IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

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
Dist. Ct. 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

ERRATA TO RESPONDENTS' TO REPLY IN SUPPORT OF MOTION TO DISMISS

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Please take notice that footnote 2 was inadvertently included in the reply as filed. A corrected version with that footnote omitted is attached hereto.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **ERRATA TO RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS** was filed electronically with the Nevada Supreme Court on the 12th day of November, 2024. Electronic service of the foregoing document shall be made in accordance with the Master Service List.

/s/ Leo S. Wolpert
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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 **Dist. Ct. 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 **RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS**

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INTRODUCTION

The State cannot punish misrepresentations to the federal government or interfere with the federal government's exclusive role as final arbiter over disputed elections. The State's colorful efforts to distract fail.

LEGAL ARGUMENT

A. Jurisdiction Can Challenged at Any Time.

The State latches on to irrelevant details of *Highroller Transp., LLC v. Nev. Transp. Auth.,* 541 P.3d 793, 803 (Ct. App. 2023) to distract from *Highroller*'s relevant holding that challenges to the state court's subject matter jurisdiction are not waivable and can be raised at any time. *Id.* at 803-04.

B. The Statutes at Issue Are Not Election Laws.

The State strains to reframe NRS 239.330 and NRS 205.110 as falling within its powers to govern selecting electors. Those statutes do not.[1] Instead, they prohibit offering or filing "false or forged instruments" and forgery, respectively, without any reference to elections or electors. NRS 239.330 and NRS 205.110 are orthogonal to Nevada's authority over Presidential electors.

C. The State Incorrectly Frames the Conduct at Issue.

Whether Defendants are guilty of any crimes is a determination for a jury, not the State or this Court. Yet, the State hyperbolically refers to "the political mare's

[1] NRS Chapter 298 contains Nevada's laws regarding presidential electors and elections.

nest the GOP Electors created through their political conduct," telling this Court it "must consider the full scope of the harm the GOP Electors perpetrated on the body politic." (Opp., p. 11.) But this case is unlike *Chiafalo v. Washington*, 591 U.S. 578 (2020)—a case the State depends on—which involved the valid enforcement of state election laws. There, Democratic electors "decided to cast their ballots for someone else" other than the winner. *Id.* at 586. But this case does not involve faithless electors; rather, contingent electors who submitted their own certificates to preserve their right to challenge the 2020 results (including this Court's determination). Whether the State can punish other elector conduct is irrelevant; it has no authority to punish Defendants' conduct.

D. The State Cannot Punish Alleged Misrepresentations to the Federal Government.

NRS 239.330 and NRS 205.110 generally prohibit submission of false records to government agencies and forgery; the State uses these statutes in part to punish the submission to Judge Du. But the State does not have jurisdiction over alleged misrepresentations to the federal government; the prosecution is preempted by 18 U.S.C. § 1001.

Although the conduct at issue in *In re Loney,* 134 U.S. 372 (1890) involved a false oath made to a state notary public, punishable under a general Virgina law, the oath was made in connection with misrepresentations to a federal tribunal—and "the power of punishing a witness for testifying falsely in a judicial proceeding belongs

peculiarly to the government in whose tribunals that proceeding is had." *Id*. at 374. Thus, ***even if otherwise punishable under state's general laws,*** the offense against the federal tribunal "***cannot…be punished in the courts of Virginia under the general provision of her statutes***[.]" *Id.* at 375 (emphasis added). Despite the State's misreading, the conduct in *Loney* purportedly violated Virginia's general prohibition on false representations. Thus, the question is not whether some other state law may apply, but whether the state's effort to apply its own laws interferes with the federal government's ability to police its own administration.[2] The alleged misrepresentations to Judge Du are not like the types of cases that the *Loney* recognized as allowing punishment by both federal and state governments: making and uttering counterfeit money. *Id.* at 373.

