

Appendix A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

-against-

DONALD J. TRUMP,

Defendant.

STATEMENT OF FACTS
IND-71543-23

INTRODUCTION

1. The defendant DONALD J. TRUMP repeatedly and fraudulently falsified New York business records to conceal criminal conduct that hid damaging information from the voting public during the 2016 presidential election.

2. From August 2015 to December 2017, the Defendant orchestrated a scheme with others to influence the 2016 presidential election by identifying and purchasing negative information about him to suppress its publication and benefit the Defendant's electoral prospects. In order to execute the unlawful scheme, the participants violated election laws and made and caused false entries in the business records of various entities in New York. The participants also took steps that mischaracterized, for tax purposes, the true nature of the payments made in furtherance of the scheme.

3. One component of this scheme was that, at the Defendant's request, a lawyer who then worked for the Trump Organization as Special Counsel to Defendant ("Lawyer A"), covertly paid \$130,000 to an adult film actress shortly before the election to prevent her from publicizing a sexual encounter with the Defendant. Lawyer A made the \$130,000 payment through a shell corporation he set up and funded at a bank in Manhattan. This payment was illegal, and Lawyer A has since pleaded guilty to making an illegal campaign contribution and

served time in prison. Further, false entries were made in New York business records to effectuate this payment, separate and apart from the New York business records used to conceal the payment.

4. After the election, the Defendant reimbursed Lawyer A for the illegal payment through a series of monthly checks, first from the Donald J. Trump Revocable Trust (the “Defendant’s Trust”)—a Trust created under the laws of New York which held the Trump Organization entity assets after the Defendant was elected President—and then from the Defendant’s bank account. Each check was processed by the Trump Organization, and each check was disguised as a payment for legal services rendered in a given month of 2017 pursuant to a retainer agreement. The payment records, kept and maintained by the Trump Organization, were false New York business records. In truth, there was no retainer agreement, and Lawyer A was not being paid for legal services rendered in 2017. The Defendant caused his entities’ business records to be falsified to disguise his and others’ criminal conduct.

BACKGROUND

5. The Defendant is the beneficial owner of a collection of business entities known by the trade name the Trump Organization. The Trump Organization comprises approximately 500 separate entities that, among other business activities, own and manage hotels, golf courses, commercial real estate, condominium developments, and other properties. The Trump Organization is headquartered at 725 Fifth Avenue in New York County.

6. From approximately June 2015 to November 2016, the Defendant was a candidate for the office of President of the United States. On January 20, 2017, he became President of the United States.

THE SCHEME

I. The Catch and Kill Scheme to Suppress Negative Information

7. During and in furtherance of his candidacy for President, the Defendant and others agreed to identify and suppress negative stories about him. Two parties to this agreement have admitted to committing illegal conduct in connection with the scheme. In August 2018, Lawyer A pleaded guilty to two federal crimes involving illegal campaign contributions, and subsequently served time in prison. In addition, in August 2018, American Media, Inc. (“AMI”), a media company that owned and published magazines and supermarket tabloids including the *National Enquirer*, admitted in a non-prosecution agreement that it made a payment to a source of a story to ensure that the source “did not publicize damaging allegations” about the Defendant “before the 2016 presidential election and thereby influence that election.”

A. The 2015 Trump Tower Meeting

8. In June 2015, the Defendant announced his candidacy for President of the United States.

9. Soon after, in August 2015, the Defendant met with Lawyer A and AMI’s Chairman and Chief Executive Officer (the “AMI CEO”) at Trump Tower in New York County. At the meeting, the AMI CEO agreed to help with the Defendant’s campaign, saying that he would act as the “eyes and ears” for the campaign by looking out for negative stories about the Defendant and alerting Lawyer A before the stories were published. The AMI CEO also agreed to publish negative stories about the Defendant’s competitors for the election.

B. Suppressing the Doorman’s Story

10. A few months later, in or about October or November 2015, the AMI CEO learned that a former Trump Tower doorman (the “Doorman”) was trying to sell information regarding a child that the Defendant had allegedly fathered out of wedlock. At the AMI CEO’s

direction, AMI negotiated and signed an agreement to pay the Doorman \$30,000 to acquire exclusive rights to the story. AMI falsely characterized this payment in AMI's books and records, including in its general ledger. AMI purchased the information from the Doorman without fully investigating his claims, but the AMI CEO directed that the deal take place because of his agreement with the Defendant and Lawyer A.

11. When AMI later concluded that the story was not true, the AMI CEO wanted to release the Doorman from the agreement. However, Lawyer A instructed the AMI CEO not to release the Doorman until after the presidential election, and the AMI CEO complied with that instruction because of his agreement with the Defendant and Lawyer A.

C. Suppressing Woman 1's Account

12. About five months before the presidential election, in or about June 2016, the editor-in-chief of the *National Enquirer* and AMI's Chief Content Officer (the "AMI Editor-in-Chief") contacted Lawyer A about a woman ("Woman 1") who alleged she had a sexual relationship with the Defendant while he was married. The AMI Editor-in-Chief updated Lawyer A regularly about the matter over text message and by telephone. The Defendant did not want this information to become public because he was concerned about the effect it could have on his candidacy. Thereafter, the Defendant, the AMI CEO, and Lawyer A had a series of discussions about who should pay off Woman 1 to secure her silence.

13. AMI ultimately paid \$150,000 to Woman 1 in exchange for her agreement not to speak out about the alleged sexual relationship, as well as for two magazine cover features of Woman 1 and a series of articles that would be published under her byline. AMI falsely characterized this payment in AMI's books and records, including in its general ledger. The AMI CEO agreed to the deal after discussing it with both the Defendant and Lawyer A, and on

the understanding from Lawyer A that the Defendant or the Trump Organization would reimburse AMI.

14. In a conversation captured in an audio recording in approximately September 2016 concerning Woman 1's account, the Defendant and Lawyer A discussed how to obtain the rights to Woman 1's account from AMI and how to reimburse AMI for its payment. Lawyer A told the Defendant he would open up a company for the transfer of Woman 1's account and other information, and stated that he had spoken to the Chief Financial Officer for the Trump Organization (the "TO CFO") about "how to set the whole thing up." The Defendant asked, "So what do we got to pay for this? One fifty?" and suggested paying by cash. When Lawyer A disagreed, the Defendant then mentioned payment by check. After the conversation, Lawyer A created a shell company called Resolution Consultants, LLC on or about September 30, 2016.

15. Less than two months before the election, on or about September 30, 2016, the AMI CEO signed an agreement in which AMI agreed to transfer its rights to Woman 1's account to Lawyer A's shell company for \$125,000. However, after the assignment agreement was signed but before the reimbursement took place, the AMI CEO consulted with AMI's general counsel and then told Lawyer A that the deal to transfer the rights to Lawyer A's shell company was off.

D. Suppressing Woman 2's Account

16. About one month before the election, on or about October 7, 2016, news broke that the Defendant had been caught on tape saying to the host of *Access Hollywood*: "I just start kissing them [women]. It's like a magnet. Just kiss. I don't even wait. And when you're a star, they let you do it. You can do anything. . . . Grab 'em by the [genitals]. You can do anything." The evidence shows that both the Defendant and his campaign staff were concerned that the tape would harm his viability as a candidate and reduce his standing with female voters in particular.

17. Shortly after the *Access Hollywood* tape became public, the AMI Editor-in-Chief contacted the AMI CEO about another woman (“Woman 2”) who alleged she had a sexual encounter with the Defendant while he was married. The AMI CEO told the AMI Editor-in-Chief to notify Lawyer A.

18. On or about October 10, 2016, the AMI Editor-in-Chief connected Lawyer A with Woman 2’s lawyer (“Lawyer B”). Lawyer A then negotiated a deal with Lawyer B to secure Woman 2’s silence and prevent disclosure of the damaging information in the final weeks before the presidential election. Under the deal that Lawyer B negotiated, Woman 2 would be paid \$130,000 for the rights to her account.

19. The Defendant directed Lawyer A to delay making a payment to Woman 2 as long as possible. He instructed Lawyer A that if they could delay the payment until after the election, they could avoid paying altogether, because at that point it would not matter if the story became public. As reflected in emails and text messages between and among Lawyer A, Lawyer B, and the AMI Editor-in-Chief, Lawyer A attempted to delay making payment as long as possible.

20. Ultimately, with pressure mounting and the election approaching, the Defendant agreed to the payoff and directed Lawyer A to proceed. Lawyer A discussed the deal with the Defendant and the TO CFO. The Defendant did not want to make the \$130,000 payment himself, and asked Lawyer A and the TO CFO to find a way to make the payment. After discussing various payment options with the TO CFO, Lawyer A agreed he would make the payment. Before making the payment, Lawyer A confirmed with the Defendant that Defendant would pay him back.

21. On or about October 26, shortly after speaking with the Defendant on the phone, Lawyer A opened a bank account in Manhattan in the name of Essential Consultants LLC, a new shell company he had created to effectuate the payment. He then transferred \$131,000 from his personal home equity line of credit (“HELOC”) into that account. On or about October 27, Lawyer A wired \$130,000 from his Essential Consultants LLC account in New York to Lawyer B to suppress Woman 2’s account.

E. Post-Election Communications with AMI CEO

22. On November 8, 2016, the Defendant won the presidential election and became the President-Elect. Thereafter, AMI released both the doorman and Woman 1 from their non-disclosure agreements.

23. The Defendant was inaugurated as President on January 20, 2017. Between Election Day and Inauguration Day, during the period of the Defendant’s transition to his role as President, the Defendant met with the AMI CEO privately in Trump Tower in Manhattan. The Defendant thanked the AMI CEO for handling the stories of the Doorman and Woman 1, and invited the AMI CEO to the Inauguration. In the summer of 2017, the Defendant invited the AMI CEO to the White House for a dinner to thank him for his help during the campaign.

II. The Defendant Falsified Business Records

24. Shortly after being elected President, the Defendant arranged to reimburse Lawyer A for the payoff he made on the Defendant’s behalf. In or around January 2017, the TO CFO and Lawyer A met to discuss how Lawyer A would be reimbursed for the money he paid to ensure Woman 2’s silence. The TO CFO asked Lawyer A to bring a copy of a bank statement for the Essential Consultants account showing the \$130,000 payment.

25. The TO CFO and Lawyer A agreed to a total repayment amount of \$420,000. They reached that figure by adding the \$130,000 payment to a \$50,000 payment for another

expense for which Lawyer A also claimed reimbursement, for a total of \$180,000. The TO CFO then doubled that amount to \$360,000 so that Lawyer A could characterize the payment as income on his tax returns, instead of a reimbursement, and Lawyer A would be left with \$180,000 after paying approximately 50% in income taxes. Finally, the TO CFO added an additional \$60,000 as a supplemental year-end bonus. Together, these amounts totaled \$420,000. The TO CFO memorialized these calculations in handwritten notes on the copy of the bank statement that Lawyer A had provided.

26. The Defendant, the TO CFO, and Lawyer A then agreed that Lawyer A would be paid the \$420,000 through twelve monthly payments of \$35,000 over the course of 2017. Each month, Lawyer A was to send an invoice to the Defendant through Trump Organization employees, falsely requesting payment of \$35,000 for legal services rendered in a given month of 2017 pursuant to a retainer agreement. At no point did Lawyer A have a retainer agreement with the Defendant or the Trump Organization.

27. In early February 2017, the Defendant and Lawyer A met in the Oval Office at the White House and confirmed this repayment arrangement.

28. On or about February 14, 2017, Lawyer A emailed the Controller of the Trump Organization (the “TO Controller”) the first monthly invoice, which stated: “Pursuant to the retainer agreement, kindly remit payment for services rendered for the months of January and February, 2017.” The invoice requested payment in the amount of \$35,000 for each of those two months. The TO CFO approved the payment, and, in turn, the TO Controller sent the invoice to the Trump Organization Accounts Payable Supervisor (the “TO Accounts Payable Supervisor”) with the following instructions: “Post to legal expenses. Put ‘retainer for the months of January and February 2017’ in the description.”

29. Lawyer A submitted ten similar monthly invoices by email to the Trump Organization for the remaining months in 2017. Each invoice falsely stated that it was being submitted “[p]ursuant to the retainer agreement,” and falsely requested “payment for services rendered” for a month of 2017. In fact, there was no such retainer agreement and Lawyer A was not being paid for services rendered in any month of 2017.

30. The TO Controller forwarded each invoice to the TO Accounts Payable Supervisor. Consistent with the TO Controller’s initial instructions, the TO Accounts Payable Supervisor printed out each invoice and marked it with an accounts payable stamp and the general ledger code “51505” for legal expenses. The Trump Organization maintained the invoices as records of expenses paid.

31. As instructed, the TO Accounts Payable Supervisor recorded each payment in the Trump Organization’s electronic accounting system, falsely describing it as a “legal expense” pursuant to a retainer agreement for a month of 2017. The Trump Organization maintained a digital entry for each expense, called a “voucher,” and these vouchers, like vouchers for other expenses, became part of the Trump Organization’s general ledgers.

32. The TO Accounts Payable Supervisor then prepared checks with attached check stubs for approval and signature. The first check was paid from the Defendant’s Trust and signed by the TO CFO and the Defendant’s son, as trustees. The check stub falsely recorded the payment as “Retainer for 1/1-1/31/17” and “Retainer for 2/1-2/28/17.” The second check, for March 2017, was also paid from the Trust and signed by two trustees. The check stub falsely recorded the payment as “Retainer for 3/1-3/31/17.”

33. The remaining nine checks, corresponding to the months of April through December of 2017, were paid by the Defendant personally. Each of the checks was cut from the

Defendant's bank account and sent, along with the corresponding invoices from Lawyer A, from the Trump Organization in New York County to the Defendant in Washington, D.C. The checks and stubs bearing the false statements were stapled to the invoices also bearing false statements. The Defendant signed each of the checks personally and had them sent back to the Trump Organization in New York County. There, the checks, the stubs, and the invoices were scanned and maintained in the Trump Organization's data system before the checks themselves were detached and mailed to Lawyer A for payment.

34. The \$35,000 payments stopped after the December 2017 payment.

III. The Investigation into Lawyer A and the Defendant's Pressure Campaign

35. On or about April 9, 2018, the FBI executed a search warrant on Lawyer A's residences and office. In the months that followed, the Defendant and others engaged in a public and private pressure campaign to ensure that Lawyer A did not cooperate with law enforcement in the federal investigation.

36. On the day of the FBI searches, Lawyer A called to speak with the Defendant to let him know what had occurred. In a return call, the Defendant told Lawyer A to "stay strong."

37. On or about April 21, 2018, the Defendant publicly commented on Twitter encouraging Lawyer A not to "flip," stating, "Most people will flip if the Government lets them out of trouble, even if . . . it means lying or making up stories. Sorry, I don't see [Lawyer A] doing that"

38. In mid-April 2018, Lawyer A was also approached by an attorney ("Lawyer C"), who offered to represent him in the interest of maintaining a "back channel of communication" to the Defendant. On or about April 21, 2018, Lawyer C emailed Lawyer A, highlighting that he had a close relationship with the Defendant's personal attorney ("Lawyer D") and stating, "[T]his could not be a better situation for the President or you." Later that day, Lawyer C

emailed Lawyer A again, writing, “I spoke with [Lawyer D]. Very Very Positive. You are ‘loved.’ . . . [Lawyer D] said this communication channel must be maintained. . . . Sleep well tonight, you have friends in high places.”

39. On or about June 14, 2018, Lawyer C emailed Lawyer A a news clip discussing the possibility of Lawyer A cooperating, and continued to urge him not to cooperate with law enforcement, writing, “The whole objective of this exercise by the [federal prosecutors] is to drain you, emotionally and financially, until you reach a point that you see them as your only means to salvation.” In the same email, Lawyer C, wrote, “You are making a very big mistake if you believe the stories these ‘journalists’ are writing about you. They want you to cave. They want you to fail. They do not want you to persevere and succeed.”

40. On August 21, 2018, Lawyer A pleaded guilty in the federal investigation. The next day, on or about August 22, 2018, the Defendant commented on Twitter, “If anyone is looking for a good lawyer, I would strongly suggest that you don’t retain the services of [Lawyer A]!” Later that day, the Defendant posted to Twitter again, stating, “I feel very badly for” one of his former campaign managers who had been criminally charged, saying, “[U]nlike [Lawyer A], he refused to ‘break’ – make up stories in order to get a ‘deal.’”

IV. Lawyer A and AMI Admit Guilt in Connection with Payoffs of Woman 1 and Woman 2

41. Ultimately, other participants in the scheme admitted that the payoffs were unlawful.

42. In or about September 2018, AMI entered into a non-prosecution agreement with the United States Attorney’s Office for the Southern District of New York in connection with AMI’s payoff of Woman 1, admitting that “[a]t no time during the negotiation or acquisition of [Woman 1’s] story did AMI intend to publish the story or disseminate information about it

publicly.” Rather, AMI admitted that it made the payment to ensure that Woman 1 “did not publicize damaging allegations” about the Defendant “before the 2016 presidential election and thereby influence that election.”

43. In August 21, 2018, Lawyer A pleaded guilty to a felony in connection with his role in AMI’s payoff to Woman 1, admitting in his guilty plea that he had done so at the Defendant’s direction:

[O]n or about the summer of 2016, **in coordination with, and at the direction of, a candidate for federal office**, I and the CEO of a media company at the request of the candidate worked together to keep an individual with information that would be harmful to the candidate and to the campaign from publicly disclosing this information. After a number of discussions, we eventually accomplished the goal by the media company entering into a contract with the individual under which she received compensation of \$150,000. I participated in this conduct, which on my part took place in Manhattan, for the principal purpose of influencing the election.

(emphasis added).

44. Lawyer A also pleaded guilty to a felony in connection with his payoff of Woman 2 to secure her silence, again at the Defendant’s direction. Lawyer A admitted as part of his guilty plea:

[O]n or about October of 2016, **in coordination with, and at the direction of, the same candidate**, I arranged to make a payment to a second individual with information that would be harmful to the candidate and to the campaign to keep the individual from disclosing the information. To accomplish this, I used a company that was under my control to make a payment in the sum of \$130,000. The monies I advanced through my company were later repaid to me by the candidate. I participated in this conduct, which on my part took place in Manhattan, for the principal purpose of influencing the election.

(emphasis added).¹

¹ This Statement of Facts contains certain of the information that is relevant to the events described herein, and does not contain all facts relevant to the charged conduct.

DATED: New York, New York
April 4, 2023

ALVIN L. BRAGG, JR.
District Attorney
New York County

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,	)	
	)	
	)	23-cv-3773
	)	
v.	)	NOTICE OF REMOVAL
	)	
	)	Removed from:
	)	
DONALD J. TRUMP,	)	Supreme Court of the State of New
	)	York County of New York
Defendant.	)	Ind. No. 71543-23
	)	

To: The Clerk of the United States District Court for the Southern District of New York.

DONALD J. TRUMP'S NOTICE OF REMOVAL

President Donald J. Trump, by and through undersigned counsel, hereby removes this case from the Supreme Court of the State of New York, County of New York, to the United States District Court for the Southern District of New York, pursuant to 28 U.S.C. §§ 1442 and 1455.

1. The pending action is styled *People of the State of New York v. Donald J. Trump*, Indictment No. 71543/2013, before the Supreme Court of the State of New York, County of New York, located at 100 Centre Street, New York, New York, 10007. A true and correct copy of the indictment filed in this matter is attached as **Exhibit A**.

2. As explained below, this Court has original subject matter jurisdiction over this criminal action because the case involves important federal questions since the indictment charges President Trump for conduct committed while he was President of the United States that was within the "color of his office," and the charges involve alleged federal and state election law violations that have a federal preemption defense.

3. This case is unprecedented in our nation’s history. Never before has a local elected prosecutor criminally prosecuted a defendant either for conduct that occurred entirely while the defendant was the sitting President of the United States or for conduct that related to federal campaign contribution laws. As explained below, removal is required.

I. THE NOTICE OF REMOVAL IS TIMELY

4. This removal is timely, since it is filed within 30 days of April 4, 2023, the date on which President Trump was arraigned. *See* 28 U.S.C. §1455(b)(1) (“A notice of removal of a criminal prosecution shall be filed not later than 30 days after the arraignment in the State court”).

II. VENUE IS PROPER IN THE SOUTHERN DISTRICT OF NEW YORK

5. Under 28 U.S.C. § 112, the United States District Court for the Southern District of New York is the proper venue for removal under 28 U.S.C. § 1455(a), because the Southern District of New York encompasses New York County, where this state action is now pending.

III. BACKGROUND

6. The allegations against President Trump in this case are based on checks allegedly written to Michael Cohen by President Trump in 2017, while he was President of the United States. The District Attorney’s Office alleges that these checks, which President Trump allegedly signed while sitting in the Oval Office, as well as related records, are false because they characterize these payments as “legal expenses” and “retainer” payments when, according to the District Attorney’s Office, they were allegedly reimbursements to Michael Cohen for payment made by Cohen to Stormy Daniels for campaign purposes. The defense denies that these were false records.

7. After investigating this case for five years, on March 30, 2023, a grand jury returned a 34-count Indictment against President Trump. All 34 counts charge the same offense, *i.e.*, felony falsifying business records in violation of New York Penal Law §175.10.

8. The misdemeanor falsifying business records offenses is contained in New York Penal Law §175.05. As relevant to this matter, it punishes as a misdemeanor one who, with intent to defraud, “[m]akes or causes a false entry in the business records of an enterprise.” §175.05(1).

9. Under New York law, the misdemeanor offense is elevated to a felony when the person “commits the crime of falsifying business records in the second degree, and when his intent to defraud includes an intent to commit another crime or to aid or conceal the commission thereof.” N.Y. Penal Law §175.10.

10. The District Attorney’s Office alleges that the other crime that President Trump intended to commit or conceal was election law violations in connection with the 2016 federal election for President of the United States.

11. This is a novel theory—that President Trump committed a felony under New York law because the payments to Michael Cohen were supposedly mischaracterized in the records of an enterprise, and that this mischaracterization was allegedly done in order to conceal an election law crime. There has never been a prosecution under New York State law based on an alleged violation of election law pertaining to a federal election. And there are serious federal preemption issues with such a prosecution.

12. Indeed, as noted by the Hon. Mary Kay Vyskocil in a recent decision, a former ADA who wrote a book about this case conceded, *inter alia*, the following about the legal theory underlying this case:

- The facts surrounding the payments did not amount to much in legal terms as paying hush money is not a crime under New York State law, even if the payment was made to help an electoral candidate.
- There appeared to be no felony state crime in play.
- The Trump investigation should have been handled by the U.S. Department of Justice, rather than by the Manhattan district attorney's office.
- Federal prosecutors previously looked into the Clifford "hush money payment" and did not move forward with the prosecution.

See Bragg v. Jordan, 2023 WL 2999971 at *3–6 (S.D.N.Y. April 19, 2023) (bullet points in the original).

13. Judge Vyskocil also recognized that D.A. Bragg faced political pressure to bring this case, writing that Bragg "is an elected prosecutor in New York County with constituents, some of whom wish to see Bragg wield the force of law against the former President and a current candidate for the Republican presidential nomination." *Id.* at *36.

IV. REMOVAL IS REQUIRED

14. Pursuant to 28 U.S.C. §1442 (a)(1), upon the application of the federal officer, a "criminal prosecution that is commenced in a State court and that is against or directed to" any "officer" of the United States, "in an official or individual capacity for or relating to any act under color of such office" must "be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending."

15. The removal statute applies to former officers of the United States if the charged conduct relates to conduct performed while in office.

16. In officer-removal cases, a district court applies a two-step test: "First, the officer

must ‘raise a colorable federal defense.’” *K&D LLC v. Trump Old Post Office LLC*, 951 F.3d 503, 506 (D.C. Cir. 2020) (citations omitted). “The federal defense need only be colorable, not clearly sustainable.” *Id.* Second, “the officer must show that the suit is one ‘for or relating to any act under color of [his] office.’” *Id.* For the second step, it “is sufficient for there to be a ‘connection’ or ‘association’ between the act in question and the federal office.” *In re Commonwealth’s Motion to Appoint Counsel Against or Directed to Defender Ass’n of Phila.*, 790 F.3d 457, 471 (3d Cir. 2015).

17. President Trump satisfies both of these elements.

A. President Trump Will Raise a Number of Colorable Federal Defenses

18. President Trump, in his defense of this case, will raise a number of federal defenses.

19. President Trump will assert that the statements in the purported business records at issue were in fact truthful statements because the money paid to Michael Cohen was, in part, “retainer” or legal payments to Michael Cohen to act as President Trump’s personal attorney. At the time of his election, there was some public expressions of concern about potential conflicts of interest, corruption, and possible constitutional violations due to President Trump’s extensive business interests and wealth. Thus, shortly before assuming the Office of the Presidency, and in order to assure the American public that he had separated his personal business from his public duties, *see* Morgan Lewis White Paper, attached as **Exhibit B**, as well as to fulfill various constitutional obligations, *e.g.*, the Foreign Emoluments Clause, Art. I, sec. 9, cl. 8, and the Take Care Clause, Art. II, sec. 3, President Trump, in an abundance of caution, placed his businesses in a Trust. Additionally, President Trump hired a personal lawyer—Michael Cohen—to handle

his personal affairs. These steps were taken solely because he was President of the United States.

20. As such, President Trump’s decision to retain Michael Cohen to act as his personal lawyer arose out of his duties as President and therefore gives rise to a federal defense to the charges in this case.

21. Moreover, the District Attorney’s Office has made clear in court filings that the felony charges in this case are predicated on an alleged intent to violate New York Election Law § 17-152 and the Federal Election Campaign Act, 52 U.S.C. § 30101. *See* People’s Motion for a Protective Order, at 3, attached as **Exhibit C** (“Defendant caused business records associated with the repayments to be falsified to disguise his and others’ criminal conduct including violations of New York Election Law § 17-152 and violations of the individual and corporate campaign contribution limits under the Federal Election Campaign Act, 52 U.S.C. § 30101 et seq.”).

22. President Trump will raise a federal defense—preemption—to both of these predicate charges. *See Orange County Water Dist. V. Unocal Corp. (In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.)*, 364 F. Supp.2d 329, 336 (S.D.N.Y. 2004) (“conclud[ing] that preemption is a colorable federal defense for purposes of the federal officer removal statute”).

23. New York Election Law § 17-152 makes it a misdemeanor offense for “[a]ny two or more persons [to] conspire to promote or prevent the election of any person to a public office by unlawful means and which conspiracy is acted upon by one or more of the parties thereto.” Applying §17-152 to President Trump, who has only been a candidate for federal office, would violate the preemption provisions of 52 U.S.C. § 30143, which provides that “[t]he provisions of

[the Federal Election Campaign] Act, and of rules prescribed under this Act, supersede and preempt *any provision of State law* with respect to election to Federal office.” (emphasis added). *See also* 11 C.F.R. § 108.7.

24. Similarly, that preemption provision preempts the ability of a state prosecutor to charge a crime where an element of that crime is a federal campaign contribution violation, as the District Attorney’s Office attempts to do here.

B. The Underlying Conduct Relates to Acts Performed Under Color of Office

25. In determining whether the underlying conduct “relat[es] to” acts performed under color of office, within the meaning of the federal removal statute, “the officer must show a nexus, a causal connection between the charged conduct and asserted official authority.” *Trump Old Post Office LLC*, 951 F.3d at 507.

26. President Trump more than adequately satisfies this standard.

27. All of the indictment’s charges relate to a claim that President Trump falsified business records maintained by the Trump Organization by allegedly falsely indicating that the payments to Michael Cohen were for “legal expenses” or “retainer” payments when, according to the District Attorney’s Office, the money was in fact reimbursement for payments made by Cohen.

28. As discussed, *supra* ¶¶17-18, as part of his defense in this case, President Trump will demonstrate that Mr. Cohen was in fact his personal lawyer who was only hired as a direct result of President Trump’s role as President of the United States and his obligations under the Constitution, and in order to separate his business affairs from his public duties.

29. Additionally, acts taken as part of the election to the office of President of the United States “relat[e] to,” § 1442(a)(1), President Trump’s position as President, and therefore conduct underlying the charges “relat[es] to” acts performed under color of office.

30. In other words, there is a clear nexus between the payments to Mr. Cohen and former President Trump’s position as President of the United States.

C. This Court Has Protective Jurisdiction

31. Finally, because the instant indictment is politically motivated and was brought because a local politician—here D.A. Bragg—disfavored President’s Trump’s acts and policies as President of the United States, federal courts have so-called “protective jurisdiction” over this case. Although the Supreme Court has never definitively decided whether § 1442 provides federal protective jurisdiction in cases of state hostility to the federal officer, at least some Justices has said it does. *See Mesa v. California*, 489 U.S. 121, 140 (1989) (Brennan, J. concurring) (“It is not at all inconceivable, however, that Congress’ concern about local hostility to federal authority could come into play in some circumstances [even] where the federal officer is unable to present any ‘federal defense.’ . . . Such harassment could well take the form of unjustified prosecution for traffic or other offenses, to which the federal officer would have no immunity or other federal defense. The removal statute, it would seem to me, might well have been intended to apply in such unfortunate and exceptional circumstances.”). *See also Trump v. Vance*, 140 S. Ct. 2412, 2428 (2020) (recognizing “the possibility that state prosecutors may have political motivations” for prosecuting federal officials).

32. For this additional reason, this case is removable.

WHEREFORE, this case should be removed to Federal Court.

Dated: New York, New York
May 4, 2023

Respectfully submitted,

Todd Blanche
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Appendix C

Supreme Court
of the
State of New York



JUAN M. MERCHAN
JUDGE OF THE COURT OF CLAIMS
SUPREME COURT, CRIMINAL TERM
FIRST JUDICIAL DISTRICT

CHAMBERS
100 CENTRE STREET
NEW YORK, N.Y. 10013

Via Email

July 2, 2024

Emil Bove, Esq.
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ADA Joshua Steinglass
New York County District Attorney's Office
One Hogan Place
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Re: *People v. Trump*, Ind. No. 71543-2023

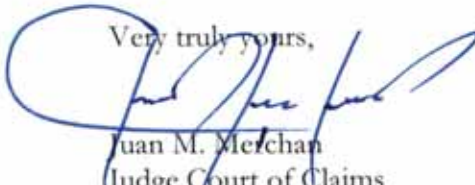
Dear Counsel:

I write to you in response to your recent communications. I refer specifically to the People's e-mail of July 1, 2024, requesting permission to delay filing of the sentencing recommendation pending further guidance from this Court; Mr. Bove's pre-motion letter of July 1, 2024, seeking leave to file a motion to set aside the jury's verdict, pursuant to CPL § 330.30(1) based on the Supreme Court's decision in *People v. Trump*, 2024 WL 3237603, and requesting until July 10, 2024, to submit a memorandum of law in support of the motion; and the People's letter dated July 2, 2024, requesting a deadline of July 24, 2024, to file and serve a response to Defendant's CPL § 330.30 motion.

The People's request regarding the sentencing recommendation was granted yesterday. Defendant's request to file a CPL § 330.30 motion by July 10, 2024, is granted. The People's request for a deadline of July 24, 2024, to file a response to the motion is also granted.

The July 11, 2024, sentencing date is therefore vacated. The Court's decision will be rendered off-calendar on September 6, 2024 and the matter is adjourned to September 18, 2024, at 10:00 AM for the imposition of sentence, if such is still necessary, or other proceedings.

Very truly yours,



Juan M. Merchan
Judge Court of Claims
Acting Justice Supreme Court

RON J. MERCHAN

cc: Counsel of record
Assistant District Attorneys of record
Court file

JUL 02 2024

Appendix D

Supreme Court
of the
State of New York



JUAN M. MERCHAN
JUDGE OF THE COURT OF CLAIMS
SUPREME COURT, CRIMINAL TERM
FIRST JUDICIAL DISTRICT

CHAMBERS
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Via Email

September 6, 2024

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Re: *People v. Trump*, Ind. No. 71543-2023

Dear Counsel:

By letter dated August 14, 2024, Defendant requests an adjournment of his sentencing, currently scheduled for September 18, 2024, until after the 2024 presidential election. He argues the adjournment is necessary to provide adequate time to “assess and pursue” appellate options in the event this Court denies his pending Criminal Procedure Law (“CPL”) § 330.30 motion and to avoid the potential “politically prejudicial” impact that a public sentencing could have on him and his prospects in the upcoming election. He attempts to bolster his application by repeating a litany of perceived and unsubstantiated grievances from previous filings that do not merit this Court’s attention and will not be addressed in this Decision. The People, by letter dated August 16, 2024, state that they “defer to the Court on the appropriate post-trial schedule that allows adequate time to adjudicate defendant’s CPL § 330.30 motion[.]” Nonetheless, the People, “to assist the Court” with its determination, identify several reasons why an adjournment would be appropriate.

On August 29, 2024, Defendant informed this Court by letter that he had filed a second Removal Notice in the United States District Court for the Southern District of New York (“USDC-SDNY”). Defendant’s motion was denied by Judge Hellerstein, and Defendant is currently appealing that decision to the Second Circuit Court of Appeals.

As a threshold matter, this Court finds that, despite the People’s stated neutrality, they present concerns in their letter of August 16, 2024, in a manner which seemingly supports Defendant’s application for an adjournment. The People certainly do not oppose, and a careful reading of their response can fairly be construed as a joinder of the motion.

Notably, had Defendant been sentenced on July 11, 2024, as originally scheduled, there would of course have been no cause for delay. However, on July 1, 2024, the Supreme Court of the United States rendered a historic and intervening decision in *Trump v. United States*, 144 S Ct 2347 [2024]. Relying on that decision, Defendant immediately sought leave of this Court to file a CPL § 330.30 motion to set aside the verdict on the instant matter and to dismiss the indictment. In light of the Supreme Court’s decision which this Court must interpret and apply as appropriate, this Court granted Defendant leave to file his motion. Defendant’s application to adjourn sentencing until after resolution of his motion was not opposed by the People in their July 2, 2024, letter response. To allow full briefing by both parties, and this Court the time necessary to adequately consider the motion, sentencing was rescheduled initially to September 6, 2024. It was then adjourned again to September 18, 2024, following the filing of a third defense motion for this Court’s recusal. This now means that any adjournment, of even one week beyond September 18, will bring us within approximately 41 days of the 2024 presidential election.

This matter is one that stands alone, in a unique place in this Nation’s history, and this Court has presided over it since its inception – from arraignment to jury verdict and a plenitude of motions and other matters in-between. Were this Court to decide, after careful consideration of the Supreme Court’s decision in *Trump*, that this case should proceed, it will be faced with one of the most critical and difficult decisions a trial court judge faces – the sentencing of a defendant found guilty of crimes by a unanimous jury of his peers.

This adjournment request has now been decided in the same way this Court has decided every other issue that has arisen since the origination of this case, applying the facts and the law after carefully considering the issues and respective arguments of the parties to ensure that the integrity of the proceeding is protected, justice is served, and the independence of this judiciary kept firmly intact.

If Defendant's CPL § 330.30 motion is denied, the law requires the imposition of sentence following a guilty verdict without unreasonable delay. CPL § 380.30 (1). The public's confidence in the integrity of our judicial system demands a sentencing hearing that is entirely focused on the verdict of the jury and the weighing of aggravating and mitigating factors free from distraction or distortion. The members of this jury served diligently on this case, and their verdict must be respected and addressed in a manner that is not diluted by the enormity of the upcoming presidential election. Likewise, if one is necessary, the Defendant has the right to a sentencing hearing that respects and protects his constitutional rights.

Unfortunately, we are now at a place in time that is fraught with complexities rendering the requirements of a sentencing hearing, should one be necessary, difficult to execute. Thus, in accordance with certain of the grounds submitted by Defendant and the reasons for adjournment provided by the People coupled with the unique time frame this matter currently finds itself in, the decision on the CPL § 330.30 motion and the imposition of sentence will be adjourned to avoid any appearance—however unwarranted—that the proceeding has been affected by or seeks to affect the approaching Presidential election in which the Defendant is a candidate. The Court is a fair, impartial, and apolitical institution. Adjourning decision on the motion and sentencing, if such is required, should dispel any suggestion that the Court will have issued any decision or imposed sentence either to give an advantage to, or to create a disadvantage for, any political party and/or any candidate for any office. Adjournments for sentencing are routinely granted, often several times, in any number of other criminal matters pending in this courthouse, particularly when unopposed, for reasons ranging from personal circumstances to the scheduling needs of the parties involved. Given the unique facts and circumstances of this case, there is no reason why this Defendant should be treated any differently than any other.

This is not a decision this Court makes lightly but it is the decision which in this Court's view, best advances the interests of justice.

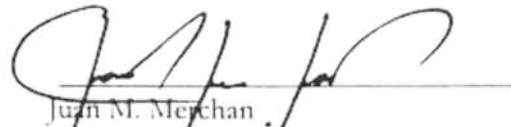
Therefore, it is hereby

ORDERED, that decision on Defendant's CPL § 330.30 motion to set aside the jury verdict and to dismiss the indictment will be handed down off-calendar on November 12, 2024; and it is further

ORDERED, that sentencing on this matter, if necessary, is adjourned to November 26, 2024, at 10am; and it is further

ORDERED, that Defendant's motion to preclude the People from filing a pre-sentence memorandum is DENIED. The People's submission, if any, will be filed with the Court under seal pursuant to CPL § 390.50(1).

The above constitutes the Decision and Order of the Court.



Juan M. Merchan
Acting Justice of the Supreme Court
Judge of the Court of Claims

Appendix E

PART 59 JUL 25 2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

THE PEOPLE OF THE STATE OF NEW
YORK

-against-

DONALD J. TRUMP,

Defendant.

Ind. No. 71543-23

**PEOPLE'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S POST-TRIAL MOTION**

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INTRODUCTION

This Court should reject defendant's request to vacate his conviction and dismiss the indictment on the basis of the Supreme Court's recent ruling on presidential immunity. *Trump v. United States*, 144 S. Ct. 2312 (2024). Contrary to defendant's arguments, that decision has no bearing on this prosecution and would not support vacatur of the jury's unanimous verdict (let alone dismissal of the indictment) even if its reasoning did apply here.

At issue in the Supreme Court's decision was whether defendant could be federally prosecuted "for conduct alleged to involve official acts during his tenure in office." *Id.* at 2324. The criminal charges here, by contrast, exclusively stem from defendant's "unofficial acts"—conduct for which "there is no immunity." *Id.* at 2332. Although the Supreme Court also restricted the consideration of certain evidence of official conduct for which the President is immune, that ancillary holding is also inapplicable here. For one thing, defendant failed to preserve an objection on immunity grounds to most of the evidence that is the subject of his current motion. And, in any event, all of the evidence that he complains of either concerned wholly unofficial conduct or, at most, official conduct for which any presumption of immunity has been rebutted.

The Supreme Court's recent ruling thus has nothing to say about defendant's conviction. But even if that decision required the exclusion of all of the evidence that defendant cites here, there would still need be no basis for disturbing the verdict because of the other overwhelming evidence of defendant's guilt. For all the pages that defendant devotes to his current motion, the evidence that he claims is affected by the Supreme Court's ruling constitutes only a sliver of the mountains of testimony and documentary proof that the jury considered in finding him guilty of all 34 felony charges beyond a reasonable doubt. Under these circumstances, there is no basis for disturbing the jury's verdict, and defendant's motion should be denied.

BACKGROUND

On March 30, 2023, a New York County grand jury filed an Indictment charging defendant with 34 counts of Falsifying Business Records in the First Degree (Penal Law § 175.10). As this Court is aware, the People alleged that defendant falsified business records to conceal an illegal scheme to suppress negative information about defendant before the 2016 presidential election. The business records that formed the basis for the charges fraudulently stated that certain payments that defendant made after the election to his personal attorney Michael Cohen were for legal expenses pursuant to a retainer, when in fact they were to reimburse Cohen for hush-money payments Cohen paid before the election as part of the criminal conspiracy to corrupt the election. On May 30, 2024, a jury unanimously found defendant guilty as charged.

The following background briefly recounts certain information relevant to defendant's current motion under CPL § 330.30.

I. The federal removal proceeding.

On May 4, 2023, defendant removed this criminal action to federal court under 28 U.S.C. § 1442(a)(1). Under that provision, a state criminal prosecution against a federal officer may be removed to federal court if the charges against the federal officer are “for or relating to any act under color of such office.” A defendant seeking federal-officer removal must also identify a “colorable federal defense” to the state-court charges. *Mesa v. California*, 489 U.S. 121, 129 (1989). The federal district court held an evidentiary hearing on June 27, 2023. The court issued a decision remanding the matter to this Court on July 19, 2023. *See New York v. Trump*, 683 F. Supp. 3d 334, 342 (S.D.N.Y. 2023).

As relevant here, the district court rejected defendant's claim that the charges were for or related to any action he took under color of federal office. Referring to the reimbursement payments to Cohen, the court held that “[t]he evidence overwhelmingly suggests that the matter

was a purely a personal item of the President—a cover-up of an embarrassing event. Hush money paid to an adult film star is not related to a President’s official acts. It does not reflect in any way the color of the President’s official duties.” *Id.* at 345. The district court found that Cohen had been hired to handle “private matters” and was paid with “private funds,” which were recorded through the documents of a “private enterprise.” *Id.* Hiring Cohen to manage defendant’s “private matters,” the court noted, constituted a “private act,” not an official duty. *Id.*

The district court also found that defendant had not identified any colorable federal defense to the charges, including on the basis of presidential immunity. *See id.* at 346-50. Defendant had earlier conceded that he was not raising a claim of “absolute presidential immunity against criminal liability.” Def.’s Mem. of Law in Opp. to Remand at 21, *New York v. Trump*, No. 23 Civ. 3773 (S.D.N.Y. June 15, 2023), ECF No. 34. Instead, defendant claimed to have a colorable Supremacy Clause defense because he allegedly made the payments to Cohen as part of a purportedly official responsibility to separate his personal and business affairs. *See id.* at 21-25. The district court rejected this claim, holding that “[r]eimbursement for advancing hush money to Stephanie Clifford cannot be considered the performance of a constitutional duty,” and “[f]alsifying business records to hide such reimbursement, and to transform the reimbursement into a business expense for [defendant] and income to Cohen, likewise does not relate to a presidential duty.” *Trump*, 683 F. Supp. 3d at 347.

Defendant filed a notice of appeal challenging the district court’s decision, but he withdrew that appeal on November 15, 2023. *See People v. Trump*, No. 23-1085, 2023 WL 9380793 (2d Cir. 2023).

