Case No. 89064

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA,

Appellant,

v.

JAMES WALTER DEGRAFFENREID III, DUWARD JAMES HINDLE III, JESSE REED LAW, MICHAEL JAMES MCDONALD, SHAWN MICHAEL MEEHAN, EILEEN A. RICE

Respondents.

STATE OF NEVADA'S REPLY BRIEF

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INTRODUCTION

The GOP Electors created venue in Clark County when they directed their criminal conduct at Clark County. They valiantly attempt to avoid that straightforward result. But even their new preemption argument provides them with no refuge.

The Founders vested each state legislature with plenary authority to choose the method for selecting electors. U.S. Const. Art. II, § 1. In other words, the GOP Electors' actions strike at the core of a sovereign function the Founders expressly reserved to the States in this Nation's charter.

It is inconceivable that an act of Congress could preempt Nevada from exercising her sovereign authority to protect the integrity of her chosen method for selecting electors. And the rest of the GOP Elector's attempts to sustain the district court's judgment fall flat too: (1) they fail to rebut authority universally supporting the State on *locus delicti*; (2) they cite a federal case originally cited by the State, adopting dicta from that case when the *holding* undermines their "pitstop" theory; (3) they misunderstand the difference between speculation and circumstantial evidence; (4) they fail to grapple with at least two instances of their own

statements contradicting their position on venue; (5) their only response to the State's points on the practical consequences of their arguments on "effects" for victims of mail fraud is to call the State's position "political"; and (6) they fail to rebut the State's reliance on this Court's long history of recognizing the limits of dismissal as a remedy and treating grand jury error as susceptible harmlessness.[1]

Reversal and reinstatement of the indictment is the only answer here.

* * *

[1] The GOP Electors also admit to addressing facts "not relevant to the questions on appeal." AB at 9-10. If they wanted to assert those facts, they should have asserted related claims. But they chose not to. So, there is no *proper* reason to present those facts now. If the State had no concerns about slowing progress of this appeal, it would move to strike the irrelevant material. But given the need for expedience, the State merely asks this Court to disregard those facts until they accompany a relevant legal argument. And the State will reserve any response of substance for that time.

ARGUMENT

I. No act of Congress can preempt Nevada from enforcing state criminal laws to protect the integrity of a core sovereign function the Founders reserved to the States in the U.S. Constitution.

Although the GOP Electors assert a preemption argument for the first time on appeal, they were right not to raise the issue below. OB at 14-16. They likely waived preemption by not raising it below, *cf. Webb, ex rel. Webb v. Clark County School Dist.*, 125 Nev. 611, 619, 218 P.3d 1239, 1245 (2009), but the argument is without support and cannot stand given Article II, Section 1 of the U.S. Constitution.

Preemption is a legal doctrine emanating from the Supremacy Clause intended that addresses conflict between acts of Congress and state law. *See*, *e.g.*, *Nanopierce Technologies, Inc. v. Depository Trust and Clearing Corp.*, 123 Nev. 362, 371, 168 P.3d 73, 79 (2007). Preemption takes multiple forms: express preemption and implied preemption, and implied preemption is further divided into field preemption, conflict preemption, and obstacle preemption. *Martin v. Martin*, 138 Nev. ___, ___, 520 P.3d 813, 818 (2022); *People v. Dillard*, 21 Cal. App. 5th 1205, 1214 (Ct. App. 2018).

The GOP Electors bear the burden of identifying the applicable form of preemption. *Dillard*, 21 Cal. App. 5th at 1214. But they don't say which form applies. AB at 14-16. Certainly, preemption does not apply just because they may have also committed federal crimes. *Loney v. Thomas*, 134 U.S. 372, 375 (1890). Otherwise, the dual sovereignty doctrine would not exist. *See Gamble v. United States*, 587 U.S. 678 (2019).

In any event, the presumption against preemption controls. *See*, *e.g.*, *Dillard*, 21 Cal. App. at 1221. "The state legislature's power to select the manner for appointing electors is plenary." *Bush v. Gore*, 531 U.S. 98, 104 (2000). This is because the Founders expressly reserved that power to state legislatures in Article II, Section 1 of the U.S. Constitution. *Id.*

It is inconceivable that an act of Congress could preempt a state from using her criminal laws to protect the integrity of her chosen method for selecting electors. Each case the GOP Electors cite supports the State. Start with *Loney*, which is not really a preemption case. That case involved a charge of perjury brought by the Commonwealth of Virginia arising from an election contest for the U.S. House of Representatives. *Loney*, 134 U.S. at 374. The Constitution makes the House of

Representatives "the judge of the elections, returns, and qualifications of its own members." *Id* at 373 (citing U.S. Const. art. I, § 5). And Congress created the process for contesting an election, including taking of "depositions on oath of a witness," and prescribed perjury as the penalty for knowingly making false statements under that oath. *Id*. at 373-74.

