IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, Appellant vs. JAMES WALTER DEGRAFFENREID III, DURWARD JAMES HINDLE III, JESSE REED LAW, MICHAEL JAMES MCDONALD, SHAWN MICHAEL MEEHAN, AND EILEEN A. RICE, Respondents.	CASE NO.: 89064 **RESPONDENTS' JOINT RESPONSE TO STATE'S MOTION TO EXPEDITE**

I. INTRODUCTION

While it may raise important questions of prosecutorial conduct, this case is not—as the State claims in its Docketing Statement—one of first impression. Instead, the district court properly applied this Court's precedent and mandates—thoroughly set forth in *Guzman v. Second Judicial Dist. Court ("Guzman I")*, 136 Nev. 103 460 P.3d 443 (2020) and *Guzman v. Second Judicial Dist. Court ("Guzman II")*, 496 P.3d 572, 576 (Nev. 2021)—to determine that venue did not lie in the Eighth Judicial District. While the State contends that this Court should reverse the district court's straightforward application of case law, the political nature of the case should not, in fact, sway the Court.

Nor should the Court grant the State's Motion to Expedite Consideration (and Briefing) of this appeal (the "Motion" or "Mot."). While the State is free to file its Opening Brief as soon as it likes, there is no basis to expedite this appeal. First, even

if the district court had not dismissed the case, it would not have gone to trial until January 2025, after the 2024 election. While it is true that deterrence is one of the aims of criminal justice, it is convictions that punish, not reinstating indictments. Thus, the State's request that this Court expedite the appeal to send a message of retribution is improper.

Second, while the State suddenly wants to rush this case along, it waited over three years from the 2020 election to suddenly seek an indictment in December 2023, switching gears after the Attorney General himself publicly stated Respondents' alleged conduct was not criminal under existing Nevada law.[1] While the State may now wish to preserve other options to refile the forgery charge, its own continuing delays in this case are not a basis to rush this Court or to shorten the time Respondents have to respond to the State's Opening Brief.

II. RESPONSE TO PURPORTED FACTS

The underlying alleged facts regarding Respondents' conduct are not relevant.

---

[1] Last legislative session, Attorney General Ford testified in favor of a bill designed to make the conduct at issue illegal and create harsh punishments for it, publicly stating his view that existing law "did not directly address the conduct in question." *See* Jacob Solis and Gabby Birenbaum, *AG Ford: 'Nothing changed' ahead of decision to charge Nevada fake electors*, The Nevada Independent, December 12, 2023, https://thenevadaindependent.com/article/ag-ford-nothing-changed-ahead-of-decision-to-charge-nevada-fake-electors (last visited August 19, 2024). While Attorney General Ford later tried to downplay his prior concession that Respondents' acts were not criminal, as Respondents explained in their writ petitions below, the charges ultimately filed do not apply. Because the motion to dismiss and joinders thereto were granted, the district court did not rule on the writ petitions.

However, the State misrepresents several facts that require correction.

A. Kenneth Chesebro's Communications with Respondents.

The State alleges that Mr. Chesebro asked Mr. DeGraffenreid whether litigation was still pending in Nevada because in his view, the existence of pending litigation was the "only reason to cast alternate elector votes." (Mot., p. 5.) The State further alleges that Mr. Chesebro received no response to his inquiry. These statements are false—the State cites to the Grand Jury Transcripts to support these assertions; however, the State ignores that the extensive briefing in the pretrial petitions for writ of habeas corpus included exculpatory evidence—which the State failed to present to the Clark County Grand Jury—including the many statements of Mr. Chesebro explaining that pending litigation was not necessary for the rationale in submitting contingent elector ballots. The statements from Mr. Chesebro were learned by the State during a video proffer the State conducted with Mr. Chesebro. During the proffer, Mr. Chesebro described legal challenges taking place in Wisconsin, and explained a successful legal challenge in Wisconsin court in July, 2021, related to the 2020 Presidential election. (*See* **Exhibit A**, part 2, at 5:45.)

Mr. Chesebro explained that there was precedent for alternate electors voting, as this was the procedure that took place in Hawaii during the 1960 presidential election between Kennedy and Nixon. Mr. Chesebro discussed many times during the recorded proffer that he believed that the Trump campaign might have beyond

January 6th to win litigation based on a disagreement about the meaning of the 12th Amendment to the United States Constitution. He explained that the Senate could cause a test case to go to the United States Supreme Court that could cause a delay in the counting of the electoral votes. (*See, e.g.,* **Ex. A**, part 2 at 19:53; *id.* part 4, at 46:00.) Mr. Chesebro discussed his conversations with individuals from the Trump campaign including Justin Clark, Mike Roman, Boris Epshteyn, Rudy Giuliani, Josh Findlay, Judge Troupis, and Matt Morgan regarding Nevada and whether Nevada Republican electors should vote absent a current legal challenge; however, no Nevada electors were involved in these discussions, and Mr. Chesebro never informed the Nevada electors that they should not vote if there is no ongoing legal challenge. (*Id.*, part 2 at 43:00.) Mr. Chesebro discussed his response to an email about attorney Jesse Binnall's legal challenge in Nevada and wondered if he was "planning on filing a cert petition." (*Id.*, part 2 at 1:04.)