Even if state law generally prohibits misrepresentations, the conduct targeted is alleged misrepresentation to the federal government, which is exclusively the federal government's province. Just as witnesses must be able to testify freely before federal tribunals for the impartial administration of federal proceedings, persons challenging elections at the federal level must be free to do so "unrestrained by legislation of the State, or by fear of punishment in the state courts." *Id.* at 374.

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[2] This is precisely why the State's attempt to seek support in cases like *United States Term Limits v. Thornton*, 514 U.S. 779, 806 (1995), *Cook v. Gralike*, 531 U.S. 510, 523 (2001), and *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) fails. (*See* Opp., pp. 9-10; Motion, pp. 8-9.)

Even assuming, *arguendo*, the State had the authority to punish any of the conduct at issue here, that does not mean the State can rely on misrepresentations to the federal government to do so, contrary to the State's arguments. (Opp., p. 12.)

E. States' Power Over Electors Does Not Permit Interference with the Federal Government's Exclusive Powers.

1. The State Ignores the Federal Government's Role.

If the State were to be believed, the federal government has no exclusive authority over Presidential elections, which is patently false. For example, "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States ***unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College***." *Bush v. Gore*, 531 U.S. 98, 104 (2000) (emphasis added) (per curiam).[3] While the State controls the method of selecting electors, the federal government is still the ultimate arbiter of election contests, and the State's powers cannot be interpreted so broadly as to permit interfering with that role.

If the State's apparent position to the contrary were correct, the United States Supreme Court would not have had any authority to render a decision in *Bush.* As that court recognized, "[w]hen contending parties invoke the process of the court…it

[3] Defendants apologize for failing to reference that two citations in the Motion were to the dissent in this case. (*See* Opp., p.16; Motion, pp. 9-10, 12.) These citations referenced the ECA's text and legislative history, not any substantive ruling.

becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront." *Id.* at 111. In *Bush*, the Court reached the merits[4] of the election contest. *Id.*

While states control the initial manner of selection, electors indisputably play a federal role. Justice Rehnquist's concurrence, joined by Justices Scalia and Thomas, explained,

> …[electors] exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated.

531 U.S. at 112. Thus, the State's attempt to distinguish various cases regarding the exclusive, distinct role the federal government plays (Opp., p. 12) fails.

2. The State Cannot Interfere with the Federal Role.

Just like "the administration of justice in the national tribunals" at issue in *Loney*, the federal government's role as the ultimate arbiter of Presidential elections would be impeded if persons seeking relief "were liable to prosecution and punishment in the courts of the State upon a charge of perjury, preferred by a disappointed suitor or contestant, or instigated by local passion or prejudice." 134

[4] The *Bush* Court denied the requested relief because it was not possible to have a recount before the December 12, 2020, safe harbor date. *Id.*

U.S. at 375.[5] Likewise, relief under the ECA was available and could not be interfered with by Nevada. Again, the State's arguments about the ECA ignore the separate role the federal government plays with regards to federal elections (in particular, regarding adjudicating election contests). That the ECA provided a deadline by which those contests had to be completed (*i.e.*, 6 days before the Electors' meeting) does not change the conclusion that the State cannot interfere with any such efforts.

3. The State Cannot Criminalize Challenging Election Results.

The State reluctantly concedes that "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." (Opp., p. 14.) But there is no "perhaps" necessary: Defendants absolutely have the right to express their opinions regarding the 2020 election and, relevant here, to preserve their rights to challenge elections via the courts, without fear of political reprisal. If this Court adopted the State's positions, nobody in Nevada could ever question the official government position regarding an election, let alone seek federal relief—a result repugnant to the First Amendment.

[5] Whether challenges to the 2020 election had merit has no bearing on these legal issues, and the State's efforts to inflame the Court's passion illustrates the central problem to be avoided under *Loney*.