II. This Court’s rejection of defendant’s untimely pretrial preclusion motion.

On June 23, 2023, this Court set a schedule requiring defendant to file his omnibus motions on or before September 29, 2023. Defendant timely filed his omnibus motions and asserted a

variety of challenges to the charges against him; he did not, however, raise any challenge based on presidential immunity. By contrast, one week later on October 5, 2023, defendant moved to dismiss the federal charges against him in the District of Columbia based on presidential immunity. *See* Mot. to Dismiss Indictment Based on Presidential Immunity, *United States v. Trump*, No. 23-cr-00257 (D.D.C. Oct. 5, 2023), ECF No. 74.

On December 21, 2023, the Court established a briefing schedule that required the parties to submit their respective pretrial motions *in limine* on February 22, 2024. Defendant timely filed motions *in limine*; he did not seek to preclude evidence of his official acts on immunity grounds.

Two weeks after the deadline for *in limine* motions, on March 7, 2024, defendant filed a motion to delay trial and to preclude the admission of evidence of his official acts as President. *See* Def.’s Mot. to Preclude Evidence & for an Adjournment Based on Presidential Immunity (Mar. 7, 2024). The People opposed the motion, arguing that there was no basis to preclude such evidence; alternatively, the People argued that the motion was untimely and that the Court should “defer any determination on the admissibility of this evidence until trial.” People’s Opp. to Def.’s Mot. to Exclude Evidence at 4, 9-12 (Mar. 13, 2024). On April 3, 2024, this Court found defendant’s request untimely. *See* Decision & Order at 3 (Apr. 3, 2024). The Court expressly declined to “consider whether the doctrine of presidential immunity precludes the introduction of evidence of purported official presidential acts in a criminal proceeding.” *Id.* at 6.

III. Defendant’s limited objections at trial.

On the first day of trial, pursuant to the Court’s *in limine* ruling, the People made an offer of proof regarding the evidence they intended to present about a pressure campaign in 2018 to dissuade Cohen from cooperating with investigations into the payments to McDougal and Stormy Daniels. *See* Decision & Order on People’s In Limine Mots. at 12-13 (Mar. 18, 2024); Tr. 41:1-58:14. The People explained that evidence of the pressure campaign would include Tweets from

defendant, as well as phone calls and emails that Cohen would describe in his testimony. *See* Tr. 41:10-46:21. The People argued that this evidence was relevant for three reasons: to explain why Cohen “continued to lie for [defendant] as long as he did”; to establish the personal costs to Cohen of cooperating by documenting the “attack[s] [on] his livelihood”; and to show defendant’s consciousness of guilt. Tr. 46:12-14.

Defense counsel opposed the application, noting that they anticipated “putting in a submission soon about the evidentiary admissibility of the Tweets while President Trump was President and in the White House because of presidential immunity.” Tr. 53:6-9. As to the pressure campaign more generally, defense counsel argued that it was relevant only to Cohen’s credibility and should be permitted, if at all, only on redirect if the defense opened the door during cross-examination by attacking Cohen’s credibility in a way that evidence of the pressure campaign would rebut. *See* Tr. 54:16-55:4. The Court precluded the evidence, but explained that it would reconsider that ruling if the defense opened the door by attacking Cohen’s credibility in a relevant way. Tr. 57:22-58:14.

Later that night, at 11:07 PM, defendant submitted a letter seeking to preclude the admission at trial of evidence of his official acts. *See* Def.’s Ltr. to Hon. Juan M. Merchan (Apr. 15, 2024). The People responded the next day, urging the Court to adhere to its earlier procedural ruling and to “reserve judgment on defendant’s evidentiary objection until trial.” People’s Ltr. to Hon. Juan M. Merchan (Apr. 16, 2024). The Court denied the request during proceedings on April 19, 2024, stating that “[w]e are going to wait until trial and you can make your objections at that time. Both of you have already made your arguments in the letters, so the Court will decide it at the time of trial when the objection is made.” Tr. 802:15-19.

On April 30, 2024, the People renewed their request to admit evidence of the pressure campaign, arguing that the defense had opened the door to that testimony during their opening statement. Tr. 1652:25-1655:13. The Court agreed that the defense had opened the door to evidence of the pressure campaign; however, it ruled that the evidence could be introduced only to show its effect on Cohen's actions, not to show defendant's consciousness of guilt. Tr. 1661:23-1662:12.

As trial proceeded, defendant objected twice to the admission of evidence regarding defendant's purportedly official acts as President. Specifically, on May 3, 2024, before Hope Hicks took the stand, defense counsel requested a sidebar to "put on the record our objection on Presidential immunity grounds" to testimony from Hicks "related to statements by [defendant] while he was President of the United States." Tr. 2121:10-13. The Court overruled the objection. Tr. 2122:13-15. Then, on May 6, 2024, counsel objected to the admission of an Office of Government Ethics ("OGE") Form 278e that defendant submitted in 2018, arguing that he signed the document "as President of the United States" making it "an official act that should not come into evidence." Tr. 2369:21-2370:1. The Court overruled that objection as well. Tr. 2371:7-12.

Defendant did not raise any objection based on his purportedly official acts to the testimony of Michael Cohen or Madeleine Westerhout, *see generally* Tr. 3258-4203 (Cohen), Tr. 2972-3125 (Westerhout); nor did he raise any such objection to the admission of four statements posted to his Twitter account while he was President, *see* Tr. 3168:1-9 (admission into evidence of People's 407-F, 407-G, 407-H, and 407-I).

IV. The Supreme Court's decision in *Trump v. United States*.

On July 1, 2024, the U.S. Supreme Court issued its decision in *Trump v. United States*, 144 S. Ct. 2312 (2024). That case involved federal criminal charges against defendant arising from his role in the January 6, 2021 attack on the U.S. Capitol that occurred while defendant was serving

as President. In that federal prosecution, defendant claimed that he was immune from federal prosecution for the charges in the indictment. The lower courts rejected that claim, but the Supreme Court disagreed in part and remanded the case to the district court for further proceedings consistent with its opinion. *See id.* at 2332-33, 2347.

The Court explained that the scope of a President's immunity from criminal prosecution depended on whether his acts while in office were official or unofficial. "As for a President's unofficial acts, there is no immunity," even if he committed those acts while serving as President. *Id.* at 2332; *see also id.* at 2326. For official acts, the Court distinguished between two categories. First, the President is absolutely immune for conduct "within his exclusive sphere of constitutional authority." *Id.* at 2328. This narrow category of absolute immunity applies only to actions taken pursuant to the President's "conclusive and preclusive" constitutional authority—that is, authority that neither Congress nor the courts have the authority to supervise, such as the President's power to grant reprieves and pardons, to recognize foreign countries, or to remove executive officers. *Id.* Second, the President is presumptively immune for all other official acts taken within the "outer perimeter of his official responsibility." *Id.* at 2331. But that presumption of immunity may be rebutted if a prosecutor can show that "applying a criminal prohibition to that act would pose no 'dangers of intrusion on the authority and functions of the Executive Branch.'" *Id.* at 2331-32 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982)).

In addition to holding that the President may not be directly prosecuted for certain official acts committed during his Presidency, the Court also limited the use of evidence of "official conduct for which the President is immune," "even on charges that purport to be based only on his unofficial conduct." *Id.* at 2341. In the Court's view, admitting such evidence would "heighten the prospect that the President's official decision-making will be distorted" by inviting the jury "to

examine acts for which a President is immune.” *Id.* at 2340-41. But the Court made clear that “of course” not all evidence related to an official presidential act was subject to preclusion. *Id.* at 2341 n.3. In particular, a “prosecutor may point to the public record to show the fact that the President performed the official act”; a prosecutor may not, however, “admit testimony or private records of the President or his advisers probing the official act itself.” *Id.*

V. Defendant’s motion to vacate under CPL § 330.30

On July 10, 2024, defendant moved to vacate his conviction under CPL § 330.30(1) based on the allegedly improper admission of certain evidence at trial that he claimed concerned official acts for which he enjoyed presidential immunity. Defendant identified six categories of such evidence. *See* Def.’s Post-Trial Presidential Immunity Mot. (“Def.’s Mem.”) 9-16, 26-40. Specifically, defendant objected to the admission of: (1) testimony from Hope Hicks about events that occurred while she was the White House Communications Director; (2) testimony from Madeleine Westerhout about office process and procedures when she worked in the White House; (3) four Tweets posted to defendant’s personal Twitter account; (4) testimony from Cohen about why he lied to Congress; (5) testimony from Cohen about conversations he had with other third parties about Federal Election Commission (“FEC”) investigations; and (6) defendant’s OGE Form 278e. *See id.* at 9-16.

ARGUMENT

CPL § 330.30(1) authorizes a trial court to set aside a guilty verdict based on “[a]ny ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court.” A trial court may not set aside a verdict based on an alleged error that was not properly preserved at trial. *See, e.g., People v. Everson*, 100 N.Y.2d 609, 610 (2003); *People v. Sudol*, 89 A.D.3d 499,

499-500 (1st Dep’t 2011); *see also People v. Padro*, 75 N.Y.2d 820, 821 (1990) (making a CPL § 330.30 motion “is not, by itself, ordinarily sufficient to preserve a ‘question of law’”).

Under these standards, defendant’s motion should be denied. Defendant failed to preserve any immunity-based objection to most of the evidence that is the subject of his current motion. His arguments are meritless in any event, since the evidence at issue either concerned unofficial conduct that is not subject to any immunity, or is a matter of public record that is not subject to preclusion. And even if some of this evidence were improperly admitted, any error was harmless in light of other overwhelming evidence of defendant’s guilt. Finally, defendant’s unpreserved challenge to the grand jury proceeding is beyond this Court’s review and fails in any event under the highly deferential standard for reviewing such proceedings.

I. Defendant’s arguments based on official-acts immunity are largely unpreserved.

A trial court “may only grant a CPL § 330.30(1) motion where the error alleged has been preserved by a proper objection at trial.” *Sudol*, 89 A.D.3d at 499-500. Defendant’s evidentiary arguments based on official-acts immunity are largely unpreserved. Specifically, defendant raised immunity objections to only two of the six categories of evidence that are the basis of his current motion: Hicks’s testimony about “statements by [defendant] while he was President of the United States,” Tr. 2121:10-13; and the admission of defendant’s 2018 OGE Form 278e, *see* Tr. 2369:21-2370:1. Defendant raised no immunity objection to any of the other categories of evidence, or to other testimony by Hicks. This other evidence accordingly provides no basis to set aside the verdict under CPL § 330.30(1).

Before trial, defendant twice sought an advance ruling on the admissibility of evidence of his purportedly official acts based on presidential immunity. *See* Def.’s Mot. to Preclude Evidence & for an Adjournment Based on Presidential Immunity (Mar. 7, 2024); Def.’s Ltr. to Hon. Juan M. Merchan (Apr. 15, 2024). This Court denied both requests as untimely, but instructed defendant

to “wait until trial” to “make [his] objections” and informed him that the Court would “decide [the issue] at the time of trial when the objection is made,” Tr. 802:15-19; *see also* Decision & Order 3-5 (Apr. 3, 2024). During trial, defendant raised an objection based on official-acts immunity only twice. First, prior to Hope Hicks’s testimony, defendant raised an “objection on Presidential immunity grounds” to “testimony from Ms. Hicks related to statements by [defendant] while he was President of the United States.” Tr. 2121:10-13. Second, when the People sought to introduce defendant’s OGE Form 278e (People’s 81), defendant objected that this document reflected “an official act that should not come into evidence at the trial.” Tr. 2369:21-2370:1. This Court overruled those objections.

By contrast, defendant raised no objection based on official-acts immunity to the balance of the evidence he now claims was erroneously admitted. For Westerhout, defendant never raised any objections in pretrial motions; and during her trial testimony, the defense raised only a single general objection to a question about whether Westerhout thought it was “unusual” for defendant to send only one personal message to Allen Weisselberg in 2017—a subject that had nothing to do with any conceivable official act by defendant. Tr. 3009:23-24. During Michael Cohen’s testimony, the defense raised several objections, but none of them was based on the current theory that Cohen could not testify about defendant’s purportedly official acts. Indeed, as to one of the categories of Cohen testimony at issue in the motion—namely, Cohen’s testimony about the FEC investigations—defense counsel not only failed to object, but affirmatively *consented* to the admission of that evidence subject to a limiting instruction that had nothing to do with official-acts immunity. *See* Tr. 3510:19-22. With regard to defendant’s social media posts on Twitter, *see* People’s 407-F, 407-G, 407-H, and 407-I, the only objection that defense counsel raised was “the same objection as discussed last week,” Tr. 3168:3-4—a reference to counsel’s earlier hearsay and

foundation objections to the admission of other Tweets, *see* People’s 407-A, 407-B, 407-C, 407-D, 407-E; Tr. 2106-2107 (May 3, 2024). Finally, while defendant now argues that “[a]ll of Hicks’s testimony concerning events in 2018” was “categorically inadmissible,” Def.’s Mem. 26, his objection at trial was limited only to Hicks’s testimony about “statements by [defendant] while he was President of the United States.” Tr. 2121:10-13.

The fact that the Supreme Court issued its decision in *Trump v. United States* after trial does not excuse defendant’s failure to preserve an objection based on official-acts immunity. Just last year, the Court of Appeals confirmed that “preservation is essential . . . even if governing law was altered by an intervening Supreme Court decision” that “effect[s] a dramatic change” in the law, *People v. Cabrera*, 41 N.Y.3d 35, 45 (2023)—a reference, in that case, to the Supreme Court’s fundamental reshaping of Second Amendment jurisprudence in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022). Moreover, as in *Cabrera*, defendant’s evidentiary objection here was “not foreclosed by binding precedent from [the Court of Appeals] or the U.S. Supreme Court at the time of trial,” 41 N.Y.3d at 46; to the contrary, as the Supreme Court observed in *Trump*, the questions presented in that case were novel and “unprecedented,” *Trump*, 144 S. Ct. at 2332. Finally, there was no conceivable excuse for defendant’s failure to raise specific objections based on official-acts immunity to all of the categories of evidence that are the basis of his current motion. This Court specifically invited defendant to raise such an objection as appropriate during the trial, Tr. 802:15-16; and defendant in fact raised that objection twice.¹ Defendant’s failure to raise a proper objection thus precludes this Court from considering any

¹ In addressing the applicability of harmless-error review, defendant quotes a decision that notes that both harmless error and preservation do not apply to so-called “mode of proceedings” errors. Defendant does not meaningfully develop that argument—either in the context of harmless error, or as an excuse for his failure to preserve—and the argument is meritless for the reasons we discuss in Part III.A below.

claim to vacate his conviction on a basis other than the admission of the OGE Form 278e (People's 81) and Hicks's testimony about defendant's statements while serving as President.

II. The challenged evidence is not required to be precluded under *Trump v. United States*.

The principal holding of *Trump v. United States* concerns the scope of a former President's immunity from criminal prosecution "for official acts taken during his Presidency." 144 S. Ct. at 2346-47. That holding has no bearing here because, as defendant does not dispute, the charges in this case all involve purely personal conduct, rather than official presidential acts. The U.S. District Court for the Southern District of New York—in addressing the closely related question of whether the charged conduct involved "any act under color of office" for purposes of federal-officer removal, 28 U.S.C. § 1442(a)(1)—rightly concluded that the conduct charged "was purely a personal item of the President—a cover-up of an embarrassing event. Hush money paid to an adult film star is not related to a President's official acts. It does not reflect in any way the color of the President's official duties." *Trump*, 683 F. Supp. 3d at 345. The principal immunity holding of *Trump v. United States* thus is wholly inapplicable here.²

Defendant does not contend otherwise. Instead, he relies exclusively on an ancillary holding in *Trump v. United States* that evidence about "official conduct for which the President is immune" may not be introduced at trial "even on charges that purport to be based only on his unofficial conduct." 144 S. Ct. at 2341. By its own terms, however, this newly announced rule applies only when evidence concerns "official acts for which the President is immune" from

² Defendant also affirmatively waived reliance on presidential immunity as a defense to the criminal charges here in the federal removal proceeding, *see Trump*, 683 F. Supp. 3d at 346 ("Trump has expressly waived any argument premised on a theory of absolute presidential immunity."), and waived that defense again by failing to raise it in his omnibus motions in this proceeding, *see Carroll v. Trump*, 88 F.4th 418, 429-30 (2d Cir. 2023) (holding that defense of presidential immunity is a waivable defense).

criminal liability; there is no evidentiary bar with respect to unofficial acts by the President (such as the conduct that is the subject of the charges here). *Id.* As for official acts, *Trump v. United States* separated them into two distinct categories. The first, narrow category consists of acts by the President to carry out an explicit constitutional commitment of exclusive authority; for such conduct, the President has absolute immunity. *Id.* at 2327-28. The second category consists of all other acts that a President is authorized to commit; for such conduct, the President is entitled only to presumptive immunity, which can be rebutted by showing that “applying a criminal prohibition to that act would pose no dangers of intrusion on the authority and functions of the Executive Branch.” *Id.* at 2331-32 (quotation marks omitted). Finally, even as to official acts for which the President is immune, “of course the prosecutor may point to the public record to show the fact that the President performed the official act.” *Id.* at 2341 n.3.

In other words, under *Trump v. United States*, evidence about defendant’s conduct during his Presidency may be properly admitted if *any* of the following is true: (a) the evidence concerns defendant’s unofficial conduct; (b) the evidence concerns official conduct for which the presumption of immunity has been rebutted because reliance on such evidence in a criminal prosecution poses no risk of interference with presidential decision-making; or (c) the evidence consists of a public record of an official act. As explained further below, one or more of these factors applies to each of the categories of evidence that are the subject of defendant’s current motion.

A. Defendant’s Tweets.

Defendant objects to the admission of four Tweets from his Twitter account. Def.’s Mem. 14-16; *see* People’s 407-F, 407-G, 407-H, 407-I. Three Tweets reflected defendant’s opinion about Cohen, his personal attorney (People’s 407-F, 407-H, 407-I); the fourth contained defendant’s observations about “a private contract between two parties,” Cohen and Stormy Daniels (People’s

407-G). Defendant's objection to the admission of these Tweets is wholly unpreserved (*see supra* Part I). His arguments fail in any event.

First, the subject matter of the Tweets consists solely of "unofficial acts" for which "there is no immunity." *Trump*, 144 S. Ct. at 2331. Defendant is wrong to claim that the recent Supreme Court decision would apply "absolute immunity with respect to these Tweets." Def.'s Mem. 33. To the contrary, the Supreme Court specifically recognized that defendant could make public statements—including Tweets—"in an unofficial capacity," such as if he spoke "as a candidate for office or party leader," rather than as the President exercising his Article II powers. *Id.* at 2340. In a closely related context, the U.S. Court of Appeals for the D.C. Circuit likewise rejected defendant's "sweeping" claim "that *all* of a President's speech on matters of public concern, as a categorical rule, is an exercise of official presidential responsibility." *Blassingame v. Trump*, 87 F.4th 1, 15 (D.C. Cir. 2023); *see also Trump*, 144 S. Ct. at 2333 (citing *Blassingame* as authority for distinguishing between official and unofficial conduct). Rather, the question is whether, in making any particular statement, defendant was "act[ing] in an unofficial, private capacity," or instead "carrying out the official duties of the presidency." *Blassingame*, 87 F.4th at 4.

Here, the four Tweets objected to by defendant were all issued in defendant's unofficial capacity. All four Tweets refer to Michael Cohen. The trial record establishes that Cohen was defendant's personal attorney at the time. Tr. 3494:23-3495:1, 3548:13-15, 3583:7-10 (Cohen). Defendant also admitted in the federal removal proceeding, and the district court found, that Cohen at the time was defendant's personal attorney: Cohen was hired "to attend to [defendant's] private matters"; he was "paid . . . from private funds" that "did not depend on any Presidential power for their authorization"; and the records concerning Cohen's work and reimbursements "were maintained by the Trump Organization, a private enterprise, in New York City, not in Washington,

D.C. as official records of the President.” *Trump*, 683 F. Supp. 3d at 345. Defendant’s Tweets conveying his personal opinion about his private attorney do not bear any conceivable relationship to any official duty of the Presidency.

One of the Tweets also provides defendant’s opinion about—in his own words—“a private contract between two parties,” namely Cohen and Daniels (People’s 407-G). A “private contract” that was signed solely by two non-government officials and that was executed before defendant became President has nothing to do with any official act of the Presidency. Moreover, this “private contract” was an integral part of the hush-money payment scheme that is the subject of the criminal charges here. As the federal district court found, and defendant no longer contests, that entire scheme was “not related to a President’s official acts” and did “not reflect in any way the color of the President’s official duties.” *Trump*, 683 F. Supp. 3d at 345. Defendant was thus “speak[ing] in an unofficial capacity,” *Trump*, 144 S. Ct. at 2340, when he commented on a private contract between private individuals that was signed before his Presidency and that had no relationship to any official presidential duty.

The challenged Tweets bear no resemblance to the kinds of public comments that the Supreme Court indicated would qualify as official presidential conduct. Defendant did not “purport[] to discharge an official duty” in issuing the Tweets. *Lindke v. Freed*, 601 U.S. 187, 203 (2024). The Tweets did not seek to “persuade Americans” to pursue a pressing policy in the public interest, or respond to a public emergency or tragedy that required a national voice, or advance any particular initiative or public work, or touch on any of the “vast array of activities” of “American life” that Presidents may be expected to address. *Trump*, 144 S. Ct. at 2340; *Blassingame*, 87 F.4th at 15 (suggesting that President acts in official capacity when he “announces his intention to issue an executive order, eulogizes the fallen leader of an ally, or offers the nation’s

condolences and support to a community reeling from a tragedy”). To the contrary, the Tweets reflected nothing more than defendant’s personal opinion about private individuals or entirely unofficial conduct committed prior to his presidency.

Second, even assuming that the Tweets constitute official conduct, they at most give rise to a presumption of immunity that is easily rebutted here.³ Defendant’s assertion that irrebuttable “absolute immunity” applies here, Def.’s Mem. 33, is flatly inconsistent with the Supreme Court’s recent decision. The Court described “most of a President’s public communications” as being “within the outer perimeter of his official responsibilities,” *Trump*, 144 S. Ct. at 2340—a characterization that gives rise only to “a *presumptive* immunity from criminal prosecution,” not absolute immunity, *id.* at 2331. That presumption can be rebutted if consideration of these Tweets would not “pose any dangers of intrusion on the authority and functions of the Executive Branch.” *Id.* at 2337.

There is no such danger here because the subject matter of the Tweets bore no relationship to any official duty of the Presidency. Defendant was not performing, or even describing, any official presidential act in conveying his personal opinions about his personal attorney and a private nondisclosure agreement entered into prior to his Presidency. Consideration of these Tweets thus

³ Contrary to defendant’s claim, the People did not “waive” any opportunity to rebut the presumption of immunity. Def.’s Mem. 19. Because this Court denied defendant’s immunity claims altogether, there was never any need for the People to make the type of rebuttal argument contemplated by the Supreme Court’s intervening decision. Defendant claims that a waiver arose because the People “rush[ed] to trial over [defendant’s] objection.” *Id.* No such waiver rule exists. And defendant’s claim about a “rush” to trial is factually inaccurate in any event. This Court set the original March 25, 2024 trial date at *defendant’s* request. *See* Tr. of Arraignment 18 (Apr. 4, 2023) (requesting a Spring 2024 trial date). And the eventual start of trial on April 15, 2024 was 377 days after defendant’s arraignment—slightly longer than the average time from arraignment to trial for white-collar cases in this Office over the past decade. (The average is 361 days from arraignment to trial for the 119 white-collar prosecutions in New York County between January 1, 2013 and February 28, 2020 and between January 1, 2022 and June 30, 2024. COVID-impacted cases are not included in this calculation.)

poses no danger of “distort[ing] Presidential decisionmaking,” *id.* at 2331, because no Presidential decisionmaking was involved. At most, future Presidents may be disinclined to express their personal opinions about unofficial conduct if they believe such public statements may be used as evidence in criminal proceedings. *See* Def.’s Mem. 37. But any such effect would not trigger the concerns raised in *Trump v. United States*. The “justifying purposes” of presidential immunity “are to ensure that the President can undertake his *constitutionally designated functions* effectively, free from undue pressures or distortions.” *Id.* at 2332 (emphasis added). When, as here, a President’s public statements are “not related to a President’s official acts” at all, *Trump*, 683 F. Supp. 3d at 345, then reliance on such acts as admissible evidence does not interfere with the performance of official duties.

Third, even if defendant’s Tweets were official acts for which defendant would be immune, they would still be admissible here because the People admitted nothing more than the “public record” of those Tweets “to show the fact that the President performed the official act”—i.e., that he made those statements on Twitter. *Trump*, 144 S. Ct. at 2341 n.3. As this Court rightly observed, defendant “Tweeted out to millions of people voluntarily.” Tr. 55:12-13. The admission of those Tweets at trial did nothing more than give to the jury the same information that had been available for years to the public; in particular, the People did not “admit testimony or private records of the President or his advisers probing” the Tweets themselves. *Trump*, 144 S. Ct. at 2341 n.3. Nor was the jury invited “to inspect the [defendant’s] motivations,” *id.*—to the contrary, this Court allowed the Tweets to be introduced only to show their effect on Cohen’s actions, not to show defendant’s consciousness of guilt. Tr. 1661:23-1662:12. Under the circumstances, there is no barrier to relying on a public record of any official conduct that may have taken place through defendant’s Tweets.

Finally, for three of the four challenged Tweets—People’s 407-F, 407-H, and 407-I (as well as Cohen’s testimony about his response to congressional investigations, see *infra*)—defendant also opened the door to that evidence and thus cannot complain about its admission now. This Court originally barred the People from presenting this evidence. In doing so, however, it warned defendant that impeaching Cohen about his decision to plead guilty to campaign finance and other charges would open the door to rebuttal evidence from the People about why Cohen ultimately pleaded guilty. *See* Tr. 57:22-58:14. As this Court later correctly found, and defense counsel “mostly concede[d],” defendant’s opening statement squarely challenged Cohen’s credibility on precisely that ground. *See* Tr. 1661:23-1662:12. It is well-settled that a defendant may open the door to the introduction of otherwise inadmissible evidence if the defendant has provided a characterization of the facts that would be “incomplete and misleading” without a full picture. N.Y. Evid. Rule 4.08(1); *see, e.g., People v. Fardan*, 82 N.Y.2d 638, 641 (1993) (permitting *Sandoval* evidence); *People v. Goodson*, 57 N.Y.2d 828, 829-830 (1982) (permitting un-noticed statements by the defendant). As particularly relevant here, courts routinely rely upon this theory to allow the introduction of evidence that would otherwise be wholly privileged from disclosure. *See, e.g., People v. Mendoza*, 240 A.D.2d 316, 316 (1st Dep’t 1997) (attorney-client privilege); *People v. Williams*, 127 A.D.3d 1118, 1119 (2d Dep’t 2015) (physician-patient privilege). The defense’s strategic choice to attack Cohen’s credibility thus supports the admission of the Tweets here even if they would otherwise be inadmissible.

Defendant’s contrary arguments are unavailing. *First*, defendant argues that the Tweets were official presidential acts because he was necessarily “communicat[ing] with the American people regarding matters of public concern bearing on [his] credibility as the Commander in Chief.” Def.’s Mem. 33-34. But the Supreme Court expressly declined to adopt a rule that would

effectively extend immunity to *all* of a President's statements to the public. To the contrary, the Court expressly held that a President can speak to the public in an unofficial capacity for which no immunity would attach at all. *See Trump*, 144 S. Ct. at 2340; *see also Blassingame*, 87 F.4th at 14. Defendant's sweeping position is thus inconsistent with the very decision that he relies upon.

Second, defendant asserts that these Tweets reflected his authority to "comment upon and criticize the conduct of federal prosecutors and regulators exercising Article II authority." Def.'s Mem. 35. But the Tweets say nothing of the sort. They are entirely silent about the federal criminal investigation of Cohen, and instead comment exclusively about Cohen's character and representation of defendant's personal matters. At most, one of the Tweets could be interpreted as implicitly criticizing Cohen for pleading guilty in federal court by comparing him unfavorably to defendant's former campaign manager (People's 407-I), but even that Tweet only describes Cohen's motivations rather than saying anything about the federal criminal proceeding leading up to his guilty plea.

Third, defendant cannot find support for his argument in either *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 231 (2d Cir. 2019), *vacated on other grounds sub nom. Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021), or *Lindke v. Freed*, 601 U.S. 187 (2024). *Knight* was vacated as moot by the Supreme Court. *See* 141 S. Ct. 1220.⁴ And *Knight*'s reasoning was superseded by *Lindke*, which undercuts rather than supports defendant's position here. Contrary to defendant's categorical approach to a President's public statements,

⁴ Defendant's reliance on *Knight* for the proposition that his Twitter account was an official White House account also conflicts with the position that he took in that actual litigation. Indeed, while President, defendant vociferously opposed *Knight*'s holding and reasoning and asked the Supreme Court to reverse that decision on the ground that his "ability to use the features of his personal Twitter account, including the blocking function, are independent of his presidential office." Pet. for a Writ of Certiorari, *Trump v. Knight First Amend. Inst. at Columbia Univ.*, No. 20-197, 2020 WL 4905204, at *14 (Aug. 20, 2020).

Lindke squarely held that a public “official does not necessarily purport to exercise his authority simply by posting about a matter” on social media, and that a “fact-specific” analysis of an individual “post’s content and function” determines whether an official is exercising official responsibilities or instead “engaging in private speech.” 601 U.S. at 203; *see also id.* at 201 (“If the public employee does not use his speech in furtherance of his official responsibilities, he is speaking in his own voice.”). Here, as explained, that fact-specific analysis demonstrates that defendant was acting unofficially in posting the Tweets at issue.

B. Hope Hicks’s testimony.

Defendant next contends that “[a]ll of Hicks’s testimony concerning events in 2018” was “categorically inadmissible” because she was “serving as the White House Communications Director” at the time. Def.’s Mem. 26. (Defendant thus raises no challenge to Hicks’s extensive testimony about the campaign, including defendant’s reaction to the Access Hollywood tape and defendant’s public comments during the campaign and at campaign events. *See* Tr. 2146:11-2175:6.)

As discussed above, this argument is at least partially unpreserved because defendant raised an objection on immunity grounds only to Hicks’s testimony about “statements by [defendant] while he was President of the United States.” Tr. 2121:10-13. Defendant has thus failed to preserve any objection to Hicks’s testimony about statements by individuals other than defendant—including Westerhout, Cohen, and journalists. *E.g.*, Tr. 2212:7-2217:10.

In any event, defendant’s argument also fails on the merits. As a threshold matter, defendant is wrong to assert that Hicks’s testimony categorically “concerned official acts based on core Article II authority for which [defendant] is entitled to absolute immunity” solely because she was acting as the White House Communications Director at the time. Def.’s Mem. 26. The Supreme Court rejected any such categorical approach to absolute immunity based on a

government official's role in its recent immunity decision. For example, the Court held that not all of a President's discussions with his Vice President would qualify as official conduct subject to absolute immunity. *See Trump*, 144 S. Ct. at 2336-37. Likewise, although the Court found that defendant was absolutely immune "for the alleged conduct involving his discussions with Justice Department officials," including the Attorney General, that ruling did not turn on those officials' governmental role alone, but relied as well on the Court's finding that the subject matter of their discussion was the potential exercise of the President's "conclusive and preclusive authority" to investigate and prosecute crimes. *Id.* at 2334 (quotation marks omitted).

If even a President's discussions with a constitutional officer like the Vice President or a cabinet member like the Attorney General are not categorically entitled to absolute immunity, then the same must be true for an official like the White House Communications Director, who is neither mentioned in the Constitution nor formally appointed with the advice and consent of the Senate. Rather, whether immunity attaches at all to any particular discussion involving the Communications Director—and whether any immunity may be rebutted—requires a particularized and "fact specific" analysis of the nature and context of the discussion and the persons involved. *Id.* at 2339. And even assuming that the subject of any discussion is a planned communication to the public (which is not true for the testimony here, as explained below), that analysis may still conclude that the Communications Director engaged in unofficial conduct; after all, if the President can communicate to the public "in an unofficial capacity," *id.* at 2340, then White House personnel who help to facilitate such unofficial communications must necessarily be acting in an unofficial capacity as well.

Here, for a number of reasons, Hicks's testimony was admissible under the Supreme Court's recent ruling. *First*, there was no bar to Hicks's testimony about individuals other than

defendant because that testimony simply did not concern “[t]he *President’s* immune conduct.” *Id.* at 2341 (emphasis added). For example, Hicks testified about communications with reporters “describing a story they planned to publish” about Stormy Daniels, Tr. 2215:17-23; and a conversation with Michael Cohen where he told her that the report “wasn’t true” and that “no payment had been made,” Tr. 2217:4-5. Hicks also testified about her own impressions of Cohen. Tr. 2220:9-22. None of this testimony is affected by the Supreme Court’s newly announced rule concerning the admission of evidence of “official conduct for which the President is immune,” *Trump*, 144 S. Ct. at 2341, because none of it describes the President’s conduct at all, official or otherwise.

Second, even as to Hicks’s testimony about her discussions with defendant in 2018, all of those discussions related solely to unofficial conduct. The only testimony elicited by the People concerned discussions between defendant and Hicks about the hush-money scheme that was then being reported in the press. Tr. 2214:25-2215:3, 2217:11-20, 2218:22-2221:13. But as explained above, that scheme was entirely personal and largely committed before the election, and it had no relationship whatsoever to any official duty of the presidency. A President’s discussions about a purely private matter, even with a White House advisor, do not constitute “official acts for which the President is immune,” *Trump*, 144 S. Ct. at 2341, because neither the internal discussions nor the subject matter has any “connection with the general matters committed by law to his control or supervision,” *Blassingame*, 87 F.4th at 13 (quotation marks omitted).

Defendant’s contrary argument depends on his assertion that Hicks testified about his efforts “to communicate with the media and the public” about the hush-money scheme. Def.’s Mem. 28. But that claim is entirely unsupported by the factual record, since Hicks did not in fact testify about any such specific public-facing conduct by defendant. For example, when asked

“what did you discuss with Mr. Trump” about the new stories coming out, Hicks responded only, “Just how to respond to the story, how he would like a team to respond to the story,” without any particulars about public communications that defendant did or did not direct. Tr. 2217:14-16. Hicks also testified about a conversation that defendant described himself having with Cohen, in which Cohen told defendant that he made the payment to Stormy Daniels “out of the kindness of his heart”; and about defendant’s statement to her that “it was better to be dealing with [the scandal] now, and that it would have been bad to have that story come out before the election.” Tr. 2219:25-2221:12. But there is nothing in Hicks’s testimony—or elsewhere in the trial record—that these statements from defendant were about how to “communicate with the media and the public,” Def.’s Mem. 28; rather, Hicks described them as private conversations between herself and defendant unconnected to any public statement to “the American people,” *Trump*, 144 S. Ct. at 2333. The private and unofficial nature of this conversation is reinforced by the fact that defendant’s reference to the period “before the election” appears to be invoking Hicks’s prior role as the Press Secretary for defendant’s campaign, Tr. 2136-2137, 2146-2150—thus discussing with Hicks a period of time when both were necessarily engaged in unofficial conduct.

In any event, even assuming that Hicks’s testimony was about defendant’s efforts to speak to the public about the hush-money scheme, that testimony would still be about defendant’s unofficial conduct because, as previously explained, a President can “speak[] in an unofficial capacity.” *Id.* at 2340. Here, for the reasons given above about the Tweets, any public communication that defendant may have given about the hush-money scheme would concern a subject matter that was “not related to a President’s official acts” and did “not reflect in any way the color of the President’s official duties.” *Trump*, 683 F. Supp. 3d at 345. As the Supreme Court has observed, “Presidents . . . face a variety of demands on their time, . . . some private, some

political, and some as a result of official duty.” *Clinton v. Jones*, 520 U.S. 681, 705 n.40 (1997). To the extent that Hicks and defendant were in fact discussing a potential public statement, the unofficial nature of any such statement would be further established by its unofficial subject matter. See *Thompson v. Trump*, 590 F. Supp. 3d 46, 80 (D.D.C. 2022) (President speaks unofficially if, for example, he “falsely and with malice accuses a political opponent . . . of running a child-trafficking operation”), *aff’d sub nom. Blassingame*, 87 F.4th 1.

Third, even assuming that Hicks’s testimony concerned official acts by the President, any presumption of immunity would be rebutted here because there is no danger that consideration of this testimony would interfere with the authority and functions of the Executive Branch. *Trump*, 144 S. Ct. at 2337. Defendant makes the sweeping claim that a President must be able to discuss *any* subject confidentially with his White House Communications Director. Def.’s Mem. 29-30. But that argument goes too far—the Supreme Court’s recent decision instead sought to protect only “the President’s official decisionmaking.” *Trump*, 144 S. Ct. at 2341. There is no risk of interference with such official decision-making when, as here, the President’s discussions with his Communications Director concern a purely private matter, and when the testimony did not describe any discussions about official acts to be done in response to the private matter.

Defendant is wrong to suggest (see Def.’s Mem. 28-29), that Hicks’s testimony must be precluded because *Clinton v. Jones*, 520 U.S. 681 (1997), held that a President engages in official conduct when he directs White House officials to make public statements about a private sexual affair. In fact, the courts in the *Clinton* case expressly declined to resolve that issue altogether: the U.S. Court of Appeals for the Eighth Circuit found unpreserved any argument about whether “actions alleged to have been taken by [Clinton’s] presidential press secretary while [Clinton] was President . . . fall inside the outer perimeter of the President’s official responsibility,” *Jones v.*

Clinton, 72 F.3d 1354, 1359 n.7 (8th Cir. 1996); and the Supreme Court similarly refused to address the issue, *see Clinton*, 520 U.S. at 686 n.3. Contrary to defendant’s assertion here (Def.’s Mem. 29), *Trump v. United States* did not “resolve[]” the issue. Instead, the Court only generally recognized that a President may act in an official capacity by making public statements that “encourage” other people “to act in a manner that promotes the President’s view of the public good.” *Trump*, 144 S. Ct. at 2338. But the Court did not hold that public messaging by the President and White House officials about purely unofficial conduct always constitutes an official presidential act subject to immunity.

C. The Office of Government Ethics form.

Defendant incorrectly objects to the admission of the 2018 OGE Form 278e (People’s 81) on the ground that his completion of that form constituted an official presidential act entitled to immunity. Def.’s Mem. 40. But the obligation to file this OGE form is not limited to Presidents; it applies to other officials and even to political candidates for federal office. *See* 5 U.S.C. § 13103(b)-(c), (f). Moreover, the information disclosed on the OGE form consists of the official’s or candidate’s private finances, which are necessarily separate from any official acts. *See id.* § 13104; *see generally* People’s 81.

Even assuming that the OGE form nonetheless reflects official conduct, the form here would be a quintessential “public record to show the fact that the President performed the official act.” *Trump*, 144 S. Ct. at 2341 n.3. Moreover, in admitting the form, the People did not rely on “testimony or private records of the President or his advisers probing the official act itself.” *Id.* To the contrary, the form was admitted through the testimony of Jeffrey McConney, a Trump Organization employee (not a government official), who prepared the form for defendant in his capacity as a private employee and stored it in the records of the Trump Organization. Tr. 2366:21-2369:13. And McConney’s testimony consisted largely of a description of the content from the

face of the form, Tr. 2371:15-2376:9, not any commentary about defendant’s “motivations.” *Trump*, 144 S. Ct. at 2341 n.3. This form thus fits squarely within the type of public-record evidence that the Supreme Court has expressly allowed.

Defendant contends otherwise based on his assertion that the OGE form constituted an official act of “speaking to . . . the American people.” Def.’s Mem. 40. Defendant did not preserve any such claim at trial.⁵ It is patently meritless in any event. There is no evidence whatsoever in the trial record that defendant completed the OGE form in an effort to communicate with the public at large. And although the OGE is statutorily required to make filings publicly available, *see* 5 U.S.C. § 13107(a); *see also id.* §§ 13101(18)(D), 13122(b)(1), there is a night-and-day difference between a President merely filing a form with a government agency, and a President using the power of “the office’s ‘bully pulpit’ to persuade Americans . . . in ways that the President believes would advance the public interest.” *Trump*, 144 S. Ct. at 2340.

D. Madeleine Westerhout’s testimony.

Defendant objects to testimony from Westerhout about a variety of “Presidential practices,” such as White House procedures and defendant’s work habits, Def.’s Mem. 11-12, which he claims reflect his “exercise of Article II authority in the Oval Office,” *id.* at 31. This wholly unpreserved claim fails for several reasons.

First, much of Westerhout’s testimony involved details about how she helped defendant handle his private affairs—unofficial conduct that is not subject to any claim of immunity. For example, Westerhout testified about working with Trump Organization personnel to handle

⁵ Although defendant preserved an objection based on official-acts immunity to the admission of the OGE form, his argument at trial was that the form constituted an official presidential act because defendant “signed [it] in 2018 as President of the United States.” Tr. 2369:23-24. Defendant’s separate argument that the form represented defendant’s effort to “speak[] to . . . the American people” was never raised during trial and is thus unpreserved.

defendant's "personal affairs." Tr. 3036:10-17. She testified that defendant handled his personal expenses by check, and that she received FedEx deliveries from the Trump Organization containing personal checks for him to sign. *See* Tr. 3010:15-3013:3. Westerhout testified about specific instances in which she worked with Rhona Graff and other Trump Organization employees to handle personal matters for defendant, such as to generate a list of the personal contacts defendant frequently called, *see* Tr. 2995:20-3002:7, to suspend defendant's membership at the Winged Foot Golf Club, *see* Tr. 3016:9-3019:5, and to purchase a Tiffany's frame he requested, Tr. 3019:9-3021:16. None of this testimony had anything to do with official presidential acts or duties and thus does not raise any concerns about admitting "evidence concerning the President's official acts." *Trump*, 144 S. Ct. at 2340.

Second, Westerhout also testified about basic work habits like the process by which calls were "patched through," Tr. 2987:18; where defendant preferred to work, Tr. 2989:3-5; and how he composed Tweets, Tr. 2991:19-2992:24. Some of this testimony did not involve a description of defendant's conduct at all and thus triggers no concerns about official-acts immunity. For example, her description of the "rather complicated process" for making phone calls to the Oval Office described the work of "operators" who received and directed calls, including to and from "the situation room." Tr. 2987:19-2988:10. That testimony describes no conduct by the President, let alone "official conduct for which the President is immune." *Trump*, 144 S. Ct. at 2341.

