GILLEN WITHERS & LAKE LLC

ATTORNEYS AT LAW

CRAIG A. GILLEN

400 GALLERIA PARKWAY
SUITE 1920
ATLANTA, GEORGIA 30339
TELEPHONE: (404) 842-9700
TELECOPIER: (404) 842-9750
E-MAIL: cgillen@gwllawfirm.com

WEBSITE: gwllaw.com

SAVANNAH OFFICE:

8 EAST LIBERTY STREET
SAVANNAH, GEORGIA 31401
TELEPHONE: (912) 447-8400
TELECOPIER: (912) 233-6584

July 18, 2023

Via United States mail and electronic mail to fani.willisda@fultoncountyga.gov

Fani T. Willis
District Attorney for Fulton County, Georgia
Fulton County District Attorney's Office
136 Pryor Street, S.W.
Third Floor
Atlanta, Georgia 30303

Re: Renewed Request for Meeting or Conference Regarding Mr. David Shafer/First, Fifth and Fourteenth Amendment Bars to Criminal Prosecutions in Georgia/Due Process and Jurisdictional Issues

Dear Madam District Attorney:

We write you once again to ask that you spare some time at your earliest convenience to have a brief meeting or a remote conference with us to discuss our client, Mr. David Shafer, the immediate past State Chairman of the Georgia Republican Party. We made our first request for a meeting on December 23, 2022, and renewed it on January 3, 2023; February 24, 2023; and March 26, 2023. Although you have not specified a "target offense" or suggested any statute that our client may have violated, you have indicated he is a "target" of your investigation. In our experience, meetings are routinely held between prosecutors and the counsel for targets of their investigations because they are an important opportunity to exchange critical information that is beneficial to both parties and, in some cases, can help avoid a wrongful prosecution. We understand that your office has had such meetings with other targets of this investigation, and we respectfully again request the courtesy of such a meeting before you make final decisions with regard to Mr. Shafer.

While we await such a meeting, we wish to supplement the information we provided to you in our March 26, 2023 letter with additional, material information that we believe is important for you and your team to consider. This letter outlines United States and Georgia Constitutional authority, as well as significant jurisdictional limitations, that make clear that the entirety of Mr. Shafer's conduct in relation to the 2020 presidential election in the State of Georgia, including his role as a co-plaintiff in the legal action, *Trump et al. v. Raffensperger et al.*, case number 2020CV343255, in the

Superior Court of Fulton County, State of Georgia, is constitutionally protected and that any attempted prosecution of this conduct would be wrongful.[1]

Enclosed for your consideration is the Expert Declaration of Professor Todd Zywicki (Zywicki Decl.), a law professor at George Mason University and a widely recognized scholar on Presidential transitions. Professor Zywicki's expert Declaration confirms the legality of the casting of contingent electoral votes when a judicial contest has been filed under the Georgia Election Code and has not been decided as of the date that the federal Electoral Count Act ("ECA") requires the Presidential electors to meet and cast their votes. Professor Zywicki also specifically addresses and explains the reasonableness, propriety and lawfulness of the actions taken by our client and the other contingent Republican Presidential elector nominees in Georgia.

Professor Zywicki concludes that both state and federal law anticipate and permit the actions of the Republican Presidential elector nominees and that their actions, therefore, were "lawful, reasonable, proper, and necessary, and any suggestion that they could be 'criminal' ignores legal and historical precedent, the reasoned advice of legal counsel received, and the plain language of the Constitution, federal and Georgia law."[2] *See* Zywicki Decl. ¶ 30. Professor Zywicki furthermore explains that the casting of contingent electoral votes "is not only reasonable, proper and lawful, but the best approach available to enable the resolution of election contests while preserving the ability of a state to have its electoral votes counted by Congress should a (pending) judicial contest change the outcome of the election." *Id.*

It is important to understand, as Professor Zywicki explains in his expert Declaration, that Mr. Shafer and the other Republican presidential elector nominees were contingent Presidential electors by operation of law according to the plain language of the Georgia Election Code. Their lawful actions were specifically contemplated by the ECA, fully protected by the Constitution, entirely consistent with specifically applicable Georgia law, and wholly consistent with legal and historical precedent. Indeed, at no time before the 2020 presidential election did any court, prosecutor, scholar or political figure suggest that such actions could even be considered improper, much less unlawful. Instead, as Professor Zywicki points out, up to and even during the 2020 election, political leaders, legal scholars, and even members of the Supreme Court lauded the practice of both sets of presidential electors executing their ballots in a challenged close election as essentially the "gold standard." The legality and advisability of this conduct has consistently been touted since at least 1960, and the applicable constitutional and statutory provisions did not suddenly change in 2020 (or retroactively change in 2021).

