No. 24A666

In the Supreme Court of the United States

PRESIDENT DONALD J. TRUMP,
Applicant,

v.

PEOPLE OF THE STATE OF NEW YORK BY ALVIN L. BRAGG, JR., AND ACTING JUSTICE JUAN M. MERCHAN, A.J.S.C., OF THE SUPREME COURT OF NEW YORK COUNTY, NEW YORK,
Respondents.

On Application for Stay of Criminal Proceedings in the Supreme Court of New York County, New York, Pending the Resolution of President Trump's Interlocutory Appeal on Presidential Immunity

BRIEF FOR FORMER ATTORNEY GENERAL EDWIN MEESE III AND PROFESSOR STEVEN G. CALABRESI AS *AMICI CURIAE* IN SUPPORT OF APPLICANT AND GRANTING STAY

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

This continued prosecution of President Trump violates core constitutional principles long recognized by the Department of Justice's Office of Legal Counsel (OLC), which issues opinions on behalf of the Attorney General that are the formal legal position of the Federal Government and binding on the Executive Branch. OLC has issued three opinions—in 1972, 2000, and 2024—on prosecuting a sitting President of the United States. And, under OLC's consistent view, given President Trump's imminent return to the White House, presidential immunity requires that the prosecution brought against him in New York County by District Attorney Alvin Bragg be dismissed and the jury verdict vacated. President Trump's request for a stay is therefore well-grounded.

OLC holds that the Constitution forbids a sitting President being indicted or prosecuted, granting him unique immunity. This presidential immunity arises from the separation of powers at the federal level, and exists at the state level because of federalism and comity rooted in the Supremacy Clause. It extends to all stages of criminal proceedings, including sentencing and appeals. Criminal prosecutions are of a different species from civil litigation because of the greater burden they impose. Although a particular prosecution might not burden a President to an unconstitutional extent, the lack of certainty *ex ante* on that score necessitates a categorical rule against indictment and prosecution. The scope and gravity of a

[1] No party or counsel for party authored this brief in whole or in part, and no entity, aside from *amici* and their counsel, made any monetary contribution toward the preparation or submission of this brief.

President's duties are such that the practical demands of the presidency are all-consuming, whether as Commander in Chief or Chief Executive. And the risk that the stigma attending criminal proceedings would impair the President's performance both at home and abroad is intolerable under the Constitution. Given that, it is unsurprising that OLC recently concluded that the Constitution does not even permit a prosecution to be held in abeyance during a President's term in office. Presidential immunity extends to the outer perimeter of his responsibilities, so a categorical rule best captures the core of immunity that its holder need not answer to a court.

Even if the Constitution did not definitively require dismissal, prudence counsels it. While a state has a legitimate interests in each criminal prosecution to vindicate its sovereign right to define societal harms and pursue violators, the United States has a compelling public interest in the sitting President's devoting his full attention to his duties, unburdened and undistracted by ongoing prosecutions. President Trump is already engaged in official duties as President-Elect and besmirching his standing as he performs those duties would be noxious to the Constitution. No President can be impaired in that fashion by a county prosecutor. Even if the charges were well-founded and the continued prosecution consistent with the Constitution, New York's interests in any single criminal prosecution is dwarfed by the interests of the Nation as a whole.

Given their interest in and demonstrated commitment to the rule of law, the immunity issue this brief addresses is particularly important to *amici.* Edwin Meese III served as the seventy-fifth Attorney General of the United States after having

served as Counselor to the President, and is now the Ronald Reagan Distinguished Fellow Emeritus at the Heritage Foundation. And Steven G. Calabresi is one of the Nation's foremost constitutional scholars and advised Attorney General Meese during his time in office. And, as explained below, *amici* fully agree with OLC's conclusions on the scope of presidential immunity.

ARGUMENT

Consistent with Article II, § 2, cl. 1 of the Constitution, Attorneys General have provided legal opinions to Presidents since the Judiciary Act of 1789, which provided for an "attorney-general for the United States … to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments." Pub. L. No. 1-20 § 35, 1 Stat. 73, 93. The Attorney General has delegated that function to the Assistant Attorney General for the Office of Legal Counsel (OLC). 28 C.F.R. § 0.25. While the Attorney General can still issue opinions—and does so—typical Department practice is that OLC publishes an opinion pursuant to this delegated authority. These opinions are binding upon the Executive Branch. Mem. from David J. Barron, Acting Ass't Att'y Gen., to Att'ys of Off. Legal Counsel, *Best Practices for OLC Legal Advice & Written Ops.* 1-2 (July 16, 2010), https://tinyurl.com/mryehzhm; accord *United States* v. *Arizona*, 641 F.3d 339, 385 n.16 (9th Cir. 2011), *aff'd in part, rev'd in part on other grounds*, 567 U.S. 387 (2012). OLC opinions speak for the Department of Justice and this Court frequently takes note of their position. See, *e.g.*, *Trump* v. *Vance*, 591 U.S. 786, 803 (2020).