Westerhout's general descriptions of defendant's work practices also do not trigger any concerns about official-acts immunity because she provided no testimony about any particular official act of the President, let alone any specific "exercise of Article II authority in the Oval Office." Def.'s Mem. 31. Such testimony about general practice is not subject to the evidentiary bar announced in *Trump v. United States*. The purpose of presidential immunity is to prevent

“diversion of the President’s attention during the decisionmaking process caused by needless worry as to the possibility of [criminal liability] stemming from any particular official decision.” *Trump*, 144 S. Ct. at 2329 (quoting *Clinton*, 520 U.S. at 694 n.19). But Westerhout did not testify as to “any particular official decision,” and it is difficult to imagine criminal liability stemming from general work practices. *Id.* If criminal liability is unavailable, then immunity is also unnecessary. Westerhout’s testimony thus does not concern any particular “official conduct for which the President is immune.” *Trump*, 144 S. Ct. at 2340.

Defendant’s claims to the contrary vastly exaggerate Westerhout’s testimony. For example, Westerhout was asked whether defendant had a system for organizing papers in “the dining room” (“a room off the side of the Oval Office”); she responded by saying, “To my understanding, the President knew where things were and he kept it organized. But he did have a lot of papers and often brought things back and forth to his residence or Air Force One or Marine One.” Tr. 2989:6-14. From this solitary and unsolicited reference to the President’s methods of air transportation, defendant claims that Westerhout testified about defendant’s “practices with respect to Air Force One, Marine One” and that she observed him “exercising his Article II authority,” Def.’s Mem. 32, but in fact she said nothing of the sort.

Third, even if Westerhout’s testimony about defendant’s general work practices described official conduct for which the President would be presumptively immune, that presumption would be rebutted here. The purpose of this testimony was to lay a foundation for establishing that defendant received personal papers directed to his attention. But what mattered was only the fact that defendant received the personal papers, not the specific manner in which he did so. In other words, nothing in this case turned on the precise manner in which defendant received and handled his personal papers, so long as he in fact did receive and handle them—which presumably every

President does. Given that the specifics of defendant's work practices did not have any direct bearing on his criminal liability for unofficial conduct, the introduction of evidence about those general practices is unlikely to influence any decision that he (or a future President) makes.

E. Cohen's testimony about the FEC investigations.

Defendant objects to two pieces of evidence regarding Cohen's responses to FEC investigations into whether the hush-money payments to McDougal and Daniels violated campaign finance laws. First, the People presented a text message from Cohen to a New York Times reporter stating that defendant had "approve[d]" Cohen's written response to an FEC civil complaint related to the Stormy Daniels payment (People's 260), and a text message from Jay Sekulow (whom defendant concedes was a "private attorney," Def.'s Mem. 38) to Cohen reporting that defendant was grateful for the statement that Cohen had issued. *See* Tr. 3566:10-3567:25, 3573:1-3574:19 (Cohen); People's 217. Second, Cohen testified that he had told Pecker that defendant had told him that the FEC investigation of AMI was "going to be taken care of" by then-Attorney General Jeff Sessions. Tr. 3575:13-3578:11.

Neither piece of testimony involved an official act to which presidential immunity attaches. For one, each of the FEC investigations at issue arose out of conduct that defendant concedes was entirely personal and that involved no official act—i.e., the pre-election hush-money payments to McDougal and Daniels to suppress their stories before the election. *See* Tr. 1262:11-1264:4, 1460:20-1464:7 (Pecker); Tr. 3564:3-3565:25 (Cohen). Moreover, aside from defendant, all of the relevant actors mentioned in this evidence—Cohen, Sekulow, and Pecker—were not acting in any official capacity; indeed, Cohen was acting as defendant's personal attorney at the time specifically so he could act independently from defendant's official presidential duties. *See* Tr. 3494:23-3495:1, 3548:13-3548:15, 3583:7-3583:10 (Cohen); *Trump*, 683 F. Supp. 3d at 345, 346-47. At oral argument in the Supreme Court immunity case, defendant "appeared to concede" that acts

“involving ‘private actors’ . . . entail ‘private’ conduct.” *Trump*, 144 S. Ct. at 2338; *see also* Tr. of Oral Argument at 29, *Trump v. United States*, No. 23-939 (Apr. 25, 2024) (“Justice Barrett: Petitioner turned to a private attorney who was willing to spread knowingly false claims of election fraud to spearhead his challenges to the election results. Private? . . . [Defense Counsel]: —that sounds private to me.”).

In addition, the President has no clear statutory or constitutional authority to interfere with an administrative investigation by the FEC—thus further weighing against any claim of absolute immunity here and rebutting any presumptive immunity that may apply. *See Trump*, 144 S. Ct. at 2337. Unlike the Department of Justice, which is subject to presidential supervision through the appointment of the Attorney General, the FEC “is an independent administrative agency vested with exclusive jurisdiction over civil enforcement of the [Federal Election Campaign Act (“FECA”)].” *Fed. Election Comm’n v. Nat’l Right to Work Comm.*, 459 U.S. 197, 199 n.2 (1982). As relevant here, the FEC has “exclusive jurisdiction with respect to the civil enforcement” of FECA, 52 U.S.C. § 30106(b)(1), which is not “subject to control of the Attorney General,” *Fed. Election Comm’n v. NRA Political Victory Fund*, 513 U.S. 88, 92 n.1 (1994) (citing 28 U.S.C. §§ 516, 519). And although the President appoints the commissioners to the FEC, the commissioners’ terms are staggered, and its balanced political composition is fixed by statute, in order to confer greater independence on the agency. *See* 52 U.S.C. § 30106(a); *Fed. Election Comm’n v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993) (indicating that FECA “likely” limits President to for-cause removal). These factors further support the conclusion that defendant was not exercising any official presidential duty in becoming involved with a private person’s response to the FEC’s civil inquiry. At minimum, even if there were some official duty involved to which presumptive immunity attached, that presumptive immunity would be rebutted because official

presidential decision-making is unlikely to be affected by judicial scrutiny of a President's gratuitous involvement in an independent federal agency's exclusive civil enforcement.⁶

Defendant's counterarguments are unavailing. As to the texts showing that defendant approved of Cohen's response to the FEC (People's 217, 260), defendant claims that he was exercising an official duty when he used "a private attorney (Sekulow) to coordinate a public statement by another private attorney (Cohen)." Def.'s Mem. 38. This characterization of the evidence basically refutes defendant's own argument by making clear that the text messages involved communications between purely private parties about a purely private matter. But defendant's argument is also absurd on another level: the "public statement" here was *by Cohen*, not by defendant or any Executive Branch employee, and at no point did the statement even attribute any of its claims to defendant. *See* People's 202. If not even all of a President's *own public statements* constitute official conduct, *see Trump*, 144 S. Ct. at 2340, then it is even less plausible that a President engages in official conduct by secretly directing a public statement attributed solely to a private person regarding an independent government investigation into a private affair.

Defendant attempts to find support in *Clinton v. Jones*, but that argument (again) fails. As explained above, no court in that litigation actually resolved whether the conduct at issue was part of an official duty. And although part of the underlying claims concerned the then-President's use of a private attorney, the only allegation that the Eighth Circuit considered (but did not resolve) to be even arguably within the "outer perimeter" of a President's official duties involved "actions alleged to have been taken by Mr. Clinton's presidential press secretary while Mr. Clinton was

⁶ Because neither the President nor the Attorney General has authority to interfere with an FEC investigation, this situation is distinct from one in which the President, for allegedly corrupt reasons, directs the Attorney General to initiate a prosecution or investigation, or take some other action that the Attorney General has authority to take and whose supervision comes within the President's "'conclusive and preclusive' authority." *Trump*, 144 S. Ct. at 2334.

President.” *Jones*, 72 F.3d at 1359 n.7. Defendant thus simply mischaracterizes that litigation in claiming that any court found “President Clinton’s use of a private attorney to make public statements denying the allegations by Paula Jones” to be official conduct. Mem. 38.

As to Cohen’s testimony that he told Pecker that then-Attorney General Sessions would “take[] care of” the FEC investigation, defendant claims that this reference implicated his “conclusive and preclusive authority” to pursue federal criminal investigations. Def.’s Mem. 38. But defendant has not identified any plausible presidential duty that he could have been exercising in communicating with the then-Attorney General to interfere with an independent agency’s investigative decisions over which neither the President nor Attorney General had any direct supervisory authority. *See Trump*, 144 S. Ct. at 2337 (noting that immunity may not attach to the President’s discussions with the Vice President where “the President plays no direct constitutional or statutory role” in the subject of discussion). Moreover, defendant does not even acknowledge whether he ever actually spoke to the then-Attorney General—meaning that the only “conduct” at issue here would appear to be an empty promise from defendant to reassure his private attorney about an independent agency’s investigation into private affairs. That conduct reflects no exercise of actual presidential responsibilities whatsoever.

F. Cohen’s testimony about investigations by Congress and prosecutors.

Defendant further objects to two pieces of testimony from Cohen that he inaccurately describes as “relating to [defendant’s] public responses to investigations by Congress and federal prosecutors, and his deliberations relating to the pardon power.” Def.’s Mem. 39. Defendant’s arguments are meritless.

First, contrary to defendant’s characterization, Cohen in fact offered no testimony “relating to [defendant’s] public responses to investigations by Congress and federal prosecutors” involving Russian interference. Def.’s Mem. 39. Rather, Cohen testified solely about *his own* reasons for

lying to Congress; in doing so, he explained that he lied to Congress during its investigation of Russian interference with the 2016 presidential election because he wanted to “stay[] on [defendant’s] message” denying any Russian involvement. Tr. 3551:13-16. But Cohen did not identify any specific conduct or statement by defendant; instead, he described only his own motivations, based on his perception of defendant’s preferences. The Supreme Court’s rule precluding admission of evidence of a President’s immune official acts simply does not apply to a private individual’s explanation of the reasons for his own personal, non-official actions, even if they are based on the individual’s personal beliefs about a President’s wishes.

Second, there was also no testimony by Cohen about defendant’s “deliberations relating to the pardon power.” Def.’s Mem. 39. Defendant’s argument refers to Cohen’s testimony about an email exchange between Cohen and Costello in which Costello offered to ask Rudy Giuliani to ask defendant to issue a pardon. Tr. 3604:2-18. But defendant was not a party to that email exchange; the participants did not say that they had lodged the pardon request with defendant; the exchange did not attribute any comments to defendant; and defendant never pardoned Cohen. Indeed, as defense counsel argued during trial, “[t]here is zero evidence that anything that Mr. Costello said to Mr. Cohen came from President Trump.” Tr. 52:11-13. A private conversation between two private individuals about a pardon they never requested from defendant and that defendant never granted is not testimony about any official presidential act.

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The Supreme Court has long recognized that a President can act in an unofficial, personal capacity. Nothing in the Court’s recent immunity decision changes that basic fact. *Trump*, 144 S. Ct. at 2332. This case involved evidence of defendant’s personal conduct, not his official acts.

III. Any error in admitting official-acts evidence was harmless.

Even assuming that the evidence in question should not have been admitted, any error was harmless. And harmless error cannot be a basis for setting aside a verdict because it would not “require a reversal . . . as a matter of law by an appellate court.” CPL § 330.30(1); *see People v. Ortiz*, 250 A.D.2d 372, 375 (1st Dep’t 1998).

A. The erroneous admission of official-acts evidence is subject to harmless-error review.

Defendant argues that harmless-error analysis is unavailable here under the Supreme Court’s recent immunity ruling, Def.’s Mem. 43-45, but he is wrong. In fact, the Supreme Court expressly endorsed a form of harmless-error analysis regarding the indictment in that case. After finding that some of the federal indictment’s allegations concerned official acts for which defendant was immune from prosecution, the Court remanded so that the parties and the lower court could “ensure that sufficient allegations support the indictment’s charges without such conduct.” *Trump*, 144 S. Ct. at 2340. Such a review parallels the harmless-error inquiry, which turns on whether an “error can be found to have been rendered harmless by the weight and the nature of the other proof.” *People v. Crimmins*, 36 N.Y.2d 230, 241 (1975).

The availability of harmless-error analysis also follows from the fact that defendant’s only claim here is that certain evidence of purportedly official acts should not have been admitted. “Typically, harmless error analysis is applied to trial errors, where evidence, argument, or instruction was improperly presented to, or improperly precluded from, the jury during trial.” *People v. Flores*, 153 A.D.3d 182, 194 (2d Dep’t 2017), *aff’d*, 32 N.Y.3d 1087 (2018). Here, defendant’s complaint is that “evidence . . . was improperly presented to . . . the jury during trial.” *Id.* at 195; *see* Def.’s Mem. 26-41. Like New York’s courts, the U.S. Supreme Court “repeatedly has held” that “errors such as mistaken admission of evidence” are not “immune from harmless-

error analysis.” *Rose v. Clark*, 478 U.S. 570, 582 n.11 (1986) (citing cases). And, as particularly relevant here, the Supreme Court has applied harmless-error review even when the improperly admitted evidence involved “conduct that was not criminal when the defendant engaged in that conduct.” *United States v. Marcus*, 560 U.S. 258, 263 (2010). If a reviewing court can determine whether it was harmless to introduce evidence of conduct for which a defendant could not have been prosecuted because it was not a crime, then the same must be true for evidence of conduct for which a defendant could not have been prosecuted because of immunity.

Under both New York and federal law, harmless-error analysis is unavailable for only extremely narrow categories of errors—none of which include the erroneous introduction of evidence. Defendant points to New York’s “mode of proceedings” doctrine and the Supreme Court’s “structural errors” doctrine, Def.’s Mem. 45, but neither is applicable here. A “mode of proceedings” error is one that “goes to the general and over-all *procedure* of the trial,” altering “mandated procedural, structural, and process-oriented standards.” *People v. Gray*, 86 N.Y.2d 10, 21 (1995) (emphasis in original). But errors that merely “affect the substance” of the trial—including essentially all errors regarding the proof presented at trial—do not qualify as mode-of-proceedings errors and thus are amenable to harmless-error review. *People v. Hawkins*, 11 N.Y.3d 484, 492 n.2 (2008); see *Gray*, 86 N.Y.2d at 22 (“[A]n assertion that an element is missing from the proof required goes to substance and not to the mode of proceedings.”). Similarly, under federal law, a “structural defect affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991); see also *Neder v. United States*, 527 U.S. 1, 8 (1999). But evidentiary defects—such as any “error which occurred during the presentation of the case to the jury”—are trial errors rather than structural errors and “may therefore be quantitatively assessed in the context of other evidence presented in

order to determine whether its admission was harmless beyond a reasonable doubt.” *Fulminante*, 499 U.S. at 307-08; see *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993).

Defendant’s arguments to the contrary are meritless. *First*, defendant claims that “the jury lacked authority to ‘adjudicate’ this case because DANY framed the trial proof in a manner that ‘examine[d] . . . Presidential actions.’” Def.’s Mem. 44 (quoting *Trump*, 144 S. Ct. at 2328). But, as already explained—and as defendant does not and cannot dispute—the conduct for which he was tried constituted private acts for which no immunity applies. Thus, the jury plainly did have authority to “adjudicate this case.” The only issue is whether the jury heard some evidence that should not have been admitted. But that issue is no different from innumerable other evidentiary challenges that defendants raise and that are routinely subject to harmless-error review.

Second, defendant appears to suggest that harmless-error analysis is unavailable because of the importance or constitutional nature of official-acts immunity. But neither factor makes any evidentiary error here unique. Many evidentiary privileges derive from important public-policy concerns.⁷ Yet the Court of Appeals has applied harmless-error analysis even to extremely important evidentiary privileges.⁸ Likewise, courts routinely apply harmless-error review when evidence has been wrongly admitted in violation of a constitutional right or privilege: for example,

⁷ See, e.g., *People v. Rivera*, 25 N.Y.3d 256, 262-63 (2015) (physician-patient privilege should be afforded a broad construction to carry out its policy of “encouraging full disclosure by patients so that they may secure treatment”); *People v. Carmona*, 82 N.Y.2d 603, 608-09 (1993) (cleric-congregant privilege recognizes “the urgent need of people to confide in, without fear of reprisal, those entrusted with the pressing task of offering spiritual guidance,” and is aimed at all religious ministers who perform counseling “which may involve disclosure of sensitive matters” (citations omitted)); *People v. Edney*, 39 N.Y.2d 620, 626 (1976) (attorney-client privilege is grounded in policy of encouraging clients “to disclose freely the facts in reference to which they seek advice, without fear that such facts will be made public to their disgrace or detriment by their attorney” (citation omitted)).

⁸ See *Rivera*, 25 N.Y.3d at 265 (physician-patient privilege); *Carmona*, 82 N.Y.2d at 608, 614-15 (cleric-congregant privilege); *People v. Fediuk*, 66 N.Y.2d 881, 884 (1985) (marital privilege); *People v. Glenn*, 52 N.Y.2d 880, 881 (1981) (attorney-client privilege).

testimony that violates the privilege against self-incrimination, *People v. Ventimiglia*, 52 N.Y.2d 350, 356 n.1 (1981) (summation comment regarding defendants' privilege not to testify was harmless); *People v. Perez*, 160 A.D.2d 637, 638 (1st Dep't 1990) (cross-examination of defendant in violation of privilege against self-incrimination harmless); testimony that violates a defendant's rights under the Confrontation Clause, *Cotto v. Herbert*, 331 F.3d 217, 253 (2d Cir. 2003); and evidence that was admitted despite a defendant's use immunity. *See People v. Shu*, 216 A.D.2d 46, 47 (1st Dep't 1995).

Third, defendant claims that harmless-error review is inconsistent with the availability of immediate "interlocutory appeal of an adverse Presidential immunity determination." Def.'s Mem. 43. That argument is a non sequitur. The Supreme Court held that "[q]uestions about whether the President may be held *liable* for particular actions, consistent with the separation of powers, must be addressed at the outset of a proceeding." *Trump*, 144 S. Ct. at 2344 (emphasis added). But here, the actual criminal charges do not concern official acts for which defendant could claim immunity. Thus, unlike in the federal prosecution, there is no question here that defendant *could* be tried for the charges based on his unofficial conduct; the only question presented now is whether certain evidence was properly admitted to support those charges.

In any event, the mere fact that the admissibility of certain evidence of purportedly official acts could have been resolved before trial does not mean that the erroneous introduction of such evidence requires automatic reversal regardless of prejudice. After all, the admissibility of unconstitutionally or illegally obtained evidence is routinely litigated before trial so that the defendant is not "forced . . . to litigate [the] evidence at trial." Def.'s Mem. 45; *see* CPL §§ 710.20, 710.40(3). But if a court wrongly admits evidence at trial that should have been suppressed before trial, harmless-error analysis is still available. *See, e.g., People v. Johnson*, 31 N.Y.3d 942, 943

(2018); *United States v. Ponds*, 454 F.3d 313, 329 (D.C. Cir. 2006); *United States v. Yousef*, 327 F.3d 56, 128 (2d Cir. 2003). Here, too, even if the evidence defendant now challenges should have been reviewed and precluded prior to trial, harmless-error analysis is still available.

B. If official-acts evidence was erroneously admitted at trial, the error was harmless in light of the overwhelming evidence of defendant's guilt.

To the extent the Court concludes that any evidence of official presidential acts was improperly admitted at trial, defendant's request to set aside the verdict should be rejected on harmless-error grounds because the trial record contains overwhelming evidence of defendant's guilt.⁹ *See People v. Lee*, 214 A.D.3d 457, 458 (1st Dep't 2023) ("[A]ny error was harmless in light of the overwhelming evidence of defendant's guilt.") (citing *Crimmins*, 36 N.Y.2d at 237). In addition, because the narrow categories of evidence that defendant complains about here were all cumulative of extensive other evidence that is not even colorably subject to the Supreme Court's recent immunity ruling, there is no reasonable possibility that the limited evidence discussed above (even assuming that it should have been excluded) meaningfully contributed to his conviction. *See People v. Hamlin*, 71 N.Y.2d 750, 758-59 (1988) (finding that jury was not likely to have been affected by erroneous admission of codefendants' statements when defendant's guilt was proven by other corroborating evidence); *People v. Shaw*, 68 A.D.3d 507, 508 (1st Dep't 2009) (improperly admitted evidence harmless when it was "cumulative to unchallenged declarations made to other persons").

Defendant is wrong to claim that the Supreme Court's recent ruling compels the conclusion that *any* admission of purportedly official acts is automatically prejudicial. Def.'s Mem. 51-52.

⁹ The citations to the trial record in the discussion that follows are necessarily selective in the interest of brevity. The People incorporate by reference the entirety of the trial testimony and evidence admitted at trial (exclusive of the limited evidence defendant opposes on immunity grounds). That evidence was described more fully in the People's summation. Tr. 4589-4811.

Although the Supreme Court referred to the “unique risk that the jurors’ deliberations will be prejudiced by their views of the President’s policies and performance while in office,” *Trump*, 144 S. Ct. at 2341, the mere existence of potential prejudice does not require a categorical finding that a trial error improperly affected the jury’s verdict. To the contrary, prejudice from improperly admitted evidence can be “quantitatively assessed in the context of other evidence presented,” *Fulminante*, 499 U.S. at 307-08, and reviewing courts routinely consider such prejudice in assessing whether a trial error was harmless overall, *see, e.g., Hamlin*, 71 N.Y.2d at 758; *see also Brecht*, 507 U.S. at 636 (“State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process”). More fundamentally, the particular evidence at issue in this case minimizes the possibility that the jury would have been prejudiced by their personal “views of the President’s policies and performance while in office.” *Trump*, 144 S. Ct. at 2341. None of the evidence that defendant objects to here said anything whatsoever about defendant’s presidential policies or political positions. And this Court not only allowed extensive individualized questioning during voir dire to ensure that the jurors were not politically biased, but also carefully instructed the jury not to let their personal or political opinions of defendant affect their consideration of the evidence. Tr. 4819-4820.

Thus, neither the Supreme Court’s decision nor the particular record in this case supports defendant’s assertion that prejudice should be automatically presumed here. And, as the following examination of the record in this case demonstrates, defendant was not in fact prejudiced by admission of any of the evidence at issue, even assuming that it should have been excluded.

1. Defendant made or caused false entries in the business records of an enterprise.

As this Court properly charged the jury, there are two elements to establish falsifying business records in the first degree: first, that defendant made or caused a false entry in the business

records of an enterprise; and second, that defendant did so with intent to defraud that included an intent to commit another crime or to aid or conceal the commission thereof. Tr. 4838:7-12; *see* PL § 175.10. The first element—that defendant made or caused false entries in the business records of an enterprise—is overwhelmingly established by the trial record without reference to any of the evidence defendant objects to on immunity grounds.

1. Beginning with falsity, the evidence establishes beyond a reasonable doubt that the invoices, general ledger entries, and checks with check stubs contain false entries. The invoices request payment for services rendered for a given month pursuant to a retainer agreement. *See* People’s 1, 5, 8, 11, 14, 17, 20, 23, 26, 29, 32. The general ledger entries also record payments pursuant to a retainer for a given month. *See* People’s 2, 3, 6, 9, 12, 15, 18, 21, 24, 27, 30, 33. And the signed checks with check stubs likewise record that the payments were made pursuant to a retainer. *See* People’s 4, 7, 10, 13, 16, 19, 22, 25, 28, 31, 34.

Those entries are false. There was no retainer agreement; Cohen was not paid for legal services rendered; and the \$420,000 payments were instead a reimbursement. Among other evidence, People’s 35 and People’s 36—Weisselberg’s handwritten notes on the shell company bank statement grossing up the \$130,000 expense to a \$420,000 repayment, and McConney’s notes calculating how the total \$420,000 obligation was to be repaid based on future invoices—establish that the \$420,000 Cohen received was not payment for legal services rendered in a given month pursuant to a retainer, but was instead a reimbursement for the wire to Keith Davidson for the Stormy Daniels payoff, plus the Red Finch expense, the extra bonus, and the grossed-up additional amount to cover for taxes. People’s 35, 36; Tr. 2290:11-2307:24 (McConney). Jeff McConney testified that he understood the payments were reimbursements, as People’s 35 and People’s 36 show. Tr. 2290:11-2291:16, 2299:6-9, 2302:9-13, 2304:4-7. McConney also testified that he never

saw a retainer agreement and did not get approval from the Trump Organization's legal department to reimburse Cohen, as would be typical if the Trump Organization were actually paying a legal expense instead of a reimbursement. Tr. 2316:10-11, 2317:18-22. Cohen likewise testified that there was no retainer agreement, and that the payments totaling \$420,000 that he received in 2017 were not for services rendered in a given month but were instead a grossed-up reimbursement for the Daniels payoff and the other expenses.¹⁰ See Tr. 3442:3-6, 3495:14-19, 3500:24-3501:2, 3518:15-16, 3520:17-20, 3521:22-25, 3523:11-13, 3525:11-15, 3526:1-7, 3527:7-12, 3527:25-3528:3, 3528:19-3529:2, 3529:12-18, 3530:6-11, 3531:12-15, 3532:7-14, 3533:2-5, 3533:22-3534:1, 3535:3-8, 3535:21-24, 3536:12-14, 3537:1-4, 3537:19-25, 3538:15-18, 3539:8-12, 3540:4-7, 3541:2-14, 3959:20-23.

This evidence is corroborated by testimony that Cohen performed some personal legal services for defendant in 2018 but was never paid for those services. Tr. 2357:5-13, 2359:24-2360:4 (McConney); Tr. 3546:10-18, 4134:15-23 (Cohen); People's 43-45, 54, 55. It is further corroborated by testimony from both Pecker and Davidson that Cohen complained to them in December 2016 that defendant had not yet reimbursed him for the Stormy Daniels payoff. Tr. 1208:9-1209:3 (Pecker); Tr. 1855:17-1857:1 (Davidson). And the evidence of falsity is further supported by defendant's concession in court papers in civil litigation involving Stormy Daniels that he reimbursed the \$130,000 payment in 2017. See Tr. 2913:1-16 (Daniels). The additional admissions that defendant claims should not have been admitted on immunity grounds—People's 81 (the OGE Form) and People's 407-G (the May 3, 2018 Tweet)—are merely cumulative of this extensive trial evidence fully establishing the falsity of these entries. The falsehoods in defendant's

¹⁰ Making the falsehood crystal clear, some of the invoices were even sent and approved on the first day of the month for the *next* month's payment, purportedly compensating Cohen for legal services he could not possibly have performed yet. See People's 37-G, 37-K; Tr. 4735:23-4736:2.

records are proven far beyond a reasonable doubt by evidence having nothing to do with the documents defendant now argues were inadmissible.

2. Next, the stamped invoices, general ledger entries, and checks with check stubs are all business records of an enterprise. These documents are business records because they were kept or maintained by the Trump Organization and they reflect its condition and activity. PL § 175.00(2). Specifically, the invoices reflect an obligation to pay, and the Trump Organization required invoices for that exact purpose. Tr. 2280:22-24, 2295:25-2296:3 (McConney); Tr. 2426:7-11, 2429:22-2431:10 (Tarasoff); Tr. 2924:22-2925:7 (Manochio); *see People v. Kisina*, 14 N.Y.3d 153, 159-60 (2010); *People v. Dove*, 85 A.D.3d 547, 548 (1st Dep’t 2011). The general ledger entries reflect that a payment had been made to Cohen for a purported retainer for a particular month or months in 2017. Tr. 2319:14-21, 2360:12-25, 2362:1-3 (McConney); Tr. 2447:18, 2449:21, 2456:24, 2462:11, 2467:4, 2475:4 (Tarasoff); *see Kisina*, 14 N.Y.3d at 159-60. And the signed checks and check stubs were maintained in the Trump Organization’s files to reflect its satisfaction of its repayment obligations. Tr. 2451:4-8 (Tarasoff); Tr. 2285:4-6 (McConney); *see Kisina*, 14 N.Y.3d at 159-60. McConney further testified that these business records—and in particular, the general ledger entries—were examined by the Trump Organization’s outside accounting firm at tax time to determine the appropriate tax treatment. Tr. 2275:5-13, 2320:9-2321:10 (McConney).

The evidence also shows beyond a reasonable doubt that the Trump Organization is an enterprise because it was a conglomerate of nearly 500 entities engaged in real estate, property management, leisure, and other commercial and business activities. Tr. 2260:20-2262:5 (McConney); *see* PL § 175.00(1). The Trump Organization’s accounting staff of ten managed the general ledger and bank accounts for the “DJT” account, which was used as the main operating

account to reallocate cash between Trump Organization entities and to advance funds to pay an entity's bills. Tr. 2270:5-9, 2277:3-2278:19 (McConney); Tr. 2431:18-24 (Tarasoff). And although not necessary to support the conviction, the Donald J. Trump Revocable Trust is also an enterprise. *See* People's 86; Tr. 2263:1-2267:6 (McConney).

Literally none of the evidence defendant claims was erroneously admitted at trial has anything to do with the trial proof establishing well beyond any doubt that the records defendant was convicted of falsifying are business records of an enterprise.

3. Finally, defendant made or caused the false entries in his business records. Defendant himself personally signed every one of the nine falsified checks from the DJT account, and therefore clearly made those false entries. People's 10, 13, 16, 19, 22, 25, 28, 31, 34; Tr. 2468:11-16, 2470:10-13, 2473:11-14, 2475:19-22, 2480:25-2481:3, 2482:18-21, 2484:20-21, 2486:20-23 (Tarasoff); Tr. 3528:6-23, 3530:12-18, 3531:25-3532:3, 3533:13-17, 3534:19-24, 3536:3-7, 3537:8-15, 3538:22-3539:4, 3540:17-22 (Cohen). As to the false entries in the remaining business records, the trial evidence proved beyond a reasonable doubt that defendant made or caused those entries as well. As a matter of law, a person "causes" a false entry when, even if he does not prepare the relevant business record himself, the creation of a false entry in the business record is a reasonably foreseeable consequence of his conduct. *People v. Barto*, 144 A.D.3d 1641, 1643 (4th Dep't 2016); *see also People v. Park*, 163 A.D.3d 1060, 1063 (3d Dep't 2018); *People v. Myles*, 58 A.D.3d 889, 892 (3d Dep't 2009). The trial record proved that defendant set the fraudulent repayment scheme in motion, and that the creation of business records to carry out that scheme was a predictable consequence of his decision. Tr. 3418:9-19, 3421:1-10, 3431:20-3432:23, 3491:14-3494:22, 3514:1-18 (Cohen); Tr. 2282:5-18 (McConney); Tr. 2430:16-2431:10, 2434:4-17 (Tarasoff); People's 256, 349.

Again, this evidence is overwhelming without any recourse to the evidence defendant opposes on immunity grounds. Contrary to defendant's argument, Def.'s Mem. 50, testimony from Madeleine Westerhout was not remotely necessary to establish defendant's "detail-oriented manner" or that defendant knew what he was signing: the trial record included extensive evidence on that front, including defendant's *own admission* that he reviewed and signed checks carefully, both for the purpose of "seeing what's really going on inside your business" and because "if people see your signature at the bottom of the check, they know you're watching them, and they screw you less because they have proof that you care about the details." People's 414-F at xii. David Pecker also personally saw defendant reviewing invoices before he signed his checks. Tr. 1009:7-21. And there was a parade of other evidence proving both that defendant paid careful attention to his finances and that he was a micromanager. Tr. 1010:3-11, 1117:24-1118:7 (Pecker); Tr. 1784:10-11 (Davidson); Tr. 2130:15-18 (Hicks); Tr. 2279:6-2280:4 (McConney); Tr. 2427:24-2428:1, 2430:16-2431:10, 2435:8:19, 2436:23-2437:3, 2441:4-17 (Tarasoff); Tr. 3279:21-25 (Cohen); People's 71, 75, 413-B, 414-A, 414-B, 414-C, 414-D, 414-F, 415-A.

The trial evidence establishing that defendant made or caused false entries in the business records of an enterprise was overwhelming without reference to any purported official-acts evidence; and given that the minimal evidence defendant now opposes on immunity grounds—People's 81 (the OGE Form), People's 407-G (the May 3, 2018 Tweet), and Westerhout's generalized testimony about defendant's attention to detail—were "merely cumulative" of other trial evidence, *People v. Jones*, 63 A.D.3d 1643, 1644 (4th Dep't 2009), there is "no reasonable

possibility” that this evidence improperly contributed to his conviction.¹¹ *Crimmins*, 36 N.Y.2d at 237.

2. Defendant acted with intent to defraud which included an intent to commit or conceal the commission of another crime.

The second element of falsifying business records in the first degree—that defendant acted with an intent to defraud that included the intent to commit, aid, or conceal the commission of another crime—is also overwhelmingly established by the trial record without any consideration of the evidence defendant now claims was erroneously admitted at trial.

1. Regarding intent to defraud, there is overwhelming evidence that defendant intended the false business records to obscure the repayment to Cohen for the Stormy Daniels payoff. People’s 35 and People’s 36 alone are likely dispositive of this point; those documents conclusively show that the \$420,000 payments were to reimburse Cohen for the wire to Keith Davidson, contrary to how the payments were then recorded in the Trump Organization’s business records. People’s 35, 36; Tr. 2290:11-2307:24 (McConney). And the evidence of the Trump Tower conspiracy and the steps taken to effectuate it—established by testimony from David Pecker, Keith Davidson, Stormy Daniels, Michael Cohen, and Gary Farro, as well as by the dozens of emails, text messages, phone calls, recorded conversations, business documents, and other records that corroborate that testimony—prove that hiding information and concealing the underlying conspiracy was the entire point of the scheme. *See, e.g.*, Tr. 1019:4-1026:4, 1091:21-1092:20, 1133:8-13, 1146:11-18,

¹¹ Any error in admitting Westerhout’s testimony was harmless for the separate reason that it was “beneficial to both the People and defendant.” *People v. Perez*, 183 A.D.3d 934, 936-37 (3d Dep’t 2020). Defendant elicited extensive testimony from Westerhout about defendant’s practices in the White House, including that he was very busy and often multitasking, and that she claimed to see him “signing checks without reviewing them.” Tr. 3114:10-18 (Westerhout). To the extent any of Westerhout’s testimony was improperly admitted, it “was probative of both the People’s case and defendant’s . . . defense,” and “did not affect the verdict.” *Perez*, 183 A.D.3d at 937.

1194:4-7, 1199:16-1200:12 (Pecker); Tr. 1743:21-1744:3 (Davidson); Tr. 2275:5-13, 2320:9-2321:10 (McConney); Tr. 2913:9-16 (Daniels); Tr. 3294:23-3296:1, 3492:4-3493:24, 3514:1-18, 3615:14-20 (Cohen); Tr. 1558:10-19, 1562:16-21, 1565:22-1566:7, 1570:16-1572:19 (Farro); People's 35, 36, 81, 156, 157, 161, 162, 164, 182, 202, 248, 260, 265, 276, 364, 366, 368, 369, 376.

Of course, there was also abundant and damning evidence—much of it in defendant's own words—proving beyond any doubt that he was motivated to conceal the sexual encounter with Stormy Daniels because he was concerned that its public disclosure would damage his standing with female voters and harm his chances for election, particularly after the release of the Access Hollywood Tape. *See, e.g.*, Tr. 1180:3-1185:7 (Pecker); Tr. 1755:13-1758:16 (Davidson); Tr. 2146:11-2175:6, 2203:10-12 (Hicks); Tr. 2651:24-2654:4 (Daniels); Tr. 2976:4-17, 3122:22-3123:10 (Westerhout); Tr. 3367:10-3381:8, 3953:2-6, 4049:15-18 (Cohen); People's 167, 176-A, 218, 404-C, 407-A, 407-B, 407-C, 407-D, 407-E, 409-A, 409-B, 409-C.

All of this evidence overwhelmingly proves that defendant intended to conceal information from government regulators, tax professionals, or the voting public. *See, e.g., People v. Lang*, 36 N.Y.2d 366, 371 (1975); *Morgenthau v. Khalil*, 73 A.D.3d 509, 510 (1st Dep't 2010); *People v. Pymm*, 151 A.D.2d 133, 135, 141 (2d Dep't 1989), *aff'd*, 76 N.Y.2d 511 (1990); *People v. Kase*, 76 A.D.2d 532, 537-38 (1st Dep't 1980), *aff'd*, 53 N.Y.2d 989 (1981). And none of the evidence regarding defendant's intent to defraud relies at all on the documents and testimony he claims was erroneously admitted.

2. Regarding the intent to conceal another crime, the admissible evidence established beyond a reasonable doubt that defendant intended to conceal the conspiracy to promote his election by unlawful means. Testimony from Pecker and Cohen establishes that a conspiracy to

influence the election was formed in August 2015 in Trump Tower. Tr. 1019:4-1026:4 (Pecker); Tr. 3294:23-3296:1 (Cohen). That testimony is supported by the documentary evidence of the Sajudin, McDougal, and Daniels transactions, as well as by testimony from Davidson regarding the execution of that conspiracy. *See, e.g.*, People’s 154–158, 160, 162–164, 276; Tr. 1709:12-1800:24, 1836:10-1850:17 (Davidson). The testimony from Hope Hicks that defendant claims was improperly admitted—that defendant told her in February 2018 that it would have been bad for the Stormy Daniels story to come out before the election, Tr. 2221:10-12—was merely confirmatory of the mountain of other evidence proving beyond any doubt that defendant sought to conceal both the fact of his sexual encounter with Daniels and the broader Trump Tower conspiracy.¹² *See, e.g.*, Tr. 1091:19-1092:23, Tr. 1112:21-1115:18, 1199:6-1200:12, 1211:18-1219:11, 1228:7-1231:25, 1237:4-1239:20, 1241:1-16 (Pecker); Tr. 2205:8-2205:20 (Hicks); Tr. 3431:20-3433:5, 3465:13-3466:2, 4189:13-4190:3 (Cohen); People’s 179, 259.

The evidence also proves that the participants intended to and ultimately did advance that conspiracy by unlawful means, including through violations of FECA, the falsification of other business records, and violations of tax laws. Tr. 4843:9-4846:15 (jury charge).

As a threshold matter, defendant’s arguments incorrectly assume that, for purposes of this element, the People were required to establish beyond a reasonable doubt that defendant employed

¹² Defendant claims that because the People described this testimony as “devastating” on summation, the exclusion of this evidence would somehow undermine the guilty verdict. Def.’s Mem. 51. But evidence can be both devastating and cumulative. For example, even the erroneous admission of an unconstitutionally obtained confession by a defendant—which has been described as “the most probative and damaging evidence that can be admitted against” a defendant, *Fulminante*, 499 U.S. at 296 (quotation marks omitted)—can be harmless error where it is cumulative of other properly admitted evidence. *See People v. Krom*, 61 N.Y.2d 187, 201 (1984); *see also People v. Sanders*, 56 N.Y.2d 51, 66-67 (1982) (improper admission of defendant’s statement admitting involvement in a criminal conspiracy, taken in violation of his right to counsel, was harmless error because it was cumulative of other evidence).

a particular unlawful means. But the Election Law does not require the jury to identify any specified or particular unlawful means, *see People v. Mackey*, 49 N.Y.2d 274, 279 (1980) (reaching same conclusion regarding burglary statute); and under New York law, it is well-established that the jury need not be unanimous about alternative means of accomplishing a single offense, *see People v. Mateo*, 2 N.Y.3d 383, 407 (2004). And the first-degree falsifying business records offense does not require that the underlying object crime itself be successfully completed—criminal culpability is a question of defendant’s intent. *See People v. Taveras*, 12 N.Y.3d 21, 27 (2009) (“[F]alsifying business records in the second degree is elevated to a first-degree offense on the basis of an enhanced intent requirement . . . not any additional actus reus element.”); *see also People v. Thompson*, 124 A.D.3d 448, 449 (1st Dep’t 2015); *People v. Houghtaling*, 79 A.D.3d 1155, 1157-58 (3d Dep’t 2010); *People v. McCumiskey*, 12 A.D.3d 1145, 1145 (4th Dep’t 2004). Thus, the relevant question here is whether defendant’s fraudulent intent included the intent to conceal a conspiracy to promote the election of any person to a public office by unlawful means in general—not whether there was overwhelming evidence of any particular unlawful means.

In any event, whether taken individually or as a whole, the evidence of unlawful means was overwhelming. As to the evidence of FECA violations, the evidence was more than sufficient to establish that the \$150,000 payment to Karen McDougal was a prohibited corporate contribution that violated FECA. Tr. 1133:8-13, 1146:2-25 (Pecker); People’s 182. The evidence also proves that the \$130,000 payment to Stormy Daniels was an excessive individual contribution by Michael Cohen in violation of FECA, because it was the payment of a candidate’s personal expenses that he would not have made irrespective of defendant’s candidacy. Tr. 3614:21-23, 3446:19-25 (Cohen). Defendant does not claim that proof of the FECA violations relies on official-acts evidence at all; instead, he argues simply that the evidence does not support a willful FECA

violation as to the McDougal payoff. Def.'s Mem. 49. But Pecker testified that his principal purpose in entering into the non-disclosure agreement with Karen McDougal was to suppress her story so as to prevent it from influencing the election; that he did so because of the Trump Tower conspiracy; that he knew at the time that corporate expenditures in coordination with or at the request of a candidate were unlawful; and that he only made the payments on the understanding that defendant would reimburse him. *See, e.g.*, Tr. 1114:22-1115:1, 1115:18-1116:11, 1119:22-1120:20, 1124:17-1128:16, 1132:5-1133:13, 1144:4-14, 1146:2-25, 1148:13-20, 1456:13-1457:13 (Pecker); Tr. 3311:7-14, 3318:11-3320:15, 3327:4-3328:23 (Cohen). And defendant's argument ignores entirely that Cohen also willfully violated FECA when he made the hush money payment to Stormy Daniels—he made a \$130,000 payment to Daniels on the eve of the election to bury her account of her sexual interaction with defendant, and he did so at defendant's direction and for the principal purpose of influencing the election. *See, e.g.*, Tr. 1190:12-17, 1483:1-25 (Pecker); Tr. 1775:23-1777:10, 1784:14-25, 1841:23-1842:1, 1855:2-8, 1975:15-24 (Davidson); Tr. 2691:14-22 (Daniels), Tr. 3389:6-3392:8, 3432:9-3433:4, 4193:7-18 (Cohen); People's 63–65, 176-A, 177-A, 178-A, 265, 267, 276, 281–285, 361–379. So even without AMI's violation of FECA in connection with the McDougal payment, the evidence clearly supports a criminal Election Law conspiracy based on the illegal Stormy Daniels payoff alone.