It is also important not to conflate the activities regarding other states with what occurred in Georgia. According to the January 6th Select Committee report, after the December 11, 2020 Supreme Court rejection of the lawsuit filed by Texas challenging the

[1] This letter is not and is not intended to be an exhaustive list or analysis of all of the relevant factual and legal points related to Mr. Shafer.

[2] As Professor Zywicki's Declaration makes clear, actions that are specifically required or permitted by federal law, such as the ECA, cannot be criminalized under state law.

election results in Pennsylvania, Georgia, Michigan and Wisconsin, the Trump Campaign senior legal staffers reduced their involvement in planning for the contingent elector meetings.

Justin Clark, who served as Senior Counsel to the Trump Campaign, testified that he warned his colleagues that "unless we have litigation pending like in these states, like I don't think this is appropriate or, you know, this isn't the right thing to do." Select Committee to Investigate the January 6th Attack on the United States Capitol, Transcript interview of Justin Clark, pp. 116, 118 (May 17, 2022). On that point we agree with Mr. Clark: Mr. Shafer's Georgia litigation was filed on December 4, 2020, was pending on December 14, 2020, and the actions of Mr. Shafer to preserve remedies under that pending litigation were wholly appropriate.[3]

Additionally, the entirety of our client's conduct was protected by the First Amendment, which, as set forth at length below, guaranteed him freedom of speech, press, peaceable assembly and *to petition the government for a redress of grievances.* The election contest which Mr. Shafer filed on December 4, 2020 was a "petition to the government for a redress of grievances." The meeting of the Republican Presidential elector nominees on December 14, 2020 was a "peaceable assembly" to preserve the "redress" requested in his petition, as advised by legal counsel who had prepared the petition. And, under the Constitution and the ECA, the December 14, 2020 meeting and execution of contingent electoral ballots was also a "petition" to the government, specifically Congress, which is the only governmental authority empowered to adjudicate and count electoral ballots from any State. Any attempt to punish our client for engaging in these protected activities would violate the United States and Georgia Constitutions, as well as unambiguous federal and state law.

I. Mr. Shafer's Actions Are Protected Under The United States and Georgia Constitutions

A. First, Fifth, and Fourteenth Amendments and Relevant Freedoms and Rights

The First Amendment provides, in relevant part, that "Congress shall make no law... abridging the freedom of speech... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I.[4] "The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances." *Smith v. Arkansas State Highway Emp., Loc. 1315*, 441 U.S. 463, 464 (1979). The provisions of the

[3] Media outlets have conflated those states with "litigation pending" and those states without "litigation pending."

[4] The Georgia Constitution similarly provides that "[n]o law shall be passed to curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty." Ga. Const. Art. I, § 1, ¶ V. The Supreme Court of Georgia has held that this free speech provision provides *even broader protection of speech* than the First Amendment. *See Statesboro Pub. Co. v. City of Sylvania*, 271 Ga. 92, 95 (1999) (citing *State v. Miller*, 260 Ga. 669, 671 (1990)).

First Amendment are made applicable to the States by the Fourteenth Amendment. *See Manhattan Cmty. Access Corp. v. Halleck*, --- U.S. ---, 139 S. Ct. 1921, 1928 (2019) (quoting U.S. Const. Amend. XIV).

The Fifth Amendment states, in pertinent part, that "No person shall... be deprived of life, liberty, or property, without due process of law..." U.S. Const. Amend. V. The Fourteenth Amendment similarly provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV § 1. The Georgia Constitution's Bill of Rights likewise contains a provision that "No person shall be deprived of life, liberty, or property except by due process of law." Ga. Const. art. I, § 1, ¶ I.

B. The Right to Petition the Government and Right to Access to the Courts

"[T]he rights to assemble peaceably and to petition for a redress or grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press. All these, though not identical, are inseparable." *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222, 88 S. Ct. 353, 356, 19 L. Ed. 2d 426 (1967). The Petition Clause of the First Amendment "protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387 (2011). "The right of access to the courts is... one aspect of the right of petition." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (citing *Johnson v. Avery*, 393 U.S. 483, 485 (1972); *Ex parte Hull*, 312 U.S. 546, 549 (1941)). The right to petition and to access to the courts constitute "an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482 (1985).

