No. _____, Original

In the
Supreme Court of the United States

STATE OF MISSOURI,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

MOTION FOR PRELIMINARY INJUNCTION OR STAY

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INTRODUCTION

Two weeks ago, this Court recognized that a showing that a "statute had never been used" in a context is relevant evidence to whether a prosecution or arrest is unlawful. *Gonzalez* v. *Trevino*, 602 U.S. ___ (2024) (per curiam) (slip op., at 3). That is exactly what occurred here. New York dusted off a bookkeeping statute that has never been used in a context like this, recruited the former third-highest ranking attorney at the Biden Administration's Department of Justice to lead charges, and used this novel statute to prosecute the presumptive Republican nominee for President just a few months before the election. A month after the trial, Donald Trump is *still* under a gag order, he will be under that order for at least the next two months, and New York imminently threatens to impose a sentence hindering or destroying Trump's ability to campaign between now and November.

No doubt it is true that the Constitution would not have tolerated a future Confederate state gagging and sentencing Abraham Lincoln in 1860 to interfere with his campaign for the Presidency. Doing so obviously would have interfered with federal interests the same way Maryland's attempt to tax the Bank of the United States did 40 years earlier.

Constitutionally, it is no different with New York's attempt to use coercive power in the form of a gag order and impending sentence to interfere with Donald Trump's campaign. New York has no interest—between now and November—in continuing its gag order and imposing a sentence that will impede a major-party candidate's ability to campaign. Any

gag order and sentence must be stayed until after the election.

STANDARD OF REVIEW

By this Court's Rule 17.2, this Court has incorporated the motions practice of the Federal Rules of Civil Procedure. Missouri can obtain a preliminary injunction in an original action. *See California* v. *Texas*, 459 U.S. 1067 (1982) ("The motion of plaintiff for issuance of a preliminary injunction is granted.").

In assessing whether to grant a stay under Rule 65, courts assess likelihood of success on the merits, whether a moving party will suffer irreparable harm, the balance of the equities, and any harm to the defendant from interim relief. *Winter* v. *Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008). This Court's standard for a stay is similar: a reasonable probability that the Court will take the case,[1] a "fair prospect" of success, and a likelihood of irreparable harm absent relief. *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010). Missouri meets these tests.

ARGUMENT

The Court should enjoin or stay any gag order and impending sentence against Donald Trump until after the election. Missouri has standing to press these

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[1] For the reasons stated in the brief in support of the motion to file a bill of complaint, there is a reasonable probability the Court will take the case.

claims, Missouri is likely to prevail on the merits, and the equities favor Missouri.

I. Missouri Has Standing.

An original action must meet Article III requirements: "it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence." *Maryland* v. *Louisiana*, 451 U.S. 725, 735–36 (1981) (internal quotations omitted). This requires identifying either a "sovereign" or "quasi-sovereign" interest harmed by another State. *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 665 (1976). Missouri has met this standard.[2]

A. New York's actions impose a sovereign harm to the ability of Missouri's 10 electors to exercise their federal authority.

Unlike the "32 States" that have "pledge laws" requiring electors to pledge to vote for a certain candidate, *Chiafalo* v. *Washington*, 591 U.S. 578, 585 (2020), Missouri law permits electors to exercise their "discretion and discernment," *id.*, at 592 (citation

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[2] In addition, once a State has standing to challenge New York's unlawful actions, it often may press any legal theory that undermines those actions. *See, e.g.*, *Duke Power Co.* v. *Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 78-81 (1978); *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 353 n.5 (2006).

omitted), and vote for whomever they please. That means *both* the millions of citizens of Missouri *and* the 10 prospective electors will be paying attention to the campaign into November. Missouri "indisputably has a compelling interest in preserving the integrity of [this] election process." *Purcell* v. *Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

New York has interfered with this process. By imposing constraints on the ability of one major-party candidate—and only one—to campaign nationwide, New York impairs the ability of Missouri's electors to receive all information relevant to their decision to choose for whom to vote. In the voting context, that is a classic form of injury: "the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific." *Fed. Election Comm'n.* v. *Akins*, 524 U.S. 11, 24–25 (1998); *id.*, at 21 ("information would help them … to evaluate candidates for public office"). The Constitution "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Fed. Election Comm'n* v. *Cruz*, 596 U.S. 289, 302 (2022) (citation omitted).

And by injuring Missouri's electors, New York necessarily injures the sovereign interests of the State of Missouri itself. Although presidential electors "exercise a federal function," they are state officials; they act "by authority of the state that in turn receives its authority from the federal constitution." *Ray* v. *Blair*, 343 U.S. 214, 224–25 (1952). Because they are state officials, the State can sue on their behalf. *E.g.*, *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2365–67 (2023). And the Missouri Attorney General is

authorized by Missouri law to do so. Mo. Rev. Stat. § 27.060.

It makes no difference that Missouri's electors will not be formally selected until November. New York's actions impose harm *now* that will make it more difficult for Missouri electors to exercise their legal functions later this year. The harms thus will affect whoever is selected to hold that office, so Missouri has standing to sue on behalf of those prospective officials no matter who those officials will be. In addition, prospective electors have already been selected by the Missouri political parties. They simply await formal selection by the voters in November. To exercise their votes later this year, they are paying attention to campaign speech now.