Likewise, an email from Mr. Chesebro dated December 11, 2020 (addressed to various members of the Trump campaign: Joshua Findlay; Justin Clark; Matthew Morgan; Jason Miller; Nick Trainer; and Boris Epshteyn) discusses whether Nevada had litigation pending in December, 2020, prior to the ceremony held by the Republican Electors on December 14, 2020. (**Exhibit B**.) In this email Mr. Chesebro, commenting on the Nevada Supreme Court rejecting the Trump campaign appeal on December 8, 2020, opines, "it seems plausible for Nevada to seek cert. in

the Supreme Court on the same basis on which Jack Wilenchick apparently plans to seek cert. from the AZ Sup. Ct. Dismissal." (*Id.*) The email further states: "[P]erhaps there is a plan to file for cert. from the Nevada decision." (*Id*.)

Mr. Chesebro again discusses the alternate electors in an email to "Judge" Troupis dated December 8, 2020. (**Exhibit C**.) He explicitly states that "[c]ourt challenges pending on Jan. 6 really not necessary" and that, "I think having the electors send in alternate slates of votes on Dec. 14 can pay huge dividends **even if there is no litigation pending on Jan. 6**...." (*Id.* (emphasis in original).)

Additionally, while the State alleges that Mr. Chesebro received no response from Mr. DeGraffenreid to his inquiry about whether litigation was still pending in Nevada, Mr. DeGraffenreid did directly reply to Mr. Chesebro by email stating: "Hi Ken, Forwarding your question on the lawsuit to our lead attorney, Jessee Binnall, copied on this email, as he is most up to date on the situation with our state level case in Nevada." (*See* **Exhibit D**.)

B. Mailing to U.S. District Court.

The State alleges in its rendition of the "facts" that the U.S. District Court in Las Vegas received the alternate elector documents in Las Vegas; while the documents were inadvertently mailed to Judge Du in Las Vegas, the mailing was not received and opened in Las Vegas because Judge Du's chambers are located in Reno, Nevada. This was explained and demonstrated in the Petitions for Pretrial Writ in

district court with exculpatory evidence that the State failed to present to the Clark County Grand Jury.

Prior to presenting the case to the Clark County Grand Jury, the State interviewed Debra Kempi, Clerk for the U.S. District Court of Nevada.[2] During her interview, Ms. Kempi stated that she is located in Reno and she discussed the process for sorting and receiving mail. If a document is received by the clerk's office addressed to a judge, it is forwarded to that judge's chambers unopened unless it is clearly related to a case with a case number. If mail is received in Las Vegas, and is addressed to Judge Du (the then Chief of the U.S. District Court for the District of Nevada) it is re-routed to her in Reno. (*See* **Ex. E** at 6:03.)[3]

Ms. Kempi was asked about documents received by certified mail from Michael McDonald. (**Ex. E** at 7:45.) Ms. Kempi stated that the mailing was received in Las Vegas and re-routed by either inter-office mail or brought up to Reno by someone and then delivered, unopened, to Judge Du's chambers in Reno. (*Id.* at 14:35.) The mailing from Mr. McDonald was then put in the vault; the outer envelope was opened by Judge Du's chambers (in Reno), but the inner envelopes containing the signed documents were not opened by the Court until they received a

[2] This interview has not been transcribed, but its audio is designated as **Exhibit E** and will be transmitted to this court on a thumb drive.

[3] When asked if the documents related to the electoral college are filed, registered, or recorded by the Court, Ms. Kempi stated that the documents are not filed or recorded; they are only stored in a vault at the court. (**Ex. E at** 6:27.)

call from the Attorney General's Office. (*Id.* at 15:50.)

III. ARGUMENT

A. Legal Standard

NRAP 2 requires a showing of "good cause" before expediting a case. As detailed below, the State fails to establish good cause. Good cause does not lie in every case and deviation from this Court's rules is the exception, not the norm. *See, e.g, Cty. Comm'srs v. Las Vegas Disc. Golf*, 110 Nev. 567, 568 n.3, 875 P.2d 1045, 1046 (1994) (expediting appeal where County estimated damages delays would be extremely high, and cause other harm).While it does not appear that this Court has specifically defined "good cause" in the context of NRAP 2 and motions to expedite appeals, it is axiomatic that a party's own delays can never constitute good cause in any context; if a party could demonstrate good cause based on impediments created by the party's own inaction, NRCP 4(i)'s requirements would be meaningless.