The unlawful means also include the falsification of other business records committed in the course of the conspiracy, including:

- the invoice from Investor Advisory Services to Resolution Consultants, falsely describing the expected payment as “‘flat fee’ for advisory services,” *see* People's 161; Tr. 1154:3-1158:2 (Pecker); Tr. 3362:18-3363:22 (Cohen);
- false statements in bank records that accompanied Cohen's request to open a bank account for Resolution Consultants LLC around October 13, 2016, *see* People's 366; Tr. 1562:4-1567:5 (Farro); Tr. 3405:6-3407:4 (Cohen);

- false statements in the account opening paperwork for the Essential Consultants LLC account on October 26, 2016, *see* People's 368; Tr. 1569:9-1572:22 (Farro); Tr. 3434:18-3435:24 (Cohen);
- false statements in the wire transfer form authorizing the wire to Keith Davidson the next day, *see* People's 376; Tr. 1604:9-1609:7 (Farro); Tr. 3440:25-3442:15 (Cohen); and
- false statements in the 1099 Forms that the Trump Organization prepared and submitted to the IRS as a record of payments to Cohen that were falsely described as income when in fact they were reimbursements, *see* People's 93; Tr. 2363:7-2365:17 (McConney).

Defendant again makes no argument that any of this evidence should have been excluded on immunity grounds; instead, he argues vaguely that the evidence of other falsified business records was "speculative and unsupported." Def.'s Mem. 50. But that characterization simply flies in the face of the actual facts and evidence, as cited above. More fundamentally, defendant's argument that "there was no evidence" that the Trump Tower conspiracy included an objective to lie in any business records ignores that the *entire purpose* of the months-long catch-and-kill effort was to conceal negative information about defendant that could have affected the election; and given that that was the express agreement the conspirators made in the Trump Tower meeting, it would have made no sense to accurately record the illegal steps in that conspiracy. *See, e.g.*, Tr. 4680:14-16 (summation) ("Cohen couldn't very well say, I'm opening this account so a presidential nominee can pay off a porn star."); Tr. 1536:3-1537:10, 1592:1-1593:25 (Farro).

Finally, the evidence of unlawful means also includes evidence of federal, state, and city tax law violations. Again, evidence entirely independent of the narrow categories that are the subject of defendant's current motion overwhelmingly establishes these tax law violations as well. Defendant agreed to gross up the reimbursement to Cohen so it could be disguised as income. *See* People's 35, 36; Tr. 2299:6-16 (McConney); Tr. 3484:18-3486:12, 3488:23-3489:2, 3490:4-3494:228 (Cohen). The Trump Organization then followed through on that deception and reported the repayment to the IRS as compensation to Cohen on two 1099 Forms. *See* People's 93; Tr.

2363:5-6, 2365:15-17 (McConney). Under federal law, it is unlawful to submit false or fraudulent documents or to aid anyone in doing so; and under New York State and City law, it is unlawful to submit false information in connection with any tax return. *See* 26 U.S.C. §§ 7206(1), 7206(2); Tax Law §§ 1801(a)(3), 1802; Tr. 4846:5-15. Defendant yet again does not contend that any of this evidence should be excluded as an official presidential act; instead, he argues that there was no evidence of criminal intent in this tax fraud scheme. Def.’s Mem. 49. But Cohen explained that the reimbursement was grossed up specifically so it could be described as income, and that defendant approved that repayment plan.¹³ *See* Tr. 3484:18-3486:12, 3488:23-3489:2, 3490:4-3494:228 (Cohen); People’s 35. And even without this testimony and Weisselberg’s handwritten notes corroborating it, the evidence of falsity described in Part III.B.1 above establishes that defendant knew he was intentionally disguising an expense reimbursement as income in the form of legal fees.

In short, even excluding entirely the claimed official-acts evidence, the trial record overwhelmingly establishes every element of first-degree falsifying business records and supports defendant’s guilt on all thirty-four counts. Because there is “no reasonable possibility that the error might have contributed to defendant’s conviction” in light of this overwhelming evidence, any error was “harmless beyond a reasonable doubt.” *Crimmins*, 36 N.Y.2d at 237.

¹³ Defendant takes out of context Cohen’s answer that he “didn’t know” why Weisselberg grossed up the reimbursement, *see* Tr. 3491:6-9, to claim that there was no criminal intent at the time of the agreement. Def.’s Mem. 49. In fact, Cohen explained repeatedly and in detail that the reimbursement was grossed up “because I was taking it as income” and “in order to get back the 180, you need to actually double it because of tax purposes.” Tr. 3485:1-18; *see also* Tr. 3486:3-12. Defendant also mischaracterizes McConney’s testimony by misleadingly quoting only part of his response. Def.’s Mem. 49. When asked “What does ‘grossed up’ mean?”, McConney’s full answer was: “I don’t know exactly what it meant, but he probably meant – so for tax purposes, if Michael recorded \$360,000 income he would net, assuming a 50 percent tax rate, \$180,000.” Tr. 2299:13-16.

C. Defendant's description of the trial record is wrong on the facts and the law.

Defendant presents a smattering of other factual and legal arguments in an effort to counter the mountain of evidence described above. Defendant's arguments do not undermine the jury's unanimous verdict of guilt on all thirty-four felony counts.

1. The Court should reject defendant's mischaracterizations of the trial record.

Defendant focuses nearly all of his harmless-error argument on an effort to discredit Michael Cohen's trial testimony. Def.'s Mem. 46-48. The credibility of witness testimony is for the jury to determine, as the Court properly instructed. *People v. Mays*, 197 A.D.2d 425, 426 (1st Dep't 1993); Tr. 4829:3-4834:6. At trial, as in his post-trial brief, defendant sought at great length to impeach Cohen's credibility—it was the focus of defendant's days-long cross-examination of Cohen, Tr. 3652:2-3969:18, 4024:23-4128:23 (Cohen cross); it was the entirety of the defense case, *see* Tr. 4205:14-4209:23 (Sitko), Tr. 4228:19-4259:12 (Costello); and it was the centerpiece of defense counsel's summation. *E.g.*, Tr. 4579:1-2. The jury was not persuaded by defendant's strenuous efforts to malign Cohen, and none of the evidence defendant challenges materially affected that determination.

In addition, defendant's motion vastly overstates the importance of Cohen's testimony. As the People argued on summation, the evidence supported defendant's guilt beyond a reasonable doubt even if the jury disregarded Cohen's testimony. Tr. 4620:1-4623:4. And as demonstrated in the overview of the evidence in Part III.B above, that argument is clearly correct: on every salient point on which Cohen testified, the point was amply proven by other testimonial and documentary evidence. Thus, even if the admitted evidence should have been precluded—and even if its preclusion could somehow have altered the jury's assessment of Cohen's credibility—that would have had no effect on the jury's ultimate verdict.

In any event, defendant's specific efforts to undercut Cohen's credibility rely on mischaracterizations of the trial record and speculation about possible facts that appear nowhere in evidence. First, defendant claims that Cohen committed perjury in October 2023 during his testimony in the New York Attorney General's fraud lawsuit against Trump and other defendants. Def.'s Mem. 46. But the federal court opinion defendant cites to describe Cohen's state court testimony was not admitted as evidence at this trial, and was not a subject of defense counsel's cross-examination of Cohen. Indeed, defendant made a strategic calculation not to seek to admit that court opinion or to elicit testimony from Cohen or any other witness about it. The People specifically noted during a sidebar with the Court during Cohen's cross-examination that if defense counsel sought to admit the federal court decision, the People would object; and if admitted, the People would seek to admit judicial findings to the contrary. Tr. 3746:15-3747:1. The Court asked defense counsel if he intended to bring out the federal decision, and defense counsel responded "No." Tr. 3751:11-13. Based on defendant's strategic choice, no evidence was admitted at this trial purporting to show that a federal court believed Cohen lied in his October 2023 state-court trial testimony. And if such evidence had been admitted, the People would have rebutted it by seeking to admit evidence that Justice Engoron—sitting as the finder of fact in the New York Attorney General's civil fraud trial—expressly found that "Michael Cohen told the truth" and that "the Court found his testimony credible." Decision & Order After Non-Jury Trial 43, *People by James v. Trump*, Index No. 452564/2022, NYSCEF Doc. No. 1688 (Sup. Ct. N.Y. Cnty. Feb. 16, 2024). Defendant's claim that Cohen lied during that trial in October 2023 should thus be rejected because it has no support in the trial record. *See People v. Wolf*, 98 N.Y.2d 105, 119 (2002) ("The factual assertions concerning [the purported error] were outside the record and for that reason could not be considered in a CPL 330.30(1) motion.").

Next, defendant asks the Court to draw a negative inference regarding Cohen's credibility based on the People's decision not to call Allen Weisselberg as a witness at trial. Def.'s Mem. 46. But defendant did not request a missing witness charge, and would not have satisfied the requirements for such an instruction in any event. *See People v. Smith*, 33 N.Y.3d 454, 458-59 (2019) (citing *People v. Gonzalez*, 68 N.Y.2d 424, 427-28 (1986)). Because defendant decided not to request a missing witness charge at trial, there is no basis whatsoever for his post-trial request that the Court draw any adverse inference from the absence of Weisselberg's trial testimony.

Third, defendant's claim that Cohen lied about an October 24, 2016 telephone conversation with defendant using Keith Schiller's telephone, Def.'s Mem. 47, should also be rejected. On cross examination, Cohen firmly rejected defense counsel's assertion that Cohen lied about speaking to defendant on that call, and testified that "[b]ased upon the records that I was able to review, in light of everything that was going on, I believe I also spoke to Mr. President Trump and told him everything regarding the Stormy Daniels matter was being worked on and it's going to be resolved." Tr. 3896:9-3898:8. This testimony was corroborated both by photographic evidence of Schiller standing next to defendant mere minutes before the phone call in question, *see People's* 417-B; Tr. 4187:8-14 (Cohen), and by testimony from Cohen and other witnesses that they sometimes contacted Schiller in order to reach defendant by phone. Tr. 3276:2-10, 3313:21-24 (Cohen); Tr. 1008:14-18 (Pecker); Tr. 2141:1-8 (Hicks). Notably, the defense offered no testimonial or other evidence to rebut Cohen's testimony that he in fact spoke with defendant about the Daniels payoff on that October 24, 2016 call.

In any event, the October 24 call was not necessary to establish defendant's guilt. The call was just one update of many that Cohen communicated to defendant regarding the Daniels matter. Tr. 3389:6-15, 3400:18-21 (Cohen); *People's* 349. During the October 2016 time period, Cohen

estimated that he had more than twenty conversations with defendant about the Stormy Daniels matter—some in person, some by phone. Tr. 4187:21-4188:10 (Cohen). And the October 24 call was not defendant’s final approval for Cohen to pay off Stormy Daniels—that came two days later, on October 26, 2016. *See* Tr. 3431:14-3433:4 (Cohen); People’s 349. And the October 24 call was not defendant’s final approval for Cohen to pay off Stormy Daniels—that came two days later, on October 26, 2016. *See* Tr. 3431:14-3433:4 (Cohen); People’s 349. The defense vigorously argued to the jury that the October 24 call demonstrated that Cohen was lying. However that evidence was considered by the jury, nothing in defendant’s instant motion warrants this Court to reevaluate the jury’s determination of Cohen’s credibility, and defendant’s argument cannot possibly serve as a basis to set aside the jury’s guilty verdicts.

Finally, defendant’s claim that Cohen lied about the “substance and circumstances” of the recorded conversation between himself and defendant on September 6, 2016, Def.’s Mem. 47-48, should also be rejected as baseless. As an initial matter, defendant’s vague reference to “all the problems with the recording,” *id.* at 48, is inconsistent with the actual evidence at trial. Doug Daus, the Supervising Computer Forensic Analyst who extracted and analyzed the data from Cohen’s cell phone, testified that the metadata he extracted for the recording of the September 6 conversation reflected that the audio file was never modified after the date it was made. Tr. 2070:23-2071:14; People’s 246, 247. Daus further testified that he identified no evidence of tampering or manipulation on any data related to that recording. Tr. 2085:9-2087:10. That testimony was uncontested. Indeed, on re-cross, defense counsel made clear he was not asking Daus about any evidence of affirmative tampering, but only whether there could be *risks* of tampering. Tr. 2088:17-19. But a risk of tampering is not the same as evidence of tampering—of which there was none.

Defendant's assertion that Cohen falsely claimed to have ended the recording because of an incoming phone call, Def.'s Mem. 48, is also completely unsubstantiated. Defendant argues that Cohen could not have answered the incoming call because the phone records show it went to voicemail. *Id.* But Cohen testified that he did not recall whether the incoming call connected or went to voicemail when he tried to answer it. Tr. 3345:23-3346:3. And whether he answered the incoming call or not, there is no evidence rebutting his testimony that he ended the recording because of an incoming call—which phone records reflect having come in at about the same time that the recorded conversation cuts off. People's 400 at DANYGJ00002726; Tr. 3211:18-3212:15, 3234:1-20, 3236:1-16 (Jarmel-Schneider).

Defendant's assertion that the phone records indicate the incoming call went to a different physical device than the phone from which the recording was later retrieved is misleading and immaterial. The call detail records show the incoming call went to the same cell phone number that was assigned to the device from which the audio recording was extracted, and the subscriber records confirm that that cell phone number belonged to Cohen at that time. People's 400 at DANYGJ00000038, DANYGJ00002726; Tr. 1988:9-19 (Daus). The records further showed that an entire backup had previously been restored to the device, and that the recording on the device collected by DANY retained metadata confirming both that it was created on September 6, 2016, and that it was not altered after that date. Tr. 2006:22-25, 2070:23-2071:14, 2063:24-2065:12, 2085:9-2087:10 (Daus); Tr. 3210:18-3211:21, 3234:22-3235:2 (Jarmel-Schneider); People's 247. Defense counsel's lengthy excursion into IMEI numbers shows nothing more than that Cohen got a new phone at some point after he recorded the conversation with defendant, kept the same phone number, and restored a complete backup to the phone that was later produced to the People and the defendant.

Nor should the Court credit defendant's claim that when the September 6 recording ended, defendant "was in the process of asking Cohen to 'check' on details that were not captured on the audio file." Def.'s Mem. 48. That assertion is entirely invented. The audio recording actually reflects that defendant said "pay with cash"; Cohen responded, "No, no, no, no, no"; and defendant then said "check." People's 246, 248. Cohen testified, logically, that "check" meant the payment should be made by check after he rejected defendant's suggestion to pay with cash. Tr. 3344:2-9. The defense proffered no evidence that "check" meant "check on details" or was anything other than a reference to how the payment should be made, and a CPL § 330.30 motion may not be based on made-up facts. *See Wolf*, 98 N.Y.2d at 119.

The Court should likewise reject defendant's effort to discount the significance of the September 6 recording by claiming it "had nothing to do with" Cohen's payment to Daniels. Def.'s Mem. 48. It is correct that on September 6, 2016, Cohen and defendant were discussing the McDougal hush money payment, not the Daniels hush money payment. But the recorded conversation is compelling evidence that supports defendant's guilt because it corroborates Pecker's and Cohen's testimony about defendant's personal involvement in the Trump Tower conspiracy and his knowledge of and participation in the steps to execute the illegal conspiracy: it proves that defendant knew Pecker had paid \$150,000 to purchase McDougal's life rights to secure her silence before the 2016 presidential election, and it shows defendant plotting surreptitious steps to reimburse Pecker for that illegal payment. Tr. 1115:18-1116:11, 1117:20-1118:7, 1119:22-1120:20, 1146:21-1148:20, 1153:20-1158:10, 1464:16-19 (Pecker); Tr. 3319:15-3320:2, 3327:4-3328:23, 3338:18-3339:5, 3365:3-9 (Cohen). That it related to a different part of the Election Law conspiracy than the Daniels payment is completely beside the point.

2. The Court should reject defendant’s belated arguments regarding legal error.

Defendant raises a number of claims of legal error as well, purportedly as part of his harmless-error argument. Def.’s Mem. 48. Specifically, defendant contends both that the People “hid the ball” regarding the Election Law charging theory, and that the Court erred in instructing the jury that it did not have to be unanimous as to the “unlawful means” for the Election Law object crime. Def.’s Mem. 48. To the extent the Court considers these untimely arguments, both should be rejected.¹⁴

Defendant’s claim of surprise is frivolous. He himself acknowledged in sworn court filings more than a year ago that he was on notice of the Election Law charging theory. In his notice of removal to federal court—filed on May 4, 2023, just one month after he was arraigned—defendant wrote that “the felony charges in this case are predicated on an alleged intent to violate New York Election Law § 17-152 and the Federal Election Campaign Act, 52 U.S.C. § 30101.” Notice of Removal ¶ 21, *New York v. Trump*, No. 23 Civ. 3773 (S.D.N.Y. May 4, 2023), ECF No. 1. Indeed, the Election Law predicate was the basis for defendant’s unsuccessful preemption argument in federal court. *See Trump*, 683 F. Supp. 3d at 347 (“Trump argues that the [Federal Election Campaign] Act preempts two of the crimes that he is charged with intending to commit or conceal by falsifying business records,” including “crimes under New York Election Law § 17-152”). And the reason defendant was on notice of the Election Law predicate is that the People clearly identified it for him a year before trial. *See People’s Mot. for Protective Order 3* ¶ 3 (Apr. 24,

¹⁴ Neither argument is related to the official-acts immunity issue that defendant sought leave to address, and neither argument has anything to do with the Court’s harmless-error analysis. Both arguments are therefore untimely, *see* Tr. 4958:6-8 (directing that all post-trial motions be filed by June 13, 2024), and the Court would be justified in disregarding these arguments for that reason alone. The People nonetheless respond to these arguments to the extent the Court considers it necessary to address them.

2023) (“Defendant caused business records associated with the repayments to be falsified to disguise his and others’ criminal conduct including violations of New York Election Law § 17-152”); *see also* People’s Response to Def.’s Request for a Bill of Particulars 5-6 (May 12, 2023). If more were needed to rebut his claim of surprise—which it is not—the People explained the Election Law predicate in their opposition to defendant’s omnibus motion in November 2023, as the Court expressly recognized in its February 2024 Order denying defendant’s omnibus motions:

[T]he People allege that Defendant intended to violate N.Y. Election Law § 17-152 by conspiring “to promote the election of any person to a public office . . . by entering [into] a scheme specifically for the purposes of influencing the 2016 presidential election; and that they did so by ‘unlawful means,’ including by violating FECA through the unlaw[ful] individual and corporate contributions by Cohen, Pecker, and AMI; and . . . by falsifying the records of other New York enterprises and mischaracterizing the nature of the repayment for tax purposes.”

Decision & Order Denying Def.’s Omnibus Mots. 12 (Feb. 15, 2024) (quoting People’s Mem. Opp. Omnibus Mots. 25 (Nov. 9, 2023)).

Defendant’s objection to the Court’s “unlawful means” instruction is equally meritless. As noted above, the jury need not be unanimous about alternative means of accomplishing a single offense. *See Mateo*, 2 N.Y.3d at 407; *see also People v. Watson*, 284 A.D.2d 212, 213 (1st Dep’t 2001) (“A conviction of larceny, whether by false promise or false pretense, constitutes only one offense. Thus, juror unanimity is not required as to the particular method by which the larceny was committed.”). Indeed, the statute does not require the jury to identify any specified or particular unlawful means at all. *Mackey*, 49 N.Y.2d at 279. Thus, the Court correctly instructed the jury that it need not agree on which unlawful means were employed, so long as the jury did unanimously agree that the defendant conspired to promote or prevent the election of any person to a public office by unlawful means. Tr. 4937:4-7. And in any event, defendant waived any complaint he might have had regarding the Court’s instructions when he expressly agreed during the pre-charge

conference that a unanimity instruction as to “unlawful means” was not required, but should instead be considered solely as an exercise of the Court’s discretion. Tr. 4403:7-4404:3; *see People v. Capella*, 180 A.D.3d 498, 499 (1st Dep’t 2020); *People v. James*, 35 A.D.3d 762, 762 (2d Dep’t 2006).

IV. Defendant’s challenge to the sufficiency of the indictment is unpreserved and meritless.

Defendant’s request that the Court not only vacate the jury verdict but also dismiss the indictment based on the use of official-acts evidence in the grand jury, Def.’s Mem. 41-43, should be rejected because he failed to preserve the argument in his pretrial motions to dismiss, and because it is wrong on the merits in any event.

A. Defendant failed to preserve his challenge to the admission of purported official-acts evidence in the grand jury.

As noted above, CPL § 330.30(1) does not authorize the Court to set aside a jury verdict based on an alleged error unless that error was properly preserved. *See, e.g., Everson*, 100 N.Y.2d 610; *Sudol*, 89 A.D.3d 499-500; *People v. Quinones*, 228 A.D.2d 190, 190-91 (1st Dep’t 1996). Here, defendant never sought to dismiss the indictment on the ground that the People improperly presented official-acts evidence to the grand jury, despite raising other arguments about the presentation of allegedly inadmissible evidence during that proceeding in his omnibus motions. *See* Def.’s Mem. Supp. Omnibus Mots. at 25-26 (Sept. 29, 2023).

The fact that *Trump v. United States* was decided after trial does not excuse this failure. First, as described in Part I above, defendant’s other pretrial motions and trial objections establish that he knew how to object to the admission of evidence on immunity grounds before trial. Second, preservation is required “even if governing law was altered by an intervening Supreme Court decision.” *Cabrera*, 41 N.Y.3d at 45. Having failed to seek dismissal of the indictment on this

basis within the time required by CPL § 255.20 and the Court's scheduling orders, defendant may not seek relief under CPL § 330.30(1) now.

B. None of the cited grand jury evidence should be precluded.

If the Court nonetheless considers the sufficiency of the grand jury evidence notwithstanding defendant's failure to preserve the argument, the Court should deny defendant's request to dismiss the indictment.

As an initial matter, the evidence defendant claims was erroneously presented to the grand jury is not entitled to any protection on a claim of presidential immunity. The grand jury testimony from Hicks, Pecker, and Cohen, as well as the four Tweets defendant issued while serving as President, all reflect unofficial conduct and are admissible for the reasons described in Part II above.

Defendant further objects to grand jury testimony from [REDACTED], who was not called as a witness at trial, regarding [REDACTED] Def.'s Mem. 41 (citing GJ Tr. 731-764). This vague and cursory reference to the witness's testimony does not adequately present any claim of immunity, and the Court should reject defendant's argument without more. Regardless, the bulk of the cited testimony relates exclusively to [REDACTED] [REDACTED] which has nothing to do with "*the President's* immune conduct." *Trump*, 144 S. Ct. at 2341 (emphasis added). And the handful of passing references to [REDACTED] [REDACTED]. The witness testified that [REDACTED] [REDACTED] [REDACTED] [REDACTED] GJ Tr. 763 [REDACTED]. As a federal court already held in considering this exact conduct, "[h]ush money paid to an adult film star," as "a cover-up of an

embarrassing event,” “is not related to a President’s official acts. It does not reflect in any way the color of the President’s official duties.” *Trump*, 683 F. Supp. 3d at 344-45. Indeed, the witness specifically told the grand jury that [REDACTED]

[REDACTED]

[REDACTED] GJ Tr. 754 [REDACTED]

The witness’s testimony was admissible.

C. Even excluding all of the evidence defendant belatedly identifies as immune, the grand jury record is easily sufficient to support the indictment.

Excluding the evidence defendant opposes does not undermine the indictment in any event, because the grand jury record without the purported official-acts evidence far exceeds the required *prima facie* showing on every element of first-degree falsifying business records. *See Trump*, 114 S. Ct. at 2340 (recognizing that indictment could be sustained if “sufficient allegations support the indictment’s charges without [immune] conduct”).

“[T]he submission of some inadmissible evidence during the [grand jury presentation] is held to be fatal only when the remaining legal evidence is insufficient to sustain the indictment.” *People v. Avant*, 33 N.Y.2d 265, 271 (1973); *see also People v. Huston*, 88 N.Y.2d 400, 409 (1996). “Legally sufficient evidence” is defined as “competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant’s commission thereof.” CPL § 70.10(1). In the grand jury context, “legal sufficiency means *prima facie* proof of the crimes charged, not proof beyond a reasonable doubt.” *People v. Bello*, 92 N.Y.2d 523, 526 (1998) (citing *People v. Mayo*, 36 N.Y.2d 1002, 1004 (1975)). The standard for the Court’s review is therefore “‘whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes,’ and whether ‘the Grand Jury could rationally have drawn the guilty inference.’” *Id.* (quoting *People v. Deegan*, 69 N.Y.2d 976, 979 (1987)).

Contrary to defendant's suggestion, Def.'s Mem. 42-43, the First Department's opinion in *People v. Ohrenstein*, 153 A.D.2d 342 (1st Dep't 1989), does not change the Court's standard of review in this context. The charges in *Ohrenstein* were dismissed because the indictment there was "based on" evidence that was inadmissible pursuant to Speech or Debate Clause immunity under the New York Constitution. 153 A.D.2d at 356. Nothing in *Ohrenstein* creates a different rule for legal sufficiency of an indictment when evidence related to immune acts is improperly presented to the grand jury; rather, on the facts of that case, there was insufficient admissible evidence to support the charges. *See id.* at 357 ("[T]he People failed to meet their obligation of showing that the prosecution [of certain counts] could proceed without touching upon the specifics of . . . privileged legislative assignments."). But as described below, the indictment in this case was not "based on" any evidence of immune conduct, and the overwhelming grand jury record supports a *prima facie* showing of defendant's guilt without any reliance whatsoever on any official-acts evidence.

1. The grand jury evidence establishes that the records defendant falsified are all records of an enterprise. An "enterprise" is "any entity of one or more persons, corporate or otherwise, public or private, engaged in business, commercial, professional, industrial, eleemosynary, social, political or governmental activity." PL § 175.00(1). The Trump Organization is a collection of approximately 500 separate entities that own and manage hotels, golf courses, commercial real estate, condominium developments, and other properties. GJ Tr. 108, 110, 118-121 [REDACTED]; GJ Tr. 230, 235, 239-241 [REDACTED]. The Trust owns all of the entities that collectively comprise the Trump Organization. GJ Tr. 119-121, 146-148 [REDACTED]. Defendant is the sole beneficiary of the Trust and the beneficial owner of the entities that make up the Trump Organization. GJ Tr.

120 [REDACTED]. All three entities maintain records of their business activities. GJ Tr. 122-131, 196 [REDACTED]; GJ Tr. 287-297 [REDACTED].

2. The grand jury record also establishes that the falsified invoices, general ledger entries, and checks with check stubs are “business records.” PL § 175.00(2). The invoices were addressed to [REDACTED] (then the Trump Organization’s Chief Financial Officer); were “kept or maintained” by an enterprise; and evidence its “condition”—namely, its obligation to reimburse the payee as described in the invoice. GJ Tr. 184-213 [REDACTED]; GJ Tr. 292-295, 317-319, 361-364 [REDACTED]; GJ Tr. 891-908 [REDACTED]; GJ-20. The same is true of the general ledger entries recording the Cohen repayments, which the Trump Organization maintained as records that a payment had been made to Cohen for a retainer. GJ Tr. 363-364 [REDACTED]; GJ-21. And the signed checks and check stubs were maintained in the Trump Organization’s files to reflect its satisfaction of its repayment obligations. GJ Tr. 261-262, 295, 319-323, 363-364 [REDACTED]; GJ-22.

3. The business records all contain false entries. They record that Cohen billed and was paid for services rendered pursuant to a retainer agreement. GJ-20; GJ-21; GJ-22. There was no retainer agreement, and Cohen was not paid for services rendered during any month of 2017. GJ Tr. 882-908 [REDACTED]. Instead, the grand jury evidence establishes—through witness testimony, [REDACTED] handwritten notes on the shell company bank statement grossing up the \$130,000 expense to a \$420,000 repayment (GJ-5), and [REDACTED] notes recording how that obligation would be repaid (GJ-6)—that the payments to Cohen in 2017 were monthly reimbursements for the Daniels payoff (plus the Red Finch expense and a supplemental 2016 bonus). GJ Tr. 152-177, 215-217 [REDACTED]; GJ Tr. 514-519, 530-532 [REDACTED]; GJ Tr. 619-643 [REDACTED]; GJ Tr. 882-908, 957-958 [REDACTED]; GJ-5; GJ-6; GJ-43; GJ-63.

4. Defendant made or caused the false entries. He personally signed nine of the eleven falsified checks. GJ-22; GJ Tr. 274-275, 340 [REDACTED]; GJ Tr. 897, 899-900, 902-908 [REDACTED]. Other employees of the Trump Organization created the remaining false records, and the evidence shows that defendant set the repayment scheme in motion, and that the creation of business records to carry out that scheme was a predictable consequence of defendant's decision to reimburse Cohen through monthly checks that disguised the reimbursement. GJ Tr. 27-29, 53-57, 65, 83-91 [REDACTED]; GJ Tr. 145, 169, 199 [REDACTED]; GJ Tr. 271-277, 288-290 [REDACTED]; GJ Tr. 866-870, 888-891 [REDACTED]; GJ-5; GJ-6; GJ-22.

5. Defendant acted with intent to defraud. The grand jury evidence established that defendant sought to purchase and suppress information that could have affected his presidential campaign, and made and caused false entries in the relevant business records in order to prevent public disclosure of both the scheme and the underlying information. GJ Tr. 31-37, 83-85, 88-93 [REDACTED]; GJ Tr. 297-361 [REDACTED]; GJ Tr. 668, 681-687 [REDACTED]; GJ Tr. 577-590 [REDACTED]; Tr. 854-857, 865-871, 875, 888-891 [REDACTED]. The grand jury record also supports the conclusion that defendant concealed information with the intent to defraud the government, including election regulators, based on [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

See GJ Tr. 838-839, 843-845, 871-872 [REDACTED]; GJ-71.

6. Defendant's intent to defraud included the intent to commit or conceal other crimes, including violations of Election Law § 17-152. The grand jury evidence is sufficient to support the conclusion that defendant and others "conspire[d] to promote" the "election of any person to a

public office” by entering into a scheme to influence the 2016 presidential election by unlawful means—including by violating FECA through unlawful individual and corporate contributions by Cohen, Pecker, and AML; and by falsifying the records of other New York enterprises and mischaracterizing the nature of the repayment for tax purposes. *See generally* People’s Mem. Opp. Omnibus Mots. 3-8, 23-25, 37-44 (citing grand jury record).

The extensive grand jury evidence cited above far exceeds the required *prima facie* showing of every element of falsifying business records in the first degree. *See Bello*, 92 N.Y.2d at 526; PL § 175.10. And no part of the grand jury record described above relies on any official-acts evidence. Because the indictment is overwhelmingly supported by admissible evidence, *see Avant*, 33 N.Y.2d at 271, defendant’s belated and unpreserved effort to dismiss the indictment should be rejected.

DATED: July 24, 2024

Respectfully submitted,

ALVIN L. BRAGG, JR.
District Attorney, New York County

Steven C. Wu
Alan Gadlin
Philip V. Tisne
Of Counsel

By: /s/ Matthew Colangelo
Matthew Colangelo
Christopher Conroy
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Becky Mangold
Joshua Steinglass
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Appendix F

104A
JA-1139

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

- v. -

DONALD J. TRUMP,

Defendant.

MEMORANDUM OF LAW

No. 23 Civ. 3773 (AKH)

**PRESIDENT DONALD J. TRUMP'S MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR LEAVE TO FILE SECOND REMOVAL NOTICE ON ECF**

President Donald J. Trump respectfully submits this memorandum of law in support of his September 3, 2024 motion for leave to file on ECF the Second Removal Notice docketed at ECF No. 46.

President Trump filed the Second Removal Notice and an accompanying evidentiary Affirmation on August 29, 2024. *See* ECF Nos. 46-47. The Second Removal Notice is attached hereto as Exhibit A. A courtesy copy of the Second Removal Notice and the Affirmation were delivered to Your Honor's chambers the following day.

On August 30, 2024, an ECF notice was entered directing President Trump to "RE-FILE" the Second Removal Notice with, *inter alia*, the "Court's leave." Based on conversations with the Clerk's Office this morning, September 3, 2024, President Trump is submitting this motion seeking that relief. For the reasons set forth in paragraphs 12 and 116 – 146 of the Second Removal Notice, President Trump respectfully submits that (1) there is "good cause" for the filing of the Second Removal Notice under 28 U.S.C. §§ 1455(b)(1) and 1455(b)(2); and (2) in the alternative, leave to amend the First Removal Notice based on intervening Supreme Court decisions and DANY's trial presentation is appropriate pursuant to 28 U.S.C. § 1653.

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JA-1140

Case 1:23-cv-03773-AKH Document 49 Filed 09/03/24 Page 2 of 2

Accordingly, President Trump respectfully requests that the Court authorize the filing of the Second Removal Notice on ECF.

Dated: September 3, 2024
New York, N.Y.

By: /s/ Emil Bove
Todd Blanche
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Attorneys for President Donald J. Trump

Appendix G



TODD BLANCHE
 ToddBlanche@blanchelaw.com
 (212) 716-1250

November 19, 2024

Honorable Juan M. Merchan,
 Acting Justice - Supreme Court, Criminal Term

Re: People v. Trump, Ind. No. 71543/23

PART 59 NOV 20 2024

Dear Justice Merchan:

Immediate dismissal of this case is mandated by the federal Constitution, the Presidential Transition Act of 1963, and the interests of justice, in order to facilitate the orderly transition of Executive power following President Trump's overwhelming victory in the 2024 Presidential election. Therefore, we respectfully submit this promotion letter to request permission to file a motion to dismiss by December 20, 2024, pursuant to CPL § 210.40, and to request, as DANY has consented to, that the Court stay other deadlines.

As DA Bragg engages in his own election campaign, DANY appears to not yet be ready to dismiss this politically-motivated and fatally flawed case, which is what is mandated by the law and will happen as justice takes its course. However, DOJ is reportedly preparing to dismiss the federal cases against President Trump, and will report its final decision to federal courts on December 2, 2024.¹ As in those cases, dismissal is necessary here. The Constitution forbids "plac[ing] into the hands of a single prosecutor and grand jury the practical power to interfere with the ability of a popularly elected President to carry out his constitutional functions." OLC, *A Sitting President's Amenability to Indictment and Criminal Prosecution* ("OLC Memo"), 2000 WL 33711291, at *19 (2000). Just as a sitting President is completely immune from any criminal process, so too is President Trump as President-elect. Federal law provides for the "orderly transfer of Executive powers in connection with the expiration of the term of office of a President and the inauguration of a new President."² "[T]he President-elect . . . is called upon probably to make more fateful decisions than he will have to make after he is, indeed, sworn into office." 109 Cong. Rec. 13348 (1963). "There . . . exists the greatest public interest in providing the President with the maximum ability to deal fearlessly and impartially with the duties of his office." *Trump v. United States*, 603 U.S. 593, 611 (2024) (cleaned up). This interest attaches to the ongoing transition activities, which are "an integral part of the presidential administration," in the "national interest," and part of President Trump's "public function," as he prepares to govern based on the powerful national mandate established by the Presidential election. OLC, *Reimbursing Transition-Related Expenses Incurred Before The Administrator Of General Services Ascertained Who Were The Apparent Successful Candidates For The Office Of President And Vice President*, 2001 WL 34058234, at *3 (2001). Thus, the Presidential Transition Act requires "all officers of the Government" to "take appropriate lawful steps to avoid or minimize disruptions that might be occasioned by the transfer of the executive power," and to "promote orderly transitions in the office of President." 3 U.S.C. § 102 note.

Continuing with this case would "be uniquely destabilizing" and threaten to "hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs." OLC Memo at *7 (cleaned up). "Any disruption occasioned by the transfer of the executive power could produce results detrimental to the safety and well-being of the United States and its people." 3 U.S.C. § 102 note. "[S]tates have no power . . . to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by [C]ongress,"

¹ Hugo Lowell, *US special counsel to wind down criminal cases against Donald Trump*, The Guardian (Nov. 6, 2024), <https://www.theguardian.com/us-news/2024/nov/06/special-counsel-trump-criminal-cases>.

² OMB, No. M-24-13, Memorandum for Heads of Executive Departments and Agencies (Apr. 26, 2024), <https://www.whitehouse.gov/wp-content/uploads/2024/04/M-24-13-Implementing-the-Presidential-Transition-Act.pdf>.

November 19, 2024

Page 2

including the Presidential Transition Act. *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819). Indeed, in *Trump v. Vance*, DANY conceded at oral argument before the U.S. Supreme Court that “courts are empowered to impose a wide variety of limitations, including, if necessary, to shut an investigation . . . or a litigation,” where the matter presents a “real burden” to the President. Tr. 63. The Presidential Transition Act establishes that the burden here is all too real. Under these unprecedented and dangerous circumstances, CPL § 210.40 provides a mechanism for the dismissal that the Supremacy Clause requires.

We request a December 20, 2024 deadline to file the brief so that President Trump has the opportunity to address in that submission the positions taken by DOJ in the federal cases. The Court must address these new issues, and dismiss the case, prior to issuing a decision on the previously filed Presidential immunity motion. Any other action would obviously violate the Presidential immunity doctrine and the Supremacy Clause. Even if the Court were to wrongly deny the new interests-of-justice motion, which it should not do, the appropriate forum for any additional proceedings must first be resolved in President Trump’s removal appeal, *People v. Trump*, 24-2299-cv (2d Cir. 2024). Moving forward in the absence of a ruling by the Second Circuit “would defeat the very purpose of permitting an appeal,” as Congress has done in 28 U.S.C. § 1447(d). *Forty Six Hundred LLC v. Cadence Educ., LLC*, 15 F.4th 70, 79 (1st Cir. 2021). That wrongful approach would be particularly problematic given the “question[s] of lasting significance” at issue. *Trump*, 603 U.S. at 641. To the extent the Court plans to deny any aspect of the relief requested herein, including by moving forward with other rulings, President Trump requests that the Court stay the implementation of the ruling so that President Trump has adequate time to pursue appellate review.

On November 5, 2024, the Nation’s People issued a mandate that supersedes the political motivations of DANY’s “People.” This case must be immediately dismissed.

Respectfully Submitted,

/s/ Todd Blanche / Emil Bove

Todd Blanche

Emil Bove

Blanche Law PLLC

Attorneys for President Donald J. Trump

Cc: Matthew Colangelo
Susan Hoffinger
Rebecca Mangold
Joshua Steinglass
Steven Wu
(Via Email)

AFFIDAVIT OF SERVICE

I, Gedalia M. Stern, an attorney admitted to practice in the State of New York and counsel for defendant Donald J. Trump, hereby affirm, under the penalties of perjury, that my co-counsel in this case, Emil Bove, on November 19, 2024, served President Trump's letter-motion seeking dismissal of the indictment, by causing a true copy of the same to be emailed to ADA Susan Hoffinger and ADA Matthew Colangelo.

A handwritten signature in black ink, appearing to read "Gedalia Stern", is written over a horizontal line.

Gedalia Stern

Appendix H

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

THE PEOPLE OF THE STATE OF NEW YORK

- against -

DONALD J. TRUMP,

Defendant.

DECISION AND ORDER

Ind. No. 71543/2023

HON. JUAN M. MERCHAN A.J.S.C.:

On November 19, 2024, this Court received separate submissions from Defendant and the District Attorney of New York County ("DANY" or the "PEOPLE"), seeking various forms of relief in connection with the above-captioned matter. The respective applications are decided as follows:

IT IS HEREBY ORDERED, that Defendant's request for leave to file a motion to dismiss pursuant to Criminal Procedure Law ("CPL") § 210.40 is GRANTED; and it is further

ORDERED that the joint request for a motion schedule is GRANTED. Defendant's motion is due by the close of business Monday, December 2, 2024. The People's response is due by the close of business Monday, December 9, 2024. The Court will not accept reply briefs; and it is further

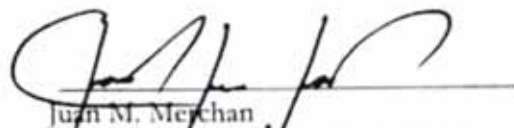
ORDERED that the application to stay decision on Defendant's CPL § 330.30(1) motion is GRANTED pending receipt of the papers from all parties submitted in accordance with the motion schedule noted above; and it is further

ORDERED that the joint application for a stay of sentencing is GRANTED to the extent that the November 26, 2024, date is adjourned.

The above constitutes the Decision and Order of the Court.

November 22, 2024
New York, New York

NOV 22 2024


Juan M. Merchan
Acting Justice of the Supreme Court
Judge of the Court of Claims

JUAN J. MERCHAN

Appendix I

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

PART 59 DEC 19 2024

THE PEOPLE OF THE STATE OF NEW
YORK

-against-

DONALD J. TRUMP,

Defendant.

Ind. No. 71543-23

**PEOPLE'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

Alvin L. Bragg, Jr.
District Attorney
New York County
One Hogan Place
New York, NY 10013

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INTRODUCTION

This Court should reject defendant's motion to "immediately" dismiss the indictment and vacate the jury's guilty verdict based on the outcome of the recent presidential election. Def.'s Mem. 1.¹ There are no grounds for such relief now, prior to defendant's inauguration, because President-elect immunity does not exist. And even after the inauguration, defendant's temporary immunity as the sitting President will still not justify the extreme remedy of discarding the jury's unanimous guilty verdict and wiping out the already-completed phases of this criminal proceeding. As defendant does not dispute, the 34 felonies of which he stands convicted involved purely unofficial conduct, not any official presidential acts. "[F]or a President's unofficial acts, there is no immunity." *Trump v. United States*, 603 U.S. 593, 615 (2024). At most, defendant should receive temporary accommodations during his presidency to prevent this criminal case from meaningfully interfering with his official decision-making. But multiple accommodations well short of dismissal and vacatur would satisfy that objective, including a stay of proceedings during his term in office if judgment has not been entered before presidential immunity attaches. By contrast, defendant's requested relief would go well beyond what is necessary to protect the presidency and would subvert the compelling public interest in preserving the jury's unanimous verdict and upholding the rule of law.

Defendant's remaining arguments do not come close to supporting dismissal and vacatur. The vast majority of defendant's claims involve objections that this Court and others have repeatedly rejected, including defendant's persistent and baseless attacks on the integrity of this Court and on the People's conduct during this prosecution. Defendant provides no basis

¹ Citations to "Def.'s Mem. ___" are to the December 2, 2024 memorandum of law supporting defendant's motion to dismiss.

whatsoever for this Court to revisit these rewarmed complaints. Instead, the overwhelming evidence of defendant's guilt and the critical importance of preserving public confidence in the criminal justice system, among many other factors, weigh heavily against dismissal. This Court should accordingly deny defendant's motion.

PROCEDURAL BACKGROUND

Defendant was indicted by the grand jury on March 30, 2023, on 34 felony counts of falsifying business records to conceal a criminal conspiracy to undermine the integrity of the 2016 presidential election. He was arraigned on April 4, 2023. Trial began with jury selection on April 15, 2024. Defendant was convicted by the jury on May 30, 2024, of all 34 felony counts. Tr. 4947-4952; *see* CPL §§ 1.20(12); 1.20(13); 310.40(1); 310.80. The Court then adjourned the matter for sentence to July 11, 2024. *See* Tr. 4957.

