IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, Appellant, vs. JAMES WALTER DEGRAFFENREID III, DUWARD JAMES HINDLE III, JESSE REED LAW, MICHAEL JAMES MCDONALD, SHAWN MICHAEL MEEHAN, EILEEN A. RICE, Respondents.	**CASE NO.** 89064 **Dist. Court No.** C-23-379122-1 C-23-379122-2 C-23-379122-3 C-23-379122-4 C-23-379122-5 C-23-379122-6 **STATE OF NEVADA'S RESPONSE TO RESPONDENTS' MOTION TO DISMISS AND COUNTERMOTION TO STRIKE**

INTRODUCTION

Exactly 160 years ago today, Nevada was admitted into the Union as the 36th State. And because Nevada entered the Union on equal footing with every other state, that admission came with all of the sovereign powers vested in the States by and through the U.S. Constitution. *See*, *e.g.*, *Lessee of Pollard v. Hagan*, 44 U.S. 212, 222 (1845) (recognizing the Equal Footing Doctrine). Those sovereign powers include the plenary authority to determine the manner for selecting the State's electors in a presidential election. U.S. Const. Art. II, § 1; *see also Bush v. Gore*, 531 U.S. 98, 104 (2000).

No federal statute—not a general criminal statute like 18 U.S.C. § 1001, and not the Electoral Count Act of 1887—could preempt the authority the States derive from Article II, Section 1 of the U.S. Constitution. Preemption doctrine is a function of the Supremacy Clause that addresses conflicts between state and federal law.

It is foundational, black letter constitutional law that Congress cannot, through legislation, override the Constitution—the Constitution reigns supreme over every act of Congress. *Marbury v. Madison*, 5 U.S. 137, 180 (1803) ("Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument") (emphasis in original). Article V of the U.S. Constitution lays out a much more daunting procedure for amending the Constitution than the process Congress must follow to adopt federal legislation famously demonstrated by Schoolhouse Rock's 1975 cartoon musical rendition of that process, "I'm Just a Bill."[1]

[1] Schoolhouse Rock!, *I'm Just a Bill* (1975), available at https://www.youtube.com/watch?v=SZ8psP4S6BQ (last visited on October 31, 2024).

But before this Court engages the arguments the GOP Electors put forth in their motion, this Court should strongly consider striking the motion and with it the GOP Electors' improper factual recitations from the Answering Brief. For reasons explained below, the GOP Electors' filing is no motion to dismiss—it is an unauthorized sur-reply that is an obvious improper attempt to respond to the State's reply brief and slow down this Court's resolution of the appeal.

ARGUMENT

I. This Court should strike the motion to dismiss and the improper factual statements the GOP Electors asserted in the Answering Brief.[2]

Because today is Nevada's birthday, that also means it is Halloween. But even on Halloween, an unauthorized sur-reply masquerading as a motion to dismiss is still an unauthorized sur-reply.

Ten days ago, this Court placed an entry on its docket stating that briefing is complete in this case. But a week later, the GOP Electors filed a "motion to dismiss" that is really a response to the State's reply brief. As this Court has said, the substance of an order controls its effect, not its label. *State v. Shade*, 110 Nev. 57, 61 n.1, 867 P.2d 393, 395 n.1 (1994) ("It

[2] The State submits this countermotion under NRAP 27(a)(3)(B).

is the substance of an order, rather than its caption, which is determinative of whether the order is appealable."). This Court should apply a similar substance-over-form rule here too.

This action by the GOP Electors is the latest in a series of actions exhibiting the GOP Electors belief that they are above both the law and this Court's rules. As the State alleges in the indictment—and is reinforced by the State's response to the GOP Electors' brand new preemption argument under the ECA that will follow below—the GOP Electors flouted the law when they uttered or offered documents falsely declaring themselves to be Nevada's electors when they knew any such statement to be false, they flouted this Court's rules by knowingly including irrelevant facts in their answering brief, and now they are flouting this Court's briefing rules (including evading word count limits)[3] by cloaking what is in substance a sur-reply with the title "motion to dismiss."

