No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY BOSSERT CLARK,

Applicant,

v.

D.C. OFFICE OF DISCIPLINARY COUNSEL

Respondent.

APPLICATION TO THE HON. JOHN G. ROBERTS, JR., CIRCUIT JUSTICE

FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Pursuant to Supreme Court Rule 13(5), Jeffrey Bossert Clark ("Applicant") hereby moves for an extension of time of 60 days, to and including **December 9, 2024**, for the filing of a petition for a writ of certiorari. Unless an extension is granted, the deadline for filing the petition for certiorari will be October 10, 2024.

In support of this request, Applicant states as follows:

The United States Court of Appeals for the District of Columbia Circuit rendered its decision on July 12, 2024 (Exhibit A). That Court refused to consider a

petition for rehearing on September 12, 2024. (Exhibit B).[1] This Court has jurisdiction under 28 U.S.C. § 1254(1).

The Supremacy Clause immunizes federal officers from state prosecution for acts undertaken as part of their official duties. *See generally In re Neagle*, 135 U.S. 1 (1890). The separation of powers doctrine insulates the exercise of core Article II authorities from intrusion, investigation, hindrance, or prosecution—civil, criminal or administrative—by other branches of the federal government. *See Trump v. United States*, 144 S. Ct. 2312 (2024). This necessarily extends to preclude such intrusions by the D.C. government as a subordinate creature of the Article I Branch. At issue is whether the federal-officer removal statute is the specified mechanism for such a federal officer to invoke federal jurisdiction and have the immunity defenses adjudicated in federal court in a quasi-criminal bar discipline case brought by the D.C. Office of Disciplinary Counsel. That statute permits removal of a "civil ***or criminal action***," defined broadly as "any proceeding (whether or not ancillary to another proceeding) to the extent that in such proceeding a judicial order … is sought," against "any officer. . . for or relating to any act under color of such office."

[1] Applicant is a former federal officer, having been an Assistant Attorney General in the Department of Justice during the period giving rise to this case. At the time of his resignation on January 14, 2021, he was simultaneously running two of DOJ's seven litigating Divisions (the Environment & Natural Resources Division in his Senate-confirmed capacity and the Civil Division in his capacity as an Acting Assistant Attorney General, consistent with the Federal Vacancies Reform Act). Applicant contends the petition for rehearing below was timely under the 45-day deadline of Fed. R. App. P. 40(a)(1)(D). However, the D.C. Circuit issued the mandate a few days before the 45 days had run (though well after the ordinary 14-day deadline), despite its Clerk's Office having given assurances in advance that, as a former federal officer and consistent with the text of Rule 40(a)(1)(D), Mr. Clark would be afforded the full 45-days in which to file his en banc petition. Indeed, the D.C. Circuit had specifically allowed that filing by withholding the issuance of the mandate on July 12, 2024. *See* Exhibit A. Despite this, the panel denied a motion to recall the mandate. *See* Exhibit B.

28 U.S.C. § 1442(a)(1) and (d)(1) (definition). *See also* 28 U.S.C. § 1451(2) (defining "State[s]" for purposes of removal to include the District of Columbia).

Like any jurisdictional inquiry, the test for federal-officer removal is readily administrable at the outset of a case. Under settled law, a court treats these jurisdictional thresholds as imposing a low bar: an officer "must both raise a colorable federal defense," *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999), and establish that the suit is "for or relating to any act under color of . . . office," 28 U.S.C. § 1442(a)(1). Courts are required to "credit the [removing officer's] theory of the case for purposes of both elements of [the] jurisdictional inquiry." *Acker*, 527 U.S. at 432. Courts do not ask whether the federal defense will ultimately prevail, *see id*. at 431, because the whole point of the federal-officer removal statute is to guarantee a federal forum for adjudicating that federal defense. *See Willingham v. Morgan*, 395 U.S. 402, 409 (1969).

Applicant served in the Justice Department as the Assistant Attorney General for the Environment and Natural Resources and simultaneously as the Acting Assistant Attorney General for the Civil Division at all times relevant to this case. In those capacities, he advised the President on whether and to what extent to exercise his core Article II authorities in connection with the 2020 presidential election. In *Trump v. United States*, the President's interactions with the Applicant and other senior Justice Department officials were held to be within the scope of President

Trump's core Article II authorities under the Take Care Clause, and therefore absolutely immune from criminal prosecution. 144 S. Ct. at 2334-35. In addition, the Court imposed *a per se* categorical ban on the introduction of evidence of the President's deliberations within the zone of his core Article II authorities, such as his deliberations with the Applicant and/or other senior Justice Department officials, whether drawn from official or personal records of those officials. *Id*. at 2341, n.3. ("What the prosecutor may not do, however, is admit ***testimony or private records*** of the President ***or his advisers*** probing the official act itself.") (emphasis added).