Although the Virginia Governor appointed the notary public who administered the oath, no Virginia law required the oath. *Id.* at 374. It was "an oath authorized to be administered by the laws of the United States, and by those laws only; and the witness gives his testimony in obedience to those laws, and not in the performance of any duty which he owes to the state in which his testimony is taken." *Id.*

So *Loney* is not really a preemption case. What the Court said there is that the alleged perjury was only a crime against the federal government, and Virginia had no interest in prosecuting federal crimes.

This case is different. Given the terms of Article II, Section 1, state legislatures define the method for selecting electors. So state law is the fount of authority from which a person claims their status as an elector. *See also* NRS 298.065(1) ("Except as otherwise provided in this section and NRS 298.075, the nominees for presidential elector whose candidates

for President and Vice President receive the highest number of votes in this State at the general election *are the presidential electors*.") (emphasis added). And here, the State alleges that the GOP Electors uttered or offered an instrument professing to be the "duly elected and qualified Electors for President and Vice President of the United States of America from the State of Nevada" when the GOP Electors knew that statement to be false. 4-APP-0837.

Nothing in *Loney* suggests that Nevada lacks authority to prosecute criminal conduct that undermines the integrity of Nevada's process for choosing electors, even if that conduct includes an intent to defraud a federal officer. *Loney* says different: "There are cases (the most familiar of which are those making and uttering counterfeit money) in which the same act may be a violation of the laws of the State, as well as the laws of the United States, and be punishable by the judiciary of either." 134 U.S. at 375. And because Nevada's interest in preventing such harm is constitutionally ordained, the answer is even more obvious here: Congress cannot preempt the Constitution.

Then comes *People v. Hassan*, 168 Cal. App. 4th 1306 (Ct. App. 2008), also not a preemption case. Like *Loney*, *Hassan* says nothing to

demonstrate that Nevada lacks authority to use her criminal laws to protect the integrity of her chosen method of selecting electors. *Hassan* addressed a charge about "false documents provided in connection with a federal immigration investigation." 168 Cal. App. 4th at 1318. And the California court merely held that California's statutes did not criminalize the charged conduct, limiting their statute "to its manifest purpose to protect the integrity of state and not federal proceedings." *Id*.

Last but most certainly not least comes *Dillard*, which *is* a preemption case. *Dillard*'s analysis of "the presumption of preemption" ends any debate on preemption here. The presumption applies when "state regulation occurs in a field which the States have traditionally occupied." *Dillard*, 21 Cal. App. 5th at 1221 (quoting *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 347 (2001)) (internal quotation marks omitted). Addressing the presumption, the California court contrasted the issue in that case with the issue in *Quesada v. Herb Thyme Farms, Inc.*, 361 P.3d 868 (Cal. 2015). It concluded that the presumption did not apply to the case before it, which involved a purely federal program. *Id*. at 1222. But the presumption did apply in *Quesada*, which involved regulations governing food labels that "the California Supreme

Court found to be quintessentially a matter of long-standing local concern." *Id*. (internal quotation marks omitted).

There can be no greater sign of something being reserved to the States than an express reservation in the U.S. Constitution. No act of Congress can preempt a State's sovereign interest in protecting the integrity of the State's chosen method for selecting electors.

II. The State proved venue *before the grand jury by a preponderance of the evidence.*

The State has never shied from the burden this Court imposed in its decisions addressing NRS 172.105 and NRS 171.030: *Martinez Guzman*, 136 Nev. 103, 460 P.3d 443 (2020) (*Martinez Guzman I*), and *Martinez Guzman*, 137 Nev. 599, 496 P.3d 572 (2021) (*Martinez Guzman II*). OB at 13-48. True, the State did include in its opening brief (1) a footnote intended to inform this Court of tension the State sees between *Martinez Guzman II* and this Court's long line of cases setting the standard of evidence necessary to sustain an indictment, OB at 14 n.5, and (2) a harmless error argument at the end of the brief—further addressed at the end of this brief too—that includes arguments based on evidence presented for the first time in the district court, OB at 49-54.

But the State's main argument is not dependent on this Court reaching those issues; the State has argued all along that the grand jury evidence proves venue under NRS 171.030 by a preponderance of the evidence. OB at 13-48.

The State, however, did show that the district court failed to adhere to the demands of *Martinez Guzman I*. OB at 13-48. And the GOP Electors have neither proved the State wrong, nor identified sufficient alternative grounds to sustain the district court's judgment.

A. The district court erred when it determined that the crimes were not, at least in part, committed in Clark County.

The opening brief thoroughly explains why the *locus delicti* of the GOP Electors' alleged crimes includes Clark County. The GOP Electors' arguments in response do not rebut the State's position.