OLC has issued three published opinions directly on-point here. The first two are *Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office* (Sept. 24, 1973) ("1973 OLC Op.") and *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 OLC Op. 222 (2000) ("2000 OLC Op."). Although OLC is nonpartisan, it is noteworthy that the 1973 opinion was issued under Republican leadership (Attorney General Elliot Richardson under President Nixon), and the 2000 opinion was issued under Democratic leadership (Attorney General Janet Reno under President Clinton). And current Attorney General Garland's OLC reaffirmed those opinions. See Gov't Mot. to Dismiss at 6, *United States* v. *Trump*, No. 1:23-cr-257-TSC (filed D.D.C. Nov. 25, 2024) ("DOJ MTD"). These opinions thus represent the longstanding nonpartisan (and bipartisan) view of the Department of Justice on what presidential immunity requires regarding prosecutions of a sitting President of the United States. And, as shown below, they require dismissal of the prosecution at issue here.

I. UNDER OLC'S LONGSTANDING VIEW, WITH TRUMP'S IMMINENT ASCENSION TO THE PRESIDENCY, PRESIDENTIAL IMMUNITY REQUIRES DISMISSING THE CURRENT PROSECUTION.

"In 1973, the Department concluded that the indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions." 2000 OLC Op. 222. As OLC stated it in that initial opinion, "to wound [the President] by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs." 1973 OLC Op. 30. The Department

of Justice continues to "believe that the conclusion reached by the Department in 1973 still represents the best interpretation of the Constitution." 2000 OLC Op. 222.

Notwithstanding that opinion, the trial court held that "whatever threat of public stigma from [this] criminal prosecution that might have existed is long past." Stay App. 331a. It also concluded that OLC's opinion to Special Counsel Smith that the Constitution required all federal prosecutions of President Trump to be ended prior to the President's Inauguration on January 20, 2025, would not apply to this state prosecution. *Id.* at 330a. But OLC's three opinions for the Department compel the opposite conclusion.

A. Under longstanding Department precedent, the Constitution does not permit the prosecution of a sitting President.

Under longstanding Department precedent, the Constitution does not permit the prosecution of a sitting President. For 52 years, the Department's position has been that "the President is uniquely immune from" both prosecution and even from indictment. The latter is significant because an indictment must be brought before the statute of limitations runs. See 18 U.S.C. § 3282(a); NY CPL § 30.10.2(b). Therefore, a President's immunity from indictment is immunity from being placed under the shadow of prosecution, an immunity that would be violated by pending charges even if those charges are not being actively pursued during the President's tenure in office.

This prohibition extends both to federal prosecutions and state prosecutions. The former raises a separation-of-powers issue. 2000 OLC Op. 226-228. The latter turns on considerations of "federalism and comity." *Clinton* v. *Jones*, 520 U.S. 681,

691 (1997). Just as this Court "employ[s] a balancing test to preserve the opposing interests" of coequal branches of the federal government, so too courts must balance federal sovereign interests against state sovereign interests when a state prosecution is at issue. 2000 OLC Op. 245. But whether a jury is federal or state, "in well-publicized cases involving high officers, it is virtually impossible to insure a fair trial." 1973 OLC Op. 25. In the case of a President—either sitting or a former President who at the time of trial was the presumptive opposition party nominee to return as President—that level of improbability rises to a level that is constitutionally perilous to such an extent that "it might be impossible to impanel a neutral jury." *Id.* The Department correctly noted that the "passions and exposure that surround the most important office in the world" are such that the American people are unlikely to "have faith in the impartiality and sound judgment of twelve jurors selected by chance out of a population of more than [340 million]." *Id.* at 25 n.22.

The Department's constitutional analysis covers all criminal proceedings, "whether for official or unofficial wrongdoing." 2000 OLC Op. 247. In all cases, "'the proper inquiry focuses on the extent to which [a prosecution] prevents the Executive Branch from accomplishing its constitutionally assigned functions.'" *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. OLC 124, 133 (1996) (quoting *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977)).