On July 22, 2022, Applicant was charged by the Office of Disciplinary Counsel with "attempted dishonesty" in violation of Rule of Professional Conduct ("RPC") 8.4(c) and "attempted serious interference with the administration of justice" in violation of RPC 8.4(d), in light of his advice to the President for which the President was held absolutely immune in connection with a draft letter to Georgia officials that was discussed with the President and his senior-most legal advisors but ultimately never sent.

Applicant removed the case to federal court under § 1442(a)(1) and removed it twice more in response to subpoenas served upon him by the Office of Disciplinary Counsel (subpoenas the D.C. Couirt of Appeals eventually determined had violated Mr. Clark's Fifth Amendment rights, *see In re Clark*, 311 A.3d 882 (D.C. 2024)). The District Court remanded on the grounds that Bar cases were neither civil nor criminal

and hence not subject to removal under § 1442(a)(1)—a position that made no sense in light of amendments to the definition of removable actions designed to clarify the intended breadth of such removal rights in § 1442(d)(1). The District Court had presumably concluded the removal was timely or it would not have reached statutory construction issues concerning the removal.

The D.C. Circuit affirmed, but on a different ground—that the Bar discipline case is purely a civil case and that removal was untimely as to the Bar's charging document, and moot as to the subpoenas. The Court did not address the quasi-criminal nature of Bar discipline, entirely ignoring this Court's decision in *In re Ruffalo*, 390 U.S. 544, 545 (1968) ("These are adversary proceedings [seeking to strike a member from the roll of attorneys] of a quasi-criminal nature."). The D.C. Circuit panel also ignored the fact that the D.C. Court of Appeals had repeatedly characterized—***when sitting en banc, no less***—D.C. Bar disciplinary proceedings under its auspices as quasi-criminal in light of *In re Ruffalo*, including in *In re Burka*, 423 A.2d 181, 185 (D.C. 1980) (en banc); and *In re Colson*, 412 A.2d 1160, 1164 (D.C. 1979) (en banc); *see also In re Artis*, 883 A.2d 85, 98, 101 & n.19 (D.C. 2005). This Court's precedent and this line of D.C. Court of Appeals precedent following and applying *In re Ruffalo* made plain that Mr. Clark's removal was timely under the removal deadline set for criminal cases in § 1455(b)(1), consistent with the District Court having reached the removal merits. Moreover, the D.C. Circuit panel opinion

did not address any of the novel and complex constitutional and jurisdictional issues this case presents that were the subject of extended oral argument before the panel.

The trial of the D.C. Bar case was held over seven days from March 26 to April 4, 2024, over our objections including on grounds of immunity. The entirety of the Disciplinary Counsel's case in chief was testimony from the former Acting Attorney General Jeff Rosen, the former Principal Deputy Attorney General Richard Donoghue (then performing the duties of the Deputy Attorney General), and Deputy White House Counsel Patrick Philbin concerning deliberations amongst themselves, with Mr. Clark the Applicant, and with the President in various groupings of participants.

All of this testimony is clearly within the scope of the evidentiary-preclusion rule of *Trump v. United States.* That rule would be hollowed out if such testimony were permitted against Executive Branch officials engaged in the same core Article II functions that are shielded by the absolute immunity and evidence-preclusion rules of *Trump v. United States.* Nor was D.C. Disciplinary Counsel ever required to establish that this disciplinary action would not interfere with the operations of internal deliberations within the Executive Branch with the President of the United States himself. Thus, this action also ran afoul of the larger presumptive immunity category established in *Trump v. United States*.

The separation of powers and Supremacy Clause are not inapplicable to D.C. Bar disciplinary process, which is carried out by a subordinate organ of the Article I Branch of the national government. But these vital constitutional principles were steamrolled in this case in a jurisdiction whose government, at all levels, is dominated by local passion and prejudice against President Trump and his advisors—precisely the situation for which federal-officer removal affords relief. The D.C. Circuit's panel decision contrasts markedly with the decision of the Fourth Circuit in *Kolibash v. Committee on Legal Ethics of West Virgina Bar*, 872 F.2d 571 (4th Cir. 1989) (Wilkinson, J.), which allowed a U.S. Attorney appointed by President Reagan to use the federal-officer removal statute to remove state bar disciplinary proceedings against him in West Virginia to federal district court, during a period in West Virginia politics where the Democratic Party controlled the State and derivatively, the West Virginia Bar.