This Court should strike the GOP Electors' motion for noncompliance with the Nevada Rules of Appellate Procedure. NRAP

[3] The certificate of compliance for the motion indicates that the motion includes 4,569 words, and the certificate of compliance for the answering brief puts that brief at 13,710 words—just 290 words under the word count for a principal brief under NRAP 32(a)(7).

32(e). This Court's rules do not allow for the filing of a response to a reply brief. NRAP 28.

And although the State had previously suggested that it would refrain from filing a motion to strike the improper facts from the Answering Brief, *see* Reply Brief at 2 n.1, this change in circumstances has caused the State to have a change of heart. Under NRAP 28(a)(7), the statement of the case is to recite "the facts *relevant to the issues submitted for review*." (emphasis added). For that reason, this Court should also strike all facts from the answering brief that the GOP Electors expressly admitted are not relevant to any issue on appeal. *See*, *e.g.*, Answering Brief at 2 n.3, 9.

II. No act of Congress can preempt the authority that Article II, Section 1 of the U.S. Constitution vests in the States.

Although this Court should see the motion for what it is—an attempt to supplement the Answering Brief and respond to the Reply Brief—the motion fails to establish a basis for dismissal anyway. Tucked into the tail of the motion is an argument that preemption can be jurisdictional when federal law "implicates the choice of law governing an action." Motion at 17 (quoting *Highroller Transp., LLC v. Nev. Transp. Auth.*, 139 Nev. ___, ___, 541 P.3d 793, 803 (Ct. App. 2023)).

But no "choice-of-forum" legislation can preempt a constitutional provision enshrining State governance over the method for selecting electors—acts of Congress that are repugnant to the Constitution are void. *Marbury*, 5 U.S. at 180. The State already explained in the answering brief—and reiterates below—that the authority the GOP Electors cite does not support their position that their conduct only implicates federal interests and deprives the State of authority to enforce state criminal laws to protect state interests.

Loney v. Thomas, 134 U.S. 372 (1890)—the GOP Electors' seminal authority—reinforces the State's position. And the GOP Electors fail to cite any authoritative decision to the contrary. So if this Court reaches the motion on its merits, the motion should be denied.

A. *Loney* identifies a proper basis for concurrent state and federal criminal jurisdiction that applies here.

In *Loney*, the U.S. Supreme Court expressly limited its holding, noting that its ruling *did not* establish that State's are precluded from making conduct criminal simply because that conduct would also violate federal law. 134 U.S. at 374-75. As the State thoroughly explained in the Reply Brief—and the GOP Electors continue to fail to rebut—the point of the Court's holding in *Loney* was that the defendant in that case violated

an oath that arose *only* under federal law, and the State had no interest in prosecuting a violation of federal law. Reply Brief at 4-6.

This case is fundamentally different. State law is the source of a person's authority to declare themselves an elector. NRS 298.065(1); U.S. Const. art. II, § 1. That is a product of Article II, Section 1 of the U.S. Constitution, which reserves the authority to determine the method for selecting electors to the States. *Bush*, 531 U.S. at 104. The Constitution—an enduring document that can only be changed through the amendment process in Article V—reigns supreme over all laws passed by Congress. *Marbury*, 5 U.S. at 180. Congress lacks authority to deprive Nevada of the sovereign authority the People reserved to the States in Article II, Section 1.

Nothing said in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Ohio v. Thomas*, 173 U.S. 276 (1899); *In re Waite*, 81 F. 359 (N.D. Iowa 1897); or *In re Neagle*, 135 U.S. 1 (1890), is to the contrary. Those cases all address the point that a state cannot control a federal officer exercising the authority granted them *by federal law*.

The GOP Electors were not federal officers. And federal law granted

them no authority to utter or offer documents that falsely identified themselves as Nevada's "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. *See also infra* Argument II(B)(2) (addressing the GOP Electors assertions that they "had every right to challenge the results of Nevada's 2020 election results").