But the Right to Petition is not limited to petitioning through the judicial system; indeed, it extends to "all departments of the Government." *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L.Ed.2d 642 (1972); *see also Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 452–53, 83 S. Ct. 328, 348, 9 L. Ed. 2d 405 (1963) ("Freedom of expression embraces more than the right of an individual to speak his mind. It includes also his right to advocate and his right to join with his fellows in an effort to make that advocacy effective. *And just as it includes the right jointly to petition the legislature for redress of grievances*, so it must include *the right to join together for purposes of obtaining judicial redress.*") (internal citations omitted) (emphasis added). The right to petition under the Georgia Constitution is equally broad: "The people have the right to assemble peaceably for their common good and to apply by petition or *remonstrance to those vested with the powers of government for redress of grievances.*" Ga.. Const. art. I, § I, ¶ IX (emphasis added); *cf. Denton v. Browns Mill Dev. Co.*, 275 Ga. 2, 5, 561 S.E.2d 431, 433–34 (2002) (noting that under O.C.G.A. § 9-11-11.1(c), an "act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public

interest or concern" includes any written or oral statement, writing, or petition made before or to a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, or any written or oral statement, writing, or petition made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.")

Political activity lies at the heart of the Petition Clause's protections. The right to petition is protected, even though petitions "may seek to achieve results that 'contravene governmental policies or impair the proper performance of governmental functions.'" *Id.* at 389 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006)). "Individuals may... 'engag[e] in litigation as a vehicle for effective political expression and association...'" *Borough of Duryea, Pa.*, 564 U.S. at 397 (quoting *In re Primus*, 436 U.S. 412, 431 (1978)). As the U.S. Supreme Court has recognized:

> The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 [ ] (1943). This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *Ibid.*

Obergefell v. Hodges, 576 U.S. 644, 677 (2015). Citizens possess a right "'through the political process, [to] act in concert to try to shape the course of their own times.'" *Id.* (quoting *Schuette v. BAMN*, 572 U.S. ---, 134 S. Ct. 1623, 1636-1637 (2014)).

The Georgia Constitution affords its citizens even broader speech protections than the U.S. Constitution, *See Statesboro Pub. Co.*, 271 Ga. at 95 ("Our state constitution provides even broader protection of speech than the first amendment.") (citing *State v. Miller*, 260 Ga. 669, 671 (1990)); *cf.* O.C.G.A. § 9-11-11.1(a) ("The General Assembly of Georgia finds and declares that it is in the public interest to encourage participation by the citizens of Georgia in matters of public significance and public interest through the exercise of their constitutional rights of petition and freedom of speech. The General Assembly of Georgia further finds and declares that the valid exercise of the constitutional rights of petition and freedom of speech should not be chilled through abuse of the judicial process.") As the Georgia Court of Appeals has held that:

> The constitution of this [S]tate guarantees to all persons due process of law and unfettered access to the courts of this [S]tate. These fundamental constitutional rights require that every party to a lawsuit be afforded the opportunity to be heard and to present his claim or defense, i.e., to have his day in court.

Thomas v. Johnson, 329 Ga. App. 601, 604 (2014). As with the federal constitution, the Georgia Constitution protects the right to petition all aspects of government, not just the judiciary. *Richter v. Harris*, 62 Ga. App. 64, 7 S.E.2d 432, 433 (1940) ("[E]very citizen of this State is given a constitutional right to petition to those vested with the powers of government for redress of grievances[.]); *see also* Ga.. Const. art. I, § I, ¶ IX.

C. The Right to Freedom of Speech and Expressive or Symbolic Conduct

The United States Supreme Court has recognized that the purpose of the right to freedom of speech is "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Lane v. Franks*, 573 U.S. 228, 235-236 (2014) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). As with the right to petition and to access to the courts, political activity falls at the very core of the protection of the right to free speech. The right is "is essential to our democratic form of government..." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, --- U.S. ---, 138 S. Ct. 2448, 2463 (2018) (citing *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)). A major purpose of the First Amendment "was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.'" *Brown v. Hartlage*, 456 U.S. 45, 52-53 (1982) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271–272 (1971)). Pursuant to these purposes, the right to freedom of speech "'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Fed. Election Comm'n v. Cruz*, --- U.S. ---, 142 S. Ct. 1638, 1650 (2022) (quoting *Monitor Patriot Co.*, 401 U. S. at 272). *Accord Equity Prime Mortg. v. Greene for Cong., Inc.*, 366 Ga. App. 207, 214 (2022) (quoting *Eu v. San Francisco County Democratic Central Committee*, 489 U. S. 214, 223 (1989)).