Several of those prospective electors have issued sworn affidavits, attached to the motion to expedite, expressing their high likelihood of becoming electors and their interest in being able to hear Trump's campaign free from the coercive constraints imposed by New York. For example, Dean Brookshier, Thomas J. Salisbury, and William Dane Roaseau have each been selected "by the Missouri Republican Party to be an elector in the Electoral College for the State of Missouri" and will become electors in November if Missourians choose Trump. Ex. H, I, J. "In order to faithfully carry out [their] duties," all of them "take steps now to be well informed about the policies, positions and character of the candidates," including by attending "live political rallies" and following "news and social media coverage of campaign events in other states." *Ibid.* All of them "plan to attend as many Missouri Trump rallies as possible during the 2024 election cycle." *Ibid.*

Indeed, that Missouri electors will not be formally chosen until November reinforces that original jurisdiction is proper. By November, all the harm Missouri currently complains of would have already occurred. Missouri has an interest in ensuring that prospective electors are able to receive all the information they need to exercise their legal function later this year. *See Purcell*, 549 U.S., at 4.

B. New York's actions impose a quasi-sovereign harm on Missouri by depriving millions of Missourians of the information needed to vote.

New York has similarly imposed an informational harm on the millions of Missourians who will vote for electors in November. The Missouri General Assembly has delegated authority to the people of the State, by popular vote, to choose presidential electors. New York's decision to impose restraints on Trump's ability to travel the country and campaign creates an "informational injury" on the people of Missouri, which, because it affects "the most basic of political rights, is sufficiently concrete and specific." *Akins*, 524 U.S., at 21, 24–25.

This Court's recent decision in *Murthy* v. *Missouri*, 603 U.S. ___ (2024), reinforces this theory of standing. There, the Court concluded that a plaintiff can assert standing based on a "right to listen" theory where "the listener has a concrete, specific connection to the speaker," such as a consumer wanting to see advertisements for drugs that they purchase. *Id.*, at 27–28 (slip op.).

Here, Exhibits A through F (attached to the motion to expedite) are representative, sworn affidavits from individual Missourians who are considering voting for Trump in November, state specific plans to "attend a Trump rally in Missouri during the 2024 election," and are concerned about the effect the gag order and sentence will have on their ability to hear him speak. Not only do they want to attend rallies, but they also want to hear "Mr. Trump's perspective on what happened at his trial, how he was treated by the system, and why I should still vote for him." So unlike in *Murthy* where this Court (slip op., at 28) said the plaintiffs had "not identified any specific speakers or topics" they want to listen to, this lawsuit presents Missouri residents who have identified both "speakers [and] topics." They are thus just like the consumers who were permitted to sue over prohibitions on certain advertisements. *Ibid.* (citing *Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council*, 425 U.S. 748, 756–57 (1976)).

Missouri has learned that the Trump campaign has scheduled an event in Missouri for July or August. The campaign has plans for more events but is running into logistics problems because of the gag order and impending sentence. The campaign is currently unable to finalize further campaign stops in Missouri because even a sentence of probation would necessarily restrict Trump's ability to travel to hold and attend live campaign events.

Even if Trump could freely schedule events in September and October, the gag order would limit Trump's speech at campaign events. Whether Trump is being unfairly targeted for prosecution by his general-election opponent and allies of that

opponent is of course highly relevant to Trump's pitch about which candidate voters should support in November. But under the gag order, Trump cannot criticize the New York prosecution team for their close ties to and contacts with high-ranking officials in the Biden administration, nor can he criticize Judge Merchan's close relatives who are actively engaged in Democratic politics and stand to gain financially from a conviction.

Even if the Trump campaign could not visit Missouri, voters regularly follow social media, television, and the news to learn about campaign speech conducted in other States. New York's orders similarly prevent Trump from freely campaigning in other States.

Missouri can sue on behalf of the people of Missouri as *parens patriae*. When "a sufficiently substantial segment of [a State's] population" is injured, that harm becomes an injury to the State itself, and the State can sue as *parens patriae* to rectify its "quasi-sovereign" interests. *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 599, 607 (1982) (quasi-sovereign injury to Puerto Rico when "787" people affected). This rule is well settled. *E.g.*, *Maryland* v. *Louisiana*, 451 U.S. 725, 737–38 (1981); *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 665 (1976); *Kansas* v. *Colorado*, 185 U.S. 125, 142 (1902). Indeed, this Court has held that a political party can sue on behalf of voters affected by a state law. *Crawford* v. *Marion Cnty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008). It follows even more surely that a State, which has a long history of *parens patriae* representation, can too.

That the interest in hearing campaign speech is "widely shared" among millions of Missourians does not make the injury "generalizable." *Akins*, 524 U.S., at 24. As when a large number of people suffer a "widespread mass tort" or a nuisance, each of these individuals is separately and concretely injured. *Ibid.* Indeed, that the interest is widely shared reinforces that a *parens patriae* action is appropriate; the injury to individual Missourians is so widespread that it creates a quasi-sovereign injury to the State itself. "Parens patriae standing is most likely to be recognized if there is a widespread injury to important interests of many individuals that cannot easily be calculated in monetary terms." Wright & Miller, 17 Fed. Prac. & Proc. § 4047 (3d ed.) (June 2024 update).

C. New York's actions interfere with associational rights.

Finally, New York's actions interfere with the associational rights of both electors and individual citizens of Missouri. As this Court has recognized, "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000).