1. The GOP Electors cite no case holding that offenses like these are complete on mailing.

In what appears to be an effort to distance themselves from a key page of their own playbook, the GOP Electors say the State is responsible for language in the district court's order about any offenses being complete on mailing. AB at 7, 35 n.23. But that has been their theory

from the start: Eileen Rice's motion to dismiss said, "Because the alleged offenses here occurred in either Carson City (where the documents were executed) or in Douglas County (*where the documents were mailed*), the offenses *are triable only within one of those two judicial districts pursuant to Nevada's venue statute*." 2-APP-0405 (emphasis added). The GOP Electors may regret taking that position now, but it's the bed they made.

In its opening brief, the State conducted a proper statutory analysis, analyzing plain language to identify the elements of the offenses and their meaning. OB at 23-37. The State did this to identify the *locus delicti* for each offense. OB at 23-37. And then the State also explained why that analysis shows that Clark County is a proper *locus delicti* for both alleged offenses. OB at 31-32, 35-37.

The GOP Electors fail to explain why the State's reading of the plain language of NRS 205.110 and NRS 239.330 is wrong. Their main response is to say the State failed to address *all* the statutory language and there are *other ways* a person can commit both offenses. OB at 32. But that argument is non-responsive to the State's argument defining "utter" and "offer" as they are used in NRS 205.110 and NRS 239.330. OB at 26-27, 34-35.

Moreover, the State noted that it could find no case from any other state saying that the location to which a defendant mailed a forged instrument is an improper venue for the offense of uttering a forged instrument. OB at 28. Every case the State found from other states indicated that the place to which the defendant mailed the forged instrument was a proper venue for uttering. OB at 28-30. The GOP Electors have cited not one case to the contrary.

Additionally, the State identified a case from South Dakota holding that the location of the public office to which the defendant mailed a false or forged instrument was a proper venue for the offense of offering a false instrument for filing or recording. OB at 34. And again, the GOP Electors have cited not a single case to the contrary.

Apparently having found no case to support their theory that "uttering" or "offering" is complete on mailing, they cite *U.S. v. Anderson*, 328 U.S. 699 (1946), for support. In *Anderson*, the Supreme Court recognized the need to look at "the nature of the crime alleged and the location of the act or acts constituting it." 328 U.S. at 703. But that is exactly what the State did in its opening brief. OB at 23-37.

The GOP Electors' attempts to distinguish the State's cases are also unavailing. First, when arguing mailing completes the offenses, the GOP Electors make no attempt to distinguish the three cases the State cited holding that the *only* proper venue is the place to which the defendant mailed the document. *Compare* OB at 29; *with* AB at 33-34.

And the GOP Electors' attempts to distinguish the cases that treat uttering as a continuing offense also miss the mark. In *Seay v. State*, 108 So. 620, 621 (Ala. Ct. App. 1925), the Alabama court said venue would lie in either county because the crime was begun in one county and consummated in another. The GOP Electors try to distinguish this case saying their crimes would be complete even if their imposter documents had never been received. AB at 33. But they cite no authority to support that position yet cite authority to make the opposite argument a few pages later. AB at 33, 36-37.

In *People v. Thorn*, 33 P.2d 5, 14 (Ct. App. 1934), the California court said the same thing. The GOP Electors' effort to distinguish that case by relying on the discussion of preparatory acts from *Martinez Guzman II* is mystifying. AB at 34. The California court only addressed preparatory acts with respect to preparing documents and readily

accepted that "consummation of the act may have occurred when the claim was delivered at the office of the insurance company in San Francisco," *Thorn*, 33 P.2d at 14, just the same as the State argues the GOP Electors consummated both offenses on delivery of the envelope containing the imposter documents to the federal court in Las Vegas.

The Mississippi Supreme Court joined in *Bradford v. State*, 156 So. 655 (Miss. 1934). The GOP Electors argue that this case is different because "the alleged crime included publication," AB at 34, but the crime addressed was the "uttering of a forged instrument by appellant." *Bradford*, 156 So. at 656. And the Mississippi Court said the appellant was susceptible to indictment in both counties when she mailed a forged license from one county to another. *Bradford*, 156 So. at 657. There is no material difference.

And although *People v. Gould*, 246 N.Y.S.2d 758, 761-62 (1964), is not a mailing case, it still supports the proposition that the location of the office to which the defendant delivered a false document is a proper venue for trial. The delivery here occurred at the United States District Court in Las Vegas, making Clark County a proper venue. *See infra* Argument II(A)(2).

The plain language of NRS 205.110 and 239.330 supports the State's position on *locus delicti*. The GOP Electors provide no contrary interpretation that undermines the State's reading of the statute—that the State could have charged the offenses in other ways does not allow the GOP Electors to escape the State's plain language analysis. And authorities from other states around the country universally support the State on *locus delicti*.