Concerning retaliation and/or punishment for exercising the right to free speech, the U.S. Supreme Court has stated that:

> Official reprisal for protected speech "offends the Constitution [because] it threatens to inhibit exercise of the protected right," *Crawford–El v. Britton*, 523 U.S. 574, 588, n. 10 [ ] (1998), and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out, *id.*, at 592 [ ]; *see also Perry v. Sindermann*, 408 U.S. 593, 597 [ ] (1972)...

Hartman v. Moore, 547 U.S. 250, 256 (2006). "The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views." *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963). Accordingly, "where an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a 'clear and present danger' of attempting or accomplishing the prohibited crime." *Dennis v. United States*, 341 U.S. 494, 505 (1951).

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.

Id. (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)). "[A]n 'undifferentiated fear or apprehension of disturbance... is not enough to overcome the right to freedom of expression.'" *Cohen v. California*, 403 U.S. 15, 23 (1971) (quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969)).

In addition to speech, the First Amendment "affords protection to symbolic or expressive conduct as well as to actual speech." *Virginia v. Black*, 538 U.S. 343, 358 (2003) (citing *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992); *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *United States v. O'Brien*, 391 U.S. 367, 376–377 (1968); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505 (1969)). *See also State v. Fielden*, 280 Ga. 444, 445 (2006) (finding that conduct falls within the protection of the First Amendment "when it has some communicative element...") (citing *State v. Miller*, 260 Ga. 669, 671 (1990)).

D. The Right to Freedom of Association

The right to associate with others is implicit in the right to engage in activities protected by the First Amendment. *See Americans for Prosperity Found. v. Bonta*, --- U.S. ---, 141 S. Ct. 2373, 2382 (2021) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). The right of association "protects the right of citizens 'to band together in promoting among the electorate candidates who espouse their political views.'" *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (quoting *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000)). Freedom of association "tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change," *Gilmore v. City of Montgomery, Ala.*, 417 U.S. 556, 575 (1974); and is important "'in shielding dissident expression from suppression by the majority.'" *Americans for Prosperity Found.*, at 2382 (quoting *Roberts*, at 622). It "encompasses a political party's decisions about the identity of, and the process for electing, its leaders." *Eu*, 489 U. S. at 229 (citing *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *Cousins v. Wigoda*, 419 U.S. 477 (1975); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 235-236 (1986)).[5] "An association must merely engage in expressive activity that could be impaired in order to be entitled to protection." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000).

[5] "'Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.'" *Tashjian*, 479 U.S. at 215 (quoting *Democratic Party of United States*, 450 U.S. at 122; *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

As stated by the U.S. Supreme Court:

> In [*De Jonge v. Oregon*, 299 U.S. 353 (1937)] this Court held that "consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime.' And 'those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge."

Thomas v. Collins, 323 U.S. 516, 539–540 (1945) (quoting *De Jonge*, at 365). "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government." *Herndon v. Lowry*, 301 U.S. 242, 259 (1937).

E. The Due Process Right to Fair Warning

Due process requires that a criminal statute must give "'fair warning ... in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.'" *United States v. Lanier*, 520 U.S. 259, 265 (1997) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). The rule is based upon the principle that "'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *Id.* (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) *quoting United States v. Harriss*, 347 U.S. 612, 617 (1954)). "'All are entitled to be informed as to what the State commands or forbids.'" *Bouie*, at 351 (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)); *accord Johnson v. Athens-Clarke Cnty.*, 272 Ga. 384, 385 (2000) (quoting *Hall v. State*, 268 Ga. 89, 92 (1997)).

In addition to the right to fair warning, the rule of lenity requires, that "'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *Bittner v. United States*, --- U.S. ---, 143 S. Ct. 713, 725 (2023) (quoting *McBoyle*, at 27; citing *Connally v. General Constr. Co.*, 269 U.S. 385, 393 (1926); *Wooden* v. *United States*, 595 U. S. ---,142 S. Ct. 1063, 1081-1084 (2022) (Gorsuch, J., concurring in judgment)).

