GEORGIA, THE STATE OF Petitioner, v. MARK RANDALL MEADOWS, Respondent *In Re: Fulton County Civil-Inquiry Certificate*	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT C.A. No.: 2022-CP-39-01085 **RESPONDENT'S MEMORANDUM OF LAW OPPOSING APPLICATION FOR ATTENDANCE OF WITNESS OUT OF STATE**

To: 13th Circuit Solicitor, W. Walter Wilkins *et al.*

Respondent, by and through the undersigned attorney, submits this Memorandum of Law opposing Georgia's request to compel Respondent's attendance on September 27, 2022, in Fulton County Georgia, for a civil-inquiry pursuant to Georgia state statute § 15-12-100 and a certificate issued under that authority.

Memorandum of Law

Respondent opposes Georgia's Petition for the following specific reasons: First, the Fulton County Certificate of Need before the Court, requiring appearance on September 27, 2022, is now moot. Second, South Carolina's Uniform Act to Secure the Attendance of Witnesses from Without a State in a *Criminal Proceeding* does not apply to a certificate issued pursuant to Georgia Code Section 15-12-100. Even if it did, as applied in this case, Georgia's petition violates Respondent's Right to Privacy. Finally, Respondent is not a "material witness" because there are several constitutional privileges that would limit, if not outright preclude, Mr. Meadows's testimony. Requiring a witness to appear and assert a privilege, including but not limited to Executive Privilege, is prohibited by law.

I. The Georgia Certificate of Need is Moot.

The Court can and should dismiss the petition as moot. The September 27, 2022, certificate return date has passed. (Certificate ¶ 12). Specifically, this matter comes before the Court on the Fulton County District Attorney's petition, dated August 19, 2022, to compel Mark R. Meadows, former Chief of Staff to President Trump, to testify in their civil inquiry on Tuesday, September 27, 2022, at 9:00 a.m. in Fulton County, Georgia. (Petition ¶ 14). Under exactly the same circumstances and in this same Georgia civil inquiry, the Texas Court of Criminal Appeals dismissed a Georgia petition as moot because the certificate date had already come and gone. *In re Pick*, __ S.W.3d __, 2022 WL 4003842 (Sept. 1, 2022). Once the return date on the certificate has passed, the Court should not issue an Order granting the relief requested.

An order from this Court for Mr. Meadows to testify on September 27, a date in the past, "would have no practical legal effect." *See, e.g., Treasured Arts, Inc. v. Watson*, 319 S.C. 560, 564, 463 S.E.2d 90, 92 (1995) (holding that request for injunctive relief was moot where the underlying program had expired and an "order for injunctive relief would have no practical legal effect" such that "no injunctive relief can be granted"); *accord, S.C. Coastal Conservation League v. Dominion Energy S.C., Inc.*, 432 S.C. 217, 223–24, 851 S.E.2d 699, 702 (2020) (challenge to public utility rates became moot when the rates expired); *Ivey v. Town of Cherry Grove Beach*, 244 S.C. 363, 364, 137 S.E.2d 277, 277 (1964) (dispute over discharge of town employee became moot when his term expired).

Less than 24 hours prior to the scheduled hearing date, an assistant with the Fulton County District Attorney's office filed an Affidavit. In the Affidavit, it is asserted that new dates are requested. (Affidavit ¶ 9). This last-minute attempt to alter or amend the Petition filed in Fulton

County Superior Court and to alter or amend the Judicial Certificate, which both assert a September 27, 2022, appearance date, is procedurally improper and without legal effect.

Therefore, because the legal relief requested "would have no practical legal effect", the Georgia petition is moot. *Id.*

II. South Carolina's - "Uniform Act to Secure the Attendance of Witnesses from Without a State in a Criminal Proceeding" - does not apply.

In the event the Court determines that a Georgia certificate compelling attendance in the past requires adjudication, Georgia's civil grand jury does not qualify as a "criminal proceeding" or "grand jury" under South Carolina's Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. *S.C. Code Ann.* § 19-9-20. As a result, South Carolina's Uniform Act does not authorize compelling Respondent to appear in Georgia.

In addition, Georgia's *civil* grand jury neither indicts nor maintains secrecy and is without parallel in South Carolina law. *Compare S.C. Code* § 14-7-600 *et seq.* (State Grand Jury Act). Therefore, application of the Uniform Act, under these facts, would also violate Respondent's State Constitutional Right to Privacy.