Thus, actual and sufficient reason must be demonstrated. Black's Law Dictionary defines "good cause" as, "[a] legally sufficient reason. Good cause is often the burden placed on a litigant to show why a request should be granted or an action excused," and is synonymous with the terms "good cause shown; just cause; lawful cause; [and] sufficient cause." *Good Cause, Black's Law Dictionary* (11th ed. 2019). *Cf. Torremoro v. Eighth Judicial Dist. Court of Nev.*, 512 P.3d 765, 769 (Nev. 2022) (explaining, in the context of modifications to a scheduling, a party must show

good cause—and, thus, diligence); *cf, Moseley v. Eighth Judicial Dist. Court of Nev*., 124 Nev. 654, 668 n.66, 188 P.3d 1136, 1146, fn 66 (2008) (citing *State v. Williams*, 120 Nev. 473, 477, 93 P.3d 1258, 1260 (2004).) (in NRCP 6(2) context, explaining "[g]ood cause generally is established when it is shown that the circumstances causing the failure to act are beyond the individual's control.")

Wanting to get a decision from this Court on a question of no political import, *i.e.*, whether venue lies in the Eighth Judicial District, before an election for political reasons, after delaying filing charges for years, does not meet this standard.

B. The State's Own Delay Does Not Constitute Good Cause.

The State does not and cannot establish good cause. Far from "leaving no stone unturned" as the State claims it has done in handling the charges against Respondents, the State first took the position that existing law did not criminalize the conduct at issue and then, just before the applicable statutes of limitations ran, suddenly sought an indictment in Clark County, a jurisdiction where venue does not lie.

C. Deterrence Does Not Support Expediting.

The merits of the underlying allegations and the Court's view of the Respondents' conduct have no bearing on the technical question at the heart of the appeal: whether the district court properly applied this Court's precedents to the facts in evaluating venue. Thus, the State's request to expedite the appeal in the

hopes it can prevail, swiftly reinstate the indictment, and send a deterrent message to Respondents before the 2024 election is highly improper, and certainly does not establish good cause to expedite. In short, this Court should decide the appeal on the merits, and not be swayed by the State's request that it sends a message. Deterrence comes into play when the Legislature enacts criminal statutes and when a convicted defendant is sentenced[4], not when this Court evaluates venue.

As noted above, even if the district court had not dismissed the indictment, the charges would not have been resolved before the 2024 election. Any deterrence effect comes into play if and only if the Respondents are convicted; thus, expediting the appeal now does not provide any opportunity for any deterrence before the 2024 election, contrary to the State's argument.

Likewise—particularly considering the State's delays—the Court should not indulge the State's request to expedite this appeal so it can preserve its option to refile in the proper venue should this Court affirm—rather than exercising it now. Not only are there other infirmities with the State's case (addressed in defendants' writ petitions), it is not certain a jury will convict Respondents if the case ever goes to trial—which again, cannot occur before the November election in any case. Even

[4] Indeed, the case the State cites discusses deterrence in the context of evaluating a criminal sentence imposed by a district court, not evaluating venue. *Allred v. State*, 120 Nev. 410, 421, 92 P.3d 1246, 1253-54 (2004) ("The district court considered the facts of the case, including the criminal justice system's goals of deterrence, rehabilitation, and punishment…").

if there were a possibility of a jury trial before November—in Clark County or elsewhere—the recent Electoral Count Reform and Presidential Transition Improvement Act of 2022 (the "Act") changes the process for voting and the transmission and counting of electoral ballots and precludes similar conduct to the alleged conduct of defendants at issue in the indictment[5]. *See, generally*, S. 4573 - 117th Congress (2021-2022).

Further, its curious arguments about tolling[6] notwithstanding, the State cannot simply rely on its own continuing delays to justify treating this case as an emergency to maintain the option to file elsewhere. In short, as detailed further above, the facts that the State delayed seeking an indictment and that it continues to pursue charges in Clark County are not reasons to make this case an emergency for everyone else. Simply put, the State does not have the right to now expedite in the hopes of pursuing the case in its preferred venue, and it does not cite any authority for the novel proposition that a criminal appeal should be expedited on facts like this.

---

[5] Most centrally, the Act places each state's governor in charge of submitting the certificate of ascertainment (§ 5(a)(1)), precluding competing slates. Thus, the question of whether persons can send in alternate slates of electors while challenging election results is entirely moot.

[6] The State's tolling arguments are not properly before the Court and whether it can make any such arguments are a question, if at all, for another day. However, so the record is clear, the State's reliance on *Hibu Inc. v. Plotkin Fin., Inc*., 722 F. App'x 625, 627 (9th Cir. 2018) is baseless; that case addressed equitable tolling of civil claims under California state law, not tolling of criminal claims under Nevada law.

While the State endeavors to distract the Court with the political nature of its prosecution and the facts of the case, there is no principled reason to treat it as different from other criminal cases.

IV. CONCLUSION

While Respondents are duty bound to address the inaccuracies in the State's Motion, at the end of the day, the parties do not greatly differ. The Court should allow the State to expedite its appeal by filing its Opening Brief as soon as it is able. Should the State file its Opening Brief on September 4, 2024, Respondents' Answering Brief due dates should not be expedited or shortened, and should simply be set in accordance with this Court's rules.

DATED this 21st day of August 2024.

/s/ Richard A. Wright
Richard A. Wright
WRIGHT MARSH, LEVY
300 S. Fourth St., Ste 701
Las Vegas, NV 89101
Counsel for Michael James McDonald

/s/ Monti Jordana Levy
Monti Jordana Levy
WRIGHT MARSH, LEVY
300 S. Fourth St., Ste 701
Las Vegas, NV 89101
Counsel for Eileen A. Rice

/s/ Margaret A. McLetchie
Margaret A. McLetchie
MCLETCHIE LAW
602 South Tenth St.