So when state action negatively affects "the party [a voter] works to support, then [the voter] indeed suffers harm," under the First Amendment, "as do all other involved members of that party." *Gill* v. *Whitford*, 585 U.S. 48, 80 (2018) (Kagan, J., concurring). When "the essence of the harm alleged" is an "associational injury flowing from" state action,

the complaint is that state action "has burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects." *Id.*, at 81–82.

Here the associational aim of millions of Missourians is to elect Trump to the Presidency. He is currently the leader of the Republican Party. New York's actions directly interfere with that associational aim.

D. The sentence is sufficiently imminent that this case is ripe.

Gag order. This case is obviously ripe with respect to the gag order, which the trial court has left in place long after the verdict was issued. As originally written, that broadly written gag order prevented Trump from "mak[ing] public statements" about witnesses concerning their "participation in the investigation or in this criminal proceeding" and making "public statements" about "counsel in the case other than the District Attorney." Gag Order, *New York* v. *Trump*, No. 71543-23 (April 1, 2024).[3] On June 25, the trial court removed the part of the gag order concerning witnesses but maintained it concerning counsel. Order (June 25, 2024).[4] That

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[3] https://s3.documentcloud.org/documents/24528568/2024-04-01-dec-and-order-re-clarification-of-order-restricting-extrajudicial-statements.pdf

[4] https://www.courthousenews.com/wp-content/uploads/2024/06/trump-post-trial-termination-gag-order.pdf

gag order is expected to remain in place until at least September 18. *Ibid.*

Each day, that continuing gag order limits the speech Trump can issue that is relevant to voters across the country. For example, its text appears to prohibit him from challenging the credibility and political motivations of prosecutors, including a prosecutor who was the third-highest ranking attorney in the Department of Justice before switching jobs to the DA's office so he could prosecute Trump.

Sentence. The impending sentence also is sufficiently imminent. "[A]n actual arrest, prosecution, or other enforcement action is not a prerequisite" for standing. *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 158 (2014). Rather, a party need only show that the threat is "sufficiently imminent." *Id.*, at 159. It is enough that the party establish a "'substantial risk' that the harm will occur." *Id.*, at 158 (citation omitted).

That is met here. On July 2, the trial court rescheduled sentencing from July 11 to September 18, the absolute height of the campaign season.[5] By the time this lawsuit is fully briefed, that date will be near at hand, and the regular appeals process in the underlying trial after September 18 will be far too slow to afford Missouri relief.

Even if the sentence is probation, Trump may be prohibited from leaving New York without

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[5] https://www.nycourts.gov/LegacyPDFS/press/PDFs/People%20v.%20DJT%207-2-24%20Letter.pdf

preclearance from a probation officer. He would "be required to regularly report to New York City's Probation Department" and "could also be jailed immediately." Christobek, *What Penalties Does Trump Face Now That He Has Been Convicted?*, NY Times (May 29, 2024).[6] Even a suspended sentence would not deprive this case of ripeness because the trial judge in New York may be free to revisit that suspension and impose restrictions that would immediately cause irreparable harm to voters across the country. The risk of harm to Missouri is substantial and imminent enough to confer standing.

II. Missouri Is Likely to Prevail on the Merits.

A. New York's gag order and impending sentence impede the ability of electors to fulfill their federal functions.

Just as Maryland had "no power, by taxation or otherwise, to retard, impede, burden, or in any manner control" the Bank of the United States, *M'Culloch* v. *Maryland*, 17 U.S. 316, 436 (1819), so too New York has no power to "impede" or "burden" the ability of the electors of Missouri to fully exercise their federal duties. "While presidential electors are not officers or agents of the federal government, they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of

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[6] https://www.nytimes.com/2024/05/29/nyregion/trump-convicted-jail-penalties.html

the United States." *Burroughs* v. *United States*, 290 U.S. 534, 545 (1934) (citation omitted).

The gag order and impending sentence impede the ability of Missouri's electors to become fully informed before casting their ballots. Unlike in other States, Missouri electors are free to cast their ballots for whomever they wish. But the impending sentence and gag order will chill Trump's ability to campaign, "fundamentally alter[ing] the nature of the election," *Republican Natl. Comm. v. Democratic Natl. Comm.*, 589 U.S. 423, 424 (2020), and depriving those electors of information needed to cast their ballots.

Even New York would not dispute that it has no power to gag or sentence a *sitting* President. How absurd it would be for the Constitution to have permitted a future Confederate State to indict and hale into court President Lincoln. *E.g.*, Amar, *On Prosecuting Presidents*, 27 Hofstra L. Rev. 671, 674 (1999).

Equally absurd is the prospect that a State whose elected officials are hostile to a major-party candidate can attempt to kneecap that candidate's campaign by pressing flimsy charges calculated to harm that campaign. Just as South Carolina could not "have indicted Abraham Lincoln" while he was President, *id.*, so too it would have unduly interfered with the Presidential election for "some clever state or county prosecutor in Charleston, South Carolina," *id.*, to have brought charges against Lincoln right *before* the 1860 election. That is one reason why the Department of Justice has "'a very important norm which is … avoid taking any action in the run up to an election.'" Michael Horowitz, Inspector General Report, *A*

Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election, at 17 (June 2018)[7] (quoting former FBI Director James Comey).