Each of these positions will be addressed below.

A. Georgia's civil grand jury is not a criminal proceeding because it is a civil investigation and lacks the power to indict.

S.C. Code Section 19-9-10's title makes it clear that it applies "in criminal proceedings." Further, section 19-9-20 defines the proceedings the Uniform Act applies to with the specific terms "criminal proceedings" and "grand jury". These are the only types of proceedings where the Court may compel attendance out of state. *S.C. Code* § 19-9-20. Because Georgia's civil grand jury does not have the power to indict, it is not operating a "criminal proceeding" or a "grand jury" and is, therefore, outside the scope of South Carolina's Uniform Act.

Georgia code section 15-12-100 is a statutory creation, unique to Georgia, which permits "only civil investigations." *Kenerly v. State*, 311 Ga. App. 190, 195, 715 S.E.2d 688, 692 (Ga. Ct. App. 2011) (citing *State v. Bartel*, 223 Ga. App. 696, 697-699, 479 S.E.2d 4 (Ga. Ct. App.

1996). Based on Georgia's own case-law, this certificate cannot be part of a "criminal proceeding." *Id.*

Despite calling this a grand jury, Georgia's civil inquiry doesn't meet the legal definition. Black's Law Dictionary defines "grand jury" specifically as: "A body . . . of people who are chosen to sit permanently for at least a month – and sometimes a year- and *who, in ex parte proceedings, decide whether to issue indictments*." *Black's Law Dictionary* at p. 843 (11th ed. 2019)(emphasis added); *accord, U.S. v. Awadallah*, 349 F.3d 42, 52 (2nd Cir. 2003); *see also, Pick*, 2022 WL 4003842, at *4 (citing both). Because Georgia's statute only authorizes civil investigations and does not authorize an indictment, Georgia is not conducting a "criminal proceeding" or a "grand jury" as that term is typically defined or contemplated in South Carolina. The fact that this proceeding is in the Court of Common Pleas, a court with civil jurisdiction only, is prima facie evidence supporting Respondent's position.

As a majority of judges on the Texas Court of Criminal Appeals indicated, Georgia's civil grand jury "lacks the authority to indict", therefore, "it is not an actual 'grand jury' in contemplation of the Uniform Act." *Pick*, 2022 WL 4003842, at *1.

B. The lack of secrecy provisions removes Georgia's proceedings from South Carolina's definition of grand jury.

In South Carolina, grand jury secrecy is paramount. *See*, S.C. Code Ann. § 14-7-1700. Georgia's civil grand jury does not appear to be subject to typical grand jury secrecy provisions. Under Georgia law, the "special purpose grand jury" is expected to issue a final public report and may issue periodic reports. *O.C.G.A.* §15-12-101(a) (requiring "periodic reports" and "a final report"); *O.C.G.A.* § 15-12-80 (governing the publication process of the final report); *See Kenerly*, 311 Ga. App. at 195, 715 S.E.2d at 692. This public report is expected to contain specific factual

findings, the charges to be considered, and the individuals that should be charged. Testimony and evidence from the Georgia §15-12-100 inquiry will likely be included with specificity.

While public reports at the conclusion of a grand jury are not unknown, the lack of procedural safeguards for individuals during this inquiry is certainly contrary to grand jury secrecy. The Certificate and Petition before the Court serve as an example. They publicly lay bare the Fulton County District Attorney's views on Respondent and his conduct pre-indictment. Neither the Petitioner's views would be public if Fulton County Georgia were operating a true grand jury. A filing under seal would have been the appropriate grand jury procedure, and the attempt to make the inquiry appear criminal would have been unnecessary.

Further, details of the investigation have been made known by the Fulton County District Attorney to local and national press. On July 15, 2022, the Fulton County District Attorney was quoted as saying that "[The DA's Office has] informed some [of the nominee electors] that they are being looked at as a target — or let me say more clearly, we've told people's lawyers that." (available at https://www.ajc.com/politics/top-garepublicans-informed-theyre-targets-of-fulton-daprobe/3CZJHEYOD5ADFDCVP3372HROFO/). In her interview with the Washington Post on September 15, 2022, the Fulton County District Attorney gave details about the investigation, and apparently gave them information about who were likely targets and the specific allegations against them. Washington Post Article 09/15/2022 (available at https://www.washingtonpost.com/national-security/2022/09/15/fani-willis-georgia-prison/). The Fulton County District Attorney also participated in an interview via an NBC podcast.[1]