The burden imposed by a criminal prosecution is so much more profound than a civil action that the constitutional calculus shifts against ongoing prosecution of a sitting President, even when incarceration is off the table or the case is on appeal.

"Once criminal charges are filed, the burdens of responding to those charges are different in kind and far greater in degree than those of responding to civil litigation." 2000 OLC Op. 251. As the Department explains:

> To be sure, in *Clinton v. Jones* the Supreme Court rejected the argument that a sitting President is constitutionally immune from civil suits seeking damages for unofficial misconduct. But the distinctive and serious stigma of indictment and criminal prosecution imposes burdens fundamentally different in kind from those imposed by the initiation of a civil action, and these burdens threaten the President's ability to act as the Nation's leader in both the domestic and foreign spheres.

Id. at 249. The Constitution does not countenance such a threat.

B. This prohibition extends to the unusual circumstance of a prosecution of a sitting President that is being held in abeyance or on appeal.

The threat posed by these burdens infects all stages of prosecution, including a prosecution that is being held in abeyance or is on appeal. The Department reasoned:

> It is conceivable that, in a particular set of circumstances, a particular criminal charge will not in fact require so much time and energy of a sitting President so as materially to impede the capacity of the executive branch to perform its constitutionally assigned functions. It would be perilous, however, to make a judgment in advance as to whether a particular criminal prosecution would be a case of this sort. Thus a categorical rule against indictment or criminal prosecution is most consistent with the constitutional structure, rather than a doctrinal test that would require the court to assess whether a particular criminal proceeding is likely to impose serious burdens upon the President.

2000 OLC Op. 254. Consequently, "a sitting President is immune from indictment as well as from further criminal process," *id.* at 259, which includes pauses and appeals.

This follows from the all-consuming nature of the presidency. As the Department explains, "the practical demands on the individual who occupies the

Office of the President, particularly in the modern era, are enormous. President Washington wrote that 'the duties of my Office at all times unremitting attention. In the two centuries since the Washington Administration, the demands of government, and thus of the President's duties, have grown exponentially.'" *Id.* at 247 (cleaned up). This accords with Justice Robert Jackson's observation that "[i]n drama, magnitude and finality [the President's] decisions so far overshadow any others that almost alone he fills the public eye and ear." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring). Surveying the President's various duties makes it evident why the prohibition on prosecuting a sitting President extends to prosecutions being held in abeyance or on appeal.

For example, the President is Commander in Chief. U.S. Const. art. II, § 2, cl. 1. As such, he commands the entire national security apparatus, including the military and Intelligence Community. The Presidential Daily Brief contains the stuff of which nightmares are made, and the Nation needs a President whose mind is undivided as he engages on those issues. That role entails literally life-and-death matters for both those who serve and for civilians, and also requires being fully present when catastrophic events happen without notice—such as the terrorist attack on this Nation on September 11, 2001—where the Commander in Chief must respond with incredible force and clarity to protect and unify the Nation. The Commander in Chief occasionally must even defend against existential threats to the United States, which at its most extreme may even require deploying the Nation's nuclear arsenal.

The Commander in Chief's duties may be the most consequential of any person on earth.

The President is also Chief Executive, "the only person who alone composes a branch of government." *Trump* v. *Mazars USA, LLP*, 591 U.S. 848, 868 (2020). While the President's duties as Head of State are often ceremonial in nature and perhaps could be adequately performed by a distracted President, his managerial duties and leadership role as Chief Executive are a different story. As the Chief Diplomat, under the Reception Clause the President must delicately manage global affairs in a perilous world every day, dovetailing with his Commander in Chief role. America "must speak with one voice" on the world stage. *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 576 U.S. 1, 14 (2015) (cleaned up). That voice is the President's. It is essential that the President at all times be able to act with "decision, activity, secrecy, and dispatch." *Id.* (cleaned up). The President is irreplaceable on the world stage, and often when his use of American "soft power" succeeds, the President need not resort to using his "hard power" as Commander in Chief.