Las Vegas, Nevada 89101
Counsel for Jesse Reed Law

/s/ Brian R. Hardy
Brian R. Hardy
MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
Counsel for Durward James Hindle, III

/s/ Sigal Chattah
Sigal Chattah
CHATTAH LAW GROUP
5875 S. Rainbow Blvd. #204
Las Vegas, Nevada 89118
Counsel for Shawn Michael Meehan

/s/ George P. Kelesis
George P. Kelesis
COOK & KELESIS, LTD
517 S 9th Street
Las Vegas, NV 89101
Counsel for James Walter Degraffenreid, III

INDEX OF EXHIBITS

Exhibit	Description of Exhibit
A	Proffer Video of Kenneth Chesebro (to be submitted in five parts via thumb drive).
B	December 11, 2020, Email from Kenneth Chesebro to Trump Campaign
C	December 8, 2020, Email from Kenneth Chesebro to Judge Troupis
D	December 11, 2020, Email from James DeGraffenreid to Kenneth Chesebro
E	Audio interview of Debra Kempi (to be submitted via thumb drive)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONDENTS' JOINT RESPONSE TO STATE'S MOTION TO EXPEDITE was filed electronically with the Nevada Supreme Court on the 21st day of August, 2024. Electronic service of the foregoing document shall be made in accordance with the Master Service List.

/s/ Leo S. Wolpert
Employee of McLetchie Law

EXHIBIT A

(Proffer Video of Kenneth Chesebro -- to be submitted via thumb drive)

EXHIBIT B

December 11, 2020, Email from Kenneth Chesebro to Trump Campaign

Re: [EXTERNAL]Re: Electors

Kenneth Chesebro <kenchesebro@msn.com>
Fri 12/11/2020 9:54 AM
To:Joshua Findlay <jfindlay@donaldtrump.com>;Justin Clark <jclark@donaldtrump.com>
Cc:Matthew Morgan <mmorgan@donaldtrump.com>;Jason Miller <jmiller@donaldtrump.com>;Nick Trainer <ntrainer@donaldtrump.com>;Boris Epshteyn <bepshteyn@donaldtrump.com>

Josh,

Good to know you're heading this up.

Want to make 100% sure you have my update of last night -- see below.

Also, at 9:01 today, **Jim DeGraffenried of NV** e-mailed me, asking Jessee Binnall (jbinnall@harveybinnall.com), by way of copying him, to update me on the NV litigation.

Matt's concern, which I passed on to Mayor Guiliani, is that if there's no litigation pending in Nevada on Dec. 14, the rationale for electors voting explaining in the Jim Troupis draft press release doesn't apply.

However, it seems plausible for Nevada to seek cert. in the Supreme Court on the same basis on which Jack Wilenchik apparently plans to seek cert. from the AZ Sup. Ct. dismissal: the courts rushed to judgment to meet the "safe harbor" date, which was a denial of due process for no legitimate reason (because the "safe harbor" date is irrelevant in a situation like this, and also because the Electoral Count Act in which it is contained is unconstitutional).

The NV party struck the due process theme in its statement on the decision: https://nevadagop.org/nevada-gops-statement-on-the-nevada-supreme-courts-ruling/

So perhaps there is a plan to file for cert. from the Nevada decision. Presumably that effort would be incredibly uphill, but it would tend to reduce the concern Matt expressed.

That's all I had to add.

Ken

From: Joshua Findlay <jfindlay@donaldtrump.com>
Sent: Friday, December 11, 2020 9:44 AM
To: Kenneth Chesebro <kenchesebro@msn.com>; Justin Clark <jclark@donaldtrump.com>
Cc: Matthew Morgan <mmorgan@donaldtrump.com>; Jason Miller <jmiller@donaldtrump.com>; Nick Trainer <ntrainer@donaldtrump.com>; Boris Epshteyn <bepshteyn@donaldtrump.com>
Subject: Re: [EXTERNAL]Re: Electors

Hi Ken,

Great to be connected with you. I am preparing an update of what the campaign is doing in the states, along with some draft documents. I should have it to you this morning.

Thanks,

Josh

From: Kenneth Chesebro <kenchesebro@msn.com>
Sent: Friday, December 11, 2020 9:42 AM
To: Justin Clark <jclark@donaldtrump.com>
Cc: Matthew Morgan <mmorgan@donaldtrump.com>; Jason Miller <jmiller@donaldtrump.com>; Nick Trainer <ntrainer@donaldtrump.com>; Boris Epshteyn <bepshteyn@donaldtrump.com>; Joshua Findlay <jfindlay@donaldtrump.com>
Subject: Re: [EXTERNAL]Re: Electors

Great! His Georgia connection is especially helpful!

I will forward him my update of 2 a.m., and add one newer update.

I am reachable at 617-895-6196 today except for 3 hours starting at 5:30 (flying to Madison).