Violation of the right to fair warning is not limited to criminal statutes which are vague or ambiguous. *"[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has*

fairly disclosed to be within its scope..." *Lanier*, 520 U.S. at 266 (citing *Marks v. United States*, 430 U.S. 188, 191–192 (1977); *Rabe v. Washington*, 405 U.S. 313 (1972) (*per curiam*) (emphasis added); *Bouie v. City of Columbia*, 378 U.S. 347, 353-354 (1964)).

> When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' as in *Lanzetta*, or to 'guess at (the statute's) meaning and differ as to its application,' as in *Connally*, the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question.

Bouie, 378 U.S. at 352. And as the Court recognized in another case:

> [W]here a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence or on the other hand may be said or done with a purpose violently to subvert government, a conviction under such a law cannot be sustained.

Herndon, 301 U.S. at 259.

Similar to the foregoing U.S. Supreme Court authorities, the Supreme Court of Georgia has recognized that:

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

Pitts v. State, 293 Ga. 511, 514 (2013) (citing *Braley v. City of Forest Park*, 286 Ga. 760, 762 (2010); *Santos v. State*, 284 Ga. 514, 514–515 (2008)). "'[D]ue process requires that criminal statutes give sufficient warning to enable individuals to conform their conduct to avoid that which is forbidden...'" *Johnson*, 272 Ga. at 385 (quoting *Hall*, 268 Ga. at 92). "Sufficient warning" means "'fair notice' that by engaging in such conduct, one will be held criminally responsible.'" *Id.* (quoting *Hall*, at 92). A law may be unconstitutionally vague not only where its provisions are ambiguous, but also "if it 'impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.'" *Thelen v. State*, 272 Ga. 81, 82 (2000) (citing *Satterfield v. State*, 260 Ga.

427, 428 (1990); *Hall*, 268 Ga. at 93; *Bullock v. City of Dallas*, 248 Ga. 164, 166 (1981); *Dupres v. City of Newport*, 978 F. Supp. 429, 433 (D.R.I. 1997)).

F. Application of Constitutional Provisions to Mr. Shafer's Actions

As established above, political speech and political activities are at the heart of the First Amendment and, as such, are the most stringently safeguarded by the courts. Mr. Shafer had the unassailable constitutional right under both the United States and Georgia Constitutions to engage in political speech, assembly, association, and to petition his Government. His actions in petitioning the Fulton County Superior Court regarding the 2020 Presidential election, in taking the necessary actions to preserve that constitutionally protected challenge, and in petitioning Congress through the execution of his contingent presidential elector duties are all constitutionally protected under numerous provisions of the First Amendment and the Georgia Constitution's equivalent. Had Mr. Shafer not followed the explicit directions of his counsel (See Exhibit A to our March 26, 2023 letter) that he and the other Republican contingent presidential electors meet on December 14, 2020 as required by federal law and "act and vote in the exact manner as if Governor Kemp [had] certified the Presidential contest in favor of President Trump", the December 4, 2020 Trump/Shafer lawsuit challenging the Georgia presidential results would have been rendered moot, effectively compelling Mr. Shafer to waive his First Amendment rights. Such actions are not and cannot be criminal or criminalized, and any attempt to do so is a direct assault on these most highly protected constitutional freedoms.

Additionally, due process guarantees under the U.S. and Georgia Constitutions strictly prohibit the criminal prosecution of any citizen when there has been no fair notice that their actions could be criminal. Here, because Mr. Shafer's actions are expressly protected by the Constitution and permitted by federal and Georgia law, *see e.g., infra* and Zywicki Declaration, there certainly was no "fair notice" that his actions could be considered criminal. In fact, the only on-point precedent for this exact situation, the 1960 Hawaii presidential election (discussed in detail in our prior submissions to your office and in Professor Zywicki's Declaration), overtly stands for the *opposite* proposition: that Mr. Shafer and the other presidential electors' conduct was expressly legal. And, indeed, as previously disclosed, very experienced and reputable attorneys provided explicit legal advice to Mr. Shafer and the other electors that, based on the existing law and the Hawaii precedent, their actions were entirely proper and lawful. Under these circumstances, any criminal charge against Mr. Shafer would not only violate his fundamental First Amendment rights, but it would also be the type of disfavored "novel theory" of prosecution that directly violates his state and federal due process guarantees.