On July 1, 2024, the Supreme Court decided *Trump v. United States*, 603 U.S. 593 (2024), regarding the scope of presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office. *Id.* at 601-02. That day, defendant sought leave to file a motion to set aside the jury's verdict pursuant to CPL § 330.30 based on the Supreme Court's immunity ruling. On July 2, 2024, the Court granted defendant's motion; set a July 10 deadline for defendant's CPL § 330.30 motion and a July 24 deadline for the People's opposition; set September 6, 2024 as the date for decision on the motion; and adjourned the sentencing hearing to September 18, 2024, "if such is still necessary." *See* Order (July 2, 2024). Defendant's CPL § 330.30 motion has been fully briefed since July 31, 2024.

On July 31, 2024, defendant filed a motion seeking the Court's recusal and requested that the motion be resolved "prior to the resolution of the pending Presidential immunity motion." Def.'s Ltr. 1 (July 31, 2024). The People opposed recusal on August 1. *See* People's Ltr. (Aug. 1, 2024). On August 5, 2024, the Court entered a new scheduling order setting August 11, 2024 as

the date for decision on the recusal motion; setting September 16 as the date for decision on the CPL § 330.30 motion; and retaining the September 18 appearance for “the imposition of sentence or other proceedings as appropriate.” Order 2 (Aug. 5, 2024). The Court denied the recusal motion on August 13, 2024. *See* Decision on Def.’s Mot. for Recusal (Aug. 13, 2024).

On August 14, 2024, defendant moved to adjourn the sentencing “until after the 2024 Presidential election” and to allow “adequate time to assess and pursue state and federal appellate options” in response to any adverse ruling on the pending CPL § 330.30 motion. Def.’s Ltr. (Aug. 14, 2024). That motion argued, among other things, that any adverse ruling on defendant’s CPL § 330.30 motion would be immediately appealable before sentence because immunity questions must be resolved as early as possible in any litigation. *See id.* On August 16, the People filed a response stating that the People “defer to the Court on the appropriate post-trial schedule that allows for adequate time to adjudicate defendant’s CPL § 330.30 motion while also pronouncing sentence ‘without unreasonable delay.’” People’s Ltr. (Aug. 16, 2024) (quoting CPL § 380.30(1)).

On August 29, 2024, while defendant’s motion to adjourn was pending with this Court, defendant purported to file a second notice of removal in federal court.² *See* Def.’s Second Notice of Removal, *New York v. Trump*, No. 23 Civ. 3773, ECF No. 46 (S.D.N.Y. Aug. 29, 2024). That filing was rejected for failure to seek leave pursuant to 28 U.S.C. § 1455(b)(1), and on September 3 defendant filed a motion for leave to file a second removal notice. *See* Def.’s Mot. for Leave to

² Defendant filed his first notice of removal pursuant to 28 U.S.C. § 1442(a)(1) on May 4, 2023. The district court held an evidentiary hearing on June 27, 2023, and remanded the matter to this Court on July 19, 2023. *See New York v. Trump*, 683 F. Supp. 3d 334, 342, 345-50 (S.D.N.Y. 2023) (rejecting defendant’s claim that the charges were for or related to any action he took under color of federal office, and holding that defendant had not identified any colorable federal defense to the charges, including on the basis of presidential immunity). Defendant filed a notice of appeal challenging the district court’s decision, but he then moved to dismiss his appeal, which the Second Circuit granted on November 15, 2023. *See People v. Trump*, No. 23-1085, 2023 WL 9380793 (2d Cir. Nov. 15, 2023).

File, *New York v. Trump*, No. 23 Civ. 3773, ECF No. 49 (S.D.N.Y. Sept. 3, 2024). The district court denied that motion on September 3. *See New York v. Trump*, No. 23 Civ. 3773, 2024 WL 4026026 (S.D.N.Y. Sept. 3, 2024). Defendant sought a stay from the district court, which the district court denied on September 6. *See Order & Opinion Denying Mot. for Stay, New York v. Trump*, No. 23 Civ. 3773, ECF No. 54 (S.D.N.Y. Sept. 6, 2024). Defendant also filed a Second Circuit appeal and motion for stay and emergency stay on September 4, 2024.

While defendant's Second Circuit stay motion was pending, on September 6, 2024, this Court granted defendant's August 14 motion to adjourn. *See Order* (Sept. 6, 2024). The Court noted that the original sentencing date of July 11 was necessarily delayed when, on July 1, the Supreme Court "rendered a historic and intervening decision in *Trump v. United States* . . . which this Court must interpret and apply as appropriate." *Id.* at 2. The Court then explained that because "[t]he public's confidence in the integrity of our judicial system demands a sentencing hearing that is entirely focused on the verdict of the jury and the weighing of aggravating and mitigating factors free from distraction or distortion," and because "[t]he Court is a fair, impartial, and apolitical institution," the Court would grant a further adjournment to "avoid any appearance—however unwarranted—that the proceeding has been affected by or seeks to affect the approaching Presidential election in which the Defendant is a candidate." *Id.* at 3. The Court set a new schedule ordering that decision on defendant's CPL § 330.30 motion would be handed down off-calendar on November 12, 2024, and adjourning sentencing (if necessary) to November 26, 2024. *Id.* at 4.

On September 12, 2024, the Second Circuit denied defendant's motion for a stay "[i]n light of the state court's adjournment of sentencing until November 26, 2024." *Order Denying Stay, New York v. Trump*, No. 24-2299, Dkt. 31.1 (2d Cir. Sept. 12, 2024). Defendant then filed his appellate brief on the merits on October 14, 2024, and the People's response brief is due January

13, 2025. *See* Br. for Def.-Appellant, *New York v. Trump*, No. 24-2299, Dkt. 47.1 (2d Cir. Oct. 14, 2024); Scheduling Order, *New York v. Trump*, No. 24-2299, Dkt. 55.1 (2d Cir. Oct. 22, 2024)

As a result of the election held on November 5, 2024, defendant's inauguration as President will occur on January 20, 2025. In light of that development, defendant asked the District Attorney by letter dated November 8 to dismiss this prosecution and consent to a stay of these proceedings pending consideration of his dismissal request. The People asked the Court for an adjournment to evaluate that request, which defendant joined, and which the Court granted on November 10. *See* Email from Mr. Suhovsky (Nov. 10, 2024). The People then advised the Court on November 19 that after carefully evaluating defendant's request, the People believed the appropriate course was for the Court to set a briefing schedule for defendant to present his arguments for dismissal to the Court, and for the Court to adjourn further proceedings pending resolution of that motion. People's Ltr. 1 (Nov. 19, 2024). That day, defendant filed a premotion letter "to request permission to file a motion to dismiss . . . pursuant to CPL § 210.40." Def.'s Ltr. (Nov. 19, 2024).

By order dated November 22, 2024, the Court granted defendant's motion for leave to file a motion to dismiss pursuant to CPL § 210.40; stayed decision on defendant's fully-briefed CPL § 330.30 motion "pending receipt of the papers from all parties submitted in accordance with the motion schedule" for defendant's CPL § 210.40 motion; and stayed sentencing "to the extent that the November 26, 2024, date is adjourned." Decision & Order (Nov. 22, 2024). Defendant then filed his motion to dismiss on December 2, 2024.

ARGUMENT

I. Legal standard for dismissal in the interest of justice under CPL § 210.40.

The law sets a high bar for dismissal of an indictment in the interest of justice. CPL § 210.40 authorizes dismissal only when "some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment or count would

constitute or result in injustice.” *Id.* § 210.40(1). In determining whether the statutory standard for dismissal is met, the Court “must, to the extent applicable, examine and consider, individually and collectively,” the following factors:

- (a) the seriousness and circumstances of the offense;
- (b) the extent of harm caused by the offense;
- (c) the evidence of guilt, whether admissible or inadmissible at trial;
- (d) the history, character and condition of the defendant;
- (e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;
- (f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
- (g) the impact of a dismissal upon the confidence of the public in the criminal justice system;
- (h) the impact of a dismissal on the safety or welfare of the community;
- (i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;
- (j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose.

Id. In considering these factors (the “Clayton factors,” see *People v. Clayton*, 41 A.D.2d 204 (2d Dep’t 1973)), the Court must “strike a sensitive balance” between the interests of the defendant and the State. *People v. Pittman*, 228 A.D.2d 225, 226 (1st Dep’t 1996) (citing *Clayton*, 41 A.D.2d at 208). Although “the statute does not compel catechistic on-the-record discussion of items (a) through (j), . . . the need to show that the ultimate reasons given for the dismissal are both real and compelling almost inevitably will mean that one or more of the statutory criteria, even if only the catchall (j), will yield to ready identification.” *People v. Rickert*, 58 N.Y.2d 122, 128 (1983).

Dismissal in the interest of justice is committed to the trial court’s discretion, but “[t]he power to grant such relief is not absolute.” *People v. Harmon*, 181 A.D.2d 34, 36 (1st Dep’t 1992).

Rather, appellate courts repeatedly caution that dismissal under CPL § 210.40 is an “extraordinary remedy” that “should be exercised sparingly.” *People v. Hernandez*, 198 A.D.3d 545, 545 (1st Dep’t 2021). Dismissal should be reserved for “that rare and unusual case where it cries out for fundamental justice beyond the confines of conventional considerations.” *People v. Williams*, 145 A.D.3d 100, 107 (1st Dep’t 2016) (quoting *Harmon*, 181 A.D.2d at 36); *see also People v. Keith R.*, 95 A.D.3d 65, 67 (1st Dep’t 2012). Motions to dismiss in the interest of justice are therefore “granted only in exceptional circumstances,” and “trial courts granting such motions are routinely reversed and reminded by appellate tribunals that their discretion is ‘not absolute.’” Lawrence K. Marks et al., *New York Pretrial Criminal Procedure* § 5:27 at 459 & nn.94-96 (7 West’s N.Y. Prac. Series, 2d ed. 2007 & Supp. 2024) (citing cases).

Dismissal in furtherance of justice is “neither an acquittal of the charges nor any determination of the merits. Rather, it leaves the question of guilt or innocence unanswered.” *Ryan v. N.Y. Tel. Co.*, 62 N.Y.2d 494, 504-05 (1984) (citing *Rickert*, 58 N.Y.2d at 126, and *Clayton*, 41 A.D.2d at 206-07).

Because defendant’s request for leave to seek dismissal in the interest of justice was based on his claims of presidential and pre-presidential immunity arising on and after November 5, 2024, *see* Def.’s Ltr. 1-2 (Nov. 19, 2024), and because—as described further below—the remaining arguments in defendant’s December 2 motion to dismiss largely rehash failed arguments that he has presented unsuccessfully to this and other courts many times, the People’s opposition begins by addressing defendant’s claims of immunity. *See infra* Parts II, III; CPL § 210.40(1)(j).³ The People then address the remaining *Clayton* factors. *See infra* Part IV; CPL §§ 210.40(1)(a)-(i).

³ Defendant characterizes his immunity arguments as a basis for dismissal pursuant to CPL § 210.20(1)(h). That motion is time-barred for the reasons described in Part V below, but the Court

II. Defendant does not currently have immunity as President-elect.

The Court may readily reject defendant's argument that his "status as President-elect" requires immediate dismissal under Article II or the Supremacy Clause. Def.'s Mem. 35, 41-43.

A. Presidential immunity under Article II does not extend to the President-elect.

As an initial matter, presidential immunity under Article II of the Constitution does not extend to the President-elect. Article II vests the entirety of the executive power in the incumbent President, *see Trump*, 603 U.S. at 607 (quoting U.S. Const. art. II, § 1, cl. 1), and the Supreme Court has long recognized that "only the incumbent is charged with performance of the executive duty under the Constitution." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 448 (1977). The President-elect is, by definition, not yet the President. The President-elect therefore does not perform any Article II functions under the Constitution, and there are no Article II functions that would be burdened by ordinary criminal process involving the President-elect.

The rationales that support presidential immunity from prosecution for official conduct also do not apply to the President-elect. "The 'justifying purposes'" of presidential immunity for official actions "are to ensure that the President can undertake his constitutionally designated functions effectively, free from undue pressures or distortions." *Trump*, 603 U.S. at 615-16 (quoting *Clinton v. Jones*, 520 U.S. 681, 694 & n.19 (1997), and *Nixon v. Fitzgerald*, 457 U.S. 731, 755 (1982)). But only the incumbent President has any "constitutionally designated functions," *id.*, *see Nixon*, 433 U.S. at 448; and because the President-elect is not the President, there is no risk that "the President's decisionmaking is . . . distorted" by a pre-existing criminal case against a defendant who later becomes the President-elect. *Trump*, 603 U.S. at 615.

may fully consider defendant's immunity arguments pursuant to CPL § 210.40(1)(j) as part of defendant's *Clayton* motion.

Finally, the criminal charges for which defendant was convicted in this case stem exclusively from defendant's "unofficial acts"—conduct for which "there is no immunity" under Article II in any event. *Id.* Defendant's request that this Court create a doctrine of pre-presidential immunity under Article II that attaches *before* a President-elect becomes President—and that applies where the defendant's criminal conduct is wholly based on unofficial, not official, acts—has no grounding in Article II of the Constitution.

B. Intergovernmental immunity under the Supremacy Clause does not apply.

Nor is defendant correct that the demands of the presidential transition immunize him from all state criminal process during the period before his inauguration. Def.'s Mem. 33-34, 41-43.

Defendant appears to be making an argument based on the Supremacy Clause doctrine of intergovernmental immunity, which provides that a state may not "regulate[] the United States directly or discriminate[] against the Federal Government or those with whom it deals." *North Dakota v. United States*, 495 U.S. 423, 435 (1990); *see also M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) ("The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."). This rule "finds its reason in the principle that the States may not directly obstruct the activities of the Federal Government." *North Dakota*, 495 U.S. at 437-38. But a state "does not discriminate against the Federal Government and those with whom it deals unless it treats someone else better than it treats them." *Washington v. United States*, 460 U.S. 536, 544-45 (1983). Expecting a criminal defendant who has become the President-elect to comply with pre-existing court deadlines—just as a state criminal court expects of every other criminal defendant—does not discriminate against the federal government or "treat[] someone else better than it treats them." *Id.*

Nor would the limited remaining steps in this criminal case “directly obstruct” the federal government in any event. *North Dakota*, 495 U.S. at 437-38. Trial ended more than six months ago with the jury’s guilty verdict on May 30, 2024, so there is no risk that a time-consuming trial would require defendant’s full-time presence in court and unduly burden the presidential transition process. Indeed, the only remaining steps before sentencing are for this Court to adjudicate defendant’s two pending motions to dismiss under CPL §§ 210.40 and 330.30. Having filed those motions to dismiss and then sought repeated adjournments of sentencing to permit their determination by this Court, it is particularly brazen for defendant to argue that the Supremacy Clause bars the Court from taking any action on the motions defendant himself filed.

Defendant cites a range of authorities, including the Presidential Transition Act and internal Justice Department guidance on the reimbursement of transition-related expenses, for the proposition that the period between an election and inauguration is important to the orderly transfer of executive power. Def.’s Mem. 32, 41-43. The People acknowledge the importance of an orderly executive transition and the peaceful transfer of power, but those interests do not require the extraordinary step of abating post-trial motion practice in a pre-existing criminal case. The Supreme Court has repeatedly recognized that routine judicial process such as that imposed by a criminal subpoena or civil suit imposes only a limited time burden that would not create a constitutionally-impermissible distraction for the President himself. *See Trump v. Vance*, 591 U.S. 786, 802 (2020) (“Just as a ‘properly managed’ civil suit is generally ‘unlikely to occupy any substantial amount of’ a President’s time or attention, two centuries of experience confirm that a properly tailored criminal subpoena will not normally hamper the performance of the President’s constitutional duties.” (quoting *Clinton*, 520 U.S. at 702)); *see also id.* at 793-99 (surveying history of criminal process involving a sitting President). Given those holdings, this Court’s adjudication

off calendar of defendant's fully-briefed motions—during the period when defendant is the President-elect and not yet President—cannot be said to “directly obstruct the activities of the Federal Government.” *North Dakota*, 495 U.S. at 437-38.

III. Defendant's forthcoming presidential immunity does not require dismissal.

In addition to relying on the (nonexistent) theory of pre-presidential immunity, defendant also asserts that, upon his inauguration on January 20, 2025, his status as the President will require dismissal of this case. Def.'s Mem. 35-41. This claim is technically not yet ripe, since any presidential immunity will not exist until defendant is actually inaugurated. The People nonetheless address the impact of defendant's forthcoming presidential immunity now given the imminence of defendant's inauguration.

Defendant is wrong to argue that presidential immunity will require the dismissal and vacatur of the jury's verdict here once he is inaugurated. His sweeping arguments disregard the careful limits that the Supreme Court and the Department of Justice's Office of Legal Counsel (OLC) have placed on presidential immunity, as well as critical distinctions between this case and others where immunity has been raised.⁴ See *infra* Parts III.A, III.B, III.C.

To be sure, the People do not dispute that presidential immunity requires accommodation during a President's time in office. But the extreme remedy of dismissing the indictment and vacating the jury verdict is not warranted in light of multiple alternative accommodations that would fully address the concerns raised by presidential immunity. For example, if judgment has not been entered before presidential immunity attaches, the Court could at that point stay further proceedings for the duration of defendant's presidency, which—as discussed below—would

⁴ “OLC's views are not binding, nor are they entitled to deference”; rather, courts consider OLC's opinions “for their persuasive value.” *Ctr. for Biological Diversity v. U.S. Int'l Dev. Fin. Corp.*, 77 F.4th 679, 689 (D.C. Cir. 2023).

appropriately balance the competing interests here, would not run afoul of Article II immunity, and would not impair defendant's rights to a speedy trial or prompt sentencing. *See infra* Part III.D.1. If the Court concludes that even this approach would impermissibly interfere with the presidency, the Court could instead terminate these proceedings with a notation that the jury verdict has not been vacated and the indictment has not been dismissed, *see infra* Part III.D.2, or adopt limitations on any future sentencing that would minimize any impact of this pending criminal case, *see infra* Part III.D.3. Given the availability of these alternatives to dismissal, this Court should deny defendant's request to dismiss the indictment and vacate the jury verdict.

A. For unofficial conduct, presidential immunity is not a permanent exemption from criminal accountability, but only a temporary immunity that goes no further than necessary to protect official decision-making.

Contrary to some of defendant's characterizations, presidential immunity has never been held to be an absolute bar to all criminal or civil liability for a sitting President "because he is the President." *Trump*, 603 U.S. at 615. "The President is not above the law." *Id.* at 642; *see also Zervos v. Trump*, 171 A.D.3d 110, 121 (1st Dep't 2019) ("[T]he President is still a person, and he is not above the law."). Accordingly, the Supreme Court has been careful to limit presidential immunity to serve its "justifying purpose[]": namely, "to ensure that the President can undertake his constitutionally designated functions effectively, free from undue pressures or distortions." *Trump*, 603 U.S. at 615.

The fact that defendant will become the sitting President is thus not dispositive. Rather, the appropriate analysis involves a balancing of competing public interests. The first step is a *practical* inquiry into whether further judicial process will in fact meaningfully interfere with the President's official functions. *See* Memorandum from Randolph D. Moss, Assistant Att'y Gen., Office of Legal Counsel, *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. OLC 222, 244-45 (Oct. 16, 2000) ("OLC Mem."), at 2000 WL 33711291 ("the proper inquiry

focuses on the extent to which [a criminal proceeding] prevents the Executive Branch from accomplishing its constitutionally assigned functions”) (quotation marks omitted). Even when there is such interference, the next step of the balancing analysis considers whether there are “legitimate governmental objectives” that may justify further judicial proceedings nonetheless, including “the important interest in maintaining the ‘rule of law,’” *id.* at 245, 257, and the heightened public interest in “criminal prosecutions,” *Nixon*, 457 U.S. at 754 n.37.

Applying this practical focus, the Supreme Court and OLC have limited the scope of presidential immunity in several ways that defendant ignores but that are critical to this case. First, the Supreme Court has drawn a sharp distinction between official and unofficial conduct. For official acts—i.e., actions performed under the President’s official authority—the President has absolute immunity from civil liability, *Nixon*, 457 U.S. at 755-56, and at least presumptive immunity from criminal liability, *Trump*, 603 U.S. at 616. But “[a]s for a President’s unofficial acts, there is no immunity”—whether from criminal liability, *id.* at 615, or from civil liability, *Clinton*, 520 U.S. at 695.

This distinction recognizes the radically different impact that criminal liability has on the President depending on the basis for such liability. “[L]iability predicated on his official acts” threatens to “distract a President from his public duties.” *Fitzgerald*, 457 U.S. at 753. But defendant’s claim that the same “unacceptable diversions and distractions” exist for unofficial conduct, Def.’s Mem. 36, is incorrect. “Although Presidential immunity is required for *official* actions to ensure that the President’s decisionmaking is not distorted by the threat of future litigation stemming from those actions, that concern does not support immunity for *unofficial* conduct.” *Trump*, 603 U.S. at 615. Put simply, potential criminal liability for unofficial conduct—which by definition has no relationship to the President’s formal powers—does not lead to the

same “diversion of the President’s attention during the decisionmaking process” because such liability would not turn on “any particular official decision.” *Clinton*, 520 U.S. at 694 n.19. Indeed, the lack of any protection for unofficial conduct is so clear that the Supreme Court has held that a President can even be “subject to criminal prosecution for unofficial acts committed *while in office*.” *Trump*, 603 U.S. at 606 (emphasis added).

Here, as defendant does not dispute, the charges in this case all involve purely personal and unofficial conduct, rather than official presidential acts. The U.S. District Court for the Southern District of New York—in addressing the closely related question of whether the charged conduct involved “any act under color of office” for purposes of federal-officer removal, 28 U.S.C. § 1442(a)(1)—rightly concluded that the conduct charged “was purely a personal item of the President—a cover-up of an embarrassing event. Hush money paid to an adult film star is not related to a President’s official acts. It does not reflect in any way the color of the President’s official duties.” *New York v. Trump*, 683 F. Supp. 3d 334, 345 (S.D.N.Y. 2023). Criminal liability in this case thus does not, on its own, threaten the type of interference with official decision-making that would trigger the concerns animating presidential immunity.

Second, because immunity is concerned only with protecting the President’s ability to exercise his official functions, any immunity from criminal process is necessarily limited in duration: as OLC has explained, it is “a temporary immunity from such criminal process while the President remains in office.” OLC Mem. 238. This temporal restriction means that there is no immunity before a President is inaugurated. *See supra* Part II. And it also means that there is no immunity after a President leaves office. “Recognizing an immunity from prosecution for a sitting President would not preclude such prosecution once the President’s term is over or he is otherwise

removed from office by resignation or impeachment.” OLC Mem. 255; *see also Vance*, 591 U.S. at 803 (holding that a “sitting President” may be charged “after the completion of his term”).

The importance of preserving a President’s ability to be held criminally accountable after the expiration of his term has led the Supreme Court to reject applications of presidential immunity that would “forever thwart[] the public’s interest in enforcing its criminal laws.” OLC Mem. 255 n.32. Specifically, in *United States v. Nixon*, 418 U.S. 683 (1974), the Court rejected a sweeping claim of absolute immunity that would have allowed a sitting President to disregard a criminal subpoena probing into his official acts. Quashing the subpoena there, the Court held, would mean that a pending “criminal prosecution may be totally frustrated.” *Id.* at 713. Such permanent interference with the criminal process was an intolerable result given that presidential immunity is supposed to protect a President’s official decision-making only while in office, not to forever insulate the President from criminal liability—especially for his unofficial conduct.

Third, as *Nixon* demonstrates, the Supreme Court has consistently allowed the criminal process to go forward during a sitting President’s term, despite claims that doing so would impede the President’s official functions. *Nixon* thus found no categorical barrier to requiring a sitting President to respond to a criminal subpoena in a pending prosecution where the President was an unindicted co-conspirator based on his official acts. *Id.* at 687. And in *Vance*, the Court similarly held that this Office could also compel a sitting President to respond to a criminal subpoena regarding his unofficial acts. 591 U.S. at 810.

As particularly relevant here, *Vance* rejected the argument that the mere “prospect of [the President’s] future criminal *liability*” was a reason to extend immunity to block the state criminal subpoena at issue there, “even when the President is under investigation.” *Id.* at 803. And in response to defendant’s argument in that case that the criminal process there “would necessarily

divert the Chief Executive from his duties,” the Court explained that it had already “expressly rejected immunity based on distraction alone” in *Clinton* and other cases. *Id.* at 801-02. Future criminal liability alone thus does not “render [the President] unduly cautious in the discharge of his official duties,” *Fitzgerald*, 457 U.S. at 752 n.32.

Beyond what the Supreme Court has held, OLC has further opined that “the indictment and criminal prosecution of a sitting President would unduly interfere with the ability of the executive branch to perform its constitutionally assigned duties.” OLC Mem. 260. But with the exception of one passage (which is discussed below, *see infra* at 26-27), OLC’s conclusion rested on the assumption that any “criminal prosecution” would involve the imposition of active obligations on the sitting President. For example, OLC identified “[t]hree types of burdens” that could follow from criminal prosecution: “the *actual imposition* of a criminal sentence of incarceration” (not, as defendant rephrases it, merely “potential incarceration,” Def.’s Mem. 38); stigma from “the *initiation* of criminal proceedings”; and the burdens of “*assisting* in the preparation of a defense.” OLC Mem. 246 (emphasis added). Only such concrete compulsions forcing a President to participate in active criminal proceedings during his tenure would risk causing “so serious a physical interference with the President’s performance of his official duties that it would amount to an incapacitation.” *Id.* at 230 (quotation marks omitted).

B. Defendant’s request for dismissal and vacatur ignores the limitations of presidential immunity for unofficial conduct.

Neither the Supreme Court nor OLC has addressed the impact of presidential immunity in the precise circumstances of this case: a state prosecution, based on crimes consisting wholly of unofficial acts, where a jury has already found the defendant guilty beyond a reasonable doubt.⁵

⁵ Defendant wrongly suggests, *e.g.*, Def.’s Mem. 37, that OLC’s “categorical rule against indictment or criminal prosecution,” OLC Mem. 254, was meant to cover criminal proceedings

The principles outlined above, however, demonstrate that defendant's request to vacate the jury's verdict and dismiss the indictment goes far beyond the well-recognized limitations of presidential immunity.⁶

First, defendant's requested relief here would effectively give him immunity *beyond* his presidential term for his *unofficial* criminal conduct—in stark conflict with the Supreme Court's repeated holding that there is no immunity at all for unofficial conduct, and with OLC's recognition that any presidential immunity in this context is necessarily temporary. Dismissal and vacatur would effectively extend the period of defendant's immunity to a time *before* his presidency, by wiping out the effects of an indictment and jury verdict that took place before he was even reelected President. In addition, outright dismissal would have persistent consequences *after* the presidency, thereby "thwart[ing] the public's interest in enforcing its criminal laws." OLC Mem. 255 n.32. In effect, dismissal would convert "a temporary immunity from . . . criminal process while the President remains in office," OLC Mem. 238, into an exemption from criminal charges for unofficial conduct that would extend beyond the duration of his presidential term—and would not just post-date his term but *pre-date* it as well. Such an outcome would be inconsistent not only

regardless of their procedural posture. But OLC's approach was "categorical" because it was indifferent to the nature or gravity of the "particular criminal charge." *Id.* By contrast, the procedural posture of a case plainly did make a difference: hence OLC's separate "[b]alancing [of] competing concerns" in the distinct scenario where a President is indicted but the case is held in abeyance, *id.* at 259, and the Supreme Court's subsequent recognition that no immunity applies at the earlier procedural stage of a state criminal subpoena, *Vance*, 591 U.S. at 810-11; *compare id.* at 836 (Alito, J., dissenting) (asserting that search warrants, subpoenas, and indictments are all examples of "a State's exercise of its criminal law enforcement powers").

⁶ Given the unique posture of this case, defendant is simply wrong to assert that the People already "conceded" the issue here in *Trump v. Vance*. Def.'s Mem. 3-4, 45-46. As the full context of defendant's carefully selected quotations show, the People were referring to prosecutions for a President's "official acts," none of which are the basis of the criminal charges here; and with "real burden[s]" on a President's decision-making rather than "a speculative mental distraction claim," which is the principal claim that defendant raises here. *See Ex. 67* at 54, 63.

with Supreme Court precedent and OLC's analysis but also with defendant's own concession in *United States v. Trump* that "the president is subject to prosecution for all personal acts, just like every other American for personal acts." Tr. of Oral Argument 51-52, *Trump v. United States*, No. 23-939 (Apr. 25, 2024).

Second, the Supreme Court's recent conclusion that immunity for a President's official acts was necessary "to ensure that the President can undertake his constitutionally designated functions effectively, free from undue pressures or distortions," *Trump*, 603 U.S. at 615, does not warrant dismissal here. The Court's concern in that case was the overlap between the President's official duties and future criminal liability; given that overlap, a "President inclined to take one course of action based on the public interest may instead opt for another, apprehensive that criminal penalties may befall him upon his departure from office." *Id.* at 613. But there is no similar nexus between defendant's future presidential duties and the criminal charges and convictions here because falsifying business records to cover up personal payments to an adult film star "is not related to a President's official acts." *Trump*, 683 F. Supp. 3d at 345. Given the unofficial conduct underlying the criminal charges and convictions in this case, the mere pendency of this proceeding will not prevent defendant from "perform[ing] [his] designated functions effectively without fear that a particular decision may give rise to personal liability." *Clinton*, 520 U.S. at 693.⁷

The advanced stage of the criminal proceedings here also diminishes any interference with the President's official role. In discussing "the burdens of criminal defense," OLC emphasized the many pretrial and trial proceedings that "would require the President's personal attention and attendance at specific times and places"—including, critically, "his personal appearance

⁷ To the extent defendant is concerned that any future sentencing proceeding may be affected by his conduct during his term in office, this Court may adopt a number of remedies short of dismissal to ameliorate that concern. See *infra* Part III.D.

throughout the duration of [the] criminal trial” in order to provide an effective defense. OLC Mem. 253. Here, by contrast, essentially all of those proceedings have already taken place since the jury trial is complete. With the exception of sentencing—which could be adjourned if judgment is not entered before immunity attaches, *see infra* Part III.D.1—there are no more proceedings where defendant would be compelled to personally appear in a manner that would remove him from his presidential duties altogether. And to the extent defendant chooses to continue litigating issues related to his criminal conviction, such as pursuing motion practice in this Court or interlocutory or final appeals, there is no reason to believe that “flexibility in scheduling” would be unable to accommodate defendant’s official duties. OLC Mem. 252; *Clinton*, 520 U.S. at 691-92; *cf.* 22 N.Y.C.R.R. § 1250.9(a)-(b) (allowing multiple extensions beyond the default six months to perfect an appeal). Defendant is thus simply wrong to assert that this pending criminal proceeding, given its advanced stage, will mandate undue expenditure of his “personal time and energy.” Def.’s Mem. 39.

Despite the absence of any concrete interference with defendant’s official presidential functions, defendant claims that, under OLC’s analysis, “the stigma associated with an ongoing criminal prosecution” itself imposes a cognizable burden. Def.’s Mem. 38. But OLC was focused on “the public stigma and opprobrium occasioned by the *initiation* of criminal proceedings.” OLC Mem. 246 (emphasis added); *see also id.* at 249 (“stigma arising . . . from the initiation of a criminal prosecution”). In other words, OLC’s concern was with *additional* criminal process during a President’s time in office that would create—or, at minimum, amplify—“public stigma and opprobrium.” *Id.* at 246. But nothing in OLC’s analysis suggested that presidential immunity would allow a sitting President to reach back in time to vacate *preexisting* sources of such stigma that originated at a time when no presidential immunity existed. Here, any stigma that defendant

faces from this criminal proceeding already manifested when he was indicted and found guilty by a jury of his peers. *See Herrera v. Collins*, 506 U.S. 390, 399 (1993) (“Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears.”). Allowing a President’s “temporary immunity,” OLC Mem. 238, to retroactively invalidate such pre-existing sources of stigma would lead to absurd results: a President could argue, for example, that he has a right to vacate long-finalized criminal convictions (or even civil liability for, say, defamation or financial fraud) because such convictions or judgments would subject him to public criticism. Neither OLC nor the Supreme Court has ever endorsed such a far-reaching application of presidential immunity.

Defendant’s only remaining argument is that—even if he is not subject to any immediate obligations in this criminal proceeding during his presidency—the mere prospect of returning to this Court for sentencing after his presidency would “create[] unconstitutional and unacceptable diversions and distractions.” Def.’s Mem. 36. As explained above, however, the Supreme Court has already rejected the idea that this defendant’s fear of future criminal liability based on his unofficial conduct warrants any special defense from criminal process during his presidency. *Vance*, 591 U.S. at 810. And the Court did so despite the fact that, at the preliminary stage of a criminal investigation, a defendant likely feels *greater* apprehension about the future actions of a prosecutor than during subsequent stages. After all, during an investigation, a defendant will not know whether he is definitively a target, what charges may or may not be brought, or what the full range of criminal penalties might be.⁸ Yet the Supreme Court in *Vance* squarely held that no

⁸ Defendant distorts the record by claiming that the People’s accurate description of an early criminal investigation somehow included “a false suggestion” that defendant “was not the target of their investigation.” Def.’s Mem. 48. The People made no such representation. Rather, as the People’s Supreme Court brief and the entirety of the cited footnote from the dissenting opinion

distraction or influence on official decision-making from such uncertainty warranted insulating the President from a criminal investigation during his term or from criminal prosecution afterward. *Id.* at 803. That conclusion applies all the more forcefully here, when the criminal case has already been narrowed by the proceedings that have already taken place. In other words, unlike at the investigation stage, nothing that defendant does during his presidency could possibly influence the charges, the evidence at trial, or the guilty verdict that has already transpired. And to the extent that defendant still faces sentencing after his presidency, the range of available penalties is now constrained by defendant's felony convictions, and this Court can adopt various measures to blunt defendant's concerns on that front in any event, as explained below. *See infra* Part III.D.3.

Third, even assuming that the mere pendency of this criminal case during defendant's presidency could cause some concrete interference with his official duties, any such minimal interference would still be outweighed by "legitimate governmental objectives" in preserving the indictment and jury verdict here, OLC Mem. 245. In considering defendant's immunity arguments, the Court must balance competing constitutional interests and proceed "in a manner that preserves both the independence of the Executive and the integrity of the criminal justice system." *Vance*, 591 U.S. at 810 (citing *United States v. Burr*, 25 F. Cas. 30, 34 (No. 14,692D) (C.C.D. Va. 1807)). As the Supreme Court recognized in rejecting defendant's previous attempt to resist criminal process from this Office on presidential immunity grounds, there is a compelling "public interest in fair and effective law enforcement." *Vance*, 591 U.S. at 808. And under our constitutional

makes clear, the People made the point that a grand jury subpoena does not identify someone as a "target" of an investigation; and in any event the People do not use the terms "target" and "subject" in the same way as defined in the Justice Manual for federal prosecutors. Regardless, the People directly advised the Court that there was a grand jury investigation "into conduct that involves petitioner and multiple other persons and entities." Br. of Respondent 29 n. 10, *Trump v. Vance*, No. 19-635 (S. Ct. filed Feb. 26, 2020); *see also Vance*, 591 U.S. at 838 n.9 (Alito, J. dissenting).

system of dual sovereignty, “[p]erhaps the clearest example of traditional state authority is the punishment of local criminal activity.” *Bond v. United States*, 572 U.S. 844, 858 (2014). Within that domain, “[t]he guilt or innocence determination in state criminal trials is a decisive and portentous event.” *Herrera*, 506 U.S. at 401 (quotation marks omitted). Jurors are “representatives of the people,” and there is a compelling public interest in “the jury’s pronouncement of guilt or innocence, for in that singular moment the convictions and conscience of the entire community are expressed.” *United States v. Gilliam*, 994 F.2d 97, 101 (2d Cir. 1993). Discarding a jury’s verdict thus severely undermines the public interest in a manner that weighs heavily against dismissal here. *See Commonwealth v. Hernandez*, 118 N.E.3d 107, 120 (Mass. 2019) (“the State, as the representative of the community, continues to have an interest in maintaining a conviction”).⁹

C. The disposition of the Special Counsel’s federal prosecutions is not dispositive here in light of critical distinctions between the cases.

Finally, defendant asserts that this Court should follow the lead of the federal Special Counsel in defendant’s D.C. and Florida prosecutions. Def.’s Mem. 31-32, 37. Following the results of the presidential election, the Special Counsel moved to dismiss the D.C. indictment without prejudice; in Florida, where the district court had already dismissed the case against defendant, the Special Counsel moved to dismiss its appeal from that order. In taking these actions, the Special Counsel acknowledged that it was balancing “two fundamental and compelling national interests”: the interest in not interfering with the President’s official responsibilities; and

⁹ Defendant’s suggestion that his subsequent election “superseded” the jury’s verdict, Def.’s Mem. 50, is deeply misguided. As this Court carefully and correctly instructed the jury, it was the empaneled jurors who were “deciding whether the Defendant is guilty or not guilty” (Tr. 4818) because only these jurors—not the general electorate—heard all the evidence in this trial, were instructed on the relevant principles of law, and were charged with the solemn responsibility of determining whether the People had satisfied their burden of proof beyond a reasonable doubt. *See also infra* Part IV.D.

“the Nation’s commitment to the rule of law.” Gov’t’s Mot. to Dismiss 2-3, *United States v. Trump*, No. 23-cr-257, ECF No. 281 (D.D.C. Nov. 25, 2024) (the “SCO Mot.”). To resolve that balance, the Special Counsel relied on a passage in OLC’s 2000 memorandum concluding that a sitting President could not be indicted “even if all subsequent proceedings were postponed until after the President left office.” OLC Mem. 259. The Special Counsel further represented that, upon further consultation, OLC had concluded that the same reasoning applies even “where a federal indictment was returned before the defendant takes office.” SCO Mot. 6. The federal district court in D.C. granted the Special Counsel’s motion and dismissed the indictment without prejudice. Order, *United States v. Trump*, No. 23-cr-257, ECF No. 283 (D.D.C. Nov. 25, 2024). The Eleventh Circuit likewise granted the motion to dismiss the appeal. Order, *United States v. Trump*, No. 24-12311, ECF No. 81 (11th Cir. Nov. 26, 2024).

For several reasons, the disposition of defendant’s federal prosecutions does not dictate a similar result here. First, there are significant procedural and substantive differences between the two proceedings. As a procedural matter, unlike this case, both the D.C. and Florida prosecutions were at the earliest stages. The parties were still engaged in pretrial motion practice, including (in D.C.) to resolve the threshold immunity questions remanded by the Supreme Court; no jury had been impaneled; and no jury verdict had been reached, meaning that defendant still had the presumption of innocence against the criminal charges there. Given the nascent stage of those prosecutions, dismissal without prejudice was minimally disruptive, particularly because doing so did not require the court to vacate a jury verdict. Here, by contrast, the criminal proceeding is significantly more advanced, and dismissal would unwind completed phases of the criminal proceeding that the public has an interest in preserving. *See supra* at 21-22. Given these

differences, the Special Counsel’s particular balancing of “fundamental and compelling national interests” (SCO Mot. 2) simply does not extend to this case.

As a substantive matter, the D.C. prosecution was also distinct because, as originally charged, it was based in significant part on defendant’s official acts during his prior term as President, *see Trump*, 603 U.S. at 606, and on remand, the parties had briefed—but the district court had not yet resolved—the extent to which the superseding indictment that was returned after the Supreme Court’s remand was based on any official acts. As the Supreme Court has now held, prosecution based on such official conduct raises serious concerns about “distort[ing] Presidential decisionmaking” by potentially making a President “apprehensive that criminal penalties may befall him” if he makes certain official choices. *Id.* at 613. By contrast, as discussed, the criminal charges in this proceeding are not based on official conduct at all. This case thus does not raise the same concerns about interference with official decision-making as the D.C. prosecution did.

Second, if anything, the Special Counsel’s actual reasoning supports a different disposition here. The Special Counsel’s explanation for its requested relief largely agreed with the analysis presented above: it acknowledged that presidential immunity is “temporary”; it endorsed the “longstanding principle that ‘[n]o man in this country is so high that he is above the law’”; and, in D.C., it resulted in a disposition—dismissal without prejudice—that would still allow defendant to be prosecuted on his federal charges after the end of his forthcoming presidential term. SCO Mot. 3, 5-6. Defendant’s request to dismiss the indictment and vacate the jury verdict respects none of these principles. Thus, far from supporting defendant’s request for extraordinary relief here, the Special Counsel’s reasoning instead supports far less extreme remedies that would acknowledge the important public interests weighing against dismissal and vacatur here.

- D. Assuming that judgment has not been entered before presidential immunity attaches, lesser remedies than dismissal would adequately address any legitimate concerns about the effect of this pending prosecution on presidential decision-making.**

As noted, the People do not dispute that, upon his inauguration, a sitting President should receive accommodations during his time in office from state criminal proceedings that follow a trial conviction based on unofficial conduct. But multiple options well short of dismissing the indictment and vacating the jury verdict would satisfy the concerns raised by the Supreme Court and OLC. The People outline several such options here.

- 1. This proceeding could be stayed until the end of defendant's forthcoming presidential term.**

First, any remaining steps in this criminal proceeding could simply be stayed from the date of defendant's inauguration until the end of his term of office. If defendant is sentenced before his inauguration, such a stay would merely place appellate proceedings in abeyance. If defendant takes future steps to stay his sentencing and succeeds in doing so, such a stay would delay his sentencing until after the end of his presidential term.

Either way, a stay would appropriately "reflect[] a balance of competing interests," OLC Mem. 245, by entirely exempting defendant from any immediate obligations in this case during his time in office, while at the same time respecting the public interest in upholding the rule of law and preserving the meaningful aspects of the criminal process that have already taken place, including the trial and the jury verdict. And such a stay would be consistent with OLC's recognition that "the immunity from indictment and criminal prosecution for a sitting President would generally result in the delay, but not the forbearance," of criminal proceedings. OLC Mem. 257; *see also id.* at 256 ("At most, therefore, prosecution would be delayed rather than denied."). For those reasons, if judgment has not been entered before presidential immunity attaches, this type of time-limited accommodation is far more appropriate than the sweeping relief that defendant

requests here, which would render the indictment and jury verdict in this case a nullity and eliminate his accountability for the crimes that a jury of his peers found he committed by proof beyond a reasonable doubt.