But the President also has an inexhaustible list of domestic obligations. The Constitution's Take Care Clause requires the President to faithfully execute the laws, U.S. Const. art. II, § 3, which includes the Constitution and federal statutes. Per the Appointments Clause, *id.* art. II, § 2, cl. 2, in addition to nominating Supreme Court Justices and lower federal judges, the President must fill and continually replenish over 4,000 politically appointed positions. The President must then lead the team that he has assembled to address the Nation's needs and implement his agenda in an

ever-fluctuating environment. The President must lead and manage 2.4 million civilian employees in a series of departments and agencies covering a divergent portfolio. And he must constantly evaluate which legislation to recommend to Congress, *id.* art. II, § 2, cl. 3, which legislation to approve, *id.* art. I, § 7, cls. 2-3, and which legislation to oppose, *id.* His days are a never-ending series of meetings, briefings, and making decisions. He is on-duty twenty-four hours a day, 365 days a year. The livelihoods and wellbeing of 340 million people within the United States are impacted each day by the President's performance each day. The President's "innumerable functions" entail responsibilities that span "a broad variety of areas, many of them highly sensitive." *Trump* v. *United States*, 603 U.S. 593, 618 (2024) (cleaned up). The American people cannot afford their President being preoccupied by a prosecution, as that would interfere with the execution of these duties.

Exploring as one option that a prosecutor could "indict a sitting President but defer further proceedings until he is no longer in office," the Department reasoned:

> While this approach may have a claim to be considered as a solution to the problem from a legalistic point of view, it would overlook the political realities… [A]n indictment hanging over the President while he remains in office would damage the institution of the Presidency virtually to the same extent as an actual conviction… It also may be noted that the possibility that a President may escape all prosecution by the running of the statute of limitations is not a constitutional matter. The policy regarding statutes of limitations is within legislative control.

1973 OLC Op. 29.

The Department added that "[t]he spectacle of an indicted President still trying to serve as Chief Executive boggles the imagination." *Id.* at 30. Accordingly, the Department concluded that "the President's ability to perform his constitutional

functions would be unduly burdened by the mere pendency of an indictment against which he would need to defend himself after leaving office." 2000 OLC Op. 259.

The OLC opinions explain that the Constitution does not countenance certain burdens remaining on the President during his time in office because they could impermissibly interfere with his duties. The Department identifies as one such burden "the public stigma and opprobrium" attending prosecutions, citing the risk that the cloud of criminality "could compromise the President's ability to fulfill his constitutionally contemplated leadership role with respect to foreign and domestic affairs." *Id.* at 246. While the Department spoke of this burden arising from the "initiation of criminal proceedings," any such opprobrium does not attach only to the day an indictment is handed down; it persists for as long as the prosecution is ongoing, attended by recurring media coverage and public discussions. Other burdens are "the mental and physical burdens of assisting in the preparation of a defense for the various stages of the criminal proceedings," reasoning that such burdens "might severely hamper the President's performance of his official duties." *Id.* Sentencing and appeals are two such stages of proceedings. Pending criminal matters subject defendants to "public scorn" and "indefinitely prolong[] this oppression, as well as the anxiety and concern accompanying public accusation." *Klopfer* v. *North Carolina*, 386 U.S. 213, 222 (1967) (cleaned up). Until this case is over, President Trump will bear an ongoing burden. That burden "must be assessed in light of the Court's 'long recognition of the "unique position in the constitutional scheme" that this office occupies.'" 2000 OLC Op. 247 (quoting *Clinton*, 520 U.S. at

698 (quoting in turn *Nixon* v. *Fitzgerald*, 457 U.S. 731, 749 (1982))) (brackets omitted). The Constitution does not permit that burden on a sitting President.

The Court noted "that a President, like any other official or private citizen, may become distracted or preoccupied by pending litigation." *Clinton*, 520 U.S. at 705 n.40. But the weight of criminal penalties vastly exceeds those of civil liability, and so, while the latter does not transgress constitutional limits, the former does. Consequently, as OLC put it in 2000:

> We continue to believe that the better view of the Constitution accords a sitting President immunity from indictment by itself. To some degree, indictment alone will spur the President to devote some energy and attention to mounting his eventual legal defense. The stigma and opprobrium attached to indictment … far exceed that faced by the civil litigant defending a claim. Given "the realities of modern politics and mass media, and the delicacy of the political relationships which surround the Presidency both foreign and domestic," there would, as [OLC] explained in 1973, "be a Russian roulette aspect to the course of indicting the President but postponing [sentencing], hoping in the meantime that the power to govern could survive."