This is *not* to say that a gag order or criminal sentence never can be imposed on a candidate running for President.[8] To the contrary, Missouri simply asks this Court—in determining whether to stay the gag order and impending sentence—to undertake the same analysis this Court called for in *Clinton* v. *Jones*, 520 U.S. 681 (1997). There, this Court rejected "a categorical rule" requiring a stay of proceedings related to "unofficial" acts by the President. *Id.*, at 706. But this Court nonetheless made clear that "[t]he high respect that is owed to the office of the Chief Executive … is a matter that should inform the conduct of the entire proceeding, *including the timing*." *Id.*, at 707 (emphasis added).[9] The

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[7] https://s3.documentcloud.org/documents/4515884/DOJ-OIG-2016-Election-Final-Report.pdf

[8] The concerns relevant here are not necessarily relevant with respect to candidates for other federal offices. As this Court has repeatedly said, the Presidency is unique. *Clinton* v. *Jones*, 520 U.S. 681, 698 (1997) ("We have, in short, long recognized the 'unique position in the constitutional scheme' that this office occupies.") (quoting *Nixon* v. *Fitzgerald*, 457 U.S. 731, 749 (1982)). A prosecution against a candidate for the Senate or House, for example, does not trigger these unique concerns.

[9] *See also Burroughs* v. *United States*, 290 U.S. 534, 545 (1934) ("The President is vested with the executive power of the nation. The importance of his *election* and the vital character of its

"burdens" litigation imposes on that office "are appropriate matters for the … Court to evaluate." *Ibid.*

Courts, of course, owe "high respect" not only to the office of the Presidency, but also to the process of Presidential elections. So this Court should undertake a fact-based analysis that considers the "burdens" the gag order and impending sentence impose on the Presidential election process.

The facts here make clear that the gag order and impending sentence should be stayed until after the election. Two facts are highly relevant.

First is the status of the candidate affected. A criminal sentence or gag order generally will not interfere with the free choice of voters to choose their President when the defendant/candidate has almost no hope of prevailing in the election. Trump, in contrast, will soon be formally designated the Republican nominee. He is a previous President and has led in most polls this year.

Second is the nature of the criminal charges. A State that charged a defendant with a violent crime would generally have a very strong interest in proceeding with criminal sanctions immediately. But here New York has alleged mere bookkeeping offenses. There is no urgent need to press forth with an immediate sentence and gag order. There *is* an urgent need for the American people to hear from the major candidates without one State hampering one

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relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated." (emphasis added)).

candidate's campaign. New York's exercise of coercive authority violates the Constitution because it unduly interferes with the Presidential election. In our constitutional system, States have no power to do so.

In *Clinton*, this Court rejected the idea that the prospect of "politically motivated harassing and frivolous litigation" justified a "categorical rule" requiring a stay of proceedings. 520 U.S., at 706–08. Missouri here is not seeking a "categorical rule," but instead a fact-specific stay of any sentence or gag order.

And while this Court, as a factual matter, found there to be little risk of "politically motivated harassing" litigation against President Clinton, the opposite is true here.

Recall that the FBI quite literally fabricated evidence so it could spy on the Trump campaign in 2016. As the John Durham Special Counsel report concluded last year, the FBI never had any "actual evidence" justifying an investigation into the 2016 campaign. Instead, "FBI attorney Kevin Clinesmith committed a criminal offense by fabricating language in an email that was material to the FBI obtaining a FISA surveillance order." John Durham, *Report on Matters Related to Intelligence Activities and Investigations Arising Out of the 2016 Presidential Campaigns*, at 8, 17 (May 12, 2023).[10] The investigation was launched by people who had "a

[10] https://www.justice.gov/storage/durhamreport.pdf

predisposition to investigate Trump." *Id.*, at 44. "For example, Peter Strzok and Lisa Page were directly involved in matters relating to the opening of Crossfire Hurricane." *Id.*, at 48. When Page messaged Strzok, "[Trump's] not going to become president, right? Right?!," Strzok replied, "No. No, he's not. *We'll stop it*." *Id.*, at 50 (emphasis added). As soon as he obtained the opportunity to launch an investigation aimed at "stopping" Trump, "Strzok opened Crossfire Hurricane immediately." *Id.*, at 9.

Following the FBI's criminal fabrication of evidence to spy on the Trump campaign, political opponents then harassed President Trump by pressing a baseless conspiracy that Trump was a "Russian asset." Special Counsel Robert Mueller concluded in March 2019 that there was no evidence of any conspiracy between Trump and Russia. Robert Mueller, III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election*, at 1–2 (March 2019).[11] But the very existence of the special counsel investigation interfered with the ability to exercise unchilled executive authority in a way Justice Scalia famously warned about. *Morrison* v. *Olson*, 487 U.S. 654, 730 (1988) ("Does this not invite what Justice Jackson described as 'picking the man and then searching the law books, or putting investigators to work, to pin some offense on him'?") (Scalia, J., dissenting).

Then, in 2020, the FBI again intervened to try to damage the Trump campaign. For a year, the FBI

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[11] https://www.justice.gov/archives/sco/file/1373816/dl

had the Hunter Biden laptop in its possession, and it knew a story was about to be written about the contents of that laptop—a story that would be politically embarrassing to then-candidate Joseph Biden. So the FBI "badgered platforms to adopt policies to censor supposed 'hacked materials'" in order to induce those platforms to censor the story. Br. Missouri, *Murthy* v. *Missouri*, No. 23-411, at 15 (Feb. 2, 2024). It worked.