Finally, this point also squarely defeats the GOP Electors' suggestion that 18 U.S.C. § 1001 has preemptive force here. That Congress has made something a federal crime does not deprive the State of authority to make the same conduct criminal under state law—the question under *Loney* is only whether the State has a valid interest that it can protect through enforcement of her own criminal laws. 134 U.S. at 374-75. And Nevada does—one that is derived from an express provision of the U.S. Constitution.

B. The GOP Electors otherwise fail to cite any authority supporting the proposition that Nevada cannot use her general criminal laws to prosecute the GOP Electors for attempting to subvert the State's sovereign interests that arise out of the express reservation of Article II, Section 1 of the U.S. Constitution.

No case the GOP Electors cite suggests that state courts lack

jurisdiction to consider criminal charges implicating a sovereign interest that the Founders expressly reserved to the States in the U.S. Constitution. The GOP Electors preemption argument fails at its foundation and should be dispatched accordingly.

1. No act of Congress can preempt the State's independent authority to prosecute the crimes charged in the indictment—Article II, Section 1 of the U.S. Constitution reigns supreme over any act of Congress.

The State's argument in response to the preemption issue in the Reply Brief was, and continues to be, that the State derives her authority to pursue this prosecution by virtue of Article II, Section 1 of the U.S. Constitution. Reply Brief at 3-8. The GOP Electors cite no authority to the contrary. Instead, they cite cases like *United States Term Limits v. Thornton*, 514 U.S. 779, 806 (1995), and *Cook v. Gralike*, 531 U.S. 510, 523 (2001). But those cases just reinforce the State's argument—this prosecution is derived from the sovereign interests reserved to the State *by the U.S. Constitution*. Congress cannot override the Constitution. *Marbury*, 5 U.S. at 180.

But the U.S. Supreme Court *has* recognized that the States have broad authority to address the selection of electors, so long as the States' actions do not conflict with other specific federal constitutional provisions.

Williams v. Rhodes, 393 U.S. 23, 29 (1968); *see also Chiafalo v. Washington*, 591 U.S. 578, 589 (2020) ("Article II, § 1's appointment power gives the States far-reaching authority over presidential electors, absent some other constitutional constraint."). And no federal constitutional provision says that this State is prohibited from relying upon her generally applicable criminal laws to prosecute people that conspire to engage in a fraudulent scheme intended to subvert the State's method for selecting her electors.

Given the foregoing, the GOP Electors' arguments about field preemption, obstacle preemption, and conflict preemption are beyond the pale. The suggestion that an act of Congress can render the State of Nevada powerless to protect the integrity of her chosen method for ascertaining her presidential electors—a sovereign interest reserved to the States by the Constitution of the United States—is an utter failure to grasp the full extent of the harm the GOP Electors imposed on Nevada when they falsely identified themselves as Nevada's electors in fake certificates they intended to be accepted as authentic.

And it makes no difference that the State is relying on generally applicable criminal laws to protect her constitutionally ordained interests.

Make no mistake here, the GOP Electors' tired efforts to mischaracterize Attorney General Ford's comments to the Nevada Legislature are no defense.[4] The State limited the discussion of categorical harms with respect to the issue of venue for interpreting the word "effects" under NRS 171.030, consistent with this Court's prior decisions interpreting that statute. Opening Brief at 44-48; Reply Brief at 22-25.

But when it comes to the GOP Electors' preemption argument, there is no avoiding the political mare's nest the GOP Electors created through their criminal conduct. This Court must consider the full scope of the harm the GOP Electors perpetrated on the body politic of this State when it considers the State's interest to preserve the integrity of the process for ascertaining the State's electors—a matter expressly reserved to the States by Article II, Section 1 of the U.S. Constitution. *Nanopierce Tech., Inc. v. Depository Trust and Clearing Corp.*, 123 Nev. 362, 370-71, 168 P.3d 73, 79 (2007). The GOP Electors perpetrated a grave harm on the State of Nevada and her sovereign interests when they uttered or offered

[4] Once again, the State trusts that this Court can see the distinction between General Ford's statements and how the GOP Electors have tried to characterize those statements. Reply in Support of Motion for Expedited Treatment, *State v. Degraffenreid*, No. 89604, at 2 n.1 (Aug. 26, 2024).

false or forged instruments that falsely declared themselves 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. This is true, even if some of the recipients of those documents were federal officers.