2000 OLC Op. 259 (quoting 1973 OLC Op. 31).

This conclusion finds support in this Court's conclusion that the rationale for presidential immunity is "to ensure that the President can undertake his constitutionally designated functions effectively, free from undue pressures or distortions." *Trump*, 603 U.S. at 615-616. And obviously, just the stigma from prosecution at any stage presents an impermissible threat "of severely damaging the President's standing and credibility in the national and international communities," 2000 OLC Op. 251, one that "would seriously interfere with his ability to carry out

his constitutionally assigned functions," *id.* at 249. Hence, any prosecution, at any stage—including an appeal—imposes an unconstitutional burden on the President.

C. The Department recently concluded that holding a prosecution in abeyance would still be unconstitutional.

Current Attorney General Garland continues to adhere to the Department's longstanding position, and moreover apparently agrees that the Constitution requires dismissal here. As the Department recently recognized in another prosecution against President Trump, OLC's "categorical prohibition on the federal indictment of a sitting President … even if the case were held in abeyance … applies in this situation." DOJ MTD 6. Accordingly, a sitting President cannot be under indictment even "where a federal indictment was returned before the defendant takes office." *Id.* This is unsurprising, as immunity "extends to the outer perimeter of the President's official responsibilities." *Trump*, 603 U.S. at 618 (internal quotation marks omitted).

To be sure, "[i]n our system of government, as this Court has often stated, no one is above the law. That principle applies, of course, to a President. At the same time, in light of Article II of the Constitution, this Court has repeatedly declared—and this Court indicates again today—that a court may not proceed against a President as it would against an ordinary litigant." *Vance*, 591 U.S. at 812 (Kavanaugh, J., concurring in judgment) (internal quotation marks omitted). Because this Court has "long recognized the unique position in the constitutional scheme" the President occupies, the Court has made explicit the "paramount necessity of protecting the Executive Branch from vexatious litigation that might

distract it from the energetic performance of its constitutional duties." *Cheney* v. *U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 382 (2004) (internal quotation marks omitted). And nothing in OLC opinions or this Court's precedent supports Bragg's argument that the constitutional impetus for dismissal should vary based on which stage the prosecution is at when a court is considering dismissal.

Examining whether the Constitution would permit holding a federal prosecution in abeyance until President Trump leaves office in 2029, "OLC concluded that its 2000 Opinion's 'categorical' prohibition on the federal indictment of a sitting President—even if the case were held in abeyance—applies to this situation, where a federal indictment was returned before the defendant takes office." DOJ MTD 6. And that rule "does not turn on the gravity of the crimes charged, the strength of the government's proof, or the merits of the prosecution." *Id.* at 1. Underlying all this is the principle that "[t]he essence of immunity 'is its possessor's entitlement not to answer for his conduct in court." *Trump*, 603 U.S. at 630 (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 525 (1985)).

"Special considerations applicable to the President," moreover, militate that "all courts should be mindful of the burdens imposed on the Executive Branch in any further proceedings." *Cheney*, 542 U.S. at 391-392. This is because:

> unlike anyone else, the President is a branch of government, and the Constitution vests in him sweeping powers and duties. Accounting for that reality—and ensuring that the President may exercise those powers forcefully, as the Framers anticipated he would—does not place him above the law; it preserves the basic structure of the Constitution from which that law derives.

Trump, 603 U.S. at 640.

To be sure, *Vance* cabined its holding allowing process with the disclaimer that there "the President [was] not seeking immunity from the diversion occasioned by the prospect of future criminal *liability*," but instead only from a subpoena for documents for a grand jury that could consider charging him when he was not in office, referencing OLC's 2000 opinion. *Vance*, 591 U.S. at 803 (emphasis in original). The Court thus noted that its holding "must be limited to the *additional* distraction caused by the subpoena itself." *Id.* (emphasis in original). So too *Vance* rejected the President's argument regarding avoiding stigma from association with a subpoena or "risk of association with persons or activities under criminal investigation," *id.* at 803-804, not that of indictment, conviction, or sentencing. Instead, the Court concluded that the "receipt of a subpoena would not seem to categorically magnify the harm to the President's reputation." *Id.* at 804.

Vance also reasoned that the subpoena did not rise to the level of harassment that would cross a legal line. *Id.* at 805. But the Court did so by reasoning that there were adequate protections in the law to prevent that, including explicitly noting that federal injunctive relief is available if the President is unable to obtain in state court relief to which he is entitled. *See id.* at 804-806. Efforts to manipulate the President or retaliate against him are "an unconstitutional attempt to 'influence' a superior sovereign 'exempt' from such obstacles." *Id.* at 806 (quoting *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819)); accord *Vance*, 591 U.S. at 809-810.