Ken

From: Justin Clark <jclark@donaldtrump.com>
Sent: Friday, December 11, 2020 9:13 AM
To: Kenneth Chesebro <kenchesebro@msn.com>
Cc: Matthew Morgan <mmorgan@donaldtrump.com>; Jason Miller <jmiller@donaldtrump.com>; Nick Trainer <ntrainer@donaldtrump.com>; Boris Epshteyn <bepshteyn@donaldtrump.com>; Joshua Findlay <jfindlay@donaldtrump.com>
Subject: Re: [EXTERNAL]Re: Electors

+ Josh Findlay

Ken - Josh has been running point on our contacts with electors. He can provide an update and hand off what he has to you this morning.

> On Dec 10, 2020, at 7:46 PM, Kenneth Chesebro <kenchesebro@msn.com> wrote:
>
> Here's the attachment from Dec. 9.
>
> ---
>
> **From:** Kenneth Chesebro <kenchesebro@msn.com>
> **Sent:** Thursday, December 10, 2020 7:41 PM
> **To:** Matthew Morgan <mmorgan@donaldtrump.com>; Justin Clark <jclark@donaldtrump.com>
> **Cc:** Jason Miller <jmiller@donaldtrump.com>; Nick Trainer <ntrainer@donaldtrump.com>; Boris Epshteyn <bepshteyn@donaldtrump.com>
> **Subject:** Re: [EXTERNAL]Re: Electors

Hi, I just read an e-mail from Jim DeGraffenreid in Nevada.

He says Nevada is on board, and welcomes whatever documentation I can forward to help.

I would suggest we tentatively put in place plans to have the Nevada electors vote -- only 6 electors involved -- while you consult with the Mayor and others who are the ultimate decisionmakers. Presumably they'll be willing to pull the plug at the last minute, if that's best overall.

I totally get your point that the credibility of the electors voting on Dec. 14 might be diminished by electors voting in a state that doesn't meet the stated rationale, so I could see a strategic decision being made either way on Nevada, or even Arizona.

As Obama would say, that's a decision above my pay grade! lol
http://blogs.reuters.com/talesfromthetrail/2008/08/16/obama-says-pointed-abortion-query-above-his-pay-grade/

Ken

From: Kenneth Chesebro <kenchesebro@msn.com>
Sent: Thursday, December 10, 2020 7:37 PM
To: Matthew Morgan <mmorgan@donaldtrump.com>; Justin Clark <jclark@donaldtrump.com>
Cc: Jason Miller <jmiller@donaldtrump.com>; Nick Trainer <ntrainer@donaldtrump.com>; Boris Epshteyn <bepshteyn@donaldtrump.com>
Subject: Re: [EXTERNAL]Re: Electors

Very good point.

As to **Nevada**, I'm not familiar with litigation there. If there's no realistic prospect of relief there -- including no plausible cert. petition to the U.S. Supreme Court -- I would suggest dropping Nevada.

Because combining the lack of litigation with state procedures for conducting an Electoral College vote, it looks pretty hopeless -- see p. 4 of my Dec. 9 memo (attached): Nevada doesn't allow electors to simply send in votes; it requires the Secretary of State to preside, and only allow electors to cast votes for the popular vote winner.

This was intended to prevent "faithless electors," but the plain language seems to bar what the Kennedy electors did in 1960.

So I would totally understand not having the Nevada electors vote.

Though, on principle, I believe the Electoral Count Act is not binding on the current Congress, and I would love to see a motion during the electoral vote count in Congress to disallow the Nevada votes due to massive voting irregularities.

In other words, the Nevada electors not voting on Dec. 14 merely means the state can't be flipped -- it doesn't prevent a challenge to the electoral votes going in Biden's column.

As to **Arizona**, I believe there's a live, valid challenge there, at least based on my talk a couple of days ago with Jack Wilenchik.

Apparently he had a solid case, and if you could extrapolate his very limited discovery Trump & Pence would win the state, but the trial court cut off discovery and held an abbreviated hearing in a such to meet the "safe harbor" date. And the AZ Supreme Court affirmed. Jack seems sharp, and I liked his briefing. I haven't studied the filings, but he said he plans to seek U.S. Supreme Court review, and he may have a good claim that the state courts denied procedural due process in rushing to judgment to meet the "safe harbor" date -- which makes no sense, because as noted figures like Justice Ginsburg and Prof. Tribe have made clear, Jan. 6 is the only real deadline.

I'm not passing on the merits of that litigation. Apparently the AZ Supreme Court is quite conservative, so maybe it was justified in rejecting the lawsuit. But I wouldn't rule out AZ without further analysis.

So I'd be inclined to have the AZ electors vote, based on the pendency of the cert. petition. And also on the President's view that what happened in AZ is very difficult to explain as legitimate.