2. The GOP Electors' reliance on federal election law reinforces the basis for the criminal charges in this case.

The provisions of the Electoral Count Act of 1887, which have since been reformed, do not rescue the GOP Electors from facing state criminal charges. To start, the canon of constitutional avoidance requires interpreting the ECA, if possible, to avoid rendering that law unconstitutional. *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018). Thus, the ECA must be interpreted consistently with Article II, Section 1 of the U.S. Constitution—if the ECA can only be read to impair the States' authority to protect the integrity of a state's process for identifying her presidential electors, then *Marbury* would render the ECA void.

This Court, of course, need not reach that conclusion because the import of the ECA here is plain on its face. Congress adopted former 3 U.S.C. § 5—commonly referred to as the ECA's safe harbor provision—properly tasking the *States* with establishing procedures for adjudicating

election contests. If the State resolved any election contest (1) through a judicial process (or by any other state tribunal) with rules set out before the election, and (2) did so at least six days before the day the electors were to meet to cast their ballots, the State's identification of its electors was *conclusive*. *Bush*, 531 U.S. at 113 (Rehnquist, C.J. concurring) (quoting former 3 U.S.C. § 5); *see also* Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 Fla. L. Rev. 541, 587 (2004) (providing the statutory text).

This Court entered judgment and issued its remittitur, concluding the 2020 election contest the GOP Electors filed in this State within the time required by the safe harbor provision. Remittitur, *Law v. Whitmer*, No. 82178 (December 8, 2020). The GOP Electors knew that this Court denied their appeal within that time, and yet they still falsely declared themselves to be the "duly elected and qualified Electors for President and Vice President of the United States of America from the State of Nevada." 4-APP-0837.

True, the GOP Electors generically commentators have opined that the ECA was intended to give Congress limited discretion to determine that a slate of electors did not meet the requirements for satisfying the

safe harbor provision or that a state's electors do not meet the constitutional qualifications to serve as an elector when exercising its authority to count the States' electoral votes. *Siegel*, 56 Fla. L. Rev. at 589-96; Motion at 12 n.5. And perhaps the GOP Electors are right that they were free to advocate that Nevada's official slate of electors did not meet the standard for safe-harbor protection under the ECA or that the votes of Nevada's official slate of electors should not be counted.

But there is no debating that the authority to identify oneself as an elector is derived from *state law*. Article II, Section 1 of the Constitution makes plain that the States are vested with the authority to control the selection of electors. *See also* NRS 298.065(1). It is implausible that Nevada can, and does, have a statutory provision that constrains the conduct of electors similar to the one addressed in *Chiafalo*, 591 U.S. at 589, s*ee* NRS 298.075, and yet Nevada would be preempted from relying on state criminal laws to charge criminal offenses involving false statements about a person's status as a Nevada elector.

Nevada has declared her method for identifying electors in NRS 298.065(1). And no act of Congress—not 18 U.S.C. § 1001 and not the ECA—can deprive Nevada of the power to protect her constitutionally

ordained right to control who can and cannot say they are a Nevada elector.

3. The remaining cases that the GOP Electors cite in no way support the theory that Nevada's courts lack jurisdiction to consider the criminal charges in the indictment.

The GOP Electors cite the opinion of a single justice in *City of Detroit v. The Murray Corp.*, for the broad proposition that the federal government is supreme when it acts "within the scope of its powers." 355 U.S. 489, 497 (1958) (Frankfurter, J. dissenting in part and concurring in the judgment in part). There is nothing remarkable about that—the point here is that the State is acting to protect powers expressly reserved to the States by Article II, Section 1 of the U.S. Constitution. And the broad reference to the Supremacy Clause from *Martin v. Martin*, 138 Nev. ___, 520 P.3d 813 (2022), is meaningless for the same reason.