To be sure, OLC concluded in its 2000 memorandum that “a grand jury should not be permitted to indict a sitting President even if all subsequent proceedings were postponed until after the President left office.” OLC Mem. 259. For several reasons, however, that conclusion is inapplicable here. First, that recommendation was based in part on OLC’s concerns that “indictment alone will spur the President to devote some energy and attention to mounting his eventual legal defense.” *Id.* Here, however, the advanced stage of this case means that defendant has *already* mounted his legal defense at the criminal trial and in dozens of legal filings. And although defendant remains to be sentenced, the demands in preparing for a sentencing hearing (particularly if sentencing would not take place until after defendant leaves office) are categorically less burdensome than for a trial, given that sentencing in this case would not involve a jury, witness testimony, or the presentation of documentary evidence.

Second, although OLC raised concerns about “[t]he stigma and opprobrium attached to indictment” in concluding that an abeyance would not be sufficient, it was plainly concerned with the *creation* of stigma from “indict[ing] a sitting President,” OLC Mem. 259—harms that could be redressed by simply forbearing from initiating such criminal process during the President’s term. By contrast, as discussed, here any stigma was created at a time when defendant enjoyed no presidential immunity at all. And, for the reasons already discussed, there is a categorical difference between retroactively invalidating already-completed phases of the criminal process and refraining from engaging in further criminal proceedings. OLC’s concerns about creating (or

amplifying) stigma during a sitting President's term can be fully accommodated by a status here that would impose no new criminal obligations while defendant is in office.

Separately, defendant contends that there would be some legal barrier to a stay of proceedings here, Def.'s Mem. 53-54, but he is wrong. If defendant is sentenced and only his appeals remain pending at the time of his inauguration, there are no limitations whatsoever on an abeyance. New York's appellate courts provide generous deadlines for briefing, *see* 22 N.Y.C.R.R. § 1250.9(a)-(b), and it is routine for appeals to be decided years after sentencing even without a formal stay of proceedings. *See, e.g., People v. Foreman*, 223 A.D.3d 418, 418 (1st Dep't 2024) (affirming conviction more than six years after sentencing). With regard to defendant's federal appeal, the Second Circuit "unquestionably" has the power to hold appeals in abeyance, *United States v. Outen*, 286 F.3d 622, 631 (2d Cir. 2002), and further provides a procedure under which an appeal can be dismissed without prejudice to reinstatement at a later time, *see* Second Circuit Local Rule 42.1.

If defendant is not sentenced before his inauguration, there is also no legal barrier to deferring that sentencing until after the end of his presidency. CPL § 380.30(1) requires the Court to pronounce sentence "without unreasonable delay," and a failure to do so "results in a loss of jurisdiction over the defendant." *People v. Drake*, 61 N.Y.2d 359, 364 (1984). However, "the passage of time standing alone does not bar imposition of sentence or require a defendant's discharge." *Id.* at 365. Rather, it is only "*inexcusable* delay that does so." *Id.* at 366 (emphasis added). But if the delay "is caused by legal proceedings . . . it is excusable." *Id.* Even "relatively long delays occasioned by the State have been excused for good cause." *Id.* Similarly, courts have assumed that the "Sixth Amendment guarantee to a speedy trial applies to sentencing." *United States v. Bryce*, 287 F.3d 249, 256 (2d Cir. 2002). Like the CPL § 380.30(1) analysis, the speedy

trial right requires a “court to determine whether [a] delay” in sentencing “has been unreasonable in light of the peculiar circumstances of the case.” *Id.* (citing *United States v. DeLuca*, 529 F. Supp. 351, 354 (S.D.N.Y. 1982)).

Under those well-settled standards, an adjournment that resulted in sentencing being held after the end of defendant’s presidential term would be reasonable. Courts routinely approve of yearslong delays in sentencings when the delay is attributable to the defendant’s own conduct, or when it is attributable to factors outside of the People or the Court’s control. *See, e.g., People v. Murphy*, 215 A.D.3d 1075, 1076-78 (3d Dep’t 2023) (dismissal not warranted where the People “offered plausible excuses” for 25-month delay in sentencing, including defendant’s consent to an adjournment “pending resolution of his postconviction motion” and delays caused by the COVID-19 pandemic); *People v. Ruiz*, 44 A.D.3d 428, 428 (1st Dep’t 2007) (two-year delay reasonable where “the People made reasonable efforts to bring defendant to court for sentencing” but “it would have been futile for the People to make an extradition request prior to the expiration of defendant’s Connecticut sentence”);¹⁰ *People v. Savino*, 267 A.D.2d 174, 174 (1st Dep’t 1999) (14-year delay reasonable where it was “entirely attributable to defendant’s conduct”).

Here, defendant can hardly complain about a delay in sentencing when he has affirmatively sought such delay—both before and after his reelection. Sentencing in this case was originally scheduled for July 11, 2024. Tr. 4957. On July 1, the day that the Supreme Court decided *Trump*, defendant filed a CPL § 330.30 motion that led this Court to reschedule sentencing for September 18. On August 14, defendant moved to adjourn sentencing until after the election, leading this Court to reschedule the sentencing for November 26. And on November 8, in light of the election,

¹⁰ The length of the delay in *Ruiz* is not mentioned in the court’s opinion but is reflected in the briefs. *See Resp.’s Br., People v. Ruiz*, 44 A.D.3d 428 (1st Dep’t 2007), at 2007 WL 5071981.

defendant asked the District Attorney to dismiss this prosecution and consent to a stay of proceedings; he subsequently filed the motion currently under consideration, leading this Court to grant a further adjournment of proceedings. Defendant's current motion indicates that he will continue pursuing litigation to defer his sentencing through interlocutory state-court appeals, existing federal litigation, or new federal litigation. Def.'s Mem. 53, 68-69.

It is well-settled that delays in sentencing caused by a defendant's own postconviction motions are "reasonable" because they cannot be attributed to neglect on the part of either the People or the Court. *Murphy*, 215 A.D.3d at 1076-78 (dismissal not warranted where the People "offered plausible excuses" for 25-month delay in sentencing, including defendant's consent to an adjournment "pending resolution of his postconviction motion"). For the same reason, defendant's own litigation tactics rebut his related assertion that a delay in sentencing here would violate his "Sixth Amendment speedy trial right." Def.'s Mem. 53. Defendants may not rely on delays wrought by their own litigation in order to claim a violation of their speedy trial rights, whether under the constitution or under state statute. *People v. Bellamy*, 226 A.D.3d 623, 624 (1st Dep't 2024) (defendant not deprived of constitutional speedy trial right, despite "five-year delay," where "defendant largely contributed to the delay by, among other things, repeatedly seeking assignment of new counsel"); *People v. Bradshaw*, 206 A.D.3d 518, 518 (1st Dep't 2022) (defendant not deprived of constitutional speedy trial right, despite "extraordinarily long delay of almost 12 years," because the delay was "mostly caused by defendant"); *cf.* CPL § 30.30(4)(a) (reasonable periods of delay stemming from "other proceedings concerning the defendant" are excludable under CPL § 30.30).

In addition, to the extent that sentencing is delayed because of the claims of presidential immunity that defendant has raised here, the source of that delay would be a constitutional doctrine

intended to protect the official functions of the presidency—not any “judicial or prosecutorial negligence or mistake.” *Drake*, 61 N.Y.2d at 366. Delay for these reasons would hardly be the type of “inexcusable delay,” *id.*, that would warrant the extreme remedy of dismissal.

Finally, even assuming that defendant had a claim of unreasonable delay in sentencing or a violation of speedy trial rights, the proper time to raise such a claim would be when this Court seeks to reinstitute proceedings following his presidential term—not now. Speedy trial motions and applications pursuant to CPL § 380.30 necessarily address delays that have already transpired and rely on the reasonableness (or not) of such delays based on immediately preceding events. *See People v. Allard*, 28 N.Y.3d 41, 43-45 (2016); *Murphy*, 215 A.D.3d at 1076-78. Here, the parties can only speculate about the state of this criminal case four years from now. For example, courts may resolve defendant’s many pending motions or future motions in any number of ways that may affect whether and when sentencing can take place. In other words, the mere possibility that defendant may have a delay claim four years from now is not a reason for this Court to decline to stay proceedings now. Defendant would be free to raise, and this Court would be able to consider, any such claim if and when proceedings are reinstituted after his presidency ends.¹¹

¹¹ Defendant perfunctorily claims that “a delay in this case that is wholly disproportionate to the actual sentencing exposure would also violate the Eighth Amendment.” Def.’s Mem. 53. The only case he cites for that proposition, a 35-year-old criminal court decision, *People v. Harper*, 137 Misc. 2d 357 (Crim. Ct., N.Y. Cnty. 1987), did not actually rule that the Eighth Amendment applied. It merely left open the possibility. *Id.* at 364. (“Imposition of sentence after an unreasonable delay *could well* constitute cruel and unusual punishment.”) (emphasis added). In any event, as discussed in the main text, any delay on account of defendant’s election would be eminently reasonable.

2. **This Court could adopt a remedy that some courts have followed in the abatement-by-death context to terminate proceedings without vacating the jury verdict or dismissing indictment.**

Even if this Court were to believe that the mere pendency of this criminal proceeding were somehow inconsistent with defendant's future official duties as President, dismissal and vacatur would still not be warranted. Under the abatement doctrine, courts have considered an analogous question of what to do with a jury verdict and indictment when further criminal proceedings are no longer possible because of the defendant's death. Although New York currently follows an abatement *ab initio* rule that, in that circumstance, "the judgment of conviction [is] vacated and the indictment dismissed" on the ground that the defendant's death makes any further appeal impossible, *People v. Mintz*, 20 N.Y.2d 770, 771 (1967), a large majority of states no longer follow such a rule and instead have adopted less disruptive remedies that better respect the important public interests in preserving a jury verdict despite the inability to proceed further in a criminal case.¹²

This Court could likewise adopt one of the alternatives to abatement *ab initio* here in place of the extreme remedy of dismissal and vacatur that defendant has proposed. Specifically, under the so-called "Alabama rule," when a defendant dies after he is found guilty, but before the conviction becomes final through the appellate process, the court places in the record of the case a notation to the effect that the conviction removed the presumption of innocence but was neither affirmed nor reversed on appeal because the defendant died. *See Wheat v. State*, 907 So. 2d 461,

¹² The People recently urged the Appellate Division, First Department, to reject the abatement *ab initio* doctrine as well and follow the lead of the majority of other states, in two appeals that are currently pending before that court: *People v. Cruciani*, Appellate Case No. 2023-01371, and *People v. Nowell*, Appellate Case No. 2023-04545. The People are willing to provide the briefing in those pending appeals or any other briefing that this Court may request on this alternative disposition.

464 (Ala. 2005); *see also State v. Gleason*, 349 So. 3d 977, 983 (La. 2022). In this way, the Alabama rule abates the criminal proceedings without vacating the underlying conviction or dismissing the indictment. As applied here, this Court could similarly terminate the criminal proceeding by placing a notation in the record that the jury verdict removed the presumption of innocence; that defendant was never sentenced; and that his conviction was neither affirmed nor reversed on appeal because of presidential immunity.

It makes sense to borrow from the manner in which courts address abatement because many of defendant's arguments here parallel the arguments made in favor of dismissal and vacatur upon a defendant's death. For example, defendant argues that the Court cannot subject him to "further criminal proceedings" or incarceration during his second term in office. Def.'s Mem. 35-38. This mirrors the "punishment" rationale for abating criminal cases when a defendant passes away: namely, abatement is warranted because a defendant's death obviates any penal purpose in further appellate proceedings. *Mintz*, 20 N.Y.3d at 771 ("[i]f affirmed, the judgment of conviction could not be enforced and, if reversed, there is no person to try"). Defendant also argues that the instant case cannot be brought to its conclusion because his appeals will not be resolved before his second term in office begins, and he cannot be required to pursue those appeals during his presidency. Def.'s Mem. 52-53. This parallels the "finality" rationale for abatement: because appellate proceedings cannot run their course following a defendant's death, it can "never be determined whether the judgment of conviction would stand" following an appeal. *Mintz*, 20 N.Y.3d at 771.

Adopting something like the Alabama rule in this case would better balance the competing interests here than defendant's request to dismiss the indictment and vacate the jury verdict. On the one hand, this remedy would prevent defendant from being burdened during his presidency by an ongoing criminal proceeding. On the other hand, this remedy would not precipitously discard

aspects of this criminal proceeding that predated defendant's presidency, including the meaningful fact that defendant was indicted and found guilty by a jury of his peers, while also acknowledging that the proceedings were not subject to appellate review before defendant's immunity arose.

To be sure, New York law does not expressly provide for this remedy. But Judiciary Law § 2-b(3) authorizes this Court to "devise and make new process and form of proceedings" that are "necessary to carry into effect the powers and jurisdiction possessed by it." Although the Legislature "has primary authority to regulate court procedure," courts have "latitude" to fashion "innovative procedures" needed to align with "constitutional, statutory, and decisional law." *People v. Wrotten*, 14 N.Y.3d 33, 37 (2009) (quoting *People v. Ricardo B.*, 73 N.Y.2d 228, 232 (1989)). And the Court of Appeals has endorsed the adoption of even novel procedures in order to accommodate new constitutional rights recognized by intervening Supreme Court decisions. *See, e.g., Ricardo B.*, 73 N.Y.2d at 232-33 (endorsing the empanelment of two juries for a joint trial to comply with *Bruton v. United States*, 391 U.S. 123 (1968), even though "nothing" in New York law "expressly authorize[d]" the use of multiple juries); *People v. Huntley*, 15 N.Y.2d 72 (1965) (devising the new procedure of a suppression hearing to ensure statewide compliance with Supreme Court's new Fourth Amendment cases); *People v. Krieg*, 139 A.D.3d 625, 627 (1st Dep't 2016) (upholding trial court's decision to allow a defendant to appear by videoconference to preserve his constitutional right to be present at his own trial, notwithstanding CPL § 182.20's specific disallowance of such electronic appearance). Especially given the novelty of defendant's own immunity claims, it would hardly be improper for this Court to exercise its inherent authority to consider novel remedies such as adopting a version of the Alabama rule in the context of this unique case.

3. Limitations on future proceedings could also fully address defendant's concerns about interference with presidential decision-making.

Finally, to the extent that this Court finds persuasive any of defendant's claims about how the mere pendency of future criminal proceedings in this case could interfere with his presidential functions, this Court could also address those concerns by adopting certain limitations on those proceedings, including any future sentencing.

In particular, this Court could determine that any evidence of defendant's conduct during his presidency—whether official or unofficial—will not play a part in his future sentencing. Although courts generally have the authority to consider any evidence pertaining to the defendant's character up to and including the time of sentencing, *cf. People v. Alvarez*, 33 N.Y.3d 286, 292 (2019), such consideration is not mandatory. Here, a decision by this Court to disregard defendant's conduct during his forthcoming presidency would substantially diminish or entirely eliminate any prospect that the mere pendency of a future sentencing hearing would affect his official decisions.

In addition, many of defendant's concerns stem from the possibility that he will face "potential incarceration" here. Def.'s Mem. 38. Here, however, because defendant has no prior criminal convictions and was convicted of Class E felonies, this Court is not required to impose a sentence of incarceration at all, and could even impose an unconditional discharge. Penal Law §§ 60.01(2)(a)(i), 60.01(3)(b), 60.01(3)(d), 65.05, 65.20(1), 70.00(4). The Court could therefore conclude that presidential immunity, while not requiring dismissal, nonetheless would require a non-incarceratory sentence in these circumstances. Such a constitutional limitation on the range of available sentences would further diminish any impact on defendant's presidential decision-making without going so far as to discard the indictment and jury verdict altogether.

IV. The remaining *Clayton* factors weigh heavily against dismissal.

In considering defendant’s motion to dismiss, the Court must also “examine and consider” the remaining factors at CPL § 210.40(1). These factors weigh decisively against dismissal.

A. The seriousness and extent of harm caused by defendant’s offenses.

First, the crimes that the jury convicted defendant of committing are serious offenses that caused extensive harm to the sanctity of the electoral process and to the integrity of New York’s financial marketplace. *See* CPL §§ 210.40(1)(a), (b).

In convicting defendant of 34 counts of Falsifying Business Records in the First Degree, a jury of defendant’s peers concluded unanimously that defendant made or caused false entries in the business records of an enterprise, and that he did so with the intent to defraud that included an intent to commit or conceal the commission of another crime—specifically, a conspiracy to promote his own election by unlawful means in violation of New York Election Law § 17-152. *See* Tr. 4841, 4846-4847; *see also infra* Part IV.B.

In New York—the financial capital of the world—falsifying business records is a serious offense because honest recordkeeping is essential to maintaining the very integrity of the marketplace. *See People v. Bloomfield*, 6 N.Y.3d 165, 171 (2006); *People v. Dove*, 15 Misc. 3d 1134(A), at *6 n.6 (Sup. Ct. Bronx Cnty. 2007) (the statute’s “evident purpose” is “to maintain the integrity of business records and prevent business-related crime”); *see also* Richard A. Greenberg *et al.*, New York Criminal Law § 17:1 (4th ed. 2016 & Supp. 2024) (“The brevity of N.Y. Penal Law Article 175 belies its importance to New York’s criminal justice system. . . . [It] is one of the most important prosecutorial tools in so-called white collar cases.”). And falsifying business records to conceal an illegal election fraud scheme erodes public confidence in the integrity of democratic elections, implicating interests of the highest importance. *See, e.g., First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978) (“Preserving the integrity of the electoral process,

preventing corruption, and sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government are interests of the highest importance.” (cleaned up)). Compounding the seriousness of defendant’s offense is the fact that—as established by the trial record, *see infra* Part IV.B—“defendant’s criminal act was not a sudden collapse of judgment overborne by severe financial pressures, but a complex premeditated undertaking.” *People v. Perez*, 156 A.D.2d 7, 10 (1st Dep’t 1990) (reversing trial court’s CPL § 210.40 dismissal).

Indeed, this Court previously recognized that the People’s allegations—now proven beyond all reasonable doubt at trial—were “severe” and “serious.” *See* Decision & Order Denying Omnibus Mots. 6 (Feb. 15, 2024). And a federal court has described the very election fraud scheme at issue in this prosecution as “a matter of national importance” with “weighty public ramifications.” Mem. & Order Granting Unsealing Requests 2-3, *United States v. Cohen*, No. 18 Cr. 602, ECF No. 47 (S.D.N.Y. July 17, 2019). As that court also recognized, the harms caused by the violations at issue here—which were committed “on the eve of the 2016 presidential election with the intent to influence the outcome of that election”—“threaten the fairness of elections” and “implicate a far more insidious harm to our democratic institutions.” Sentencing Tr. 32-35, *United States v. Cohen*, No. 18 Cr. 602, ECF No. 31 (S.D.N.Y. Dec. 12, 2018).

Defendant argues that the crimes he committed are not serious because he was not convicted of homicide or sexual assault. Def.’s Mem. 55. But it is black-letter law that interest-of-justice dismissal is warranted only in “that rare and unusual case,” *Williams*, 145 A.D.3d at 107, not in every case involving all but the most serious Class A felonies. And the Appellate Division routinely finds that the serious nature of an offense weighs *against* dismissal where defendants are charged with or convicted of Class B misdemeanors—a categorically less serious offense than the 34 felony counts that defendant was convicted of committing here. *See, e.g., Keith R.*, 95 A.D.3d

at 66 (attempted assault in the third degree); *see also People v. Howell*, 139 A.D.3d 484, 484 (1st Dep’t 2016) (attempted criminal possession of a controlled substance in the seventh degree).

Defendant also criticizes this Office’s charging policies more generally, contending incorrectly and without reference to any facts that the People “routinely” dismiss “more serious” indictments to avoid immigration or predicate sentencing consequences. Def.’s Mem. 55. Defendant’s attack on this Office is not a legitimate basis for dismissal. Even if defendant’s fact-free supposition were correct, it is well-settled that a trial court may not exercise its interest-of-justice power because it disagrees with the People’s plea and charging practices. *See Harmon*, 181 A.D.2d at 39 (“Needless to say, an interest of justice dismissal is not a vehicle for the expression of judicial displeasure with a prosecutor’s plea policies.”); *see also Williams*, 145 A.D.3d at 107 (“[I]nterest of justice review . . . applies on a case-by-case basis, and is not designed or intended to be used to resolve public policy concerns or for a system-wide fix.”); *Keith R.*, 95 A.D.3d at 67.

Defendant separately claims that his offenses are not serious because the People did not charge other defendants. Def.’s Mem. 55. But other participants in defendant’s criminal scheme did face consequences, including criminal consequences. Michael Cohen went to jail; David Pecker and AMI were found to have committed knowing and willful violations of federal law; and AMI paid a civil penalty.¹³

The Court has likewise already rejected defendant’s claim (Def.’s Mem. 56) that the federal government’s decision not to prosecute him for campaign finance crimes has anything to do with

¹³ *See* Tr. 1247:8-1248:7, 1254:7-1255:6, 1262:11-1264:3 (Pecker); Tr. 3620:3-12, 3621:9-13 (Cohen); Judgment of Conviction, *United States v. Cohen*, No. 18 Cr. 602, ECF No. 29 (S.D.N.Y. Dec. 12, 2018); Factual & Legal Analysis 2, 10-16, *In re A360 Media, LLC f/k/a American Media, Inc., & David J. Pecker*, Federal Election Comm’n Matter Under Review 7324, 7332, & 7366 (Apr. 13, 2021), https://www.fec.gov/files/legal/murs/7324/7324_22.pdf; Conciliation Agreement, *In re American Media, Inc.*, Federal Election Comm’n Matter Under Review 7324, 7332, & 7366 (May 18, 2021), https://www.fec.gov/files/legal/murs/7324/7324_26.pdf.

the seriousness of his offenses here. *See* Decision & Order on People's Mots. in Limine 4 (Mar. 18, 2024) ("That the FEC dismissed the complaint against Defendant and the DOJ decided against prosecuting Defendant for potential FECA violations are probative of nothing. . . . There are countless reasons why the FEC and DOJ could have decided not to pursue enforcement against Defendant, all having nothing to do with whether he is guilty of the charges here against him."); *see also* People's Mots. in Limine 19-24 (Feb. 22, 2024).

And defendant's emphasis on financial injury (Def.'s Mem. 56-57) is contrary to controlling law. Felony falsifying business records is "not limited to the causing of financial harm or the deprivation of money or property." Decision & Order Denying Omnibus Mot. 19 (Feb. 15, 2024) (citing *People v. Sosa-Campana*, 167 A.D.3d 464, 464 (1st Dep't 2018)); *see also* People's Mem. Opp. Omnibus Mot. 20 & n.4 (Nov. 9, 2023) (citing cases). Nor is financial harm required (Def.'s Mem. 57) for the government to be injured by defendant's intended tax crimes. *See* Decision & Order Denying Omnibus Opp. 17 (Feb. 15, 2024); *United States v. Greenberg*, 735 F.2d 29, 31-32 (2d Cir. 1984) (citing cases).

Finally, defendant cites post-trial public statements from his expert witness, Bradley Smith, for the proposition that Cohen's \$130,000 payoff would not have been reportable before the 2016 presidential election. Def.'s Mem. 57-58. This contention is simply wrong on the law. FECA provides that in the final twenty days before a general election, contributions over \$1000 must be disclosed within 48 hours, 52 U.S.C. § 30104(a)(6)(A); *see also* 11 C.F.R. § 104.5(f). Indeed, in a passage from Mr. Smith's congressional testimony that defendant declined to bring to the Court's attention in making this argument, Mr. Smith *conceded* that "in the last 20 days before the election, campaigns are required to report contributions in excess of \$1000 within 48 hours," and therefore that "the contribution from Cohen" "would have been reported." Def.'s Ex. 76 at 5.

The evidence showed, and the jury determined, that defendant sought to corrupt the 2016 presidential election by falsifying business records over a lengthy period of time to conceal a criminal conspiracy. The “seriousness” and “extent of harm” caused by defendant’s offense weigh heavily against dismissal. CPL §§ 210.40(1)(a), (b).

B. The evidence of defendant’s guilt.

In addition, the evidence of defendant’s guilt is overwhelming. *See* CPL § 210.40(1)(c). The jury unanimously found defendant guilty of all 34 felony counts, *see* Tr. 4947-4952, and the trial record conclusively supports the jury’s determination. *See, e.g., Pittman*, 228 A.D.2d at 226 (reversing trial court’s order dismissing indictment where “[t]he evidence of defendant’s guilt was overwhelming”); *People v. Insignares*, 109 A.D.2d 221, 232 (1st Dep’t 1985) (reversing trial court’s post-verdict order dismissing indictment where “[o]ur review of the record at trial leads us to conclude that overwhelming evidence supports the jury verdict”).

The People’s opposition to defendant’s CPL § 330.30 motion explained in detail that the trial record conclusively established defendant’s guilt, and the People incorporate that discussion by reference here. *See* People’s Mem. Opp. Post-Trial Mot. 39-60 (July 24, 2024). The discussion that follows in Parts IV.B.1 and IV.B.2 is excerpted from the People’s July 24, 2024 opposition.

1. Defendant made and caused false entries in the business records of an enterprise.

The first element of Falsifying Business Records in the First Degree—that defendant made or caused false entries in the business records of an enterprise, *see* PL § 175.10; Tr. 4838:7-12—is overwhelmingly established by the trial record.

I. First, the evidence establishes beyond a reasonable doubt that the invoices, general ledger entries, and checks with check stubs contain false entries. The invoices request payment for services rendered for a given month pursuant to a retainer agreement. *See* People’s 1, 5, 8, 11, 14,

17, 20, 23, 26, 29, 32. The general ledger entries also record payments pursuant to a retainer for a given month. *See* People's 2, 3, 6, 9, 12, 15, 18, 21, 24, 27, 30, 33. The signed checks with check stubs likewise record that the payments were made pursuant to a retainer. *See* People's 4, 7, 10, 13, 16, 19, 22, 25, 28, 31, 34.

Those entries are false. There was no retainer agreement; Cohen was not paid for legal services rendered; and the \$420,000 payments were instead a reimbursement. People's 35 and People's 36—Weisselberg's handwritten notes on the shell company bank statement grossing up the \$130,000 expense to a \$420,000 repayment, and McConney's notes calculating how the total \$420,000 obligation was to be repaid based on future invoices—establish that the \$420,000 Cohen received was not payment for legal services rendered in a given month pursuant to a retainer, but was instead a reimbursement for the wire to Keith Davidson for the Stormy Daniels payoff, plus the Red Finch expense, the extra bonus, and the grossed-up additional amount to cover for taxes. People's 35, 36; Tr. 2290:11-2307:24 (McConney). Jeff McConney testified that he understood the payments were reimbursements, as People's 35 and People's 36 show. Tr. 2290:11-2291:16, 2299:6-9, 2302:9-13, 2304:4-7. McConney also testified that he never saw a retainer agreement and did not get approval from the Trump Organization's legal department to reimburse Cohen, as would be typical if the Trump Organization were actually paying a legal expense instead of a reimbursement. Tr. 2316:10-11, 2317:18-22. Cohen likewise testified that there was no retainer agreement, and that the payments totaling \$420,000 that he received in 2017 were not for services rendered in a given month but were instead a grossed-up reimbursement for the Daniels payoff and the other expenses. *See* Tr. 3442:3-6, 3495:14-19, 3500:24-3501:2, 3518:15-16, 3520:17-20, 3521:22-25, 3523:11-13, 3525:11-15, 3526:1-7, 3527:7-12, 3527:25-3528:3, 3528:19-3529:2,

3529:12-18, 3530:6-11, 3531:12-15, 3532:7-14, 3533:2-5, 3533:22-3534:1, 3535:3-8, 3535:21-24, 3536:12-14, 3537:1-4, 3537:19-25, 3538:15-18, 3539:8-12, 3540:4-7, 3541:2-14, 3959:20-23.

This evidence is corroborated by testimony that Cohen performed some personal legal services for defendant in 2018 but was never paid for those services. Tr. 2357:5-13, 2359:24-2360:4 (McConney); Tr. 3546:10-18, 4134:15-23 (Cohen); People's 43-45, 54, 55. It is further corroborated by testimony from both Pecker and Davidson that Cohen complained to them in December 2016 that defendant had not yet reimbursed him for the Stormy Daniels payoff. Tr. 1208:9-1209:3 (Pecker); Tr. 1855:17-1857:1 (Davidson). And the evidence of falsity is further supported by defendant's concession in court papers in civil litigation involving Stormy Daniels that he reimbursed the \$130,000 payment in 2017. *See* Tr. 2913:1-16 (Daniels).

2. Next, the stamped invoices, general ledger entries, and checks with check stubs are all business records of an enterprise. These documents are business records because they were kept or maintained by the Trump Organization and they reflect its condition and activity. PL § 175.00(2). Specifically, the invoices reflect an obligation to pay, and the Trump Organization required invoices for that exact purpose. Tr. 2280:22-24, 2295:25-2296:3 (McConney); Tr. 2426:7-11, 2429:22-2431:10 (Tarasoff); Tr. 2924:22-2925:7 (Manochio); *see People v. Kisina*, 14 N.Y.3d 153, 159-60 (2010); *People v. Dove*, 85 A.D.3d 547, 548 (1st Dep't 2011). The general ledger entries reflect that a payment had been made to Cohen for a purported retainer for a particular month or months in 2017. Tr. 2319:14-21, 2360:12-25, 2362:1-3 (McConney); Tr. 2447:18, 2449:21, 2456:24, 2462:11, 2467:4, 2475:4 (Tarasoff); *see Kisina*, 14 N.Y.3d at 159-60. And the signed checks and check stubs were maintained in the Trump Organization's files to reflect its satisfaction of its repayment obligations. Tr. 2451:4-8 (Tarasoff); Tr. 2285:4-6 (McConney); *see Kisina*, 14 N.Y.3d at 159-60. McConney further testified that these business

records—and in particular, the general ledger entries—were examined by the Trump Organization’s outside accounting firm at tax time to determine the appropriate tax treatment. Tr. 2275:5-13, 2320:9-2321:10 (McConney).

The evidence also shows beyond a reasonable doubt that the Trump Organization is an enterprise because it was a conglomerate of nearly 500 entities engaged in real estate, property management, leisure, and other commercial and business activities. Tr. 2260:20-2262:5 (McConney); *see* PL § 175.00(1). The Trump Organization’s accounting staff of ten managed the general ledger and bank accounts for the “DJT” account, which was used as the main operating account to reallocate cash between Trump Organization entities and to advance funds to pay an entity’s bills. Tr. 2270:5-9, 2277:3-2278:19 (McConney); Tr. 2431:18-24 (Tarasoff). The Donald J. Trump Revocable Trust is an enterprise as well. *See* People’s 86; Tr. 2263:1-2267:6 (McConney).

3. Defendant made or caused the false entries in his business records. Defendant himself personally signed every one of the nine falsified checks from the DJT account, and therefore clearly made those false entries. People’s 10, 13, 16, 19, 22, 25, 28, 31, 34; Tr. 2468:11-16, 2470:10-13, 2473:11-14, 2475:19-22, 2480:25-2481:3, 2482:18-21, 2484:20-21, 2486:20-23 (Tarasoff); Tr. 3528:6-23, 3530:12-18, 3531:25-3532:3, 3533:13-17, 3534:19-24, 3536:3-7, 3537:8-15, 3538:22-3539:4, 3540:17-22 (Cohen). As to the false entries in the remaining business records, the trial evidence proved beyond a reasonable doubt that defendant made or caused those entries as well. A person “causes” a false entry when, even if he does not prepare the relevant business record himself, the creation of a false entry in the business record is a reasonably foreseeable consequence of his conduct. *People v. Barto*, 144 A.D.3d 1641, 1643 (4th Dep’t 2016); *see also People v. Park*, 163 A.D.3d 1060, 1063 (3d Dep’t 2018); *People v. Myles*, 58 A.D.3d 889,

892 (3d Dep't 2009). The trial record proved that defendant set the fraudulent repayment scheme in motion, and that the creation of business records to carry out that scheme was a predictable consequence of his decision. Tr. 3418:9-19, 3421:1-10, 3431:20-3432:23, 3491:14-3494:22, 3514:1-18 (Cohen); Tr. 2282:5-18 (McConney); Tr. 2430:16-2431:10, 2434:4-17 (Tarasoff); People's 256, 349.

The trial record also included defendant's own admission that he reviewed and signed checks carefully, both for the purpose of "seeing what's really going on inside your business" and because "if people see your signature at the bottom of the check, they know you're watching them, and they screw you less because they have proof that you care about the details." People's 414-F at xii. David Pecker also personally saw defendant reviewing invoices before he signed his checks. Tr. 1009:7-21. Extensive additional evidence proved both that defendant paid careful attention to his finances and that he was a micromanager. Tr. 1010:3-11, 1117:24-1118:7 (Pecker); Tr. 1784:10-11 (Davidson); Tr. 2130:15-18 (Hicks); Tr. 2279:6-2280:4 (McConney); Tr. 2427:24-2428:1, 2430:16-2431:10, 2435:8:19, 2436:23-2437:3, 2441:4-17 (Tarasoff); Tr. 3279:21-25 (Cohen); People's 71, 75, 413-B, 414-A, 414-B, 414-C, 414-D, 414-F, 415-A.

2. Defendant acted with intent to defraud which included an intent to commit or conceal the commission of another crime.

The second element of the offense—that defendant acted with an intent to defraud that included the intent to commit, aid, or conceal the commission of another crime, *see* PL § 175.10; Tr. 4838:7-12—is also overwhelmingly supported by the trial record.

1. Regarding intent to defraud, there is overwhelming evidence that defendant intended the false business records to obscure the repayment to Cohen for the Stormy Daniels payoff. People's 35 and People's 36 conclusively show that the \$420,000 payments were to reimburse Cohen for the wire to Keith Davidson, contrary to how the payments were then recorded in the Trump

Organization's business records. People's 35, 36; Tr. 2290:11-2307:24 (McConney). And the evidence of the Trump Tower conspiracy and the steps taken to effectuate it—established by testimony from David Pecker, Keith Davidson, Stormy Daniels, Michael Cohen, and Gary Farro, as well as by the dozens of emails, text messages, phone calls, recorded conversations, business documents, and other records that corroborate that testimony—prove that hiding information and concealing the underlying conspiracy was the entire point of the scheme. *See, e.g.*, Tr. 1019:4-1026:4, 1091:21-1092:20, 1133:8-13, 1146:11-18, 1194:4-7, 1199:16-1200:12 (Pecker); Tr. 1743:21-1744:3 (Davidson); Tr. 2275:5-13, 2320:9-2321:10 (McConney); Tr. 2913:9-16 (Daniels); Tr. 3294:23-3296:1, 3492:4-3493:24, 3514:1-18, 3615:14-20 (Cohen); Tr. 1558:10-19, 1562:16-21, 1565:22-1566:7, 1570:16-1572:19 (Farro); People's 35, 36, 81, 156, 157, 161, 162, 164, 182, 202, 248, 260, 265, 276, 364, 366, 368, 369, 376.

The evidence also proved that defendant was motivated to conceal the sexual encounter with Stormy Daniels because he was concerned that its public disclosure would damage his standing with female voters and harm his chances for election, particularly after the release of the Access Hollywood Tape. *See, e.g.*, Tr. 1180:3-1185:7 (Pecker); Tr. 1755:13-1758:16 (Davidson); Tr. 2146:11-2175:6, 2203:10-12 (Hicks); Tr. 2651:24-2654:4 (Daniels); Tr. 2976:4-17, 3122:22-3123:10 (Westerhout); Tr. 3367:10-3381:8, 3953:2-6, 4049:15-19 (Cohen); People's 167, 176-A, 218, 404-C, 407-A, 407-B, 407-C, 407-D, 407-E, 409-A, 409-B, 409-C. All of this evidence overwhelmingly proves that defendant intended to conceal information from government regulators, tax professionals, or the voting public. *See, e.g., People v. Lang*, 36 N.Y.2d 366, 371 (1975); *Morgenthau v. Khalil*, 73 A.D.3d 509, 510 (1st Dep't 2010); *People v. Pymm*, 151 A.D.2d 133, 135, 141 (2d Dep't 1989), *aff'd*, 76 N.Y.2d 511 (1990); *People v. Kase*, 76 A.D.2d 532, 537-38 (1st Dep't 1980), *aff'd*, 53 N.Y.2d 989 (1981).

2. Regarding the intent to conceal another crime, the admissible evidence established beyond a reasonable doubt that defendant intended to conceal the conspiracy to promote his election by unlawful means. Testimony from Pecker and Cohen establishes that a conspiracy to influence the election was formed in August 2015 in Trump Tower. Tr. 1019:4-1026:4 (Pecker); Tr. 3294:23-3296:1 (Cohen). That testimony is supported by the documentary evidence of the Sajudin, McDougal, and Daniels transactions, as well as by testimony from Davidson regarding the execution of that conspiracy. *See, e.g.*, People's 154-158, 160, 162-164, 276; Tr. 1709:12-1800:24, 1836:10-1850:17 (Davidson). Extensive additional evidence proved that defendant sought to conceal both the fact of his sexual encounter with Daniels and the broader Trump Tower conspiracy. *See, e.g.*, Tr. 1091:19-1092:23, Tr. 1112:21-1115:18, 1199:6-1200:12, 1211:18-1219:11, 1228:7-1231:25, 1237:4-1239:20, 1241:1-16 (Pecker); Tr. 2205:8-2205:20 (Hicks); Tr. 3431:20-3433:5, 3465:13-3466:2, 4189:13-4190:3 (Cohen); People's 179, 259.

This evidence also proves that the participants intended to and ultimately did advance that conspiracy by unlawful means, including through violations of FECA, the falsification of other business records, and violations of tax laws. Tr. 4843:9-4846:15 (jury charge). As to the evidence of FECA violations, the evidence established that the \$150,000 payment to Karen McDougal was a prohibited corporate contribution that violated FECA. Tr. 1133:8-13, 1146:2-25 (Pecker); People's 182. Pecker testified that his principal purpose in entering into the non-disclosure agreement with McDougal was to suppress her story so as to prevent it from influencing the election; that he did so because of the Trump Tower conspiracy; that he knew at the time that corporate expenditures in coordination with or at the request of a candidate were unlawful; and that he only made the payments on the understanding that defendant would reimburse him. *See, e.g.*, Tr. 1114:22-1115:1, 1115:18-1116:11, 1119:22-1120:20, 1124:17-1128:16, 1132:5-1133:13,

1144:4-14, 1146:2-25, 1148:13-20, 1456:13-1457:13 (Pecker); Tr. 3311:7-14, 3318:11-3320:15, 3327:4-3328:23 (Cohen).

The evidence also proved that the \$130,000 payment to Stormy Daniels was an excessive individual contribution by Michael Cohen in violation of FECA, because it was the payment of a candidate's personal expenses that he would not have made irrespective of defendant's candidacy. Tr. 3446:19-25, 3614:21-23 (Cohen). Cohen made this payment to Daniels on the eve of the election to bury her account of her sexual interaction with defendant, and he did so at defendant's direction and for the principal purpose of influencing the election. *See, e.g.*, Tr. 1190:12-17, 1483:1-25 (Pecker); Tr. 1775:23-1777:10, 1784:14-25, 1841:23-1842:1, 1855:2-8, 1975:16-24 (Davidson); Tr. 2691:14-22 (Daniels), Tr. 3389:6-3392:8, 3432:9-3433:4, 4193:7-18 (Cohen); People's 63-65, 176-A, 177-A, 178-A, 265, 267, 276, 281-285, 361-379.

The unlawful means also include the falsification of other business records committed in the course of the conspiracy, including:

- the invoice from Investor Advisory Services to Resolution Consultants, falsely describing the expected payment as "'flat fee' for advisory services," *see* People's 161; Tr. 1154:3-1158:2 (Pecker); Tr. 3362:18-3363:22 (Cohen);
- false statements in bank records that accompanied Cohen's request to open a bank account for Resolution Consultants LLC around October 13, 2016, *see* People's 366; Tr. 1562:4-1567:5 (Farro); Tr. 3405:6-3407:4 (Cohen);
- false statements in the account opening paperwork for the Essential Consultants LLC account on October 26, 2016, *see* People's 368; Tr. 1569:9-1572:22 (Farro); Tr. 3434:18-3435:24 (Cohen);
- false statements in the wire transfer form authorizing the wire to Keith Davidson the next day, *see* People's 376; Tr. 1604:9-1609:7 (Farro); Tr. 3440:25-3442:15 (Cohen); and
- false statements in the 1099 Forms that the Trump Organization prepared and submitted to the IRS as a record of payments to Cohen that were falsely described as income when in fact they were reimbursements, *see* People's 93; Tr. 2363:7-2365:17 (McConney).

The evidence of unlawful means also includes evidence of federal, state, and city tax law violations. Defendant agreed to gross up the reimbursement to Cohen so it could be disguised as income. *See* People's 35, 36; Tr. 2299:6-16 (McConney); Tr. 3484:18-3486:12, 3488:23-3489:2, 3490:4-3494:22 (Cohen). The Trump Organization then followed through on that deception and reported the repayment to the IRS as compensation to Cohen on two 1099 Forms. *See* People's 93; Tr. 2363:5-6, 2365:15-17 (McConney). Cohen explained that the reimbursement was grossed up specifically so it could be described as income, and that defendant approved that repayment plan. Tr. 3484:18-3486:12, 3488:23-3489:2, 3490:4-3494:22 (Cohen); *see also* Tr. 2299:13-16 (McConney); People's 35. Under federal law, it is unlawful to submit false or fraudulent documents or to aid anyone in doing so; and under New York State and City law, it is unlawful to submit false information in connection with any tax return. *See* 26 U.S.C. §§ 7206(1), 7206(2); Tax Law §§ 1801(a)(3), 1802; Tr. 4846:5-15.

The trial record therefore overwhelmingly establishes every element of Falsifying Business Records in the First Degree and supports defendant's guilt on all 34 counts, and this factor supports denying defendant's motion to dismiss the indictment. *See* CPL § 210.40(1)(c); *Pittman*, 228 A.D.2d at 226; *Insignares*, 109 A.D.2d at 232.

3. Defendant's challenges to the evidence of his guilt are unpersuasive.

Defendant contends that Michael Cohen's trial testimony is unreliable because of his criminal history. Def.'s Mem. 58. The People rebutted this argument at length in our opposition to defendant's CPL § 330.30 motion, and we incorporate that discussion by reference here. *See* People's Mem. Opp. Post-Trial Mot. 52-57 (July 24, 2024). And the evidence supported defendant's guilt beyond a reasonable doubt even if the jury disregarded Cohen's testimony. Tr. 4620:1-4623:4 (summation); *see supra* Parts IV.B.1, IV.B.2.

Defendant also argues that the People improperly relied on official-acts evidence at trial. Def.'s Mem. 58-59. But the evidence of defendant's guilt described above does not rely on any of the evidence that defendant has argued should have been excluded on his claim of official-acts immunity.¹⁴ And in any event, the *Clayton* factors permit consideration of evidence of defendant's guilt "whether admissible or inadmissible at trial." CPL § 210.40(1)(c).