Ken

From: Matthew Morgan <mmorgan@donaldtrump.com>
Sent: Thursday, December 10, 2020 6:53 PM
To: Kenneth Chesebro <kenchesebro@msn.com>; Justin Clark <jclark@donaldtrump.com>
Cc: Jason Miller <jmiller@donaldtrump.com>; Nick Trainer <ntrainer@donaldtrump.com>; Boris Epshteyn <bepshteyn@donaldtrump.com>
Subject: Re: [EXTERNAL]Re: Electors

Ken,

Looks like you've got a great handle on things. One question I can see coming down the stretch: How do you propose we answer forthcoming press questions on why our electors are voting in Arizona and Nevada? Jim's statement below seems to rely on the existence of an ongoing case/controversy as the justification for the electors voting on Monday. That is supported by the Hawaii precedent, which had a pending contest/recount in existence on the 3 USC 7 electoral college date.

To my knowledge, neither the Campaign nor unaffiliated entities have a pending case or controversy within Arizona and Nevada. So the Comms team will need a way to explain why those electors are voting on Monday.

The others fit well within the Hawaii precedent: Wisconsin and Georgia have election contests before state courts. Pennsylvania and Michigan are at issue in the Texas Supreme Court action (which the President is seeking intervention).

As always I defer to the communicators, but just wanted to flag a forthcoming messaging piece.

Thank you,

Matt Morgan

From: Kenneth Chesebro <kenchesebro@msn.com>
Date: Thursday, December 10, 2020 at 5:30 PM
To: Justin Clark <jclark@donaldtrump.com>
Cc: Jason Miller <jmiller@donaldtrump.com>, Nick Trainer <ntrainer@donaldtrump.com>, Boris Epshteyn <bepshteyn@donaldtrump.com>, Matthew Morgan <mmorgan@donaldtrump.com>
Subject: Re: [EXTERNAL]Re: Electors

Quick heads up -- Jim Troupis has put together a tentative draft statement he would release only AFTER filing the petition seeking review in the WI Supreme Court, in which he'll be agreeing with the Wisconsin Elections Commission that the real deadline for resolving litigation is January 6.

Here it is, in case there are any concerns about it -- earliest it could go out would be Friday evening.

Perhaps a similar statement could issue in some of the other states.

> **Proposed Jim Troupis Statement on Electors Meeting**
>
> "As the legal proceedings arising from the November 3 presidential election continue to work their way through the Wisconsin court system, I have advised the Republican Party of Wisconsin to convene a separate Republican electors' meeting and have the Trump-Pence electors cast their votes at the Wisconsin State Capitol on December 14.
>
> Of course, there is precedent for such a meeting. Democrat electors pledged to John F. Kennedy convened in Hawaii in 1960, at the same time as Republicans, even though the Governor had certified Richard Nixon as the winner. In the end, the state's electoral votes were ultimately awarded to President Kennedy, even though he did not win the state until 11 days after his electors cast their votes.
>
> The legitimacy and good sense of two sets of electors meeting on December 14 to cast competing votes for President and Vice President, with the conflict to be later sorted out by the courts and Congress, was pointed out by prominent Democrat activists Larry Lessig and Van Jones in an essay published last month on CNN.com.
>
> Given that the results in Wisconsin are still in doubt, with legal arguments that have yet to be decided, just as the Democrat electors met in Hawaii in 1960 while awaiting a final resolution of that State's vote, so too the Republican electors should meet this year on December 14 as we await a final resolution in Wisconsin."

From: Justin Clark <jclark@donaldtrump.com>
Sent: Thursday, December 10, 2020 5:26 PM

To: Kenneth Chesebro <kenchesebro@msn.com>
Cc: Jason Miller <jmiller@donaldtrump.com>; Nick Trainer <ntrainer@donaldtrump.com>; Boris Epshteyn <bepshteyn@donaldtrump.com>; Matthew Morgan <mmorgan@donaldtrump.com>
Subject: Re: [EXTERNAL]Re: Electors

Go get em Ken!

On Dec 10, 2020, at 5:24 PM, Kenneth Chesebro <kenchesebro@msn.com> wrote:

Oh, fantastic. Good to have all this.

From: Jason Miller <jmiller@donaldtrump.com>
Sent: Thursday, December 10, 2020 5:23 PM
To: Nick Trainer <ntrainer@donaldtrump.com>
Cc: Kenneth Chesebro <kenchesebro@msn.com>; Boris Epshteyn <bepshteyn@donaldtrump.com>; Justin Clark <jclark@donaldtrump.com>; Matthew Morgan <mmorgan@donaldtrump.com>
Subject: Re: Electors

Thank you!

> On Dec 10, 2020, at 5:22 PM, Nick Trainer <ntrainer@donaldtrump.com> wrote:
>
>
> Here are the six w contact
>
> <Elector List-.xlsx>

CONFIDENTIALITY NOTICE: This message (including any attachments) may contain confidential, proprietary, privileged, and/or private information. This information is intended to be for the use of the individual(s) designated above. If you are not the intended recipient of this message, please notify the sender immediately, and delete the message and any attachments. Any disclosure, reproduction, distribution, or other use of this message or any attachments by an individual or entity other than the intended recipient is prohibited. Copyright and any other intellectual property rights are the sole property of Donald J. Trump for President, Inc.
CONFIDENTIALITY NOTICE: This message (including any attachments) may contain confidential, proprietary, privileged, and/or private information. This information is intended to be for the use of the individual(s) designated above. If you are not the intended recipient of this message, please notify the sender immediately, and delete the message and any attachments. Any disclosure, reproduction, distribution, or other use of this message or any attachments by an individual or entity other than the intended recipient is prohibited. Copyright and any other intellectual property rights are the sole property of Donald J. Trump for President, Inc.