2. The United States District Court received the GOP Electors' documents in Las Vegas.

The GOP Electors claim that the State is conflating the place of delivery and the place of receipt. AB at 36-38. But as they said to the district court, "[w]e're talking about *the office*." 3-APP-0636 (emphasis added). The State agreed. OB at 37. And the GOP Electors have no response to the State's reliance on the GOP Elector's representations to the district court. AB at 36-38.

The GOP Electors sent their imposter documents to an office—the United States District Court for the District of Nevada—*in Las Vegas*. 5-APP-1089, 1105, 1115. As the State already pointed out, there is only one United States District Court for the District of Nevada with courthouses

in Reno and Las Vegas. OB at 37. And that office received the imposter documents at the Las Vegas courthouse when the GOP Electors mailed those documents to Judge Du in Las Vegas in her official capacity as the then Chief Judge of the district. OB at 37. The GOP Electors have no substantive response to the State's argument that delivery to the federal district court at the Las Vegas courthouse was delivery to that "office." especially given their argument in the district court.[2]

3. The GOP Electors adopt *dicta* from a federal case originally cited by the State, but *the holding* of that case undermines their alternative "pitstop" theory.

In its opening brief, the State cited *U.S. v. Blecker*, 657 F.2d 629, 632 (4th Cir. 1981), for the proposition that *the place to which the defendant sends* a false or forged document is a proper venue. OB at 30.

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[2] Even if they had a response of substance, it would undercut their position on the purported irrelevance of Secretary Cegavske's presence in Clark County when she learned about the documents and the false statements therein. What's sauce for the goose is sauce for the gander—if the offense is only complete when the fraudulent information is conveyed to its intended recipient, Judge Du's location in Reno does not change the outcome because Secretary Cegavske was in Las Vegas when she learned about the contents of the documents sent to her as Secretary of State. *See also infra* Argument II(C)(2) (addressing "effects" under NRS 171.030).

The GOP Electors now adopt that case as their own, quoting dicta from *Blecker* to argue that venue would *only* be proper where a forged instrument is "prepared" and where it "comes to rest." AB at 34.

But *Blecker* says otherwise. In *Blecker*, the Fourth Circuit held that venue was proper in a *third* location. 657 F.3d at 633. The defendant initially sent a false claim to an intermediary before the intermediary forwarded the false claim to the federal government. *Id*. And the Fourth Circuit said venue was *also* proper where the intermediary was located. *Id*. Hence the State's prior argument that *the location to which a defendant sent* a false document is a proper venue for crimes like these, even when the documents were later forwarded to a third location.

Although this Court should not reach this issue because the delivery of the documents in Las Vegas consummated the offense, the GOP Electors are wrong that the State failed to cite a case defeating their purportedly "novel" pitstop theory. AB at 38. *Blecker* rejected such a theory—pitstop or not, the GOP Electors made Clark County a proper venue by mailing their documents to the federal court in Las Vegas. It may have been, as they now say, a mistake for them to do so. But *Blecker* says the GOP Electors' actions make Clark County a proper venue, even

if this Court accepts their alternative theory that the documents only made a "pitstop" in Las Vegas.[3]

B. The State proved the necessary commingling of preparatory acts and intent to satisfy *Martinez Guzman II*.

The GOP Electors' insistence that the conspiracy argument is new lacks record support. The State made the conspiracy argument below. 2-APP-458-459; 3-APP-650-651. And the rule established in *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981), does not limit the State to making arguments that verbatim copy their arguments from the district court. *See, e.g.*, *Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 437, 245 P.3d 542, 544 (2010). The rule prohibits

[3] To be clear, the State only asks this Court to decide whether the GOP Electors made Clark County a proper venue when they directed their fraudulent conduct at Clark County by intentionally mailing their imposter documents to the federal courthouse in Las Vegas. The State does not ask this Court to address whether a defendant who uses the Postal Service to complete delivery of a forged instrument would be subject to prosecution in any venue the package passes through *en route* to the address the defendant provided for delivery. That is not an issue here. The GOP Electors concede that they provided the envelope with the imposter documents inside to the Postal Service for delivery to Las Vegas. AB at 1 n.1.

raising new "potentially game-changing issues, not mere refinements of points already in play." *Id.* at 437, 245 P.3d 544-45.

1. Circumstantial evidence proving formation of a conspiracy and an overt act in furtherance of the conspiracy at least proves preparatory acts and intent under *Martinez Guzman II*.

The GOP Electors' tight grasp on this Court's use of the word "nonspeculative" in *Martinez Guzman II* causes them to repeatedly conflate speculation with reasonable inferences drawn from a body of circumstantial evidence. AB at 21-22, 24, 31, 35, 42, 45, 50. They would apparently have this Court require direct evidence to satisfy *Martinez Guzman II*.