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[1] *See, e.g.*, NBC News Interview (available at https://www.youtube.com/watch?v=HHWp82iyWgE) (commenting on timing and progress of investigation); Atlanta Journal-Constitution, *Breakdown Episode 2, "A force of nature"* (June 27, 2022) (available at https://www.ajc.com/news/breakdown/breakdown-ep-2-a-force-of-nature/

The public nature of the Fulton County Georgia section 15-12-100 inquiry stands in stark contrast to the strict secrecy provisions that attach to grand juries in South Carolina prior to an indictment. *See, Evans v. State,* 363 S.C. 495, 505, 611 S.E.2d 510, 515 (2005) (stating that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings" and discussing in detail the long-standing reasons behind grand jury secrecy); *see, e.g., State v. Whitted*, 279 S.C. 260, 305 S.E.2d 245 (1983) ("investigations and deliberations of a grand jury are conducted in secret and are, as a rule, legally sealed against divulgence"), *overruled on other grounds by State v. Collins*, 329 S.C. 23, 495 S.E.2d 202 (1998); *State v. Williams*, 263 S.C. 290, 295-296, 210 S.E.2d 298, 301 (1974) (upholding the "long-established secrecy of grand jury actions and the nature and of its operations and functions"); *State v. Sanders*, 251 S.C. 431, 437, 163 S.E.2d 220, 224 (1968) (rejecting a procedure that would violate "the cloak of secrecy which has always been thrown around the deliberations of that body [the grand jury]."); *Margolis v. Telech*, 239 S.C. 232, 241, 122 S.E.2d 417, 421 (1961) (emphasizing secret nature of grand jury matters)

Moreover, by preserving the secrecy of the proceedings, persons who are accused but exonerated by the grand jury are assured that they will not be held up to public ridicule; *State v. Rector*, 158 S.C. 212, 225, 155 S.E. 385, 390 (1930) ("as long as the grand jury has been known to our judicial system, and that body came with the organization of our first courts, their acts and proceedings have been regarded as almost sacredly secret"; inquiry or divulgence of grand jury proceedings uniformly is prohibited, absent legislation allowing the same).

EWUB2GEYOZDCXA5ZGYTVJ4HGFY/) (discussing details of the investigation and opining on the timing and nature of potential charges).

The lack of grand jury secrecy is another factor the Court should consider when determining the true nature of Georgia's request.

3. Forcing a South Carolina citizen to appear and offer testimony in a Georgia civil-inquiry that is being touted publicly as a "criminal investigation" without the protections of grand jury secrecy is a violation of Respondent's State Constitutional Right to Privacy.

Finally, compelling Mr. Meadows to testify before the "special purpose grand jury"—which fails to observe the stringent secrecy provisions contained in South Carolina's Statewide Grand Jury Act, would violate his right to privacy under the South Carolina Constitution.

As the State Supreme Court recently emphasized, "[t]he South Carolina Constitution grants citizens an express right to privacy." *State v. Ferguson*, 874 S.E.2d 234, 237 (S.C. Ct. App. 2022). Article I, Section 10 of the South Carolina Constitution states in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects against . . . unreasonable invasions of privacy shall not be violated."

In *Singleton v. State*, 437 S.E.2d 53 (1993), the South Carolina Supreme Court recognized this protection as a substantive right of privacy. *Id.* at 61; *see also, Watson v. Medical Univ. of S.C.*, No. 9:88-2844-18, 1991 WL 406979 (D.S.C. Feb. 7, 1991), aff'd 974 F.2d 482 (4th Cir. 1992).

The legislative history of South Carolina's right to privacy indicates that it was intended to "give an aggrieved individual a cause for action if the authorities get out of hand in an invasion of privacy by whatever means." *See Committee to Make a Study of the Constitution of South Carolina, 1895*, Minutes of Committee Meeting at 6 (Sept. 15, 1967) (unpublished minutes, on file with the University of South Carolina School of Law Coleman Karesh Library) (statement of

W.D. Workman, Jr.). "The drafters were depending upon the state judiciary to construct a precise meaning of this phrase." *State v. Counts*, 413 S.C. 153, 167, 776 S.E.2d 59, 67 (2015). To that end, the courts "favor an interpretation offering a higher level of privacy protection" than the U.S. Constitution, *State v. Boston*, 433 S.C. 177, 183, 857 S.E.2d 27, 30 (Ct. App. 2021) (addressing the Fourth Amendment) (quoting Counts). And, "other than the use of the word 'unreasonable' to modify this right, there are no parameters concerning the right or a definition of what constitutes 'unreasonable invasions of privacy.'" *Counts*, 413 S.C. at 167, 776 S.E.2d at 67.