<2020-12-09 Chesebro memo on Dec 14 requirements for electoral votes.pdf>

CONFIDENTIALITY NOTICE: This message (including any attachments) may contain confidential, proprietary, privileged, and/or private information. This information is intended to be for the use of the individual(s) designated above. If you are not the intended recipient of this message, please notify the sender immediately, and delete the message and any attachments. Any disclosure, reproduction, distribution, or other use of this message or any attachments by an individual or entity other than the intended recipient is prohibited. Copyright and any other intellectual property rights are the sole property of Donald J. Trump for President, Inc.

EXHIBIT C

December 8, 2020, Email from Kenneth Chesebro to Judge Troupis

Privileged and confidential -- additional thoughts re electors voting on Dec. 14

Kenneth Chesebro <kenchesebro@msn.com>

Tue 12/8/2020 1:15 AM

To:Judge Troupis <judgetroupis@gmail.com>

Hi, Jim, nice of you to call me. And I'm glad you like my idea regarding how leverage might be exerted in January to force serious review in Congress of election fraud in various States.

Several more notes, staying away from the specifics of how it might play out in January:

1. Court challenges pending on Jan. 6 really not necessary.

In my memo I mentioned that a key element of the strategy I've sketched would depend on litigation (either in state or federal court) pending in the six contested states on January 6.

I'm glad you pressed me on that, for example, could abuses in Georgia be examined even if no litigation were pending. On reflection, I think having the electors send in alternate slates of votes on Dec. 14 can pay huge dividends **even if there is no litigation pending on Jan. 6**, and based on final litigation in the States, Biden is still above 270 electoral votes (or, at minimum, is still ahead of Trump, with perhaps one of more States up in the air).

The reason is that constitutionally speaking, there is no barrier to Congress (here, we're talking the Senate, assuming it's still controlled by Republicans) deliberating on which electoral slate to count, even if one electoral slate is endorsed by the governor, after all litigation is final -- indeed, even if that slate met the Dec. 8 "safe harbor" deadline.

The reason is that the Constitution doesn't specify what it means to "count" the electoral votes, and everyone agrees there is some level of judgment in counting -- here, at minimum, judgment about whether the election was conducted in the "Manner" directed by the state legislature.

Thus, as Professor Tribe has put it (here), Congress has the "ability, under the Twelfth Amendment, to determine which set of [a state's] electoral votes to count." 115 Harv. L. Rev. at 277.

This can involve looking at what actually happened in the election, not just at what the governors or courts said happened. Going **behind** the governors' certificates is exactly what the Democrats sought to do in the Hayes-Tilden contest of 1876-77, when the Republican governors of three States certified, somewhat dubiously in at least one instance, that Hayes had won the States. The Democrats naturally preferred the electoral slates that had been certified by Democrats in the States.

There's nothing in the Constitution (setting aside legislation; see next point) to prevent the Senate now, if it wishes, from holding hearings, with testimony, to decide if the election was stolen in one or more States, before voting on which slate of electors should be counted -- again, even if Trump lost all the legal cases, and none are still pending. The Senate could decide if it wished that the court proceedings were too cursory, and/or the judges involved used procedural tactics to avoid the merits, so that independent examination is required.

2. Democrats' main weapon is the Electoral Count Act.

Democrats' playbook for January 6 depends entirely on the script set out in the Electoral Count Act, under which, after the certificates are opened, the tellers are supposed to tally up the votes and, as to

any contested States, the two Houses may deliberate for only two hours before definitively voting on whether to accept as valid, and count, a slate.

Under this scheme, Trump and Pence would be denied the opportunity for the presentation of any evidence (for example, live testimony) regarding the fraud in the election -- only limited debate would be allowed. Of course, preventing any sustained public inquiry into the election is key for the Democrats.

If the Electoral Count Act could be pushed aside, the Democrats would have to contend with unlimited debate in the Senate, which would be ended only with 60 votes for cloture -- giving Senators who support Trump plenty of leverage to insist on sustained inquiry into the evidence of fraud in both the election and in the canvassing. I mean, what would happen to 10 Republican senators who refused to allow an examination of what happened in the election?

3. The Electoral Count Act is not binding

The vulnerability for Democrats is that the Electoral Count Act is **not legally binding**. The scholarly consensus is that, for multiple reasons, it is difficult to imagine the Supreme Court ruling that in counting electoral votes, Congress must limit itself to debating for only 2 hours per contested State, or that Congress must accept as valid a particular State's electoral votes just because the State's governor certified them. See sources in footnote 4 of my Nov. 18 memo, here; see also Prof. Tribe's argument (here) that how to count electoral votes is inherently a "political question," on which the Supreme Court should not intrude. 115 Harv. L. Rev. 276-87.