But there is no direct evidence requirement—circumstantial evidence is sufficient. *Martinez Guzman II*, 137 Nev. 599, 603, 496 P.3d 572, 576 (2021) (quoting *James v. State*, 105 Nev. 873, 875, 784 P.2d 965, 967 (1989)). And the State has argued that its circumstantial evidence proving the underlying conspiracy *plus* the commission of an overt act in furtherance of said conspiracy within Clark County is sufficient to meet this Court's test for preparatory acts plus intent. OB at 38-44.

The parties agree that conspiracy is a specific intent crime. OB at 38; AB at 29. But it is hornbook criminal law that circumstantial evidence allowing a finder of fact to infer the necessary agreement is sufficient proof of intent to commit conspiracy. *Thomas v. State*, 114 Nev. 1127, 1143, 967 P.2d 1111, 1122 (1998). And when that intent is coupled with any overt act in furtherance of the conspiracy, that is tantamount to intent and preparatory acts under *Martinez Guzman II*.

2. The GOP Electors' arguments and chart demonstrate a misunderstanding in how circumstantial evidence works.

The members of this Court are undoubtedly familiar with attorneys giving juries examples of circumstantial evidence and may have given a few examples themselves. Classic examples come to mind. Solving the mystery of who ate the last chocolate chip cookie that Mom was saving for herself when she discovers one of her children with crumbs on his face and the remnants of melted chocolate chips on his hands. Even if no one saw him eat the cookie, the crumbs and melted chocolate give Mom the context she needs to answer her question. Or there is the man who takes a nap after tending to the plants in his garden but awakens to glints of sunlight reflecting off of a fresh blanket of snow covering the plants he

just worked on. He didn't see snow falling, but context tells him that snow fell while he was sleeping.

The State's argument is similar here. But the GOP Electors' arguments and chart dealing with the grand jury evidence improperly deal with each piece of evidence in isolation. AB at 45-50. That isn't how circumstantial evidence works. A finder of fact can look at the circumstances proved and make inferences from those circumstances to determine whether a particular fact was sufficiently proven. *See*, *e.g.*, *Frantz v. Johnson*, 116 Nev. 455, 468-69, 999 P.2d 351, 359-60 (2000). And when each of the circumstances proved by the State's evidence are considered as a whole, a rational fact finder could conclude that the State proved the formation of a conspiracy and the commission of overt acts from within Clark County.

The elaborate fake ceremony that the GOP Electors put on in Carson City on December 14, 2020, was anything but happenstance. The State's opening brief describes a clear through line between coordinating the event—including having Right Side Broadcasting travel from Washington D.C. to Nevada on December 13, 2020, to broadcast and provide live commentary of the event from Carson City—and Kenneth

Chesebro first contacting Michael McDonald, Jesse Law, and James Degraffenreid on December 10, 2020, sufficiently establishing preparatory acts and intent. OB at 39-44.

The video of the event itself evidences the central role that McDonald and Law played in the underlying fake elector scheme. 4-APP-0865. And when the grand jury evidence is taken in context as whole with evidence of (1) e-mail communications between Degraffenreid and Chesebro; (2) e-mail communications showing that Degraffenried took orders from McDonald to communicate with other interested persons; (3) e-mail communications between the GOP Electors referencing ongoing communications outside of the e-mails; (4) e-mail communications between the GOP Electors discussing edits to documents, including a draft memorandum that identified McDonald as the source; (5) McDonald conducting his work as Chairman of the Nevada Republican Party out of an office in Clark County; and (6) McDonald and Law residing in Clark County, a reasonable fact finder could infer that sufficient preparatory acts and intent occurred within Clark County

between December 10, 2020, and December 13, 2020. 4-APP-0856, 0882, 0894, 0905; 5-APP-1055-1057 1059-1061, 1088-1089, 1105.[4]

C. This Court should construe "effects" to ensure that communities with an interest in prosecuting crimes are a proper venue for inter-county offenses.

The GOP Electors' strict reading of NRS 171.030 renders the term "effects" meaningless by turning "effects" into elements of the offense. AB at 25-27. But the plain language of the statute makes effects different from the *locus deliciti*, so effects must be something other than elements. *See also Southern Nevada Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (addressing requirements of giving all provisions a statute meaning and seeking harmonious reading that serves general purpose of the statute). The State's argument, however, appropriately gives distinct meaning to effects and still places an

[4] Other than the Right Side Broadcasting video (Grand Jury Exhibit 6A), which the State relied on in opposing the motion to dismiss and at argument before the district court, all of the exhibits the State relies on here (Grand Jury Exhibits 4, 14, 18, 20, 27-29) are referenced in the supplement the district court requested. 2-APP-0453-0454; 3-APP-0621-0624, 0649-0650.

appropriate limiting construction on that term consistent with what this Court did in *Martinez Guzman II*. *Id*.