The lawfare continued this election cycle, with several States relying on an off-the-wall theory to remove Trump from the ballot. This Court was forced to step in and—unanimously—put a stop to that attempt. *Trump* v. *Anderson*, 601 U.S. 100 (2024). Similarly, one prosecutor in Georgia has tried to use racketeering laws in an unprecedented way to go after Trump. The Georgia Court of Appeals had to put that case on pause.

There is also evidence President Biden quietly directed the Attorney General to prosecute his opponent. For example, after the FBI and DOJ declined to prosecute Trump for more than a year, word "leaked" to *The New York Times* that President Biden thought President Trump "should be prosecuted." Benner, *Garland Faces Growing Pressure as Jan. 6 Investigation Widens*, NY Times (April 2, 2022).[12] Around the same time "the Justice Department [became] suddenly interested in the fake electors evidence it had declined to pursue a year

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[12] https://www.nytimes.com/2022/04/02/us/politics/merrick-garland-biden-trump.html

earlier." Leonnig, *FBI Resisted Opening Probe Into Trump's Role in Jan. 6 For More Than a Year*, Wash. Post (June 20, 2023).[13] One wonders whether this "leak" was done to notify the Attorney General without the President having to "communicate[ ] his frustrations directly to Mr. Garland" in a way that could be traced and more easily criticized. Benner, *supra.*

At the same time, the Department of Justice has prosecuted Trump in connection with the events of January 6, 2021, on the basis of an interpretation of 18 U.S.C. § 1512(c) that this Court just ruled to be an improper, unprecedented extension of that statute. *See Fischer* v. *United States*, 603 U.S. ___ (2024).

And now, of course, New York has gone after Trump. The New York Attorney General has gone after Trump's businesses to the tune of hundreds of millions of dollars (and received a judgment susceptible to being overturned as a punitive, excessive fine in violation of the Eighth Amendment). And District Attorney Alvin Bragg has gone after Trump himself, bringing charges against Trump decried across the political spectrum as a threat to the rule of law and which appear designed solely to try to harm the Republican Presidential candidate politically. And they have had some effect. Joe Biden consistently trailed Donald Trump in the polls … until the conviction was handed down in May. Smith, *Biden Overtakes Trump in Polling Average for*

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[13] www.washingtonpost.com/investigations/2023/06/19/fbi-resisted-opening-probe-into-trumps-role-jan-6-more-than-year

First Time This Year, The Telegraph (June 21, 2024).[14] The gag order and impending sentence constrain Trump from fully explaining the pattern of lawfare against him.

One can only hope that the 8-year pattern of lawfare directed at Trump will not be repeated against future candidates. If New York is allowed to proceed, that hope may be in vain given the thousands of elected prosecutors across the country. But there is no dispute that Trump has been on the receiving end of "politically motivated" lawfare designed to interfere in a federal election. *See Clinton*, 520 U.S., at 706–08. And while this Court found as a factual matter that the *Clinton* case was "highly unlikely to occupy any substantial amount of [President Clinton's] time," the opposite is true here. *Id.*, at 702. Just the trial itself took Trump off the campaign trail for 6 weeks, a fact that Joe Biden's campaign bragged about.[15]

Here, "a page of history is worth a volume of logic." *Jones* v. *Hendrix*, 599 U.S. 465, 472 (2023). The transparent purpose of the criminal charges in New York is to make it harder for Trump to campaign in

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[14] https://www.telegraph.co.uk/us/politics/2024/06/21/biden-overtakes-trump-polls-average-us-election-swing-state/

[15] The official Biden-Harris campaign account on X (formerly Twitter) said this on April 24, 2024: "While Trump is stuck in court, President Biden is keeping a very robust schedule of campaign events. He's been to Pennsylvania to talk about the economy, Virginia to talk about clean energy, and Florida to talk about abortion." https://x.com/BidenHQ/status/1783187863087001775

the Presidential election. A stay of the sentence and gag order is warranted.

B. New York's sentence and gag order violate the *Purcell* principle.

The continuing gag order imposed against Donald Trump by the State of New York, as well as the impending criminal sentence, improperly harm the integrity of Missouri's electoral process. As this Court has noted, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S., at 5.

There is no doubt that New York's actions greatly "affect" the upcoming presidential election and create confusion—both for ordinary voters and electors. There has been no shortage of articles, including in high-profile publications like *The New York Times*, asking logistical and legal questions about how a sentence and gag order would affect the ability of Trump to exercise his duties as President, if he were elected, noting that "the Constitution and U.S. law have clear answers for *only some* of the questions that have arisen and may still arise." *E.g.*, Astor, *Trump Has Been Convicted. Can He Still Run for President?*, NY Times (June 20, 2024) (emphasis added).[16] While legal experts may be able to conclude that Trump can still run for President and that a sentence or gag order would necessarily have to be suspended during a

[16] https://www.nytimes.com/article/trump-investigation-conviction.html

Presidency, ordinary voters in Missouri and across the country could be forgiven for becoming confused about the effect of a gag order or a sentence on the campaign or exercise of presidential authority.

For example, an ordinary voter may wonder how a President exercises his duties if still under a gag order, if required to request permission from a probation officer to travel outside New York, or if—in the worst case scenario—incarcerated. And when outlets across the country are running articles trying to inform readers that, yes, Trump still can run for President, *id.*, it is clear that New York's actions are sowing great confusion. New York's actions "lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Merrill* v. *Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring) (applying the "bedrock tenet of election law" reflected in the "*Purcell* principle").