Because removal of this case was not permitted, as it should have been, the D.C. Bar continues apace in its proceedings against the Applicant. In this vein, the D.C. Board on Professional Responsibility has refused both **(1)** to permit an interlocutory appeal consistent with *Trump v. United States* on Mr. Clark's immunity claims, and specifically for: **(a)** *Trump v. United States*-derivative immunity on the grounds that if the President is immune from criminal liability when he seeks the legal advice of Justice Department lawyers, that right would be hollow if Justice

Department lawyers, like Mr. Clark, could be targeted instead in order to penetrate into those same communications;[2] **(b)** absolute prosecutorial immunity, as investigative and potential prosecutorial actions were discussed by President Trump with the Applicant; and **(c)** qualified immunity (for Mr. Clark as a presidential advisor) under *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (affording qualified immunity to the Attorney General for authorizing warrantless wiretaps—comparing favorably to Mr. Clark merely advocating for a never-sent letter, where no preexisting authorities have ever imposed attorney discipline for an unsent letter), *see* Exhibit C; ***or*** **(2)** to defer its disciplinary action, under its rules, until after criminal proceedings are first completed against the Applicant and President Trump in Georgia state court, *see* Exhibit D—a prosecution that currently is before the Georgia Court of Appeals to decide whether District Attorney Fani Willis should be disqualified for conflicts of interest and violations of ethical gift-reporting rules.

Proceedings before the Board on Professional Responsibility are requiring substantial preparations by undersigned counsel to respond to D.C. Bar Hearing Committee #12's more-than-200-page opinion under the following schedule: (1) October 7, 2024: Disciplinary Counsel's opening brief; (2) October 28, 2024: Applicant's responsive brief; (3) November 8, 2024: Disciplinary Counsel reply

[2] Worse yet, the Board on Professional Responsibility took this position, despite Special Counsel Jack Smith implicitly recognizing that *Trump v. United States* applies to Mr. Clark by removing reference to his legal advice at the Justice Department from his superseding indictment. In the original *United States v. Trump* indictment, Mr. Clark was referred to as unindicted co-conspirator #4.

brief; (4) November 19, 2024, Applicant's surreply brief. *See* Exhibit E. Additionally, the disqualification appeal re Ms. Willis will take place in Georgia on December 5, 2024 (which will include Mr. MacDougald as an advocate) and the argument before the Board on Professional Responsibility on December 19, 2024 (to be presented by either Mr. MacDougald or Mr. Burnham).

Applicant respectfully requests an extension of time to accommodate his counsels' schedules. Mr. MacDougald has a one- to two-day trial commencing September 30, 2024 in Fulton County, Georgia Superior Court, preparation for which has consumed substantially all of his time the past week.[3] Even apart from his work on Mr. Clark's Board of Professional Responsibility appeal, Mr. Burnham faces a host of litigation deadlines between October 3, 2024 and December 4, 2024.[4] Additionally, Mr. Destro is working on a confidential litigation matter from October 8 through November 5, 2024. Lastly, undersigned Mr. MacDougald has a two-week trip to Europe with speaking engagements between October 10 and 23, 2024.

WHEREFORE, for the foregoing reasons, Applicant respectfully requests that an extension of time to and including **December 9, 2024**, be granted within which he may file a petition for a writ of certiorari.

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[3] *DeKalb County Republican Party v. Raffensperger*, Fulton Superior Court Case No. 24CV011028.

[4] **(1)** October 3, 2024, meeting motions deadline in *United States v. Brownlee*, No. 1:22-CR-125 (D. Md.); **(2)** November 1, 2024, sentencing in *United States v. Brock*, No. 21-CR-140 (D.D.C.); **(3)** Nov. 7, 2024 sentencing in *United States v. Russell*, 23-cr-195 (E.D. Va.) (Alexandria, VA); **(4)** November 22, 2024 sentencing in *United States v. Ayim*, No. 2:24-CR-3 (E.D. Va.) (Norfolk, VA); and **(5)** December 4, 2024 bench trial in *Commonwealth v. McIntosh*, 24-GC-3744 (Arlington, VA Gen. Dist. Ct.).

Date: September 30, 2024.

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