1. "Effects" are the category of harms the Legislature seeks to prevent by making conduct criminal.

In *Martinez Guzman II*, this Court recognized that preparatory acts will only establish venue when those acts are joined with intent to commit a crime. 137 Nev. at 609, 496 P.3d at 580. This Court imposed that limit to put teeth in limits on where a prosecutor may seek an indictment based on preparatory acts. *Id*.

The State's argument asks for similar limits here. Just as this Court recognized that "acts" in NRS 171.030 can address what precedes the commission of an offense, the State provides this Court with the means to construe "effects" as addressing what follows the commission of an offense. And the State does so in a way that appropriately constrains the word "effects" by limiting them—*categorically* speaking—to the harms the Legislature seeks to prevent by making particular conduct criminal. OB at 46-48.

That does not give a prosecutor the unfettered discretion the GOP Electors suggest that the State seeks. OB at 19. It limits venue by

focusing on the categorical effects the Legislature has sought to prevent by making certain conduct criminal and the defendant's engagement in such conduct.

The GOP Electors' only response to the State's argument on application of principles of statutory construction is to apply the cannon of the last antecedent. AB at 26-27. But their argument improperly equates "effects" with elements, when the plain language of NRS 171.030 makes effects distinct from commission of the offense. *Southern Nevada Homebuilders Ass'n*, 121 Nev. at 449, 117 P.3d at 173.

Martinez Guzman II does not limit "acts" in that way. And this Court should not limit "effects" in that way either. The State's construction gives independent meaning to "effects" but still imposes guardrails on prosecutorial discretion similar to those imposed in *Martinez Guzman II*.

2. The "effects" of the GOP Electors' offenses make Clark County a proper venue.

In the district court, the GOP Electors explained that venue will lie "where the community has an interest in prosecution of" an offense. 3-APP-0633. Again, the State agrees, especially given the practical

consequences of the district court's conclusions, which could have far-reaching consequences for victims of mail fraud. OB at 46-48.

But the GOP Electors provide no real response to the State's argument relying on the GOP Electors' representations to the district court. Instead, in a single paragraph, the GOP Electors dismiss the State's "effects" argument as "political." AB at 50.

The State's argument is that this Court should treat the word "effects" in NRS 171.030 as focusing on the *categorical* harms the Legislature seeks to prevent when it makes particular conduct criminal. OB at 46-48. The relevant harms the State identified here are (1) the receipt of "false or forged" instruments that were intended to defraud the recipient, and (2) a public office receiving a "false or forged instrument" that the government or the public may need to rely upon as a genuine record. OB at 46. And the State explained how those "effects" show up on these facts. OB at 47-48.

If the GOP Electors think that argument is political, that is their prerogative. But the State trusts that this Court will see things differently.

* * *

The controlling test under *Martinez Guzman I* is whether the State presented evidence establishing venue, nothing more and nothing less. *Martinez Guzman I*, 136 at 110, 460 P.3d at 450. "Under NRS 172.105, if venue is proper in a given district court for an alleged criminal offense, then it was committed within that court's territorial jurisdiction and a grand jury empaneled by that district court has the authority to inquire into that offense." *Id.*

Martinez Guzman I does not provide courts with an opportunity to engage in a qualitative analysis that evaluates the sufficiency, or number, of connections between the defendant and the venue. And it does not provide an opportunity for courts to pick and choose one venue over another when there is more than one proper venue. The plain language of NRS 171.030 reinforces that result—for an inter-county offense, venue is proper in any county where the State's evidence meets any of the ways to prove venue under NRS 171.030, only one of which is meeting the preparatory acts plus intent standard this Court imposed in *Martinez Guzman II*.

For the reasons explained above, the State has satisfied the venue requirements of NRS 171.030 multiple times over. *Martinez Guzman I* is satisfied, requiring reversal.

III. NACJ's policy arguments do not change the inquiry required by *Martinez Guzman I*.

At the time of filing this brief, Nevada Attorneys for Criminal Justice have a pending motion for leave to file an amicus brief. The State will not oppose that motion and expects it will be granted. So the State addresses the proposed NACJ brief too. The brief raises three concerns: (1) that venue be where the crime is committed, (2) avoiding inconvenient venues to allow access to support systems like family and friends, and (3) forum shopping.

The State appreciates NACJ's perspective, but this Court's decision in *Martinez Guzman I* controls the inquiry on each of NACJ's concerns. Venue in Nevada is statutory in nature, and the State has discretion to seek an indictment *only* where it can establish venue. *Martinez Guzman I*, 136 at 110, 460 P.3d at 450 And the State's argument here is that it *has* established venue under NRS 171.030 in multiple ways.