In short, this Court has instructed that "the high respect that is owed to the office of the Chief Executive should inform the conduct of the entire proceeding,"

Vance, 591 U.S. at 809 (cleaned up), which would include the appellate phase. And that principle requires terminating the prosecution at issue here.

II. EVEN IF THE CONSTITUTION DOES NOT REQUIRE DISMISSAL HERE, PRUDENCE COUNSELS IN FAVOR OF DISMISSING THE CASE IN THE NATIONAL INTEREST.

Even if specific and concrete constitutional violations did not require dismissal here, prudential principles weigh heavily in favor of dismissal, and thus reversing the trial court and dismissing this prosecution is in the interests of justice. Some of those principles turn on the unique place that a sitting President occupies in the life of the Nation. "In times of peace or war, prosperity or economic crisis, and tranquility or unrest, the President plays an unparalleled role in the execution of the laws, the conduct of foreign relations, and the defense of the Nation." 2000 OLC Op. 247.

A. Although States have a legitimate interest in criminal prosecutions, there is also a compelling national interest in a President's being able to devote his full attention to his duties.

The denial below "reflects a conflict between a State's interest in criminal investigation and a President's Article II interest in performing his or her duties without undue interference." *Vance*, 591 U.S. at 811 (Kavanaugh, J., concurring in judgment). The trial court misjudged that conflict, and should be reversed.

New York certainly has an interest in this prosecution. "No man in this country is so high that he is above the law." *United States* v. *Lee*, 106 U.S. 196, 220 (1882). And "[t]he Framers of the Constitution made it abundantly clear that the President was intended to be a Chief Executive, responsible, subject to the law, and lacking the prerogatives and privileges of the King of England." 1973 OLC Op. 20 n.14. There is thus a public interest in "criminal prosecutions," *Fitzgerald*, 457 U.S.

at 754 n.37, which the Department has referred to this as a "legitimate government objective." 2000 OLC Op. 245. And that is how this Court should categorize that interest.

To be sure, District Attorney Bragg says the public interest is compelling. See People's Mem. of Law in Opp'n to Def.'s Mot. to Dismiss at 1, 21, *New York* v. *Trump,* Ind. No. 71543-23 (N.Y. Sup. Ct., N.Y. Cnty., Dec. 9, 2024) (BIO). But the cases cited do not include controlling authority that elevates the State's interest to that highest category. See*, e.g.*, *United States* v. *Gilliam*, 994 F.2d 97, 101 (2d Cir. 1993). Instead, the District Attorney inserts the word "compelling" just outside the quotation marks of cases it cites for that proposition. *See, e.g.*, BIO 21 (quoting *Vance*, 591 U.S. at 808). But compelling interests are few and far between, are delineated in targeted fashion, and are usually examined on an individualized basis, not on a broad and generalized basis. See*, e.g.*, *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014) (impositions on religious liberty). Bragg's argument thus proves too much, as his sweeping claim would mean that every single criminal prosecution vindicates a compelling interest. That goes too far.

By contrast, there is a truly compelling public interest in an optimally functioning President. "The President occupies a unique position in the constitutional scheme." *Fitzgerald*, 457 U.S. at 749. As such, even when the Constitution does not definitively command special exemptions for the Commander in Chief, courts should carefully consider whether prudence militates for judicial restraint. "Because of the singular importance of the President's duties, diversion of

his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751. It is imperative to furnish the President with "'the maximum ability to deal fearlessly and impartially'" with all the challenges he faces on a daily basis, *id.* at 752 (quoting *Ferri* v. *Ackerman*, 444 U.S. 193, 203 (1979)), always mindful that each "President must concern himself with matters likely to 'arouse the most intense feelings,'" *id.* (quoting *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967)), and indeed does so constantly.

Prosecution by a District Attorney who is also a political opponent casts in stark relief a threat to the President's performance. "Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Id.* at 753. And this vulnerability is ubiquitous: "'Constitutionally speaking, the President never sleeps. The President must be ready, at a moment's notice, to do whatever it takes to preserve, protect, and defend the Constitution and the American people.'" *Vance*, 591 U.S. at 828 (Alito, J., dissenting) (quoting Akhil Amar & Neal Katyal, *Executive Privileges & Immunities: The* Nixon *and* Clinton *Cases*, 108 Harv. L. Rev. 701, 703 (1995)). And this conclusion coincides with the Court's observation in *Nixon* that courts must consider the "President's constitutional responsibilities and status as factors counseling judicial deference and restraint." *Fitzgerald*, 457 U.S. at 753.

