together, you know, when we get off of this phone call, if you could get together and work out a plan to address some of what we've got with your attorneys where we can we can actually look at the data. For example, Mr. Secretary, I can tell you say they were only two dead people who would vote. I can promise you there were more than that. And that may be what your investigation shows, but I can promise you there were more than that. But at the same time, I think it's important that we go ahead and move expeditiously to try to do this and resolve it as quickly as we possibly can. And if that's the good next step. Hopefully we can, uh we can finish this phone call and go ahead and agree that the two of you will get together immediately.

**Trump:** Well why don't my lawyers show you where you got the information. It will show the secretary of state, and you don't even have to look at any names. We don't want names. We don't care. But we got that information from you. And Stacey Abrams is laughing about you know she's going around saying these guys are dumber than a rock. What she's done to this party is unbelievable, I tell ya. And I only ran against her once. And that was with a guy named Brian Kemp and I beat her. And if I didn't run, Brian wouldn't have had even a shot, either in the general or in the primary. He was dead, dead as a doornail. He never thought he had a shot at either one of them. What a schmuck I was. But that's the way it is. That's the way it is. I would like you...for the attorneys...I'd like you to perhaps meet with Ryan ideally tomorrow, because I think we should come to a resolution of this before the election. Otherwise you're going to have people just not voting. They don't want to vote. They hate the state, they hate the governor and they hate the secretary of state. I will tell you that right now. The only people like you are people that will never vote for you. You know that Brad, right? They like you know, they like you. They can't believe what they found. They want people like you. So, look, can you get together tomorrow? And Brad. We just want the truth. It's simple. And everyone's going to look very good if the truth comes out. It's OK. It takes a little while but let the truth come out. And the real truth is I won by 400,000 votes. At least. That's the real truth. But we don't need 400,000. We need less than 2,000 votes. And are you guys able to meet tomorrow Ryan?

**Germany:** Um, I'll get with Chris, the lawyer representing us and the case, and see when he can get together with Kurt.

**Raffensperger:** Ryan will be in touch with the other attorney on this call, Mr. Meadows. Thank you President Trump for your time.

**Trump:** OK, thank you, Brad. Thank you, Ryan. Thank you. Thank you, everybody. Thank you very much. Bye.

## APPENDIX E: False Electoral Certificate Documentation for Georgia

*On March 2, 2021, American Oversight released copies of the seven false electoral slates (from Arizona, Georgia, Michigan, New Mexico, Nevada, Pennsylvania, and Wisconsin, respectively) submitted to Congress ahead of its joint session on January 6, 2021. The below documents, extracted from the records published by American Oversight, reveal the false electoral slate from Georgia and its accompanying paperwork.*

David J. Shafer

Chairman, Georgia Republican Party

Chairman, Electoral College of Georgia

### MEMORANDUM

TO: President of the Senate (By Registered Mail)  
United States Senate  
Washington, D.C. 20510

Archivist of the United States (By Registered Mail)  
700 Pennsylvania Avenue, NW  
Washington, DC 20408

Secretary of State (By Certified Mail)  
State of Georgia  
214 State Capitol  
Atlanta, GA 30334

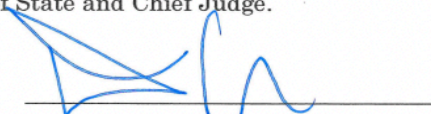
Chief Judge, U.S. District Court (By Certified Mail)  
Northern District of Georgia  
2188 Richard D. Russell Federal  
Office Building and U.S. Courthouse  
75 Ted Turner Drive, SW  
Atlanta, GA 30303

FROM: David J. Shafer, Chairperson, Electoral College of Georgia

DATE: December 14, 2020

RE: Georgia's Electoral Votes for President and Vice President

Pursuant to 3 U.S.C. § 11, enclosed please find duplicate originals of Georgia's electoral votes for President and Vice President, as follows: two (2) duplicate originals for the President of the Senate and the Archivist, and one (1) duplicate original for the Secretary of State and Chief Judge.



David J. Shafer

STATE OF GEORGIA  
COUNTY OF FULTON

**CERTIFICATE OF THE VOTES OF THE  
2020 ELECTORS FROM GEORGIA**

\*\*\*\*\*

WE, THE UNDERSIGNED, being the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Georgia, do hereby certify the following:

- (A) That we convened and organized at the State Capitol, in the City of Atlanta, County of Fulton, Georgia, at 12:00 noon on the 14th day of December, 2020, to perform the duties enjoined upon us;
- (B) That David J. Shafer presided and Shawn Still served as Secretary for the meeting.
- (C) That the undersigned 2020 Electors from the State of Georgia cast each of their respective ballots for President of the United States of America, as follows:

**FOR DONALD J. TRUMP – 16 VOTES**

JOSEPH BRANNAN  
JAMES "KEN" CARROLL  
VIKKI TOWNSEND CONSIGLIO  
CAROLYN HALL FISHER  
HON BURT JONES  
GLORIA KAY GODWIN  
DAVID G. HANNA  
MARK W. HENNESSY  
MARK AMICK  
JOHN DOWNEY  
CATHLEEN ALSTON LATHAM  
DARYL MOODY  
BRAD CARVER  
DAVID SHAFER