In *United States v. Trump*, No. 23-257 (TSC), 2023 U.S. Dist. LEXIS 215162, at *8, *56 (D.D.C. Dec. 1, 2023), the court rejected Trump's First Amendment challenge to his federal indictment because he "fail[ed] to identify any protected acts or speech that the statutes might render impermissible under the Government's interpretation." Here, in contrast, if the State could criminalize Defendants' conduct, it would have been impossible for Defendants to preserve their ability to legally challenge the results of the election.[6]

It is also patently false that the State has a "constitutionally ordained right to control who can and cannot say they are a Nevada elector." (Opp., pp. 14-15.) Petitioning the government is protected by the First Amendment. *See* U.S. Const. Amend. 1 ("Congress shall make no law … abridging … the right of the people … to petition the Government for a redress of grievances."). And the federal government cannot be indirectly constrained in its powers to adjudicate contested elections by allowing States to punish speech integral to seeking federal relief. *Cf. Loney*, 134 U.S. at 374 ("It is essential to the impartial and efficient administration of justice in the tribunals of the nation, that witnesses should be able to testify freely

[6] Nevada law does not have any mechanism to address a situation where an election result is successfully challenged without having timely submitted a certificate of electors as required by NRS 298.065; this means that, even if a challenger prevails, they could be denied relief. Thus, Defendants submitted their Certificate—even though they could not comply with all statutory requirements—to do the best they could to preserve their rights to continue to challenge the outcome.

before them, ***unrestrained by legislation of the State, or by fear of punishment in the state courts***.") (emphasis added).

Citizens have a First Amendment right to seek relief regarding Presidential elections—and to disagree with the State's determinations, even if they are wrong.[7] Likewise, the State has no right to limit the federal government's authority by punishing those who seek federal relief. Thus, the State cannot punish Defendants for preserving their rights; that this this Court denied relief does not change this fact, contrary to the State's arguments. (Opp., p. 13.)

F. Applying the Supremacy Clause Does Not Limit the Legitimate Exercise of State Power.

Preventing state interference with the federal government's role in Presidential elections does not limit the State's legitimate roles.[8] While it is generally true that just because something is also federal crime, the State is not always

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[7] Even stating false facts is protected by the First Amendment. *See United States v. Alvarez*, 567 U.S. 709, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012). Central to Justice Breyer's reasoning in concurrence was that criminalizing false statements on politically controversial topics "provides a weapon to a government broadly empowered to prosecute falsity without more;" he cautioned that unpopular groups "may fear that the government will use that weapon" to seek "political and selective prosecutions," as "in political contexts, … the risk of censorious selectivity by prosecutors is … high" (*id*. at 734-36).

[8] *Nanopierce Tech., Inc. v. Depository Trust and Clearing Corp.*, 123 Nev. 362, 370-71, 168 P.3d 73, 79 (2007) (Opp., p. 11): the word "harm" appears nowhere in the Court's preemption discussion there. *Id*., at 123. Nev. at 370-375, 168 P.3d 78-82. Rather, the sole reference to "harm" is in the Court's discussion of the misrepresentation claims at issue. *Id*., 123 Nev. at 376.

deprived of authority, the Supremacy Clause preclude the State's efforts to apply its own general laws in a manner that interferes with the federal government's exclusive authority over both policing false submissions to the federal judiciary and serving as the ultimate arbiter if challenges are presented.

CONCLUSION

The power to punish misrepresentations to the federal judiciary belongs exclusively to the federal government. The State cannot interfere with the federal government's role as ultimate arbiter over contested elections. The Motion to Dismiss should be granted.

DATED this 12th day of November, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 32(a)(9)(A):

I hereby certify that this motion 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 the REPLY IN SUPPORT OF MOTION TO DISMISS has been prepared in a proportionally spaced typeface (14-point Times New Roman font).

I further certify that this REPLY IN SUPPORT OF MOTION TO DISMISS complies with the type-volume limitation of NRAP 27(d)(2)(C) because it contains 2,107 words.

Finally, I hereby certify that I have read this appellate 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 all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the 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.

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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.

DATED this 12th day of November, 2024.

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