Moreover, *Clinton*'s seemingly inconsistent reasoning that interactions between the President and the judiciary do not "necessarily rise to the level of

constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions," *Clinton*, 520 U.S. at 702, referred to civil proceedings, *id.* at 692-694. This Court—and the Department—consistently distinguish between civil and criminal proceedings, and so the Constitution's lesser concern regarding civil burdens does not extend to the burden of criminal prosecutions. *See* 2000 OLC Op. 244 n.16. "And, notwithstanding Clinton's conclusion that *civil* litigation regarding the President's unofficial conduct would not unduly interfere with his ability to perform his constitutionally assigned functions, we believe that *Clinton* and other cases do not undermine our earlier conclusion that the burdens of *criminal* litigation would be so intrusive as to violate the separation of powers." 2000 OLC Op. 244 (emphasis in original).

As the Court itself reasoned when balancing the compelling interests of a President against the public interest in criminal prosecutions:

> No one doubts that Article II guarantees the independence of the Executive Branch. As the head of that branch, the President occupies a unique position in the constitutional scheme. His duties, which range from faithfully executing the laws to commanding the Armed Forces, are of unrivaled gravity and breadth. Quite appropriately, those duties come with protections that safeguard the President's ability to perform his vital functions.

Vance, 591 U.S. at 800 (internal quotation marks omitted). Every occupant of the Oval Office is "entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." *Fitzgerald*, 457 U.S. at 750. Those who have served in senior White House staff positions or in the President's Cabinet have a perspective of the awesome weight of the presidency. Even under the best of circumstances it is a

weight that very few people have the strength to bear. To do so while grappling with an ongoing prosecution is unthinkable, and the Nation would suffer as a result.

B. New York's interest is dwarfed by the interests of the United States as a whole in a President who is not distracted by an ongoing prosecution.

This Court's precedent clearly holds "that Article II and the Supremacy Clause of the Constitution supply some protection for the Presidency against state criminal" proceedings. *Vance*, 591 U.S. at 811-812 (Kavanaugh, J., concurring in judgment). "The question here, then, is how to balance the States interests and the Article II interests." *Id.* at 812. The Court has ruled in favor of national interests against even significant countervailing state interests when doing otherwise would result in "[t]he frustration of superior federal interests that would ensue from" ruling in favor of the State. *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 226 (1957). And it should do so here as well.

1. As Special Counsel Jack Smith explained to the federal district court in Washington, D.C., in seeking dismissal of his prosecution of President Trump, in 2000 "OLC concluded that, because a pending prosecution would impair the President's ability to carry out [his] responsibilities to the detriment of the Nation, the constitutional interest in the President's unfettered performance of his duties must take precedence over the immediate enforcement of the criminal law against a sitting President." DOJ MTD 4. This is despite the fact that OLC's opinions "recognized the critical national interest in upholding the rule of law, and stated that the President is not above it." *Id.*

Thus, even though a *former* President can be "subject to criminal prosecution for unofficial acts committed while in office," *Trump*, 603 U.S. at 606, there can be no initiation (i.e., indictment) or continuation of criminal prosecution while the President remains in office. A sitting President may be charged only "after the completion of his term." *Vance*, 591 U.S. at 803. This "temporary immunity," 2000 OLC Op. 238, includes the President's immunity from being under indictment, awaiting sentencing, or contesting a conviction on appeal during his term in office.

Bragg is thus incorrect that this "Court has consistently allowed the criminal process to go forward during a sitting President's term." BIO 15. In the facts from *Nixon* discussed by Bragg, the sitting President was an *unindicated* co-conspirator, for which the criminal subpoena was not part of prosecuting the President. *United States* v. *Nixon*, 418 U.S. 683, 687 (1974). So too in *Vance*, the President can be investigated and be required to comply with criminal subpoenas as part of that investigation, 591 U.S. at 803, 810, but cannot be under indictment or be prosecuted as a defendant.