C. The history, character, and condition of the defendant.

Defendant's contemptuous conduct during this criminal proceeding—which is consistent with his long history of threatening, abusing, and attacking participants in other legal proceedings in which he is involved—bears directly on the "history, character and condition of the defendant," CPL § 210.40(1)(d), and weighs heavily against dismissal.

1. Defendant's attacks on this criminal proceeding and repeated violations of this Court's orders.

This Court previously reviewed the extensive evidence of defendant's "threatening, inflammatory, [and] denigrating" public attacks on "local and federal officials, court and court staff, prosecutors and staff assigned to the cases, and private individuals including grand jurors performing their civic duty," and found that "[t]he consequences of those statements include not only fear on the part of the individual targeted, but also the assignment of increased security resources to investigate threats and protect the individuals and family members thereof. Such inflammatory extrajudicial statements undoubtedly risk impeding the orderly administration of this Court." Decision & Order 2 (Mar. 26, 2024). In a subsequent opinion, the Court further noted that defendant's "pattern of attacking family members of presiding jurists and attorneys assigned to his cases serves no legitimate purpose," and instead "injects fear in those assigned or called to

¹⁴ This is so even though all of the evidence defendant challenged in his CPL § 330.30 motion was in fact properly admitted at trial. *See* People's Mem. Opp. Post-Trial Mot. 12-33 (July 24, 2024).

participate in the proceedings, that not only they, *but their family members as well*, are ‘fair game’ for Defendant’s vitriol.” Decision & Order 2-3 (Apr. 1, 2024) (emphasis in original). The Court correctly recognized that defendant’s conduct “constitutes a direct attack on the Rule of Law itself.” *Id.* at 3.

Defendant has engaged in multiple such attacks on this criminal proceeding—before, during, and after the trial. While the grand jury was hearing evidence in early 2023, defendant began making a series of comments on social media attacking the anticipated charges against him and the participants in the investigation, including witnesses, the District Attorney, and staff of the District Attorney’s Office. He threatened “death and destruction” if he was indicted and posted a photo of himself wielding a baseball bat at the back of the District Attorney’s head. Ex. 1 at 46, 48.¹⁵ He made other statements directly addressing the grand jury; calling the District Attorney an “animal,” a “degenerate psychopath,” and “HUMAN SCUM”; calling prosecutors in this case “ANIMALS AND THUGS”; referring to multiple potential witnesses in pejorative and violent terms; threatening “years of hatred, chaos, and turmoil” if he was indicted; and exhorting his followers that “[w]e must stop them cold!” *See, e.g.*, Ex. 1 at 39, 42-43, 47-48, 50, 53-54, 58. These and other statements—before defendant was even indicted—had an immediate impact on public safety in the city and on the personal safety of participants in this proceeding, requiring an extensive and continuing response by multiple law enforcement agencies.

Defendant’s attacks continued after he was indicted and persisted during pre-trial proceedings, jury selection, the trial itself, and since his conviction by the jury. Those attacks have

¹⁵ Exhibit 1 is a compilation of selected social media posts by defendant that the People have cited in prior filings during these proceedings. It necessarily consists only of a selection of defendant’s voluminous social media posts and does not contain every example of online statements or other public remarks by defendant attacking this proceeding, the participants in this proceeding, or the participants in defendant’s other criminal and civil legal matters.

been documented at length in the People's prior filings, which we expressly incorporate by reference here.¹⁶ That record includes frequent attacks on witnesses and their families. Ex. 1 at 7-8, 10, 33, 35, 40-41, 87. It includes attacks on the Court and the Court's family members based on transparent falsehoods. Ex. 1 at 62, 106-113. It includes attacks on the District Attorney's family as well, and on individual prosecutors in this Office—also based on lies. Ex. 1 at 34, 52, 55-57, 59-60, 106. Defendant's language is often ominous and violent—he referred to one potential trial witness as “death” just weeks before the trial was scheduled to start. Ex. 1 at 106; *see also id.* at 36, 38-39, 50, 54, 58, 72, 77-78, 80, 105. Following these attacks, there have been numerous credible threats of violence, harassment, and intimidation directed at witnesses, the Court, the District Attorney, his family members, and employees of the District Attorney's Office. *See, e.g.*, June 20, 2024 Pistilli Aff. ¶¶ 3-8 (Ex. 2); Feb. 22, 2024 Pistilli Aff. ¶¶ 3-14 (Ex. 3); Indictment, *United States v. Gear*, No. 2:24-cr-152, ECF No. 1 (D. Nev. July 16, 2024); Felony Complaint, *United States v. Robertson*, No. 2:23-mj-722 (D. Utah Aug. 9, 2023) (charging a Utah resident with transmitting interstate death threats against the District Attorney through a series of communications that began on March 18, 2023—hours after defendant posted a call on social media for his followers to “PROTEST, TAKE OUR NATION BACK!”).

In addition, defendant willfully violated this Court's orders on extrajudicial speech multiple times during his criminal trial, resulting in ten findings of criminal contempt by this Court. First, on April 30, 2024, this Court held defendant in criminal contempt for nine willful violations

¹⁶ *See* People's Response to Def.'s Mot. to Terminate (June 20, 2024); People's Supp. Filing Regarding the Court's Order on Extrajudicial Statements (Apr. 1, 2024); People's Mot. for an Order Restricting Extrajudicial Statements (Feb. 22, 2024); People's Mot. for a Protective Order Regulating Disclosure of Juror Addresses and Names (Feb. 22, 2024); People's Mot. to Quash Def.'s Subpoena and for a Protective Order (Nov. 9, 2023); People's Mot. for a Protective Order (Apr. 24, 2023); Tr. of Arraignment 5-8, 12-13 (Apr. 4, 2023).

of this Court's orders "by making social media posts about known witnesses pertaining to their participation in this criminal proceeding and by making public statements about jurors in this criminal proceeding." Decision & Order on Contempt, *People v. Trump*, 2024 N.Y. Slip Op. 24148, at *2 (Sup. Ct. N.Y. Cnty. Apr. 30, 2024). Then on May 6, 2024, this Court again held defendant in criminal contempt—for a tenth time—for "making public statements about the jury and how it was selected" that "not only called into question the integrity, and therefore the legitimacy of these proceedings, but again raised the specter of fear for the safety of the jurors and of their loved ones." Decision & Order on Contempt, *People v. Trump*, 83 Misc. 3d 1202(A), at *3 (Sup. Ct. N.Y. Cnty. May 6, 2024).

2. Defendant's history of threatening witnesses, investigators, prosecutors, judges, jurors, court staff, and their family members.

Defendant's conduct in this case parallels his treatment of the legal system in multiple other proceedings. As the People have previously documented, defendant has a long history of public statements that attack judges, jurors, lawyers, witnesses, prosecutors, investigators, and other individuals involved in legal proceedings against him. *See supra* at 50 n.16.

For example, during an investigation and subsequent prosecution by a federal Special Counsel into defendant's efforts to subvert the results of the 2020 presidential election, defendant used social media to make repeated personal attacks on the Special Counsel; attacked the Special Counsel's wife and sister-in-law; attacked potential witnesses in that case, including former Vice President Mike Pence and former Attorney General William Barr; and attacked the presiding judge (who was then the subject of racist death threats, including one that led to a federal prosecution). Ex. 1 at 22, 23, 27-28, 61, 65-68, 73, 79-80, 84, 86, 105; *see* Aff. in Support of Criminal Complaint, *United States v. Shry*, No. 4:23-cr-00413, ECF No. 1 (S.D. Tex. Aug. 11, 2023).

In a civil fraud action brought by the New York Attorney General Letitia James, defendant repeatedly targeted Attorney General James, witnesses, the presiding judge, and the judge's wife and son. Ex. 1 at 44, 50, 81-83, 85, 87-104. Defendant also attacked the judge's law clerk, leading to "hundreds of threatening and harassing voicemail messages" and other threats against her. Hollon Aff. ¶ 5, *Trump v. Engoron*, Case No. 2023-05859 (1st Dep't 2023) (Ex. 4). Although the court ordered defendant to cease those attacks, defendant willfully violated those orders and was sanctioned twice for doing so. See Order, *People by James v. Trump*, No. 452564/2022, NYSCEF Doc. No. 1598 (Sup. Ct. N.Y. Cnty. Oct. 26, 2023) (holding that defendant intentionally violated a court order by making public attacks on that court's principal law clerk despite two prior orders not to do so, and further holding that defendant lied under oath when defendant claimed that his public comments about the law clerk were instead about a witness) (Ex. 5); Order, *People by James v. Trump*, No. 452564/2022, NYSCEF Doc. No. 1584 (Sup. Ct. N.Y. Cnty. Oct. 20, 2023) (holding that defendant violated a court order by failing to remove an "untrue, disparaging, and personally identifying post" about the court's principal law clerk from defendant's website) (Ex. 6).

Defendant's much lengthier history of attacks has been extensively documented not only in the People's prior filings but in written orders of many federal and state judges. See, e.g., *United States v. Trump*, 88 F.4th 990, 997-99, 1010-16 (D.C. Cir. 2023).¹⁷ This Court itself has

¹⁷ See also, e.g., *United States v. Trump*, 698 F. Supp. 3d 178, 179-180 (D.D.C. 2023); Order, *Carroll v. Trump*, No. 20-cv-7311 (S.D.N.Y. Nov. 3, 2023); *Carroll v. Trump*, No. 22-cv-10016, 2023 WL 2871045, at *1-2 (S.D.N.Y. Apr. 10, 2023); *Carroll v. Trump*, 663 F. Supp. 3d 380, 382 & n.7 (S.D.N.Y. 2023); *In re Sealed Search Warrant*, 622 F. Supp. 3d 1257, 1263 (S.D. Fla. 2022); Order Denying Mot. for Access to Juror Questionnaires 9 & n.6, *In re: Juror Questionnaires in United States v. Stone*, No. 1:20-mc-00016-ABJ, ECF No. 20 (D.D.C. Nov. 23, 2022); *Matter of Trump v. Merchan*, 227 A.D.3d 518 (1st Dep't 2024); *Matter of Goodlawgic, LLC v. Merchan*, 227 A.D.3d 612 (1st Dep't 2024); Order, *People by James v. Trump*, Index No. 452564/2022, NYSCEF Doc. No. 1631 (Sup. Ct. N.Y. Cnty. Nov. 3, 2023).

acknowledged defendant's dangerous pattern of harassment and intimidation in no fewer than six written orders.¹⁸

3. Defendant's history of malicious conduct and abuse of process in other adjudicated matters.

Defendant has also been the subject of multiple adjudicated findings of sexual assault, defamation, breach of fiduciary duty, and abuse of the legal process.

On May 9, 2023, a jury found in a civil case that defendant sexually abused E. Jean Carroll, and awarded her \$2,020,000 in damages, including compensatory damages for her injuries as well as punitive damages on the ground that "Mr. Trump's conduct was willfully or wantonly negligent, reckless, or done with a conscious disregard for the rights of Ms. Carroll, or was so reckless as to amount to such disregard." Verdict Form 1-2, *Carroll v. Trump*, No. 22-cv-10016, ECF No. 174 (S.D.N.Y. May 9, 2023). Also on May 9, 2023, the same jury found that defendant defamed Ms. Carroll in a public statement made on October 12, 2022 by making a false statement with actual malice. *See id.* at 2. The jury awarded Ms. Carroll \$2,980,000 in damages, including compensatory damages for her injuries as well as punitive damages on the ground that "Mr. Trump acted maliciously, out of hatred, ill will, spite, or wanton, reckless, or willful disregard of the rights of another." *See id.* at 2-3.

On September 7, 2023, a court found in a civil case that defendant defamed Ms. Carroll in public statements on June 21 and June 22, 2019, by making false statements with actual malice. *See Carroll v. Trump*, 690 F. Supp. 3d 396, 400-01, 404-09 (S.D.N.Y. 2023). On January 26, 2024,

¹⁸ *See* Order on Def.'s Mot. to Terminate (June 25, 2024); Order on Contempt (May 6, 2024); Order on Mot. to Restrict Extrajudicial Speech (Apr. 1, 2024); Order on Mot. to Restrict Extrajudicial Speech (Mar. 26, 2024); Order on Mot. for Protective Order Regulating Disclosure of Juror Information (Mar. 7, 2024); Order on People's Mot. to Quash and for a Protective Order (Dec. 18, 2023).

a jury in that civil case awarded Ms. Carroll \$83,300,000 in damages for defendant's June 2019 defamatory statements, including compensatory damages for her injuries as well as punitive damages on the ground that "Mr. Trump acted maliciously, out of hatred, ill will, or spite, vindictively, or in wanton, reckless, or willful disregard of Ms. Carroll's rights." Verdict Form 1-2, *Carroll v. Trump*, No. 20-cv-7311, ECF No. 280 (S.D.N.Y. Jan. 26, 2024).

On January 19, 2023, a court sanctioned defendant in a civil case and ordered him to pay \$937,989 in fees for filing a frivolous, bad-faith lawsuit, holding: "Here, we are confronted with a lawsuit that should never have been filed, which was completely frivolous, both factually and legally, and which was brought in bad faith for an improper purpose. Mr. Trump is a prolific and sophisticated litigant who is repeatedly using the courts to seek revenge on political adversaries. He is the mastermind of strategic abuse of the judicial process, and he cannot be seen as a litigant blindly following the advice of a lawyer. He knew full well the impact of his actions." *Trump v. Clinton*, 653 F. Supp. 3d 1198, 1210, 1233 (S.D. Fla. 2023); *see also id.* at 1207 ("A continuing pattern of misuse of the courts by Mr. Trump and his lawyers undermines the rule of law, portrays judges as partisans, and diverts resources from those who have suffered actual legal harm.").

And on November 7, 2019, a court held in a civil case that defendant breached his fiduciary duty to the Donald J. Trump Foundation by illegally allowing his 2016 presidential campaign to orchestrate a fundraiser for the Foundation, direct distribution of the funds, and use the fundraiser and distribution of the funds to further defendant's political campaign. *People by James v. Trump*, 66 Misc. 3d 200, 204 (Sup. Ct. N.Y. Cnty. 2019). The court ordered defendant to pay \$2,000,000 for breach of fiduciary duty and waste. *See id.*

4. Defendant's efforts to hinder the administration of justice weigh heavily against dismissal.

The abbreviated discussion above recites defendant's pervasive history of attempting to interfere with the administration of justice in this case and others—a history this Court has both observed first-hand and sanctioned with ten findings of criminal contempt. The Appellate Division has specifically held that this kind of conduct weighs heavily against interest-of-justice dismissal. *See, e.g., People v. Natarelli*, 154 A.D.2d 769, 770 (3d Dep't 1989) (reversing interest-of-justice dismissal where, among other factors, the defendant “chose to disregard a specific order of the court,” and noting that “[t]he act of hindering the legal process strikes at the very heart of our system for the administration of justice”); *People v. Belkota*, 50 A.D.2d 118, 122 (4th Dep't 1975) (reversing interest-of-justice dismissal and noting that “[t]his court has had occasion to comment on the conduct of those participating in the legal process who . . . hinder the courts in the lawful performance of their duties. We have condemned such acts, for they strike at the very heart of our system for the administration of justice.” (citing cases)).

Defendant asserts that he has no prior criminal record. Def.'s Mem. 59. But it is well-established that “[t]he fact that a defendant may have had no prior criminal record and an exemplary background, standing alone, is insufficient to justify a dismissal in the interest of justice.” *People v. Diggs*, 125 A.D.2d 189, 191 (1st Dep't 1986); *see also, e.g., Harmon*, 181 A.D.2d at 37; *People v. Reyes*, 174 A.D.2d 87, 90 (1st Dep't 1992); *Perez*, 156 A.D.2d at 10; *People v. Varela*, 106 A.D.2d 339, 340 (1st Dep't 1984). And in holding defendant in criminal contempt during trial for repeated violations of the Court's orders, the Court found beyond a reasonable doubt that defendant willfully violated court orders on no fewer than ten separate occasions, and that sanctions were necessary to “protect the dignity of the judicial system and to compel respect for its mandates,” and “to punish the contemnor for disobeying a court order.”

Trump, 2024 N.Y. Slip Op. 24148, at *2-3 (quoting *Matter of McCormick v. Axelrod*, 59 N.Y.2d 574, 583 (1983), and *Rush v. Save My Home Corp.*, 145 A.D.3d 930, 931 (2d Dep’t 2016)); see also *Trump*, 83 Misc. 3d 1202(A), at *3; Judiciary Law §§ 750(A)(3), 751. The fact that defendant violated the Court’s orders during the pendency of this very case militates against dismissal. Cf. *People v. Smith*, 217 A.D.2d 671, 673 (2d Dep’t 1995) (fact that defendant engaged in continued criminal conduct during the pendency of the case “militates against” dismissal); *Harmon*, 181 A.D.2d at 38 (reversing trial court’s interest-of-justice dismissal and holding that failure to consider the defendant’s subsequent criminal history was clear error); *People v. Howard*, 151 A.D.2d 253, 256 (1st Dep’t 1989). And the adjudicated findings of sexual assault, defamation, breach of fiduciary duty, and abuse of the legal process described in Part IV.C.3 above establish that defendant’s criminal conviction was not “an isolated aberrational act on his part.” *Varela*, 106 A.D.2d at 340.

Defendant also cites his public service as a factor in support of his motion to dismiss. Def.’s Mem. 59. A defendant’s professional circumstances—however laudable—are not a compelling factor warranting dismissal. See, e.g., *People v. Marshall*, 106 A.D.3d 1, 11-12 (1st Dep’t 2013) (affirming trial court’s denial of *Clayton* motion and holding that the defendant’s “public service is laudable, but it does not rise to the level of an extraordinary or special circumstance”); *Varela*, 106 A.D.2d at 340 (defendant’s “‘exemplary’ background . . . does not immunize him from the normal processes of the criminal law”); cf. *Belkote*, 50 A.D.2d at 122 (“Surely a crime becomes no less a crime when performed by a public officer, and may well be considered by some to be worse.”); *People v. Norman*, 6 Misc. 3d 317, 352-54 (Sup. Ct. Kings Cnty. 2004) (Marcus, J.).

Defendant's exhaustively-documented history of disrespect for the judicial process—which this Court previously recognized as “a direct attack on the Rule of Law itself,” Decision & Order 3 (Apr. 1, 2024)—supports denial of his motion to dismiss. CPL § 210.40(1)(d).

D. Public confidence in the criminal justice system.

Vitiating the jury's verdict would undermine public confidence in the criminal justice system. CPL § 210.40(1)(g). As discussed above, a jury verdict is a solemn “pronouncement of guilt or innocence” that there is a compelling public interest in maintaining. *Gilliam*, 994 F.2d at 101. Defendant seeks dismissal of the indictment based on a circumstance that arose months after his conviction on May 30, 2024—namely, his election to public office and his future inauguration. Those developments have nothing to do with his guilt or innocence; the fairness of the trial; or the strength of the evidence against him. Dismissing this indictment notwithstanding the jury's verdict of guilt would thus undermine the jury's fundamental role in our criminal justice system.

Defendant's apparent argument (Def.'s Mem. 25, 50) that the election itself has any bearing on the legitimacy of the jury's verdict is of course misplaced. “Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.” *United States v. Trump*, 88 F.4th 990, 1022 (D.C. Cir. 2023) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)). Dismissing an indictment after a trial and guilty verdict because the defendant later wins an election would undermine the public's perception of fairness in the criminal justice system. See *People v. Reyes*, 174 A.D.2d 87, 90 (1st Dep't 1992) (reversing interest-of-justice dismissal because “public confidence in the criminal justice system . . . can only be undermined when justice is administered in less than an evenhanded fashion”); *People v. Aleynikov*, 2013 N.Y. Slip Op. 34209(U), at *35-36 (Sup. Ct. N.Y. Cnty. 2013) (denying interest-of-justice dismissal where prosecution “can serve to remind the Public that no one is above the law”). This is particularly so where the crimes defendant was convicted of committing relate to his illegal efforts to promote his

own election in 2016. *See People v. Hadnott*, 74 Misc. 3d 509, 513 (Sup. Ct. N.Y. Cnty. 2022) (“A dismissal would have an adverse effect upon the public’s confidence in the criminal justice system’s ability to prosecute instances of public corruption”).

Reprising an argument he already presented unsuccessfully to both this Court and the Appellate Division, defendant argues that seating an impartial jury in this jurisdiction was impossible. Def.’s Mem. 64. In denying defendant’s pretrial motion to adjourn the trial because of prejudicial publicity, this Court rejected that claim and held not only that effective voir dire could identify impartial jurors, but also that defendant’s own pretrial survey indicated that 70% of the respondents in New York County could “‘definitely or probably’ be fair and impartial.”¹⁹ Decision & Order on Def.’s Mot. for Further Adjournment Based on Pre-Trial Publicity 3 (Apr. 12, 2024). The Appellate Division likewise denied defendant’s motion for venue change pursuant to CPL § 230.20 based on similar arguments. *See Order, People v. Trump*, No. 2024-02646 (1st Dep’t May 23, 2024). Defendant’s observation (Def.’s Mem. 64) that many potential jurors asked to be excused on the ground that they could not be impartial undermines his own point—this fact plainly shows that the Court’s voir dire process did in fact identify and remove prospective jurors who could not be impartial.²⁰ Dismissal based on defendant’s flawed claims about the New York

¹⁹ The Court also noted that defendant’s survey did not explain its methodology enough to demonstrate that its results were at all reliable. *Id.* (“The Court is skeptical of the reliability and interpretation of Defendant’s commissioned Survey and Media Study.”).

²⁰ The seated jurors were subject to an exhaustive voir dire process that included an initial instruction during which any juror who self-identified as being unable to be fair and impartial was excused (Tr. 123-130, 412-418); an extensive questionnaire that asked several questions about each prospective juror’s ability to judge this case fairly and impartially; and extended individualized questioning by the judge and counsel for both sides about the particulars of certain jurors (*e.g.*, Tr. 282-285, 293-297, 565-570, 578-587, 732-740). The Court also provided the parties with more time than usual to question each panel. This robust process is precisely the type of “thorough voir dire” that courts have recognized can identify jurors who are able to dispassionately evaluate the evidence in a case, whatever their initial beliefs. *People v. Govan*, 64

County jury pool would not promote “confidence of the public in the criminal justice system.” CPL § 210.40(1)(g).

Defendant also contends (Def.’s Mem. 64-66) that his allegations of law enforcement and judicial misconduct support dismissal in order to bolster public confidence. But as described below, those claims are categorically false and have been rejected by every one of the many courts to consider them. *See infra* Part IV.E. Dismissing an indictment to accommodate a defendant’s repeated lies about the Court and the prosecution would undermine, not strengthen, confidence in the judicial system. *See* People’s Mem. Opp. Recusal 8-9 (June 14, 2023).

This Court previously acknowledged that “[t]he members of this jury served diligently on this case, and their verdict must be respected.” Order 3 (Sept. 6, 2024). To dismiss the indictment after defendant was “found guilty of crimes by a unanimous jury of his peers,” *id.* at 2, would disregard those citizens’ diligent service and undermine the state’s core, foundational prerogative to enforce its own criminal law and to vindicate the judgment of its citizens that a defendant is guilty of violating that law. This factor weighs strongly against dismissal. CPL § 210.40(1)(g).

E. Defendant’s allegations of misconduct by the Court and the People are categorically false and have been repeatedly rejected by this and other courts.

The thrust of defendant’s motion (Def.’s Mem. 1-24, 59-66) is an effort to relitigate false claims of misconduct by the Court and the People that have already been examined and rejected by this and many other courts.²¹ Apart from defense counsel’s disingenuous and repeated efforts

Misc. 3d 389, 395 (Sup. Ct. Kings Cnty. 2019); *see Skilling v. United States*, 561 U.S. 358, 387-392 (2010) (voir dire process adequately ensured impartial jury despite pretrial publicity).

²¹ The Court has repeatedly admonished defense counsel not to make and relitigate these and other false and unsupported allegations. *See, e.g.*, Decision on Def.’s Mot. for Recusal 3 (Aug. 13, 2024) (“Defense Counsel’s reliance, and apparent citation to his own prior affirmation, rife with inaccuracies and unsubstantiated claims, is unavailing”; and defense “counsel has been warned repeatedly that [zealous] advocacy must not come at the expense of professional responsibility in

to malign and menace the People, the Court, and their families with inflammatory falsehoods and conspiracy theories, there is no misconduct here—much less any showing of the “exceptionally serious misconduct” required to support dismissal in the interest of justice. CPL § 210.40(1)(e).

1. The Court’s impartiality cannot reasonably be questioned. Defendant’s crusade against this Court and the Court’s family (Def.’s Mem. 5-6, 21-24, 65-66) has been rejected in no fewer than seven different orders by state and federal courts. This Court evaluated and rejected defendant’s arguments in three orders denying defendant’s motions to recuse. *See People v. Trump*, 82 Misc. 3d 1233(A), at *2-4 (Sup. Ct. N.Y. Cnty. 2023) (denying defendant’s first motion for recusal); Trial Tr. 2:17-7:24 (Apr. 15, 2024) (denying motion to renew or reargue); Decision on Def.’s Mot. for Recusal (Aug. 13, 2024) (denying third motion to recuse).²² The Appellate

one’s role as an officer of the court”); Tr. 991-992 (Apr. 23, 2024); Tr. 73 (Apr. 15, 2024); Decision & Order on Def.’s Mot. for Further Adjournment Based on Pre-Trial Publicity 3-4 (Apr. 12, 2024) (“The People’s justifiable concern” with defense counsel’s false allegations “compels the Court again to express its continuing and growing alarm over counsel’s practice of making serious allegations and representations that have no apparent basis in fact—or at least are unsupported by a legitimate basis of knowledge.”); Decision & Order on People’s Mot. to Clarify 3 (Apr. 1, 2024) (“The arguments [defense] counsel makes are at best strained and at worst baseless misrepresentations which are uncorroborated and rely upon innuendo and exaggeration,” resulting in “accusations that are disingenuous and not rational”); Decision & Order on Def.’s Mot. to Vacate 3-4 (Mar. 26, 2024) (noting what “what appears to be an attempt to circumvent the Court’s Order” by defense counsel and admonishing that “the Court expects that the line between zealous advocacy and willful disregard of its orders will not be crossed”); Hearing Tr. 35-36, 45-49, 53 (Mar. 25, 2024); Order on Def.’s Mots. in Limine 2 (Mar. 18, 2024) (“Rearguing the Court’s prior rulings in this manner is procedurally and professionally inappropriate and a waste of this Court’s valuable resources.”); Order on Redactions (Dec. 6, 2023) (“Counsel is cautioned that this Court expects all parties to adhere to the highest ethical standards, particularly when making representations which this Court obviously relies upon.”); Decision on Def.’s Mot. for Recusal 4 (Aug. 11, 2023) (“The Court finds the allegations in [defense counsel’s] affirmation inaccurate and the conclusions drawn therefrom misleading.”).

²² Those decisions were correct for the reasons set out in the Court’s three orders and in the People’s five prior submissions to this Court opposing defendant’s motions to recuse. *See People’s Ltr. Opposing Renewed Mot. to Recuse* (Aug. 1, 2024); *People’s Opp. to Def.’s Renewed Mot. for Recusal* (Apr. 5, 2024); *People’s Ltr. Opposing Leave to File Renewed Mot. for Recusal* (Apr. 2, 2024); *People’s Opp. to Def.’s Mot. for Recusal* (June 14, 2023); *People’s Aff. in Opp. to Def.’s Mot. for Recusal* (June 14, 2023).

Division likewise rejected defendant's request for relief regarding recusal three separate times. *Trump v. Merchan*, 227 A.D.3d 569, 570 (1st Dep't 2024) (dismissing article 78 challenge); Order, *Trump v. Merchan*, No. 2024-02413 (1st Dep't Apr. 30, 2024) (panel order denying stay); Order, *Trump v. Merchan*, No. 2024-02413 (1st Dep't Apr. 10, 2024) (interim order denying stay). All told, by those three Appellate Division orders, *ten different justices* of the First Department have considered and declined to disturb this Court's recusal determinations. The federal district court also rejected defendant's demand for that court to examine this Court's impartiality. *See New York v. Trump*, No. 23 Civ. 3773, 2024 WL 4026026, at *1 (S.D.N.Y. Sept. 3, 2024) ("It would be highly improper for this Court to evaluate the issues of bias, unfairness or error in the state trial."); *see also New York v. Trump*, 683 F. Supp. 3d 334, 350-51 (S.D.N.Y. 2023) (declining to assert protective jurisdiction and holding that "there is no reason to believe that the New York judicial system would not be fair and give Trump equal justice under the law"). And all of this occurred after the Advisory Committee on Judicial Ethics determined more than 18 months ago that defendant's claims provide no basis for recusal. *See Opinion of the Advisory Committee on Judicial Ethics*, Op. 23-54 (May 4, 2023).

In this Court's August 13, 2024 order denying recusal, the Court observed that although it welcomes "zealous advocacy and creative lawyering," defense counsel "has been warned repeatedly that such advocacy must not come at the expense of professional responsibility in one's role as an officer of the court." Decision on Def.'s Mot. for Recusal 3 (Aug. 13, 2024). Re-raising these failed arguments again and claiming that they show "exceptionally serious misconduct" by the Court, CPL § 210.40(1)(e)—when twelve different judges on three state and federal courts have now rejected or declined to consider these claims in seven separate court orders—is the dictionary definition of frivolous.

2. *The Court's orders protecting the integrity of the proceeding are constitutional.* Equally frivolous is defendant's claim that this Court's orders regarding extrajudicial speech are not just unconstitutional but also somehow evidence of misconduct by either the Court or the People. Def.'s Mem. 5-6, 24, 66. As described in Part IV.C above, those orders were based on extensive and uncontested factual support.²³ See Decision & Order (June 25, 2024); Decision & Order (Apr. 1, 2024); Decision & Order (Mar. 26, 2024); *see also* People's Response to Def.'s Mot. to Terminate (June 20, 2024); People's Mot. for Clarification (Mar. 28, 2024); People's Mot. for Order Restricting Extrajudicial Statements (Feb. 22, 2024). And the Court modified its pretrial orders to make them even more narrowly tailored when circumstances changed after trial. See Decision & Order (June 25, 2024).

The Court's orders were then upheld against defendant's challenges at every level of the state courts—including in *eight* different orders and opinions from the Court of Appeals and the Appellate Division. See *Trump v. Merchan*, 42 N.Y.3d 956 (Sept. 12, 2024) (dismissing appeal “upon the ground that no substantial constitutional question is directly involved”); *Trump v. Merchan*, 42 N.Y.3d 903 (Sept. 12, 2024) (denying leave to appeal); *Trump v. Merchan*, 41 N.Y.3d 1013 (June 18, 2024) (dismissing appeal “upon the ground that no substantial constitutional question is directly involved”); *Trump v. Merchan*, 230 A.D.3d 413 (1st Dep’t Aug. 1, 2024) (denying article 78 challenge); Order, *Trump v. Merchan*, No. 2024-02298 (1st Dep’t May 23, 2024) (denying motion for leave to appeal); *Trump v. Merchan*, 227 A.D.3d 518 (1st Dep’t May 14, 2024) (denying article 78 challenge); Order, *Trump v. Merchan*, No. 2024-02369 (1st Dep’t

²³ The Court's orders followed an opinion from the U.S. Court of Appeals for the D.C. Circuit affirming similar relief against the same defendant that had already been ordered by the federal district court in that case. See *United States v. Trump*, 88 F.4th 990 (D.C. Cir. 2023), *reh'g en banc denied*, 2024 WL 250647 (D.C. Cir. Jan. 23, 2024).

Apr. 23, 2024) (panel order denying stay); Order, *Trump v. Merchan*, No. 2024-02369 (1st Dep’t Apr. 9, 2024) (interim order denying stay). There is no good-faith argument that the Court’s orders are evidence of anything other than an effort to preserve the integrity of these proceedings.

3. *The People independently investigated and prosecuted this case.* As to the canard that the Justice Department directed this prosecution (Def.’s Mem. 1, 8-9, 61), the Court already collected and reviewed every single interoffice communication and internal DANY record regarding the People’s interactions with the Justice Department about this investigation dating back to 2021—reflected in two detailed attorney affirmations, more than 170 exhibits spanning over 1,000 pages, and a timeline containing 335 entries²⁴—and the Court concluded after a fact hearing that “there was no coordinated, joint investigation being conducted by the New York County District Attorney’s Office and USAO-SDNY.” Decision on Def.’s Mot. for Discovery Sanctions 3 (May 23, 2024); *see also* Hearing Tr. 36:10-21, 54:09-55:12 (Mar. 25, 2024) (“[The Court]: [T]he exhibits and the evidence that I reviewed are clear that the U.S. Attorney’s Office and the District Attorney’s Office never, during the course of their respective investigations, collaborated in any way, shape, or form on either investigation.”).

Defendant’s contention that “DOJ sent Colangelo to DANY . . . to target” the defendant (Def.’s Mem. 9) is knowingly false. As defendant knows from the People’s sworn attorney affirmation opposing defendant’s omnibus motions, the People were investigating this case and preparing for a possible grand jury presentation—in part by beginning the process of impaneling an additional grand jury in October 2022—long before ADA Colangelo was hired by this Office.

²⁴ *See* Conroy Aff. Appending Timeline & Correspondence (Mar. 21, 2024); People’s Timeline & Exs. 1-170 (Mar. 21, 2024, corrected Mar. 23, 2024); People’s Mem. Opp. Def.’s Mot. Regarding Discovery of USAO-SDNY Documents (Mar. 18, 2024, corrected Mar. 20, 2024); Conroy Aff. Supp. People’s Opposition & Exs. 1-9 (Mar. 18, 2024).

See Conroy Aff. ¶¶ 6-15, 33-35 (Nov. 9, 2023). And the United States Attorney General categorically denied this conspiracy theory during sworn testimony before a congressional committee on June 4, 2024. See *Oversight of the U.S. Dep't of Justice: Hearing Before the H. Comm. on the Judiciary*, Hearing Tr. at 22, 66, 93 (June 4, 2024) (“[Attorney General Garland]: The Justice Department did not send [Mr. Colangelo] to New York. Those decisions in New York are made by the DA of New York.”) (Ex. 7).²⁵

The Department of Justice then further responded to the congressional committee in writing to make clear that although “[t]he Department does not generally make extensive efforts to rebut conspiratorial speculation, including to avoid the risk of lending it credibility, . . . the Department has taken extraordinary steps to confirm what was already clear: there is no basis for the[] false claims” that the Justice Department is “behind the District Attorney’s so-called ‘politicized prosecution.’” Letter from Hon. Carlos Felipe Uriarte, Assistant Attorney General, Office of Legislative Affairs, U.S. Dep’t of Justice, to Hon. Jim Jordan, Chair, H. Comm. on the Judiciary (June 10, 2024) (Ex. 8).²⁶ That letter confirmed, again, that “Department leadership did not dispatch Mr. Colangelo to the District Attorney’s office, and Department leadership was unaware of his work on the investigation and prosecution involving the former President until it was reported in the news.” *Id.* The Department also explained that “[a]s the Attorney General stated at his hearing, the conspiracy theory that the recent jury verdict in New York state court was somehow controlled by the Department is not only false, it is irresponsible. Indeed, accusations of wrongdoing made without—and in fact contrary to—evidence undermine confidence in the justice

²⁵ At <https://www.govinfo.gov/content/pkg/CHRG-118hhrg55952/pdf/CHRG-118hhrg55952.pdf>.

²⁶ At <https://s3.documentcloud.org/documents/24740955/doj-letter.pdf>.

system and have contributed to increased threats of violence and attacks on career law enforcement officials and prosecutors.” *Id.* It is bad faith for defense counsel to perpetuate this lie.²⁷

4. *The People’s examination of Michael Cohen was proper.* The People’s opposition to defendant’s CPL § 330.30 motion responded at length to defendant’s contention that Michael Cohen’s testimony was unreliable or false (Def.’s Mem. 4-5, 17-18, 62-63), and we incorporate that discussion by reference here. *See* People’s Mem. Opp. Def.’s Post-Trial Mot. 52-57 (July 24, 2024). Regarding defense counsel’s inflammatory accusation that the People “elicited perjury from Cohen” regarding the October 24, 2016 phone call (Def.’s Mem. 63), that claim is categorically untrue. On cross examination, Cohen firmly rejected defense counsel’s assertion that Cohen lied about speaking to defendant on that call, and testified that “[b]ased upon the records that I was able to review, in light of everything that was going on, I believe I also spoke to Mr. President Trump and told him everything regarding the Stormy Daniels matter was being worked on and it’s going to be resolved.” Tr. 3896:9-3898:8. Cohen’s testimony was corroborated both by photographic evidence of Schiller standing next to defendant mere minutes before the phone call in question, *see* People’s 417-B; Tr. 4187:8-14 (Cohen), and by testimony from Cohen and other witnesses that they sometimes contacted Schiller in order to reach defendant by phone. Tr. 3276:2-

²⁷ Defendant’s bizarre detour into ADA Colangelo’s other assignments at DANY (Def.’s Mem. 9) is also factually false. Among other matters, ADA Colangelo’s docket since joining this Office in December 2022 has included not just this case—with its hundreds of court filings, six-week trial, and ancillary litigation and hearings in multiple other federal and state courts—but also economic justice matters, including assisting in the development of DANY’s Worker Protection Unit; sex crimes investigations and prosecution; appellate matters; and multiple other matters that by law cannot be publicly disclosed. CPL § 190.25(4). Quite obviously, most of those matters are not reported in Westlaw or announced by press release. However much defense counsel believes it helps defendant’s public crusade against this Office and its prosecutors to falsely claim otherwise, an ADA who in the past two years has worked on serious and complex matters involving nearly every Division in this Office can hardly be said to have a “singular purpose” relating to this defendant. Def.’s Mem. 8.

10, 3313:21-24 (Cohen); Tr. 1008:14-18 (Pecker); Tr. 2141:1-8 (Hicks). And the defense offered no testimonial or other evidence to rebut Cohen's testimony that he in fact spoke with defendant about the Daniels payoff on that October 24, 2016 call. The Court should reject—again—defense counsel's baseless accusations of suborning perjury. Tr. 4955:2-4956:15 (denying motion for judgment of acquittal) ("THE COURT: I'm sure you misspoke when you said 'knowing.' You're not suggesting that I 'know' anybody committed perjury; right?").

Defense counsel's claim that the People "ignor[ed] Cohen's perjury" at an October 2023 civil fraud trial (Def.'s Mem. 17-18, 63) against defendant is also false. As this Court knows, Justice Engoron—sitting as the finder of fact in the New York Attorney General's civil fraud trial—expressly found that "Michael Cohen told the truth" and that "the Court found his testimony credible." Decision & Order After Non-Jury Trial 43, *People by James v. Trump*, Index No. 452564/2022, 2024 NYLJ LEXIS 582, at *100 (Sup. Ct. N.Y. Cnty. Feb. 16, 2024); *see also* People's Mem. Opp. Post-Trial Mot. 53 (July 24, 2024); Tr. 3746:15-3747:1. Nothing about Mr. Cohen's testimony or the People's examination of this witness supports any claim of misconduct.

5. *The People's examination of Stormy Daniels was proper.* Defense counsel's meritless accusations that the People elicited false testimony from Stormy Daniels or intentionally violated the Court's orders regarding the scope of her testimony (Def.'s Mem. 5, 13, 17, 63) are contradicted by the trial record. After considering argument concerning defense counsel's objections to expected testimony by Ms. Daniels, the Court directed the People: "You can get into the sexual act, that there was a sexual act. Of course, you can talk about how she got there; how she ended up in the room. Just the facts. You can get into the facts." Tr. 2558:16-20. The People then elicited testimony to that effect. Tr. 2608:5-2615:25, 2616:12-13. In denying defendant's motion for a mistrial following that testimony, the Court expressly held—after reviewing the trial

transcripts and the Court's decisions on the omnibus motions and both motions in limine—that the Court “came away satisfied” that “everyone had followed my guidelines,” “there were no inconsistencies,” and “no one had violated my rulings.” Tr. 3073:21-3074:8; *see generally* Tr. 3073:21-3080:8 (order denying mistrial). In particular, the Court explained that the People had the right to elicit details about the sexual encounter in response to defense counsel's opening statement denying that encounter:

[I]n your opening statement, you deny that there was ever a sexual encounter between Stormy Daniels and the defendant. . . . Your denial puts the jury in a position of having to choose who they believe: Donald Trump, who denies there was an encounter, or Stormy Daniels, who claims that there was. Although the People do not have to prove that a sexual encounter actually did occur, they do have the right to rehabilitate Ms. Daniels' credibility and to corroborate her story, which was immediately attacked on opening statements. The more specificity Ms. Daniels can provide about the encounter, the more the jury can weigh to determine whether the encounter did occur and, if so, whether they choose to credit Ms. Daniels' story.

Tr. 3074:20-3075:11; *see also* 3079:22-3080:8.

Defense counsel's allegation that the People “persisted” in eliciting improper testimony despite sustained objections (Def.'s Mem. 17) is also patently false. In each example cited by defense counsel where the Court sustained defense objections, the People either rephrased the question to avoid leading, asked questions to clarify the testimony as requested by defense counsel, or moved on to ask a different question—for which there was then no objection. Tr. 2592, 2611-2615, 2618, 2620-2621, 2630, 2633, 2647, 2650-2651, 2653. To the extent the People asked some leading questions, the Court recognized that the People were “trying to direct [the witness],” which for that witness “might be the safer course,” Tr. 2619:9-11, because “[i]n fairness to the People, . . . the witness was a little difficult to control.” Tr. 2677:20-21. Indeed, the People proactively asked to approach the bench in order to seek the Court's guidance on several instances in order to comply with the Court's directives. *See, e.g.*, Tr. 2643:18-2646:1, 2717:2-2718:3, 2892:5-2895:18. And the People did not “wrongly elicit[] false testimony” that Ms. Daniels' encounter with

defendant was non-consensual (Def.'s Mem. 17); instead, the People elicited testimony that Ms. Daniels was not intoxicated, was not threatened, and never said "no" to the encounter. *See* Tr. 2611:2-2613:24, 2616:12-13. The Court expressly held that the witness made clear that she was not "coerced or forced in any way." Tr. 3077:17-19. Nothing about Ms. Daniels' testimony or the People's examination of this witness supports any claim of misconduct.