SHAWN STILL

C.B. YADAV

(D) That the undersigned 2020 Electors from the State of Georgia cast each of their respective ballots for Vice President of the United States of America, as follows

**FOR MICHAEL R. PENCE – 16 VOTES**

JOSEPH BRANNAN

JAMES "KEN" CARROLL

VIKKI TOWNSEND CONSIGLIO

CAROLYN HALL FISHER

HON BURT JONES

GLORIA KAY GODWIN

DAVID G. HANNA

MARK W. HENNESSY

MARK AMICK

JOHN DOWNEY

CATHLEEN ALSTON LATHAM

DARYL MOODY


BRAD CARVER

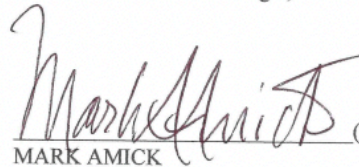
DAVID SHAFER

SHAWN STILL

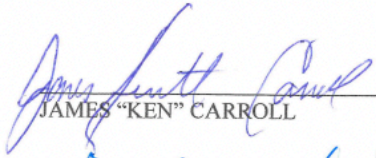
C.B. YADAV

Witness the hands and seals of the undersigned as the duly elected and qualified Electors of the President and Vice President of the United States of America from the State of Georgia, this 14th day of December, 2020.

 (SEAL)  
JOSEPH BRANNAN

 (SEAL)  
MARK AMICK

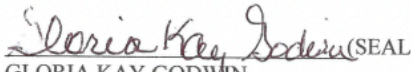


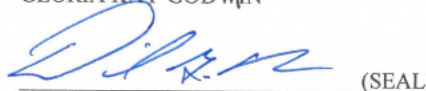
 (SEAL)  
JAMES "KEN" CARROLL

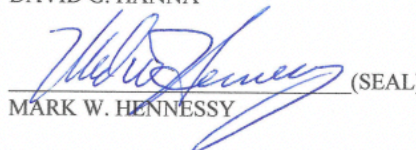
 (SEAL)  
VIKKI TOWNSEND CONSIGLIO

 (SEAL)  
CAROLYN HALL FISHER

 (SEAL)  
JOHN DOWNEY

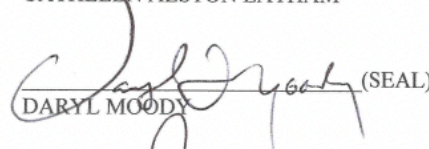
 (SEAL)  
GLORIA KAY GODWIN

 (SEAL)  
DAVID G. HANNA

 (SEAL)  
MARK W. HENNESSY

 (SEAL)  
BRAD CARVER

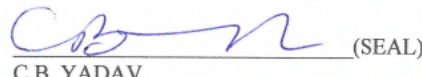
 (SEAL)  
CATHLEEN ALSTON LATHAM

 (SEAL)  
DARYL MOODY

 (SEAL)  
BURT JONES

 (SEAL)  
DAVID SHAFER

 (SEAL)  
SHAWN STILL

 (SEAL)  
C.B. YADAV

December 14, 2020

**VIA HAND DELIVERY**

The Honorable Brian P. Kemp  
Governor, State of Georgia  
206 Washington Street  
111 State Capitol  
Atlanta, GA 30334

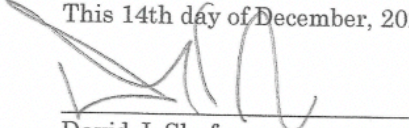
**RE: Notice of Filling of Electoral College Vacancy**

Dear Governor Kemp,


In accordance with O.C.G.A. § 21-2-12, I hereby give you notice of the following:

1. On December 14, 2020, 12 of the 16 electors pledged to Donald J. Trump for President and Michael R. Pence for Vice President assembled in accordance with O.C.G.A. § 21-2-11;
2. 4 electors, John A Isakson, Patrick Garland, Cj Pearson, Susan Holmes did not appear at the time appointed by law;
3. The Electors present proceeded to fill those vacancies;
4. The Electors elected by unanimous voice vote, Brad Carver, Mark Amick, John Downey, Burt Jones persons of the same political party as the absent Electors;
5. As the presiding officer of the Georgia Electoral College, I am immediately transmitting their names to you, and ask that you notify them in writing of their election as a Presidential Elector to fill the vacant Elector positions, and of their duty to perform, along with the other Electors, the duties required of them by the Constitution and laws of the United States.

This 14th day of December, 2020.