G. "As Applied" Invalidation of Criminal Statutes and Defenses to Criminal Prosecutions

The U.S. Supreme Court has held that "a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). Stated

otherwise, "a 'statute may be invalid as applied to one state of facts and yet valid as applied to another.'" *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (quoting *Dahnke–Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289 (1921)).

"As applied" constitutional challenges to criminal prosecutions have been successfully raised in defense to criminal proceedings in Georgia and elsewhere. *See Bouie*, 378 U.S. at 355 (finding that that South Carolina's criminal trespass statute did not give the petitioners fair warning "at the time of their conduct... that the act for which they now stand convicted was rendered criminal by the statute"); *Hall*, 268 Ga. at 89, 90, 95 (holding that the trial court erred in denying the defendant's motion to quash accusations against her under the Georgia Reckless Conduct Statute where the statute did not provide the defendant with fair notice that she could be held criminally responsible for leaving children in the care of another child, failed to provide explicit standards for those applying it and was, therefore, susceptible to arbitrary and selective enforcement); *Santos*, 284 Ga. at 514, 517 (finding that a sex offender registration requirement could not be enforced against the defendant and reversing the judgment of the trial court where the statute "d[id] not provide fair warning to persons of ordinary intelligence as to what is required to comply with the statute, and therefore, the registration requirement as applied to [the defendant] [wa]s unconstitutionally vague"); *Perkins v. State*, 277 Ga. 323, 326 (2003) (concluding that the trial court erred in denying the defendant's motion to dismiss the accusation against the defendant, observing that "[a]pplying the applicable constitutional principles to the facts of this case, [the statute] did not provide [the defendant] with fair notice that he could be held criminally responsible for acting as a bail recovery agent in Fulton County if he failed to renew his registration in that county").

H. The State's Lack of Jurisdiction to Prosecute Presidential Electors for Executing Ballots and Allowing Them to be Sent to Congress

Under the Supremacy Clause, a State has *no jurisdiction* to criminalize actions (such as the casting of or determination of the validity of presidential electoral ballots) that are taken pursuant to federal constitutional and statutory authority and are inseparably connected to the functioning of the National Government. When a State attempts to do so, federal courts are empowered to enjoin such abuses. *See, e.g., In re Loney,* 134 U.S. 372,375 (1890);[6] *see also Braden v. 30th Jud. Cir. Ct. of Kentucky,*

[6] Loney was arrested and held in custody by the state authorities under a charge of perjury committed in giving his deposition as a witness before a Virginia notary public, in the case of a contested election of a member of Congress. The intended effect of Loney's arrest by the State of Virginia was to embarrass one of the parties in the contested Congressional election, to impede him in obtaining evidence on his behalf, to intimidate witnesses he might wish to present, and to delay or disrupt the preparation of the case for final determination by Congress. The Supreme Court affirmed the issuance of the writ releasing him from state custody, stating as follows:

> It is essential to the impartial and efficient administration of justice in the tribunals of the nation that witnesses should be able to testify freely before them, unrestrained by legislation of the state, or by fear of punishment in the state courts. *The administration of justice in the national tribunals would be greatly embarrassed and impeded if a witness testifying* before a court of the United States, *or upon a contested election* of a member of congress, *were liable to prosecution and punishment in the*

410 U.S. 484, 507-08 (1973) ("The situations in which pretrial or preconviction federal interference by way of habeas corpus with state criminal processes is justified involve *the lack of jurisdiction, under the Supremacy Clause, for the State to bring any criminal charges against the petitioner.")* (citing *Wildenhus's Case,* 120 U.S. 1 (1887); *In re Loney,* 134 U.S. 372 (1890); and *In re Neagle,* 135 U.S. 1 (1890))[7] (emphasis added).

"While presidential electors are not officers or agents of the federal government, *they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States." Burroughs v. United States,* 290 U.S. 534, 545 (1934) (emphasis added). Indeed, presidential electors are created by the U.S. Constitution, not by state authority. *See* U.S. CONST. art. II, cl. 2; Amendment 12.[8] Further, the Twelfth Amendment commits exclusive authority to Congress to adjudicate and count the electoral votes of presidential electors. Specifically, the Electoral Count Act ("ECA") specifies that, when States fail to resolve disputes before January 6 (as the Georgia court here did), Congress is the sole body authorized to resolve remaining disputes about presidential electors, *including* when two slates of electors are submitted by a single state. *See* 3 U.S.C. §§ 5, 6, and 15.