The holdings of the cases NACJ cites otherwise support the State. For instance, NACJ cites *U.S. v. Cores*, 356 U.S. 405 (1958). NACJ Brief at 8. There, the U.S. Supreme Court applied *Anderson* to conclude that overstaying the term for a "conditional landing permit" is a continuing offense. *Cores*, 356 U.S. at 408-09. NACJ also cites *Neff v. State*, 915 N.E.2d 1026 (Ind. Ct. App. 2009), and *U.S. v. Johnson*, 232 U.S. 273 (1944). NACJ Brief at 7. The analysis in *Neff* suggests that Indiana falls in line with states that treat uttering as a continuing offense given the distinction the Indiana court made with *Laughner v. State*, 769 N.E.2d 1147 (Ind. Ct. App. 2004). 915 N.E.2d at 1034. And *Johnson* is a case about the Federal Denture Act that the State distinguished in its opening brief based on the case's statute-specific analysis. OB at 28 n.7. Each of those cases support the State's plain language analysis on *locus delicti*. *See supra* Argument II(A).

NACJ also cites *U.S. v. Cabrales*, 524 U.S. 1 (1998). NACJ Brief at 2. But the opinion in *Cabrales* specifically noted that "the counts at issue do not charge Cabrales with conspiracy," and the outcome of the venue question would change if the government appropriately linked the

charges to the venue by way of the conspiracy. 524 U.S. at 7, 9. So *Cabrales* supports the State's reliance on conspiracy to establish venue. *See supra* Argument II(B).

Finally, NACJ cites *U.S. v. Rivera*, 388 F.2d 545, 548 (2d Cir. 1968), a case where the Second Circuit determined the defendant waived his venue objection. And if venue is a waivable defect in federal court, that lends persuasive support for the State's arguments addressed below on the availability of harmless error. *See infra* Argument V.

IV. The Vicinage Clause does not require a different result.

The GOP Electors argue that this Court must account for the Vicinage Clause in its analysis. AB at 18-19. But the Clause is inapplicable. The U.S. Supreme Court has never incorporated the Vicinage Clause into the Fourteenth Amendment. *Stevenson v. Lewis*, 384 F.3d 1069, 1071 (9th Cir. 2004). The GOP Electors make no argument for incorporation. AB at 18-19. So this Court need not address incorporation. *See*, *e.g.*, *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). And there is no state corollary to apply.

In any event, the GOP Electors otherwise fail to explain how the State's arguments are inconsistent with the principles imposed by the Vicinage Clause, even if it were incorporated. Because there is only one federal district in this State, the plain language of the Vicinage Clause doesn't split Nevada up in any way. U.S. Const. amend VI.

V. The State's harmless error arguments are consistent with this Court's precedents and should prevail if this Court reaches them.

This Court has long recognized that (1) dismissal with prejudice is a harsh remedy to be used sparingly and must be balanced against the public interest, and (2) grand jury error can be remedied through trial. *See State v. Gonzalez*, 139 Nev. ___, ___, 535 P.3d 248, 251 (2023) (quoting *State v. Babyan*, 106 Nev. 155, 173, 787 P.2d 805, 818 (1990)); *Lisle v. State*, 114 Nev. 221, 224-25, 954 P.2d 744, 746-47 (1998). Applying harmless error here is also consistent with the interpretation of NRS 172.105 under *Martinez Guzman I*.

The GOP Electors cite no authority to support their three-paragraph argument asserting that this Court should disregard the State's arguments relying on this Court's precedents on dismissal and

harmless error. *Compare* AB at 30-31; *with* OB at 49-50.[5] The absence of any citation to relevant authority provides this Court with grounds to disregard those arguments out of hand. *Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

Elsewhere in their brief, they appear to confront this argument by asserting that territorial jurisdiction equals subject matter jurisdiction. AB at 23 n.10. But again, they fail to cite any authority to support that assertion. AB at 23 n.10. And in any event, they cite nothing from *Martinez Guzman I* or *Martinez Guzman II* holding that an indictment is rendered void when the State's grand jury evidence falls short on venue but litigating a motion to dismiss leads to developments that cure the shortcoming. OB at 30-31.