  
David J. Shafer  
Chairman, 2020 Georgia  
Electoral College Meeting

Attest:

  
Shawn Still  
Secretary, 2020 Georgia  
Electoral College Meeting

**CERTIFICATE OF FILLING VACANCY  
OF THE 2020 ELECTORS FROM GEORGIA**

\*\*\*\*\*

Upon the call of the roll, a vacancy became known due to the absence of  
Elector

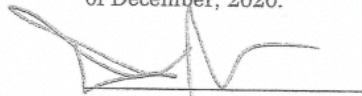
**John A. Isakson**

Thereupon, by nomination duly made and seconded,

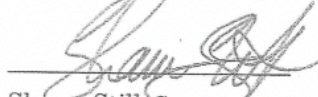
**John Downey**

Was elected by the Electors present, as an Elector of President and Vice President of the  
United States of America for the State of Georgia to fill the vacancy in the manner provided  
by law. This Elector participated in the proceedings as set forth in the record of the  
Electoral College.

IN WITNESS WHEREOF, the undersigned  
Chairperson and Secretary of the  
Electoral College of Georgia hereunto  
Subscribe their names this 14th day  
of December, 2020.



David J. Shafer, Chairperson



Shawn Still, Secretary

**CERTIFICATE OF FILLING VACANCY  
OF THE 2020 ELECTORS FROM GEORGIA**

\*\*\*\*\*

Upon the call of the roll, a vacancy became known due to the absence of  
Elector

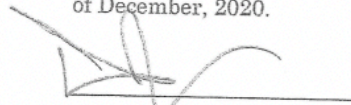
**Susan Holmes**

Thereupon, by nomination duly made and seconded,

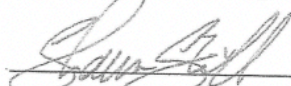
**Brad Carver**

Was elected by the Electors present, as an Elector of President and Vice President of the  
United States of America for the State of Georgia to fill the vacancy in the manner provided  
by law. This Elector participated in the proceedings as set forth in the record of the  
Electoral College.

IN WITNESS WHEREOF, the undersigned  
Chairperson and Secretary of the  
Electoral College of Georgia hereunto  
Subscribe their names this 14th day  
of December, 2020.



David J. Shafer, Chairperson



Shawn Still, Secretary

**CERTIFICATE OF FILLING VACANCY  
OF THE 2020 ELECTORS FROM GEORGIA**

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Upon the call of the roll, a vacancy became known due to the absence of  
Elector

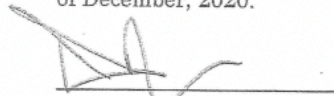
**Patrick Gartland**

Thereupon, by nomination duly made and seconded,

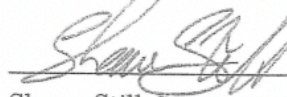
**Mark Amick**

Was elected by the Electors present, as an Elector of President and Vice President of the  
United States of America for the State of Georgia to fill the vacancy in the manner provided  
by law. This Elector participated in the proceedings as set forth in the record of the  
Electoral College.

**IN WITNESS WHEREOF**, the undersigned  
Chairperson and Secretary of the  
Electoral College of Georgia hereunto  
Subscribe their names this 14th day  
of December, 2020.



David J. Shafer, Chairperson



Shawn Still, Secretary

**CERTIFICATE OF FILLING VACANCY  
OF THE 2020 ELECTORS FROM GEORGIA**

\*\*\*\*\*

Upon the call of the roll, a vacancy became known due to the absence of  
Elector

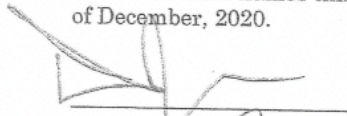
**CJ Pearson**

Thereupon, by nomination duly made and seconded,

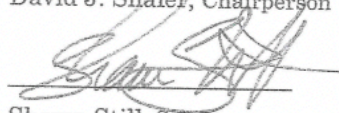
**Hon. Burt Jones**

Was elected by the Electors present, as an Elector of President and Vice President of the United States of America for the State of Georgia to fill the vacancy in the manner provided by law. This Elector participated in the proceedings as set forth in the record of the Electoral College.

IN WITNESS WHEREOF, the undersigned  
Chairperson and Secretary of the  
Electoral College of Georgia hereunto  
Subscribe their names this 14th day  
of December, 2020.



David J. Shafer, Chairperson



Shawn Still, Secretary

December 14, 2020

I, Brian P. Kemp, Governor of the State of Georgia, in accordance with O.C.G.A. § 21-2-12, hereby give notice of the following to \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_ [names of the substituted electors]:

1. On December 14, 2020, \_\_\_\_ of the 16 electors pledged to Donald J. Trump for President and Michael R. Pence for Vice President assembled in accordance with O.C.G.A. § 21-2-11;

2. \_\_\_\_ electors, \_\_\_\_\_ [name], \_\_\_\_\_ [name], and \_\_\_\_\_ name . . . [etc.], did not appear at the time appointed by law;

3. The Electors present then proceeded to fill the vacancies;

4. The Electors elected by unanimous voice vote, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, persons of the same political party as the absent Electors;

5. Immediately following that vote of the Electors, David Shafer, the presiding officer of the Electors, transmitted the names of the substitute Electors to me;

6. By this Certificate, I am hereby notifying \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_ of their election to fill the vacant Elector positions.

Witness my hand and seal of  
of my office this 14th day of  
December, 2020.

\_\_\_\_\_  
Brian P. Kemp, Governor