The GOP Electors also rely on *U.S. ex rel Noia v. Fay*, 300 F.2d 345 (2d Cir. 1962). But historical context makes that case a particularly bad source of authority for the GOP Electors to press their theory on preemption. The Second Circuit opinion is the prequel to the U.S. Supreme Court's decision in *Fay v. Noia*, 372 U.S. 391 (1963). And *Fay* is a case that established long-since abandoned federal habeas corpus

doctrine on procedural defaults. The U.S. Supreme Court abandoned that doctrine because "[t]he *Fay* standard was based on a conception of federal/state relations that undervalued the important interest in finality served by state procedural rules and the significant harm to the States that resulted from the failure of federal courts to respect them." Reinforcing its retreat from cases like *Fay*, the U.S. Supreme Court has since reiterated on multiple occasions that, "Because federal habeas review overrides the States' core power to enforce criminal law, it 'intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'" *Shinn v. Ramirez*, 596 U.S. 366, 376 (2022) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). *Fay* is not a good foundation to support a claim seeking to subvert the use of state criminal law to protect sovereign interests expressly reserved to the States in the U.S. Constitution.

The GOP Electors also repeatedly quote Justice Breyer's dissent from *Bush* without noting that they are citing a dissenting opinion. Motion at 9-10, 12. If the dissents in *Bush* had been the judgment of the Supreme Court, Al Gore likely would have been the 43rd President of the United States, not George W. Bush. More importantly, the majority

opinion in *Bush* reinforces that it is state legislatures that determine the method for selecting electors through power derived from Article II, Section 1 of the U.S. Constitution. 531 at 104. Once again, federal legislation cannot override the U.S. Constitution. *Marbury*, 5 U.S. at 180.

And finally, *Burroughs v. U.S.*, 290 U.S. 534 (1934). The GOP Electors cite *Burroughs* for the proposition that electors "exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States." Motion at 12-13.

The argument at issue in *Burroughs* was that the federal government lacked authority to charge people with *federal* crimes for seeking to improperly influence the outcome of the election of presidential and vice-presidential electors *because* Article II, Section 1 reserves selection of electors *to the States*. 290 U.S. at 544. But the Court held that the criminal statutes at issue did not "interfere with the power of a state to appoint electors or the manner in which their appointment shall be made." *Id*.

That case does no help for the GOP Electors. Again, just because the federal government has made something a crime, does not deprive the State of the authority to make that conduct a state crime too. *See supra*

Argument II(A). If that were right, we would not have what is called the dual sovereignty doctrine, which permits the a state and the federal government to a person with crimes for the exact same conduct. *Gamble v. United States*, 587 U.S. 678, 681 (2019).

There is no debating the existence of the State's strong sovereign interests derived from Article II, Section 1—Nevada has plenary authority to establish its method for selecting her electors. *Bush*, 531 U.S. at 104. And that comes with the authority to protect those interests, so long as the State does so without running afoul of any other constitutional provisions. *Chiafalo*, 591 U.S. at 589. Neither *Burroughs*, nor any other case the GOP Electors cite, says otherwise. And would *Marbury* render any act of Congress repugnant to Article II, Section 1 void. Preemption is not in play here.

* * *

CONCLUSION

This Court should strike the GOP Electors motion and decline to even consider it because it is an unauthorized sur-reply. Otherwise, the motion lacks merit and should be denied.

RESPECTFULLY SUBMITTED this 31st day of October 2024.

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CERTIFICATE OF COMPLIANCE

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

This opposition and countermotion complies with the type-volume limitation of NRAP 27(d)(2)(A) because the motion contains 3,700 words. This opposition and counter motion also complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because it 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 motion and countermotion, 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 motion and countermotion is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted October 31, 2024,

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Attorney General's Office, and pursuant to NRAP 25(b) and NEFCR 9 I electronically filed the foregoing **STATE OF NEVADA'S RESPONSE TO RESPONDENTS' MOTION TO DISMISS AND COUNTERMOTION TO STRIKE** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing System (Eflex) on October 31, 2024. Participants in the case who are registered with Eflex as users will be served by the Eflex system.

/s/ *Jeffrey M. Conner*
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