While this Court has typically applied *Purcell* in the context of a federal court interfering in election administration, there is no reason why the same principle should not apply when a State (through a prosecutor and state court) interferes in the administration of an election held in a *different* State. *Purcell* did not limit its principles to federal court orders enjoining election statutes, but instead announced a broader principle concerning "[c]ourt orders affecting elections." *Purcell*, 549 U.S., at 5.

Under *Purcell*, New York can justify a gag order and sentence before the election *only* if "(i) the underlying merits are entirely clearcut in favor of [New York]; (ii) [New York] would suffer irreparable

harm absent the injunction; (iii) [New York] has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Merrill*, 142 S. Ct., at 881 (Kavanaugh, J., concurring). New York cannot establish any of these elements.

Taking these slightly out of order, the latter three elements can be dealt with briefly.

1. New York has no hope of proving it "has not unduly delayed bringing the complaint." *Id.* Both New York DA Alvin Bragg's predecessor and the Attorney General of the United States declined to bring charges over the underlying alleged conduct. Shugerman, *The Trump Indictment Is a Legal Embarrassment*, NY Times (Apr. 5, 2023).[17] Bragg chose to bring charges only *after* Donald Trump decided to run for President—based entirely on conduct that allegedly occurred in 2017. Jury Instructions, *New York* v. *Trump*, No. 71543-23, at 24–40.[18] There is no reason New York could not have brought these charges in 2021. The delay instead appears calculated to create voter confusion in the months leading up to the election.

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[17] https://www.nytimes.com/2023/04/05/opinion/trump-bragg-indictment.html

[18] Available at https://ww2.nycourts.gov/people-v-donald-j-trump-criminal-37026; https://www.nycourts.gov/LegacyPDFS/press/PDFs/People%20v.%20DJT%20Jury%20Instructions%20and%20Charges%20FINAL%205-23-24.pdf

2. New York similarly would not suffer irreparable harm if this Court stayed a sentence and gag order. New York charged Trump solely with alleged bookkeeping offenses and delayed bringing those charges for several years. The triviality of the charges and the delay undermine any argument that a stay of a few months would inflict irreparable harm on New York.

3. Further, as already established, any sentence and gag order allowed to remain in place will necessarily create "significant cost, confusion, or hardship" not only on Trump, but also on the people and electors of Missouri. *Merrill*, 142 S. Ct., at 881 (Kavanaugh, J., concurring).

But perhaps the strongest reason for finding a *Purcell* violation is that New York has no hope of proving that "the underlying merits are entirely clearcut" in its favor. *Id.* Not even close.

4. Not only is New York unable to establish any harm from staying a gag order and sentence for about two months, but the underlying conviction is highly likely to be overturned on appeal. The charges have been panned across the political spectrum as "a disaster," "a setback for the rule of law," and "a dangerous precedent." Shugerman, *The Trump Indictment Is a Legal Embarrassment*, NY Times (Apr. 5, 2023).[19] Shugerman, a political liberal, is no friend of Donald Trump and regularly criticizes him

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[19] https://www.nytimes.com/2023/04/05/opinion/trump-bragg-indictment.html

with very aggressive rhetoric.[20] But Shugerman is correct about this case. For good reason.

For one thing, New York never informed Trump before trial of the specific law he was accused of violating. New York charged Trump with "falsifying business records … with intent to commit another crime or to aid or conceal the commission thereof" but never initially identified what that "other crime" was. Jury Instructions, *New York* v. *Trump*, No. 71543-23, at 27.[21] Later, New York identified another state statute, but that statute itself required taking action through "unlawful means"—that is, by violating a *third* unstated statute. *Id.*, at 30. Not until the end did the prosecution submit three different "theories" for three different laws the prosecution thought Trump maybe infringed. *Id.*, at 31–34.

That violates the fundamental principle that a defendant be notified at the outset of the "specific charge" against him. *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than that notice of the specific charge … [is] among the constitutional rights of every accused in a criminal proceeding in all courts,

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[20] *E.g.*, https://x.com/jedshug/status/1273375751576981508 (June 17, 2020) (accusing Trump of having "built concentration camps").

[21] Available at https://ww2.nycourts.gov/people-v-donald-j-trump-criminal-37026; https://www.nycourts.gov/LegacyPDFS/press/PDFs/People%20v.%20DJT%20Jury%20Instructions%20and%20Charges%20FINAL%205-23-24.pdf

state or federal."); *see* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right … to be informed of the nature and cause of the accusation."). "[W]here the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition, but it must state the species—it must descend to particulars." *United States* v. *Cruikshank*, 92 U.S. 542, 544 (1875). "Ours is not the system of criminal administration that left Franz Kafka's Joseph K. wondering …." *United States* v. *Canady*, 126 F.3d 352, 362 (2d Cir. 1997).

Compounding matters further, the court in New York then instructed jurors that they need not even agree on what third statute Trump was accused of violating. Jury Instructions, *supra*, 31 ("you need not be unanimous as to what those unlawful means were"). That violated the fundamental guarantee that a person cannot be convicted without a unanimous jury verdict. *Ramos* v. *Louisiana*, 590 U.S. 83, 92 (2020). As Justice Scalia puts it, the Constitution prohibits a State from charging a "felony consisting of either robbery or failure to file a tax return" and convicting based on a "6-6 verdict." *Schad* v. *Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring); *see id*., at 633 n.4 (plurality opinion) ("charge allowing a jury to combine findings of embezzlement and murder" would be unconstitutional); *id*., at 633 ("[N]othing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge … so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary,

tax evasion, or littering, for example, would suffice for conviction.").