Here, the dispute in the Georgia 2020 election about which slate of presidential electors were the proper ones was committed in the first instance to the state judiciary, which failed to timely act (or, in reality, to act at all) to resolve the dispute. While awaiting resolution of that judicial dispute, both sets of presidential electors then exercised the authority vested in them by the Constitutional and federal law to cast

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> *courts of the state upon a charge of perjury, preferred by a disappointed suitor or contestant, or instigated by local passion or prejudice.*

In re Loney, 134 U.S. at 375 (emphasis added). The Court concluded that "[t]he courts of Virginia having no jurisdiction of the matter of the charge on which the prisoner was arrested, and he being in custody, *in violation of the constitution and laws of the United States, for an act done in pursuance of those laws, by testifying in the case of a contested election of a member of congress,* law and justice required that he should be discharged from such custody. " *Id.* at 376-77.

[7] In *In re Neagle,* a deputy U.S. Marshal assigned to protect a federal judge killed an individual attempting to assassinate that judge. He was arrested by the State for homicide, and the federal district court issued a writ of habeas corpus requiring his release because the State had no jurisdiction to prosecute the Marshal who was exercising his federal duties under his federal authority.

[8] That section provides as follows:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

U.S. CONST. art. II, cl. 2. State legislatures are directed to create the manner of appointment of such electors, but their actions as presidential electors are born exclusively of federal authority and Congress has the *exclusive* authority to count and determine the validity of the presidential electoral ballots, including choosing between two "dueling" slates of electoral ballots from one state when the state has not resolved that dispute through its judicial process. *See* Amendment Xll and Electoral Count Act, 3 U.S.C. §§ 5, 6, and 15.

contingent presidential ballots. The responsibility at that point to receive, adjudicate, and count all presidential electoral ballots devolved entirely and solely to Congress, and only Congress had authority at that point to determine whether any submitted electoral slate or ballot from any State was valid or invalid.[9] State and local courts have no jurisdiction to interfere or attempt to interfere with the execution or submission of these electoral ballots to Congress or Congress' right and duty to adjudicate and count the valid ballots, especially by attempting to criminalize actions taken in furtherance of these exclusive federal duties. As such, States (and their local governments) have no jurisdiction or authority to attempt to utilize alleged state crimes to interfere with the exclusively federal process of executing and sending potential elector slates to Congress for it to adjudicate.

In short, even if Mr. Shafer's conduct were not expressly authorized by state and federal law and protected by the First Amendment of the United States Constitution and the even broader protections in the Georgia Constitution (which it is), the State simply lacks jurisdiction over his conduct (or the conduct of any other presidential elector) in connection with the exercise of federal duties that are inseparably connected to the functioning of the national government. Under the Supremacy Clause, jurisdiction lies exclusively with the federal government.[10]

It is our hope that you will make the time to discuss Mr. Shafer and these and other issues. Thank you for your attention to these matters.

Regards,

Craig A. Gillen
Holly A. Pierson
Anthony C. Lake

[9] Indeed, several court opinions and decisions have concluded that this power vested in Congress divests even federal courts from interfering with its exercise. *See, e.g. Bush v. Gore*,531 U.S. 98 (2000) (Breyer, J., dissenting) ("Given this detailed, comprehensive scheme [in the 12th Amendment and the Electoral Count Act] for counting electoral votes, *there is no reason to believe that federal law either foresees or requires resolution of such a political issue by this Court."); cf Hutchinson v. Miller,* 797 F.2d 1279, 1284 (4th Cir. 1986) ("Had the framers wished the federal judiciary to umpire election contests, they could have so provided. Instead, they reposed primary trust in popular representatives and in political correctives.").

[10] The United States House of Representatives critically examined the conduct of the contingent Republican Presidential electors in its investigation of the events of January 6, 2021, taking testimony from Mr. Shafer and others from Georgia regarding the electors meeting on December 14, 2020. In its referral to the United States Department of Justice, the House did not make reference to any of the actions of Mr. Shafer or the other contingent Republican electors or suggest that those actions warranted further investigation. Moreover, the Special Counsel investigating the referral has not taken any action against Mr. Shafer or named him a target of his investigation.