4. Procedural leverage: a practical way around the Electoral College Act

The problem for Republicans, however, is that the Electoral Count Act is, in ordinary circumstances, **politically** binding. Many of the legislators who enacted it assumed it wasn't constitutional, but they hoped that it would set ground rules for counting electoral votes that would prevent another crisis such as the one that occurred in 1876-77, in which the two Houses of Congress were controlled by different parties, and there was no clear way of resolving the partisan conflict.

At minimum, politically the Act is viewed as setting up a special rule for each House governing the counting of electoral votes, which would take a majority vote to displace.

Conventional wisdom would say that we are stuck with the Electoral College Act, and the Democrats' script, because:

(1) there is no way that all Senate Republicans would vote in lockstep to jettison the Electoral Count Act -- some obviously despise Trump, and others appear to believe that the election was fair; and

(2) there is no way that pro-Trump Republicans could convince the Supreme Court to invalidate the Electoral Count Act (in part because of the "political question" doctrine discussed by Tribe).

That's where the tactic we discussed might come into play. It would create leverage that could turn the tables on Democrats, by holding up the count unless and until they either got an order from the Supreme Court blocking the tactic (unlikely) or else agreed to extended debate. It would be impossible for the count to continue with the ordinary procedure under the Electoral Count Act.

5. Objection to extended delay

Any effort to extend scrutiny of the election returns past January 6 would be met with the objection that the process of electing the President might not be complete before January 20. But that is no reason to avoid taking the time necessary to ensure that the electoral votes of particular states are not tainted by fraud. The Constitution provides an orderly means of ensuring that there is no gap in the executive branch. If Democrats refused to agree to a reasonable amount of time for Congress to investigate and vote on the six States being contested, and the dispute dragged on, on January 20 Nancy Pelosi (upon resigning as Speaker) would become Acting President -- unless, of course, before then the Senate decided to resolve the impasse by electing Pence as Vice President, so that on January 20 he would become Acting President.

The above is more extensive than I had intended, but I hope that despite the excess verbiage, some of it is helpful.

Ken

Kenneth Chesebro
25 Northern Avenue, # 1509
Boston, MA 02210
(617) 895-6196
kenchesebro@msn.com
(Admitted in CA, FL, IL, MA, NJ, NY, and TX)

https://www.linkedin.com/in/ken-chesebro

EXHIBIT D

December 11, 2020, Email from James DeGraffenreid to Kenneth Chesebro

NEVADA REPUBLICAN PARTY

Jim DeGraffenreid <jim@nevadagop.org>

URGENT -- Trump-Pence campaign asked me to contact you to coordinate Dec. 14 voting by Nevada electors

Jim DeGraffenreid <jim@nevadagop.org> Fri, Dec 11, 2020 at 6:00 AM
To: Kenneth Chesebro [redacted]
Cc: Jesse Binnall [redacted]

Hi, Ken,

Forwarding your question on the lawsuit to our lead attorney, Jesse Binnall, copied on this email, as he is most up to date on the situation with our state level case in Nevada.

On Fri, Dec 11, 2020, 01:20 Kenneth Chesebro <[redacted] wrote:

Thanks for passing this along.

No, the COA need not be attached to the electoral votes -- the purpose of having the electoral votes sent in to Congress is to provide the opportunity to debate the election irregularities in Congress, and to keep alive the possibility that the votes could be flipped to Trump and Biden.

In that connection, can you tell me whether all court challenges Nevada are final? I'm wondering if there will an effort to seek Supreme Court review of this decision:
https://thehill.com/homenews/administration/529382-nevada-supreme-court-rejects-trump-campaign-appeal-affirms-biden-win

Thanks again!

From: Jim DeGraffenreid <jim@nevadagop.org>
Sent: Friday, December 11, 2020 1:13 AM
To: Kenneth Chesebro <[redacted]
Subject: Re: URGENT -- Trump-Pence campaign asked me to contact you to coordinate Dec. 14 voting by Nevada electors

Thank you for this information.

We were provided with a Certificate of Ascertainment - we had to have it corrected, as the SOS and Governor initially listed our alternates instead of our electors. Attached a copy - of course, it shows us with less votes than the Biden electors.

Should we use this COA for anything?

On Thu, Dec 10, 2020, 23:18 Kenneth Chesebro <[redacted] wrote:

Wonderful to hear!

Thank you for getting back to me so quickly, despite your hectic schedule.

I spoke this evening with Mayor Guiliani, who is focused on doing everything possible to ensure that that all the Trump-Pence electors vote on Dec. 14. He was glad to hear of your agreement with this strategy.

As background, I attach **my Nov. 18 memo** explaining the upside of this strategy, and, **my Dec. 9 memo** on the logistics, including the issues raised by state-law provisions regarding the Electoral College.

You'll note that page 4 of the Dec. 9 memo mentions a concern regarding Nevada law, about the role of the Secretary of State. It may well be that the electoral vote needs to proceed without the participation of the Secretary of State, on

EXHIBIT E

(Audio interview of Debra Kempi - to be submitted via thumb drive)