And then there are the serious due process concerns. For starters, the judge overseeing the case donated to Trump's opponent, President Biden, and also to a group called "Stop Republicans." Rashbaum, *Ethics Panel Cautions Judge in Trump Trial Over Political Donations*, NY Times (May 17, 2024).[22] Judge Merchan's daughter also has a political consulting company that attacks Trump and stands to gain financially from a conviction. Compl. ¶ 19. Judge Merchan's failure to recuse violated due process because the "probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Caperton* v. *A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 877 (2009) (citation omitted). Similarly, in a criminal case, it violates Due Process where "the state trial judge did not fulfill his duty to protect [the defendant] from the inherently prejudicial publicity which saturated the community." *Sheppard* v. *Maxwell*, 384 U.S. 333, 363 (1966). Here, the day before jury deliberations were set to begin, the *President of the United States* sponsored a press conference just outside the courthouse doors and subtly pressed the jury convict Trump, suggesting the jurors should "vot[e] him out once and for all." Schneider, *Biden Camp Brings in De Niro to Go After*

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[22] https://www.nytimes.com/2024/05/17/nyregion/trump-trial-judge-merchan-donations.html

Trump at the Site of His Trial, Politico (May 28, 2024).[23]

This is just a snapshot of the legal problems that are likely to doom the case on appeal, but this snapshot shows why Professor Shugerman—no admirer of Donald Trump—was correct to blast the charges as a "legal embarrassment." The charges were never serious. They appear to have been brought solely for the purpose of extracting political advantage, and this Court is "not required to exhibit a naiveté from which ordinary citizens are free." *Dept. of Com.* v. *New York*, 588 U.S. 752, 785 (2019) (citation omitted). As the former Governor and Attorney General of New York said just two weeks ago, "[i]f his name was not Donald Trump and if he wasn't running for president … I'm the former AG of in New York [and] I'm telling you that case would've never been brought." Nazzaro, *Cuomo: Trump NY Hush Money Case "Should Have Never Been Brought" Forth*, The Hill (June 22, 2024).[24]

New York thus cannot hope to show that the "underlying merits are entirely clearcut" in its favor. *Merrill*, 142 S. Ct., at 881 (Kavanaugh, J., concurring). But irreparable harm to the Presidential election will occur unless the gag order and any sentence are stayed until after the election.

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[23] https://www.politico.com/news/2024/05/28/biden-campaign-robert-de-niro-trump-trial-courthouse-00160139

[24] https://thehill.com/regulation/court-battles/4734858-andrew-cuomo-donald-trump-alvin-bragg-hush-money-case-new-york.

C. New York's sentence and gag order violate the First Amendment rights of Missouri citizens.

While it is the electors of Missouri who will ultimately cast ballots for President and Vice President, it is the voters in Missouri who will select the electors. As with the electors, they are injured by New York's state action preventing Trump from freely campaigning.

It is not just Trump's rights that are at stake in the New York criminal action. That action necessarily interferes with the well-settled First Amendment right of Missourians to "listen" to Trump's speech. *E.g.*, *Packingham* v. *North Carolina*, 582 U.S. 98, 104 (2017) (right to "speak and listen"). "[W]here a speaker exists …, the protection afforded is to the communication, to its source and to its recipients both." *Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976). The "First Amendment right to 'receive information and ideas,' … 'necessarily protects the right to receive.'" *Id.*, at 757 (quoting *Kleindienst* v. *Mandel*, 408 U.S. 753, 762–63 (1972)). This is because "the right to receive ideas follows ineluctably from the sender's First Amendment right to send them." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26* v. *Pico*, 457 U.S. 853, 867 (1982) (emphasis omitted). "[T]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality op.) (internal quotations omitted).

While the First Amendment right to listen is always important, its importance is at its apex in the context of a Presidential campaign. That is not only because speech "has its fullest and most urgent application precisely to the conduct of campaigns for political office," *Cruz*, 596 U.S., at 302, but also because "it is only through free debate and free exchange of ideas that government remains responsive to the will of the people," *Terminiello* v. *City of Chicago*, 337 U.S. 1, 4 (1949). Depriving voters of their right to listen harms the people themselves as well as the government tasked with taking actions "that reflect the People's will." *Mahanoy Area Sch. Dist.* v. *B. L.*, 141 S. Ct. 2038, 2046 (2021); *see also Borough of Duryea, Pa.* v. *Guarnieri*, 564 U.S. 379, 395–97 (2011).

New York's actions have infringed and will infringe the First Amendment rights of millions of Missourians to "receive information and ideas" regarding one of the most important public questions—whom to elect President. New York has already done so by imposing a gag order on one of the two major presidential candidates, and it is threatening imminently an even more destructive and consequential action: imposing a criminal sentence not even two months before the national election. Each of these actions—both individually and collectively—significantly infringe the rights of Missourians to receive information on one of the most important questions of our time.