Whether an insufficient showing of venue before a grand jury can be deemed harmless appears to be an open question. The obvious point

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[5] They also seek to peg the State with responsibility for delay in bringing the case. AB at 30. But to deny the State an opportunity to pursue a harmless error argument under such circumstances will create a perverse incentive for prosecutors to rush to a grand jury for an indictment before having sufficiently investigated the case just in case they will face a motion to dismiss. Forcing prosecutors to rush charging decisions is a bad outcome for everyone involved.

of *Martinez Guzman I* is to make sure that a case will be "triable" in the relevant judicial district, which "is a question reserved for the court." 136 Nev. at 110, 460 P.3d at 450. And the GOP Electors identify no unfair prejudice that will befall them if the State fulfills its obligation to present evidence establishing venue before the grand jury or in response to a motion to dismiss challenging venue. AB at 30-31. So when additional points developed in response to a motion to dismiss prove venue, the district court should be able to consider those developments when resolving whether the case is "triable" in that district.

Two developments from the district court provide additional proof of venue. This Court should consider whether they render a shortcoming on proving venue harmless.

* * *

A. The GOP Electors' reliance on NRS 171.020 does not overcome the State's argument that court staff acts in forwarding documents to Judge Du were "acts . . . requisite to consummation of the offense" under the GOP Electors' alternative argument.[6]

The GOP Electors attempt to defeat the State's first harmless error argument by invoking NRS 171.020 and *McNamara v. State*, 132 Nev. 60, 377 P.3d 106 (2016). AB at 25. They claim that the State may not rely on acts of third parties to satisfy NRS 171.030.

Comparison of the statutes' plain language suggests otherwise. The plain language of NRS 171.020 explicitly addresses the conduct of the defendant, but NRS 171.030 does not.[7] If the Legislature wanted "acts" in NRS 171.030 to include only a defendant's acts, the Legislature would

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[6] The GOP Electors fault the State for addressing this argument for the first time on appeal. AB at 25. But the GOP Electors raised the issue for the first time in their reply below. 3-APP-0493. So the State never had a chance to address it in writing. In any event, the argument is consistent with the State's continued argument that it proved venue in Clark County under NRS 171.030. This isn't the sort of "game-changing" argument that should be prohibited, especially when it is a product of the GOP Electors' alternative argument first presented in a reply. *See Schuck*, 126 Nev. 437, 245 P.3d at 544-45.

[7] The full statutory text is provided in an addendum attached to this brief under NRAP 28(f).

have included language in NRS 171.030 like it did in NRS 171.020. But it did not. The inclusion of something in NRS 171.020 and its exclusion from NRS 171.030 is presumed to be intentional. *See*, *e.g.*, *State v. Javier C.*, 128 Nev. 536, 541, 289 P.3d 1194, 1197 (2012).

Given the foregoing, a plain reading of "acts . . . requisite to consummation of the offense" makes acts of court staff forwarding the GOP Electors' envelope from Las Vegas to Reno an "act" that establishes venue in Las Vegas. And that conclusion is wholly consistent with what the Fourth Circuit said in *Blecker*, further undercutting the GOP Electors' "pitstop" theory. *See supra* Argument II(A)(3).

B. McDonald's phone records strengthen the circumstantial evidence proving venue in Clark County.

As the State explains above, the GOP Electors' argument misunderstands how circumstantial evidence works. *See supra* Argument II(B)(2). And McDonald's phone records showing his presence in Las Vegas December 10-13, 2020, provide further support of preparatory acts plus intent. 1-SAPP-003-004. When all the available evidence is considered as a whole, there is a reasonable inference to be made that McDonald formed the intent to conspire with the other GOP

Electors and committed overt acts in furtherance of the conspiracy while he was still in Clark County.

* * *

This Court should hold that any shortcoming in the grand jury evidence on venue is harmless because (1) the GOP Electors' alternative argument concedes venue under NRS 171.030 by identifying evidence of court staff undertaking "acts . . . requisite to consummation of the offense" in Clark County, and (2) McDonald's phone records reinforce his participation in the planning stages of the fake electoral scheme while he was in Clark County.

CONCLUSION

This Court should reverse and remand with instructions to reinstate the indictment.

Respectfully submitted October 18, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 32(a)(9)(A), I certify that:

This brief complies with the type-volume limitation of NRAP 32(a)(7)(A)(ii) because the brief contains 6,993 words. This brief complies with the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionately spaced typeface with Microsoft Word using Century Schoolbook 14-point font.

* * *

Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in a brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted October 18, 2024,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing in accordance with this Court's electronic filing system and consistent with NEFCR 9 on October 18, 2024.

Participants in the case who are registered with this Court's electronic filing system will receive notice that the document has been filed and is available on the court's electronic filing system.

/s/ Jeffrey M. Conner
An employee of the office
of the Nevada Attorney General

NRAP 28(f) Addendum

NRS 171.020: Act within this State culminating in crime in this or another state.

> Whenever a person, with intent to commit a crime, does any act within this State in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this State, such person is punishable for such crime in this State in the same manner as if the same had been committed entirely within this State.

NRS 171.030: Offense committed partly in one county and partly in another.

> When a public offense is committed in part in one county and in part in another or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the venue is in either county.