The burden here is not distraction of investigation alone, nor future criminal liability, but finality of a judgment of conviction in a current criminal matter with the need to appeal it. "Having identified the burdens imposed by indictment and criminal prosecution on the President's ability to perform his constitutionally assigned functions, we must still consider whether these burdens are 'justified by an overriding need to promote' legitimate governmental objectives," 2000 OLC Op. 255 (quoting *Adm'r of Gen. Servs.*, 433 U.S. at 443). And there is no such justification here: The

remaining phases of this proceeding would be Bragg's attempt to finalize and preserve criminal convictions of a sitting President. And "[t]he magnitude of this stigma and suspicion, and its likely effect on presidential respect and stature both here and abroad, cannot fairly be analogized to that caused by initiation of a private civil action." *Id.* at 250.

2. That is one reason Attorneys General of the United States have long held that normal and otherwise-legitimate public interests in criminal prosecutions must give way to the national interests in the presidency. In 1818, Attorney General Wirt advised President Monroe that a:

> subpoena ad testificandum may [be served on] the President of the U.S. But if the presence of the chief magistrate be required at the seat of government by his official duties, I think those duties paramount to any claim which an individual can have upon him, and that his personal attendance on the court from which the summons proceeds ought to be, and must, of necessity, be dispensed with.

Op. of Att'y Gen. Wirt (Jan. 13, 1818), *reproduced in* 2000 OLC Op. 253 n.29.

Even important state interests must give way to superior federal interests under the Supremacy Clause, U.S. Const. art. VI, cl. 2. "The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Gonzales* v. *Raich*, 545 U.S. 1, 29 (2005). "States have no power … to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress." *McCulloch*, 17 U.S. (4 Wheat.) at 436; accord *Boyle* v. *United Techs. Corp.*, 487 U.S. 500 (1988). "It follows that States also lack power to impede the President's execution of those laws." *Vance*, 591 U.S. at 801. Accordingly, when state interests conflict with federal interests in the proper

functioning of the Federal Government, rather than treating those two spheres of government "like equal opposing powers," *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824), superior federal interests prevail, see *id.* at 209-211. Accordingly, "[t]he Supremacy Clause prohibits state judges and prosecutors from interfering with the President's official duties." *Vance*, 591 U.S. at 806.

3. Here, moreover, Congress certified President Trump's election on January 6, 2025, and he is hard at work picking a Cabinet, sub-Cabinet Officers, and White House Staff. He has received emissaries and is negotiating with such foreign governments as Canada, Ukraine, and Russia. President Trump is also busy drafting orders that he will start issuing in 11 days when he is sworn in. It is intolerable that one county prosecutor in one State could besmirch a President's reputation and reduce his effectiveness in carrying out his extensive duties at this time.

Indeed, the issue of whether one State, on its own, can burden a federal officer or instrumentality was decided in *McCulloch*, where Chief Justice Marshall held in the second half of his legendary opinion that Maryland could not tax a branch of the Bank of the United Sates differently than all other banks doing business in Maryland were being taxed at that time. Chief Justice Marshall held that singling out a federal officer or instrumentality for a unique burden would be a power to destroy that officer or instrumentality, which is preempted by the Constitution itself.

Today, moreover, there are fifty states with roughly 2,300 county prosecutors, some of them quite partisan. This Court should not allow such a prosecutor to impair

the President's or congressionally certified President-Elect's ability to perform his duties. The Constitution itself preempts such an outcome. As OLC opined:

> In sum … criminal litigation uniquely requires the President's personal time and energy, and will inevitably entail a considerable if not overwhelming degree of mental preoccupation. Indictment also exposes the President to an official pronouncement that there is probable cause to believe he committed a criminal act, *see, e.g.*, *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297-98 (1991), impairing his credibility in carrying out his constitutional responsibilities to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and to speak as the "sole organ" of the United States in dealing with foreign nations. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936); *see also Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (describing the President "as the Nation's organ for foreign affairs"); *United States v. Louisiana*, 363 U.S. 1, 35 (1960) ("The President … is the constitutional representative of the United States in its dealings with foreign nations."). These physical and mental burdens imposed by an indictment and criminal prosecution of a sitting President are of an entirely different magnitude than those imposed by the types of judicial process previously upheld by the Court.

2000 OLC Op. 254. In applying those principles, all courts must be mindful that "the interests that underlie Presidential immunity seek to protect not the President himself, but the institution of the Presidency." *Trump*, 603 U.S. at 632.

CONCLUSION

For these reasons, if the New York Court of Appeals denies a stay, or if it becomes evident that the Court of Appeals will not grant a stay, this Court should grant the application for a stay of sentencing pending President Trump's interlocutory appeal claiming presidential immunity.

Respectfully submitted,

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