This Court has the authority to quash Georgia's certificate based on Respondent's State Constitutional Right to Privacy. Compelling Mr. Meadows, a citizen of South Carolina, to travel out of state and testify before a Georgia "special purpose grand jury" that publicly airs its work would violate this critical protection.

To justify this intrusion, the Court would need to find that it was necessary to further a compelling state interest that outweighed Mr. Meadows's personal privacy interest, and that the intrusion is narrowly tailored to further that compelling interest. *See, Singleton v. State*, 313 S.C. 75. 89. 437 S.E.2d 53, 61 (1992). Here, South Carolina does not have any interest (much less a compelling one) in the Fulton County District Attorney's investigation itself; and its interests in promoting comity through the Uniform Act are drastically diminished by the unusual nature of the "special purpose grand jury" and its investigation.

As a result, Georgia cannot meet it burden to overcome Respondent's State Constitutional Right to Privacy.

III. Respondent is not a "material witness" as defined by the Uniform Act.

Finally, if the Court does not dismiss the petition as moot or deny it on other grounds, it should conclude that Mr. Meadows is not a "material witness" within the meaning of South Carolina Code § 19-9-30. Specifically, Petitioner cannot demonstrate that Respondent's testimony is "material and necessary" within the meaning of § 19-9-40.

In this case, consideration of whether Respondent is a "material witness" requires a review of the application of privilege. There are several constitutional privileges that would limit, if not outright preclude, Mr. Meadows's testimony. The exercise of any one of these privileges would mean that Respondent had no testimony to offer. With no testimony, Respondent is not a "material witness".

As demonstrated by his pending federal lawsuit in the U.S. District Court for the District of Columbia, *Meadows v. Pelosi*, No. 1:21-cv-03217-CJN (D.D.C.), Respondent has invoked Executive Privilege. Specifically, Mr. Meadows has been instructed by the former President to preserve certain privileges and immunities attaching to his former office as White House Chief of Staff. Application of the privilege would prevent him from being compelled to testify about his work with and on behalf of then-President Donald Trump.

Petitioner plainly calls for Respondent to divulge the contents of executive privileged communications with the President. *See, e.g., Petition* ¶¶ 4–5 (explaining that the Fulton County DA wants to compel Mr. Meadows to testify because he "is known to be affiliated with . . . former President Donald Trump" and "was in constant contact with former President Trump in the weeks following the November 2020 election").

To determine if Respondent is a "material witness", this Court would need to adjudicate the same executive privilege issues currently before the D.C. District Court.[2] Since Mr. Meadows has legal privileges that would prevent him from responding to the questions to be posed by the "special purpose grand jury," the Fulton County District Attorney cannot show that his testimony is "material and necessary"—nor can they show that compelling Mr. Meadows to appear would not impose an "undue hardship" to the extent he would be required to travel in person to Fulton County, Georgia, just to assert privilege.

Further, it would be improper for the Fulton County District Attorney to force Respondent to appear just to assert a privilege. The ABA Standards relating to the prosecutor function state that it is improper conduct for the prosecutor "to call a witness to testify in the presence of the jury . . . when the prosecutor knows the witness will claim a valid privilege not to testify." *ABA Standard Relating to the Prosecution Function* § 3-6.7; *accord,* 98 *C.J.S. Witnesses* § 434(b); *1 McCormick on Evidence*, § 137 at p. 513 (misconduct sufficient to render a conviction invalid might occur if the prosecution, knowing that a witness will invoke the privilege, calls that witness before the jury and then makes a "conscious and flagrant attempt to build its case out of inferences arising from the use of the privilege").

Respondent has previously been instructed by the former President to assert a valid privilege: Executive Privilege. Respondent is not currently in a position to waive that privilege.

[2] Respondent incorporates by reference the pleadings filed on his behalf addressing Executive Privilege in *Meadows v. Pelosi*, No. 1:21-cv-03217-CJN (D.D.C.)

Conclusion

Consequently, South Carolina's Uniform Act does not provide a legal basis for a South Carolina Court to compel attendance and submission for a Georgia section 15-12-100 certificate.

Respectfully submitted,

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