Missourians, like all Americans, rely on the statements of each major candidate to select whom they will support at the ballot box. Because New York has unilaterally imposed a gag order on only one

of the two major presidential candidates, Trump will be limited in what he can say to Missouri (and all) voters. New York's actions will necessarily infringe on the "protection afforded" to Missourians to "receive information and ideas." *Va. State Bd. of Pharmacy*, 425 U.S., at 756. Similarly, the uncertainty surrounding the impending sentence has directly limited the opportunity of Missourians to hear Trump in person—in other words, their right to "speak and listen" to Trump. *Packingham*, 582 U.S., at 104. New York's actions directly attempt to block the "free debate and free exchange of ideas" critical to ensuring that "the government remains responsive to the will of the people." *Terminiello*, 337 U.S., at 4.

It of course remains true that a State does not violate the First Amendment rights of listeners every time it criminally tries somebody—who will then no longer be able to speak to listeners. The question, this Court has said, is whether "incidental burden on speech is no greater than is essential." *United States* v. *Albertini*, 472 U.S. 675, 689 (1985). That is satisfied "so long as the *neutral* regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ibid.* (emphasis added).

That standard is easily met in any ordinary action to enforce state law. But the New York case is not ordinary. New York has *never* enforced its bookkeeping laws in any context remotely similar to this one. And just two weeks ago, this Court said that evidence that a "statute had never been used" in a context is evidence that the prosecution is unlawfully retaliatory. *Gonzalez* v. *Trevino*, 602 U.S. ___ (2024) (per curiam) (slip op., at 3).

And there is nothing "neutral" about New York's decision. New York specifically targeted Trump because he will be the Republican nominee in November and is supporting the Republican platform. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger* v. *Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995).

Nor would New York's purported interest in enforcing its laws (in entirely unprecedented and novel ways) be "achieved less effectively" if New York were required to wait a few months to impose any gag order or sentence. Here, the extraordinarily weighty and unique interests of the Presidential election far outweigh any purely timing interest of New York. *Cf. Clinton*, 520 U.S., at 698 ("We have, in short, long recognized the 'unique position in the constitutional scheme' that this office occupies."). After all, because the freedom of speech is "vulnerable to gravely damaging yet barely visible encroachments," free speech "must be ringed about with adequate bulwarks." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963). A stay of any sentence and gag order until after the election is hardly too much to ask.

Missouri is likely to succeed in showing that New York's actions violate the fundamental "right to listen" to *all* political viewpoints. This Court should stay the gag order and any sentence until after the election to prevent further irreparable harm to Missourians—and all Americans.

III. The Other Factors Warrant Relief

Although Missouri's likelihood of prevailing on the merits would alone justify granting the requested interim relief, relief is also supported by the other *Winter-Hollingsworth* factors.

A. Missouri will suffer irreparable harm absent relief.

Allowing New York to continue interfering with the campaign of a major-party Presidential candidate would irreparably harm Missouri by burdening Missouri's electors' ability to perform their federal functions, sowing voter confusion, and infringing on voters' right to hear from a major-party candidate in the lead-up to a Presidential election.

As discussed above, Missouri has learned that there is at least one upcoming Trump campaign event in Missouri and that the campaign would like to schedule more. The impending sentence threatens to bar or impede travel to Missouri, and, even if travel is allowed, the gag order curtails Trump's ability speak on certain topic or face monetary fines or imprisonment. This infringes on the rights of Missourians in the significant months leading up to the Presidential election in ways that cannot be remedied. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). And this injury can arise even where the government action caused "only an indirect effect on the exercise of First Amendment rights." *Laird* v. *Tatum*, 408 U.S. 1, 12-13 (1972). Further, there can be no question that the injury to the First Amendment rights of Missouri citizens is "fairly

attributable" to the actions of New York and its State officials. *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 937 (1982).

B. New York will not suffer harm by a few-month delay of the sentence and gag order.

A minor, few-month stay of the gag order and impending sentence will not harm New York. As discussed above, District Attorney Bragg brought his action against Trump half a decade after the allegedly wrongful bookkeeping records were made, after both his predecessor and the Attorney General of the United States declined to bring charges over the underlying alleged conduct, after Trump was years out of office, and only after Trump declared he was running for President.

The significant and undue delay in bringing these charges against Trump defeats any notion that a short, few-month stay will harm New York. By contrast, Missouri would be irreparably harmed if relief were denied.

C. The public interest favors immediate, interim relief

The last *Winter* factor is the public interest. When parties dispute the lawfulness of government action, the public interest tends to collapse into the merits. *ACLU* v. *Ashcroft*, 322 F.3d 240, 251 n. 11 (3d Cir. 2003); *Washington* v. *Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994); *League of Women Voters of the United States* v. *Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). If the Court agrees that New York's actions are unlawful, the public interest requires interim relief.

The voters and electors in other States, including Missouri, have a significant interest in being able to fully evaluate their choice for President through the open and unconstrained campaigning—especially of major-party candidates. New York's partisan and political targeting of the candidate its state officials oppose infringes that significant right at a time when the protection of political speech is at its zenith: the quadrennial Presidential elections. Allowing New York's actions to stand during this election season undermines the rights of voters and electors and serves as a dangerous precedent that any one of thousands of elected prosecutors in other States may follow in the future. The public interest stands firmly with Missouri and the protection of the electoral process from this type of partisan meddling.

CONCLUSION

Missouri respectfully requests that this Court issue an order against the State of New York, staying the gag order and impending sentencing of Donald J. Trump until after the 2024 Presidential election.

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Respectfully submitted,

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