6. *The People have been candid and accurate with every court.* The People did not "misrepresent[] to the Court that Weisselberg was unavailable to testify based on his severance agreement." Def.'s Mem. 5, 18-19, 63. The People and defense counsel had a full colloquy with the Court about Mr. Weisselberg's circumstances as part of the People's application to admit Mr. Weisselberg's severance agreement, and there is no good-faith argument that the People misled the Court in any way about any aspect of Mr. Weisselberg's incarceration or the People's ability to subpoena him to testify. Tr. 3240:20-3252:16, 3257:20-3258:5. The People argued that the severance agreement was relevant and admissible to explain why the People were not calling Weisselberg as a witness: not because the agreement prohibited him from being subpoenaed but because it made clear he was still beholden to defendant financially and otherwise. Tr. 3244:10-3246:4, 3250:3-17. Defendant's claim that the People misled the Court about Mr. Weisselberg's availability (Def.'s Mem. 18-19, 63) is yet another tortured misrepresentation of the trial record, and one that is expressly contradicted by defense counsel's own concession to this Court that "Mr. Weisselberg's absence from this trial is a very complicated issue. I wouldn't be surprised if there ends up being a foundation for a missing witness instruction about the uncalled witnesses being equally unavailable to both sides." Tr. 3241:22-3242:2; *see also* Tr. 3243:4-10 (objecting to admission of the severance agreement because Mr. Weisselberg is "not available to anyone").

Nor did the People “argue[] falsely” (Def.’s Mem. 4, 19-21, 62-63) during the 2023 removal proceedings before the federal district court. During that proceeding, the People accurately characterized the charges in the indictment as being “for or related to” defendant’s personal conduct, not his official acts as President. That characterization was true when the People made it and when the district court found that the charges related to “a purely a personal item of the President” that was “not related to [the] President’s official acts” and did not “reflect in any way the color of the President’s official duties.” *Trump*, 683 F. Supp. 3d at 345. And that characterization about the nature of the charges remains true today: the People have never amended the indictment to charge defendant with crimes based on his official conduct, and defendant has never argued that presidential official-acts immunity shields him from liability for the charges in the indictment.

The People also did not make any false statement about defendant’s preemption defense. Def.’s Mem. 19-21. The People accurately disclosed (and accurately described in the removal proceeding) *every* possible basis for finding that defendant falsified business records with the intent to commit or conceal another crime; the People’s subsequent decision to tailor their theory of liability at trial was proper. *People v. Seignious*, 41 N.Y.3d 505, 511-12 (2024). And contrary to defendant’s contention (Def.’s Mem. 21), this Court’s instructions did not mention—let alone require the jury to find—anything about “specific disclosures” required by FECA. Tr. 4843:16-4845:4. The Court’s instructions simply explained that it was unlawful to exceed federal campaign contribution limits—a true fact, to which defendant made no objection at trial. Tr. 4843:19-23.

7. *The Court has exhaustively considered and rejected defendant’s arguments.* Finally, the Court has already considered and rejected each of the many other meritless allegations of

misconduct defendant rehashes in his motion to dismiss. In response to the dozens of other times defendant has raised the same false claims, the Court has concluded that:

- there is no evidence of selective prosecution (Def.'s Mem. 1-2, 6, 59-61), because defendant's "claims are devoid of evidence that the law has not been applied to other similarly situated individuals prosecuted by DANY," and defendant "failed to demonstrate that the People proceeded on an impermissible standard," *see* Decision & Order Denying Omnibus Mots. 20-22 (Feb. 15, 2024); *see also* Decision & Order on People's Mots. in Limine 4-5 (Mar. 18, 2024);
- the District Attorney's public comments before he became District Attorney (Def.'s Mem. 7-8, 60) also do not support any claim of selection prosecution, *see* Decision & Order Denying Omnibus Mots. 20-22 (Feb. 15, 2024) (denying defendant's claim); People's Mem. Opp. Omnibus Mots. 64-66 (Nov. 9, 2023); Def.'s Mem. Supp. Omnibus Mots. 30 (Sept. 29, 2023); *see also* People's Mem. Opp. Def.'s Mot. for a Further Adjournment 17 (Apr. 1, 2024);
- the District Attorney's public comments after defendant was indicted (Def.'s Mem. 13-14, 62) were completely appropriate and caused no prejudice, because "the DA, the district attorney of New York county has an obligation, literally an obligation to report on why charges were brought, what charges were brought, and to explain to the public why that's being done. . . . [E]specially, whereas here, [defendant] had put out messages regarding date of arrest, alleged charges, and speaking on what he felt was a politically driven prosecution. I think that in light of those statements that were put out there, there is no denying that the district attorney has an absolute obligation then to clarify for the people that he represents what the charges are and why he brought them." Tr. of Protective Order Hearing 24:18-25:8 (May 4, 2023); *see also* People's Mem. Opp. Def.'s Mot. for a Further Adjournment 16 (Apr. 1, 2024);
- there were no violations of grand jury secrecy (Def.'s Mem. 4, 9-10, 61-62), including through any of the newspaper articles defendant cited in his omnibus motion and re-cites in seeking dismissal, *see* Decision & Order Denying Omnibus Mots. 27-28 (Feb. 15, 2024) ("The Court has considered the arguments of the respective parties in tandem with careful examination [of] the Grand Jury minutes and finds that Defendant's claims are without merit."); *see also* Decision & Order on Def.'s Mot. for Further Adjournment Based on Pre-Trial Publicity (Apr. 12, 2024) (rejecting the same argument); People's Mem. Opp. Omnibus Mots. 71-73 (Nov. 9, 2023) (explaining that former Special ADA Mark Pomerantz's invocation of the Fifth Amendment in testimony before a congressional committee did not support that he violated grand jury secrecy);
- Mark Pomerantz's book did not cause or pressure the District Attorney to charge this case (Def.'s Mem. 4, 7, 9-13, 60, 62), because "[t]he People have demonstrated that the investigation and ensuing prosecution commenced following public reporting of Defendant's ties to criminal conduct that took place in New York prior

to the 2016 presidential election,” Decision & Order Denying Omnibus Mot. 22 (Feb. 15, 2024) (“Defendant’s allegations here strain credulity.”);

- defendant’s effort to establish any bias by former DANY Investigator Jeremy Rosenberg (Def.’s Mem. 4-5, 61) was improper because defendant failed to call any witness to establish that bias, see Tr. 2050:4-13, and because defense counsel falsely suggested to the jury that Mr. Rosenberg had violated grand jury secrecy, for which the Court directed defense counsel to correct his misrepresentations, Tr. 3771:9-3776:4, 3846:14-3849:9, 3902:1-3904:21, 3905:19-3907:9;
- the People did not “coerc[e]” Allen Weisselberg into pleading guilty to perjury or select the date of his sentencing to prejudice this defendant (Def.’s Mem. 4, 14, 62), holding that Weisselberg “answered under oath, in open court, under the penalties or perjury, that no one had forced him to plead guilty,” and that in contending otherwise “defense counsel clearly ignores the words contained in the official transcript,” Decision & Order on Def.’s Mot. for Further Adjournment Based on Pre-Trial Publicity 3-4 (Apr. 12, 2024);
- the People did not “allow[]” Michael Cohen or Stormy Daniels to “seek financial benefits” or “publicly market their status as witnesses” (Def.’s Mem. 14-17, 62), noting that witnesses like Cohen and Daniels “are not parties to this action. They’re not within the control of the People.” Tr. of Protective Order Hearing 39:23-25 (May 4, 2023); and in any event the People repeatedly advised all witnesses not to speak publicly about the case, see Tr. 3657:8-19, 3662:21-24, 3669:6-21 (Cohen) (agreeing that going back to January 2021, “the Prosecutors with the Manhattan District Attorney’s Office have repeatedly asked [Cohen] to stop publicly commenting about this case”); Tr. 3254:2-5 (People: “[W]e have repeatedly instructed all of the witnesses in this case, to the extent that we have any control over it, to refrain from making public statements.”); Hoffinger Aff. ¶ 21 (Mar. 18, 2024) (“To minimize the risk of pretrial publicity, we have periodically requested, both directly and through her attorney, that Ms. Daniels not discuss the case publicly.”); Tr. of Arraignment 13:17-20 (Apr. 4, 2023) (People “note for the record that we have done so and will continue to do so, and do everything we can to clamp down on any witness comments in public”);
- Stormy Daniels did not time the release of a documentary about her to maximize prejudicial publicity (Def.’s Mem. 16-17); in fact, a sworn affirmation from NBCUniversal established that Daniels “had no right to approve the content of the Documentary or the timing of its release,” and the Court therefore held that defendant’s claims to the contrary “are purely speculative and unsupported,” Decision & Order on Mot. to Quash 3-4 (Apr. 5, 2024); see also Reply Mem. of NBCUniversal 1-2 (Apr. 1, 2024); Aff. of Erica Forstadt ¶¶ 2-4 (Apr. 1, 2024);
- the limited portions of the People’s timeline and exhibits for the March 25, 2024 discovery hearing that were submitted in camera were properly sealed (Def.’s Mem. 14) because they contained work product and law-enforcement sensitive information; because defendant himself submitted sealed, ex parte exhibits in

connection with that hearing so as “to not compromise any potential defense strategy”; and because “the parties could have introduced exhibits into evidence at the Discovery Hearing but elected not to do so,” *see* Decision & Order on Public Filings 3 (May 16, 2024).

As to all of these arguments, dismissal is particularly unwarranted not only because defendant’s claims are spurious but also because he “fully litigated” these arguments in extensive trial and appellate motion practice over the past year and a half. *Harmon*, 181 A.D.2d at 38. There is no evidence of any misconduct by the Court or the People in connection with this case at all. CPL § 210.40(1)(e).

F. The remaining *Clayton* factors.

The remaining Clayton factors do not support dismissal.

Defendant contends that “no sentence can be timely imposed.” Def.’s Mem. 63, *see* CPL § 210.40(1)(f). But as discussed above, no principle of immunity precludes further proceedings before defendant’s inauguration. And even if judgment has not been entered at the time of defendant’s inauguration, there is no legal barrier to deferring sentencing until after defendant’s term of office concludes. *See supra* Part III.D.1. In either event, sentencing would serve the important purpose of deterring future crime. *See People v. Snowden*, 160 A.D.3d 1054, 1057 (3d Dep’t 2018) (reversing order granting defendant’s *Clayton* motion and holding that deterrence “is a goal served by sentencing a defendant who has been convicted of a crime”). This is so even where the available or likely sentence is non-incarceratory. *See Harmon*, 181 A.D.2d at 39 (holding that even where the appropriate sentence is non-incarceratory, the purposes served by sentencing weigh against interest-of-justice dismissal because dismissal “would only serve to reinforce defendant’s perception . . . that he can continue to flout this State’s . . . laws with impunity”); *Aleynikov*, 2013 N.Y. Slip Op. 34209(U), at *35 (“[T]he citizens of New York have an interest in having a guilty defendant sentenced for . . . offenses which are serious offenses,

Deterrence is a legitimate State purpose. That the People offered defendant a plea to a non-jail sentence is of no moment as to whether the indictment should be dismissed.”). The possibility that presidential immunity may require a “favorable disposition” that “entail[s] no . . . incarceration” thus weighs against interest-of-justice dismissal. *Hernandez*, 198 A.D.3d at 545.

The “impact of a dismissal on the safety or welfare of the community,” CPL § 210.40(1)(h), weighs neither in support of nor against dismissal in this case. *See Reyes*, 174 A.D.2d at 90; *Aleynikov*, 2013 N.Y. Slip Op. 34209(U), at *35. However, defendant’s claim that the People previously told the Supreme Court that “there is no real public interest at stake here,” Def.’s Mem. 66, is incorrect and deeply misleading. Defendant quotes from the People’s brief opposing certiorari in *Trump v. Vance*, where the People were contesting defendant’s claim that presidential immunity prohibited a third party from complying with a grand jury subpoena for defendant’s personal records. In that context, the People wrote that “there is no real *public* interest at stake here at all; this case instead involves Petitioner’s *private* interest in seeking his own and others’ immunity from an ordinary investigation of financial improprieties independent of official duties.” *See* Resp.’s Br. in Opposition 1, *Trump v. Vance*, No. 19-635 (S. Ct. filed Nov. 21, 2019)) (Def.’s Ex. 78). The reference to the public and private interest in defendant’s personal tax returns (which are not at issue in this prosecution in any event) was, obviously, not a reference to the public interests served by the People’s subsequent prosecution of defendant for falsifying business records to conceal a criminal election conspiracy. The public interest in both honest elections and honest financial bookkeeping is—as the People have argued through this proceeding—both self-evident and of the highest importance.

The final factor—“the attitude of the complainant or victim with respect to the motion”—is pertinent only “where the court deems it appropriate.” CPL § 210.40(1)(i). This factor is

typically considered in cases involving an individual victim or victims, *see Harmon*, 181 A.D.2d at 39, and the Court may disregard it here. If the Court does consider this factor, it does not support dismissal. To the extent defendant argues that his crime is a “victimless” offense because it did not target a specific individual for injury, *see* Def.’s Mem. 67-68, courts routinely reject that reasoning. *See, e.g., Harmon*, 181 A.D.2d at 34 (crime that affects “society as a whole” is not victimless); *Reyes*, 174 A.D.2d at 90 (court considering CPL § 210.40 motion must consider the effect of the criminal conduct “on the rest of society”).

V. Defendant’s motion to dismiss pursuant to CPL § 210.20(1)(h) is procedurally barred.

Defendant’s effort to seek dismissal pursuant to CPL § 210.20(1)(h) is time-barred. The Court may consider defendant’s immunity arguments as part of his CPL § 210.40 motion, which is the only motion the Court granted—or should grant—leave to file in these circumstances.

Defendant sought leave to file a motion “pursuant to CPL § 210.40” to raise his arguments of presidential and pre-presidential immunity in light of the results of the November 5, 2024 election and defendant’s upcoming inauguration on January 20, 2025. Def.’s Ltr. (Nov. 19, 2024). The Court granted “Defendant’s request for leave to file a motion to dismiss pursuant to [CPL] § 210.40.” Decision & Order (Nov. 22, 2024). Defendant then filed a motion seeking dismissal pursuant to both CPL § 210.40 *and* CPL § 210.20(1)(h). *See* Def.’s Notice of Mot. (Dec. 2, 2024). But the Court’s order granting leave to file a late CPL § 210.40 motion did not provide defendant *carte blanche* to submit other pretrial motions too.

Any motion to dismiss under CPL § 210.20(1)(h) was due 45 days after arraignment, absent leave to file late for good cause shown. *See* CPL §§ 210.20(2), 255.20(1), (3). The Court found good cause, and granted leave, only to file a late CPL § 210.40 motion. *See* Decision & Order (Nov. 22, 2024). The Court did not find, and could not have found, that defendant has shown the requisite good cause for a late CPL § 210.20(1)(h) motion in these circumstances. That statute allows a defendant

to seek dismissal based on a “jurisdictional or legal impediment to conviction of the defendant for the offense charged”; and here, defendant has of course already been convicted. *See* Tr. 4947-4952; CPL § 1.20(13) (defining “conviction” as “the entry of a plea of guilty to, or a verdict of guilty upon, an accusatory instrument other than a felony complaint”); CPL § 1.20(12) (defining “verdict” as “the announcement by a jury in the case of a jury trial . . . of its decision upon the defendant’s guilt or innocence of the charges submitted to or considered by it”). Because defendant was convicted more than six months ago, on May 30, 2024, a purported jurisdictional impediment that arose for the first time on November 5, 2024 (for defendant’s claim of pre-presidential immunity)—or that has not even arisen yet (for defendant’s claim of presidential immunity)—cannot *nunc pro tunc* void his prior conviction. The supposed “impediment” did not even exist at the time of the jury’s verdict.

As noted above, defendant’s contentions regarding presidential and pre-presidential immunity—based on developments that arose after November 5, 2024—may be considered as factors under CPL § 210.40(1)(j), the “catch-all” provision in the interest-of-justice dismissal statute that requires the Court to consider “any other relevant fact” as part of its analysis. Indeed, the fact that the Court may address these arguments as part of defendant’s CPL § 210.40 motion is another compelling reason to deny his improper CPL § 210.20(1)(h) motion. Subsection (h) “is to be used only when none of the other eight paragraphs” in CPL § 210.20(1) “sufficiently sets forth a specific defendant’s ground for dismissal.” *People v. Frisbie*, 40 A.D.2d 334, 336 (3d Dep’t 1973). Here, one of those other eight paragraphs—CPL § 210.20(1)(i), which permits a defendant to make a motion to dismiss an indictment in the interest of justice pursuant to CPL § 210.40—affords defendant a sufficient vehicle for his arguments.

For these reasons, defendant's effort to file a belated motion to dismiss under CPL § 210.20(1)(h) is procedurally improper and should be denied.

VI. The pending Second Circuit appeal does not warrant a stay or any other relief.

Defendant's pending Second Circuit appeal does not present any basis for a stay of proceedings before this Court.

Defendant made a second attempt to remove this case to federal court on August 29, 2024, three months after the end of trial. The district court denied defendant's request for leave to file a second notice of removal because he failed to show good cause for attempting to remove after trial and more than thirty days after arraignment. *See Trump*, 2024 WL 4026026, at *1-2. Both the district court and the Second Circuit then denied defendant's requests to stay the order denying leave. *See Order & Opinion Denying Mot. for Stay, New York v. Trump*, No. 23 Civ. 3773, ECF No. 54 (S.D.N.Y. Sept. 6, 2024); *Order Denying Stay, New York v. Trump*, No. 24-2299, Dkt. 31.1 (2d Cir. Sept. 12, 2024). Defendant's appeal from the order denying leave is pending.

Defendant argues that the Court should "refrain" from deciding his fully-briefed CPL § 330.30 motion pending defendant's Second Circuit appeal, on the ground that the Court must not show "an improper lack of respect to the federal Court of Appeals." Def.'s Mem. 68. This suggestion is exactly backwards as a matter of basic constitutional law. In our federalist system, the states delegated certain powers to the federal government but reserved all remaining powers for state and local governments. *See* U.S. Const. amend. X. And "[b]ecause the regulation of crime is pre-eminently a matter for the States," there is a "'strong judicial policy against federal interference with state criminal proceedings.'" *Arizona v. Manypenny*, 451 U.S. 232, 243 (1981) (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 600 (1975)). State courts with jurisdiction over a state criminal prosecution thus need not and should not defer to hypothetical future action by a

federal court; to do so would be to abdicate “[p]erhaps the clearest example of traditional state authority” in our constitutional system. *Bond*, 572 U.S. at 858

Nor does the federal removal statute bar the Court from deciding any of defendant’s pending motions or otherwise concluding this case. Congress provided that “[t]he filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.” 28 U.S.C. § 1455(b)(3). As an initial matter, § 1455(b)(3) does not apply here at all because defendant’s effort to file a notice of removal failed for lack of good cause. As the district court clearly held, defendant has not filed a notice of removal because his request for leave to file a belated second notice was denied. *See Order & Opinion Denying Mot. for Stay, New York v. Trump*, No. 23 Civ. 3773, ECF No. 54 (S.D.N.Y. Sept. 6, 2024) (“Since I denied leave to file for removal, and thus there has been no removal petition properly filed, there is no action in my order of [September] 3, 2024 to stay.”). Thus, because “there has been no removal petition properly filed,” *id.*, defendant’s pending Second Circuit appeal creates no obstacle to any further action by this Court. And even if § 1455(b)(3) did apply right now, it would operate at most to bar this Court from pronouncing sentence, not from adjudicating defendant’s pending motions under CPL § 210.40 and CPL § 330.30. The federal removal statute prohibits this Court from entering “a judgment of conviction” before the case is remanded, 28 U.S.C. § 1455(b)(3); and the CPL provides that “[a] judgment is comprised of a conviction and the sentence imposed thereon and is completed by imposition and entry of the sentence,” CPL § 1.20(15). But again, even that bar does not apply here because “there has been no removal petition.” *Order & Opinion Denying Mot. for Stay, New York v. Trump*, No. 23 Civ. 3773, ECF No. 54 (S.D.N.Y. Sept. 6, 2024).

Defendant's claim that adjudicating the pending defense motions would leave him "holding an empty bag," Def.'s Mem. 69, is nonsensical. Even if defendant is later successful in his appeal from the denial of leave to file a second removal notice, federal law *still* would not deprive this Court of jurisdiction to resolve any of the pending defense motions for the reasons described above. *See* 28 U.S.C. § 1455(b)(3). And if defendant had wanted a prompt resolution of his Second Circuit appeal as a way to avoid further proceedings in this Court, he had every opportunity to expedite that appeal. Instead, he took nearly six weeks to file his merits brief after filing his notice of appeal. *See* Br. for Defendant-Appellant, *New York v. Trump*, No. 24-2299, Dkt. 47.1 (2d Cir. Oct. 14, 2024). At the People's request, the Second Circuit then ordered the standard 91-day deadline for the People's response brief, which is consistent with the local rules. Scheduling Order, *New York v. Trump*, No. 24-2299, Dkt. 55.1 (2d Cir. Oct. 22, 2024); Second Circuit Local R. 31.2(a)(1)(B). And defendant has made no effort to expedite his appeal at any point in the three months since he initiated it, notwithstanding that both the district court and the Second Circuit denied his requests to stay the district court's order pending appeal. Defendant's strategic delay in resolving his Second Circuit appeal is not a reason for this Court to voluntarily abdicate its jurisdiction.

Finally, claiming that the Court must not show "improper lack of respect . . . to the Executive Branch," defendant makes a novel request for advance notice of the Court's intent to issue any decision or calendar other dates—before the Court acts—so defendant may consider potential next steps. Def.'s Mem. 68-69. Criminal defendants do not set the Court's calendar. And the Court's most recent scheduling order was clear as to the extent and duration of the Court's adjournment of previously-scheduled dates. Right now there is no barrier to concluding these proceedings in the regular course as this Court would in any other case. Indeed:

[T]he just resolution of criminal prosecutions is the purview of the judiciary. Our constitutional scheme contemplates each actor performing its respective role in the

manner it best sees fit, within the boundaries imposed by the Constitution and Congress. The defendants ask this Court to do something extraordinary: to defray the execution of its own constitutional duties [based on speculative future steps by other actors]. The Court declines that invitation.

United States v. Slaughter, No. 22-cr-354, 2024 WL 4903808, at *2 (D.D.C. Nov. 27, 2024).

CONCLUSION

The Court should deny defendant's motion to dismiss.

DATED: December 9, 2024

Respectfully submitted,

ALVIN L. BRAGG, JR.
District Attorney, New York County

Steven C. Wu
Alan Gadlin
John T. Hughes
Of Counsel

By: /s/ Christopher Conroy
Christopher Conroy
Matthew Colangelo
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Susan Hoffinger
Becky Mangold
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1 Hogan Place
New York, NY 10013

Appendix J

Supreme Court
of the
State of New York



JUAN M. MERCHAN
JUDGE OF THE COURT OF CLAIMS
SUPREME COURT, CRIMINAL TERM
FIRST JUDICIAL DISTRICT

CHAMBERS
100 CENTRE STREET
NEW YORK, N.Y. 10013

Via Email

December 16, 2024

Todd Blanche, Esq.
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ADA Joshua Steinglass
New York County District Attorney's Office
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Re: *People v. Trump*, Ind. No. 71543-2023

Dear Counsel:

Pending before this Court are three open matters: Defendant's motion to set aside the jury verdict pursuant to CPL § 330.30(1) ("CPL § 330.30(1) Motion"); Defendant's Motion to Dismiss pursuant to CPL § 210.20(1)(h) and § 210.40(1) ("Clayton Motion"); and Defendant's recent claim of juror misconduct, contained in his letter of December 3, 2024.

On July 10, 2024, Defendant filed the CPL § 330.30(1) Motion. The People filed their response on July 24, 2024, and Defendant filed a Reply on July 31, 2024. Decision on the motion was scheduled to be rendered on September 6, 2024, with sentencing, if necessary, to follow on September 18, 2024.¹ On August 14, 2024, Defendant requested an adjournment of sentencing until after the 2024

¹ Defendant filed an intervening Recusal Motion thereby causing the decision date for the CPL § 330.30(1) Motion to be delayed 10 days to September 16, 2024.

Presidential election. The People did not oppose Defendant's request. As a result, on September 6, 2024, this Court agreed to hold its decision in abeyance until November 12, 2024, and sentencing, if necessary, to November 26, 2024. As stated in its letter of September 6, 2024, this Court did so to "avoid any appearance – however unwarranted – that the proceeding has been affected by or seeks to affect the approaching Presidential election in which the Defendant is a candidate."

On November 10, 2024, Defendant requested a "stay [of] the existing scheduled dates, including the dates for a decision on the pending Presidential immunity motion and sentencing [...], and eventual dismissal of the case in the interests of justice, under the US Supreme Court's decision in *Trump v. United States* and the Presidential Transition Act of 1963." The Court granted the stay that same day to allow the People to submit their position on proceedings going forward.² On November 19, 2024, the People filed a letter reflecting their intention to oppose any motion to dismiss but agreeing to a further stay of the issuance of the Court's decision on the pending CPL § 330.30(1) Motion to "permit litigation of Defendant's forthcoming motion to dismiss." Defendant responded seeking leave to file a [Clayton Motion]. On November 22, 2024, the Court granted Defendant leave to file the motion, set a motion schedule, and granted the joint request to further stay issuance of its Decision.

Defendant filed his Clayton Motion on December 2, 2024. The People filed their Response on December 9, 2024, and Defendant filed his Reply on December 13, 2024.

It is Defendant's position that this Court is precluded from issuing its Decision on the CPL § 330.30(1) Motion. In support, Defendant points to the recent United States Supreme Court Decision in *Trump v. United States*, 603 U.S. 593 [2024]; The Presidential Transition Act of 1963; 1973 OLC Memorandum *Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office*; 2000 OLC Memorandum *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 2000 WL 33711291 (Oct. 16, 2000); the pending appeal on Defendant's Removal action currently before the Second Circuit; the Supremacy Clause; and other caselaw. In substance, Defendant argues that the aforementioned authorities stand for the proposition that this Court has been divested of authority to issue the Decision now that Defendant is the President-elect. This Court is not persuaded.

² The People initiated the email exchange with the Court, requesting a stay for the People to consider the implications of the 2024 election results on the pending proceedings, a request which followed a previous conversation between the parties.

First, the OLC Memoranda and *Trump* speak to the need for a *sitting President* to be free to fully discharge the powers and duties of his office without criminal process interfering with his ability to carry out his constitutional functions. Defendant argues, and asks this Court to infer, that the same protection extends to a President-elect and applies to the rendering of a decision, that has already been briefed by both parties. This Court does not agree. The act of rendering a decision, which has been held in abeyance for months, requires no effort on the part of the Defendant and does not implicate the concerns set forth by Defendant in his papers.

Second, Defendant argues that this Court must refrain from issuing its decision until after the Second Circuit decides his appeal for removal. Should this Court not refrain, the Defendant argues, it would demonstrate “an improper lack of respect to the federal Court of Appeals and to the Executive Branch.” In the alternative, Defendant requests a stay of the implementation of the ruling to permit interlocutory appellate review.

This Court is bound by the principles of *stare decisis* and the rule of law. As such, 28 USC § 1455 does not preclude this Court from issuing this Decision: “The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further [...]” 28 USC § 1455(b)(3). Further, while Defendant is currently appealing Judge Hellerstein’s denial of Defendant’s Motion for Leave to File a Second Removal Notice, he has not obtained a stay of these proceedings. Of course, should a stay be granted that impacts the current matter, this Court will honor such order. And finally, 28 USC § 1455(b)(5) identifies when proceedings of this nature should be halted, and that is only when a “United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.” This Court has received no such notification and is therefore not aware of any legal impediment preventing it from issuing the pending decision.

Finally, Defendant’s claim that this Court must render a decision on his “Clayton” motion, but that the Court has been divested of authority to render a decision on any other motion before it is internally inconsistent. This Court is either authorized to accept, consider, and rule on substantive motions or it is not. Accordingly, because there exists no legal barrier to the issuance of its Decision on Defendant’s CPL § 330.30(1) Motion, it will be filed and disseminated to the parties today.

Turning next to Defendant’s letter of December 3, 2024, alleging juror misconduct. This Court must first determine whether that letter, and the subsequent submissions by both parties of December 5, 2024, and December 9, 2024, should be sealed in their entirety, or redacted in part to permit them to be filed on the public docket. Defendant argues that the letters should be filed on the

public docket, with certain proposed redactions. The People argue that the letters should be sealed in their entirety. In the alternative, the People submit that if the Court allows public filing, then the letters should contain additional redactions.

In deciding this issue, this Court must balance the competing interests of the public's right to transparency of these proceedings against the very real need to protect the privacy and safety of the jurors. Indeed, the issue of juror safety is hardly in dispute, as the parties have made clear, not only in their December letters, but in their respective filings in connection with the People's Motion for an Order Pursuant to CPL § 270.15(1-a). It is significant to this analysis that Defendant's letter consists entirely of unsworn allegations. Thus, this Court finds that to allow the public filing of the letters without redactions and without the benefit of a hearing, would only serve to undermine the integrity of these proceedings while simultaneously placing the safety of the jurors at grave risk.

Taking the positions of each party into consideration, the Court agrees with Defendant that the referenced letters should be filed on the public docket, albeit with redactions. To that end, the Court accepts the respective proposed redactions of both parties. These measures are necessary to ensure public access while protecting the safety and privacy of the jurors in compliance with this Court's March 7, 2024, Decision and Order Regulating Disclosure of Juror Information and the May 8, 2023, Protective Order.

Turning to the substance of Defendant's letter of December 3, 2024, Defendant states that he "*could* file a motion to vacate the verdicts pursuant to CPL § 330.30(2)(a)," but will not. (emphasis added). Further, he argues that while this Court must take into consideration his allegations for purposes of his Clayton Motion, the Court must not, and is not authorized to, pursue any claims contained therein. Indeed, counsel opposes a hearing to explore his claims.

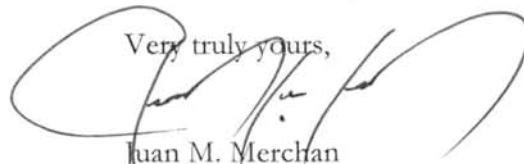
The CPL provides a mechanism whereby a defendant may move to set aside a verdict on the grounds of juror misconduct. Thus, Defendant has an avenue for this Court to consider his claim, should it be properly brought. CPL § 330.30(2)(a). Such a motion "must contain sworn allegations[.]" CPL § 330.40(2)(a). A court may then decide the motion on written submissions. If it does not, the court "must conduct a hearing and make findings of fact essential to the determination thereof." CPL § 330.40(2)(f). Allegations of juror misconduct should be thoroughly investigated. However, this Court is prohibited from deciding such claims on the basis of mere hearsay and conjecture.

In addition to the redactions made by each party, this Court has made additional redactions to Defendant's December 3, 2024 Letter consistent with those proposed by Defendant. After reviewing the redacted documents for their accuracy, which are being provided to the parties under separate

cover, the parties are directed to file the respective letters on the public docket. Unless and until a properly filed claim under CPL § 330.30(2)(a) is submitted, this Court cannot allow the public filing of unsworn, and admittedly contested statements. To do so would threaten the safety of the jurors and violate the agreed upon Order Regulating Disclosure of Juror Information. Should a properly filed claim be submitted, these redactions will be revisited.

Finally, as to Defendant's Clayton Motion, having been fully briefed as of December 13, 2024, the motion is under review by this Court.

Very truly yours,



Juan M. Merchan
Judge Court of Claims
Acting Justice Supreme Court

JUAN M. MERCHAN

cc: Counsel of record
Assistant District Attorneys of record
Court file

Appendix K

ONE HOGAN PLACE
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ALVIN L. BRAGG, JR.
DISTRICT ATTORNEY

January 7, 2025

Susanna Molina Rojas, Esq.
Clerk of the Court
Supreme Court of the State of New York
Appellate Division, First Department
27 Madison Avenue
New York, New York 10010

Re: *Matter of Trump v. Merchan*, No. 2025-00118

Dear Ms. Rojas:

Petitioner Donald J. Trump is the defendant in a criminal action in Supreme Court, New York County, under Indictment No. 71543-23, filed on March 30, 2023. Respondent the Honorable Juan Merchan is presiding over that criminal case. Trial began with jury selection on April 15, 2024, and defendant was convicted by the jury on May 30, 2024, of all 34 felony counts charged in the indictment. Sentencing is scheduled to occur on Friday morning, January 10, 2025.

Defendant has sought relief under C.P.L.R. article 78 from two interlocutory orders issued by Supreme Court: the court's December 16, 2024 order denying defendant's CPL § 330.30 motion, which sought to set aside the jury verdict on the ground that certain evidence had been improperly admitted during the trial; and the court's January 3, 2025 order denying defendant's *Clayton* motion, which asserted that this criminal case should be dismissed in light of defendant's recent reelection as President. In connection with his article 78 petition, defendant asserts that he is entitled to either an automatic stay or discretionary stay that would adjourn the January 10 sentencing date until the conclusion of appellate proceedings concerning these interlocutory orders.

The People submit this letter to oppose defendant's request for a single Justice of this Court to issue an order to show cause imposing an interim stay of the January 10 sentencing. For the reasons that follow, defendant's article 78 petition does not automatically stay sentencing in this case, and the Court should reject defendant's alternative request for a discretionary stay of sentencing.

BACKGROUND

A. The State Criminal Trial and Defendant's Conviction

On March 30, 2023, a New York County grand jury charged defendant with 34 felony counts of Falsifying Business Records in the First Degree, in violation of Penal Law § 175.10. That provision makes it a felony for any person to make or cause a false entry in the business records of an enterprise with an intent to defraud, which includes an intent “to commit another crime or to aid or conceal the commission thereof.” Penal Law § 175.10.

As described in a Statement of Facts filed with the indictment, and as later established by evidence at trial, defendant and his co-conspirators orchestrated a scheme to interfere with the 2016 U.S. presidential election by suppressing negative information that could damage defendant's presidential campaign. They executed the scheme through a variety of means, including by purchasing the rights to, and then refusing to publish, a story about an extramarital affair between defendant and Stormy Daniels, an adult film actress. To effect this catch-and-kill scheme, defendant's personal attorney, Michael Cohen, paid \$130,000 to acquire the publication rights to Daniels's story, and defendant reimbursed Cohen an amount calculated to mask the true nature of the reimbursement. Defendant then concealed the reimbursement payments to Cohen by recording them in a New York enterprise's records—invoices, general ledger entries, and check stubs—as attorney's fees paid to Cohen for services rendered pursuant to a retainer agreement. Those characterizations of the payments in those records were false, because the payments to Cohen were in fact to reimburse him for the payments he made to Daniels, not to pay him for legal services rendered pursuant to a retainer agreement. Ex. 1.

On April 15, 2024, defendant's trial commenced with jury selection. On May 30, 2024, the jury unanimously convicted defendant as charged. Sentencing was originally scheduled for on July 11, 2024, but it has since been adjourned to January 10, 2025.

Throughout the course of this criminal proceeding, defendant has engaged in extensive motion practice to divest Supreme Court of jurisdiction and to dismiss the criminal charges against him. The following summarizes the motion practice that is relevant to understand this application.

B. The First Federal Removal Proceeding in the U.S. District Court for the Southern District of New York

Defendant was arraigned in state court on April 4, 2023. On May 4, 2023, he filed a notice of removal in the U.S. District Court for the Southern District of New York seeking to remove the charges against him under the federal-officer removal

statute, 28 U.S.C. § 1442(a)(1). Ex. 2. The People moved to remand the case to state court. After an evidentiary hearing, the district court (Hellerstein, J.) issued a written decision concluding that federal-officer removal was unavailable. *New York v. Trump*, 683 F. Supp. 3d 334, 337 (S.D.N.Y. 2023).

First, the court concluded that the charges against defendant were not “for or relat[ed] to” any act defendant took under color of his federal office. The court found that the People’s allegation about defendant’s payments to Cohen “overwhelmingly suggests that the matter was a purely a personal item of the President—a cover-up of an embarrassing event.” *Id.* at 345. “Hush money paid to an adult film star is not related to a President’s official acts” and “does not reflect in any way the color of the President’s official duties.” *Id.* For this purpose, it was immaterial whether or not the payments to Cohen were attorney’s fees: as the hearing evidence established, defendant hired Cohen to “attend to his private matters”; the payments to Cohen were made from “private funds” that did not “depend on any Presidential power for their authorization”; and the documents recording those payments were maintained by “a private enterprise.” *Id.* Based on that record, the court concluded that the charges against defendant were based on his “private acts,” not “acts under the color of his office.” *Id.*

Second, the district court concluded that defendant failed to identify a colorable federal defense, thus independently defeating federal-officer removal. The court explained that defendant had “expressly waived” any defense of “absolute presidential immunity,” and that defendant had instead asserted that he was immune because his conduct—namely, his decision to retain Michael Cohen as his personal lawyer—arose out of his duties as President. *Id.* at 346. This defense was not colorable as a factual matter, the court held, because there was “[n]o evidence” that the reimbursements to Cohen constituted an official presidential act. *Id.* at 346-47 (“Reimbursing Cohen for advancing hush money to Stephanie Clifford cannot be considered the performance of a constitutional duty. Falsifying business records to hide such reimbursement, and to transform the reimbursement into a business expense for Trump and income to Cohen, likewise does not relate to a presidential duty.”). There was also no colorable preemption defense. Defendant conceded that federal law did not directly preempt Penal Law § 175.10. *See id.* at 349. And the court rejected defendant’s claim that federal law indirectly preempted Penal Law § 175.10, by preempting the crimes that defendant sought to commit or conceal by making the false business records. *See id.* at 349-50.

Defendant filed a notice of appeal from the district court’s remand decision but later moved the U.S. Court of Appeals for the Second Circuit to dismiss his appeal. The court granted that motion and dismissed the appeal. *People v. Trump*, No. 23-1085, 2023 WL 9380793 (2d Cir. 2023).

C. Defendant's Post-Trial Motion to Vacate Pursuant to CPL § 330.30(1)

On July 1, 2024, after defendant's conviction and ten days before the originally scheduled sentencing, the U.S. Supreme Court decided *Trump v. United States*, 603 U.S. 593 (2024). The dispute in that case was whether defendant could be criminally prosecuted for official acts that he performed during his tenure as President. *Id.* at 601-02. The Supreme Court held that the President "is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority," and at least presumptively immune for "acts within the outer perimeter of his official responsibility," "unless the Government can show that applying a criminal prohibition to that act would pose no 'dangers of intrusion on the authority and functions of the Executive Branch.'" *Id.* at 609, 614-15 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731 [1982]). However, the Supreme Court stressed that "the President enjoys no immunity for his unofficial acts, and not everything the President does is official." *Id.* at 642.

The Supreme Court also held that certain evidence relating to a president's official acts may be inadmissible at trial. *Id.* at 630-32. In particular, the Court concluded that although prosecutors could "point to the public record to show the fact that the President performed [an] official act," they could not "admit testimony or private records of the President or his advisers probing the official act itself" because allowing "that sort of evidence would invite the jury to inspect the President's motivations for his official actions and to second-guess their propriety." *Id.* at 632 n.3.

In response to the Supreme Court's decision, defendant sought leave to file a motion in this case to set aside the jury's verdict pursuant to CPL § 330.30. On July 2, 2024, the Court granted defendant's motion; set a briefing schedule for defendant's CPL § 330.30 motion; and adjourned the sentencing hearing to September 18, 2024, "if such is still necessary." *See* Order (July 2, 2024).

On July 10, 2024, defendant filed a motion to dismiss the indictment and vacate the jury's verdict pursuant to CPL § 330.30(1). In that motion, defendant argued that the People had improperly introduced evidence of official presidential acts before the grand and petit juries in violation of *Trump v. United States*. In particular, defendant's claim pertained to certain testimony by three witnesses: Hope Hicks, Madeleine Westerhout, and Michael Cohen. His claim also related to his postings on social media and a financial disclosure form known as OGE Form 278e for 2017. Ex. 3.

While defendant's CPL § 330.30 motion was pending, on August 14, 2024, defendant moved to adjourn the sentencing "until after the 2024 Presidential election" to allow "adequate time to assess and pursue state and federal appellate options" in response to any adverse ruling on the pending CPL § 330.30 motion. Def.'s Ltr. (Aug. 14, 2024). On August 16, the People filed a response stating that the People "defer to the Court on the appropriate post-trial schedule that allows for adequate time to

adjudicate defendant's CPL § 330.30 motion while also pronouncing sentence 'without unreasonable delay.'" People's Ltr. (Aug. 16, 2024) (quoting CPL § 380.30(1)).

On September 6, 2024, Supreme Court granted defendant's motion to adjourn. *See* Order (Sept. 6, 2024). The Court noted that the original sentencing date of July 11 was necessarily delayed when, on July 1, the Supreme Court "rendered a historic and intervening decision in *Trump v. United States* . . . which this Court must interpret and apply as appropriate." *Id.* at 2. The Court then explained that because "[t]he public's confidence in the integrity of our judicial system demands a sentencing hearing that is entirely focused on the verdict of the jury and the weighing of aggravating and mitigating factors free from distraction or distortion," and because "[t]he Court is a fair, impartial, and apolitical institution," the Court would grant a further adjournment to "avoid any appearance—however unwarranted—that the proceeding has been affected by or seeks to affect the approaching Presidential election in which the Defendant is a candidate." *Id.* at 3. The Court set a new schedule ordering that decision on defendant's CPL § 330.30 motion would be handed down off-calendar on November 12, 2024, and adjourning sentencing (if necessary) to November 26, 2024. *Id.* at 4.

On December 16, 2024, the trial court denied defendant's CPL § 330.30(1) motion. As an initial matter, the court found that defendant had failed to preserve his objections to the trial testimony of Westerhout and Cohen; and to any evidence that was introduced before the grand jury. In any event, on the merits, the court found that none of the disputed proof constituted a "core official act," nor did any of it "fall within the outer perimeter" of defendant's "official duties." In the alternative, the court found that even if certain communications described by Westerhout, Hicks, or Cohen fell within the "outer perimeter" of defendant's presidential authority, the court would "also find that other, non-privileged trial testimony provided ample non-motive related context and support to rebut a presumption of privilege" and demonstrate "that Defendant was acting in his personal capacity and not pursuant to his authority as President." Similarly, this evidence posed "no danger of intrusion on the authority and function of the Executive Branch." Finally, the court ruled that even if any of the disputed evidence amounted to proof of "official acts under the auspices of the *Trump* decision," the court would still deny defendant's motion because "introduction of the disputed evidence constitutes harmless error and no mode of proceedings error has taken place." Ex. 4.

D. The Motion for Leave to File an Untimely Second Notice of Removal

On September 3, 2024, defendant filed a motion for leave to file a second notice of removal in the U.S. District Court for the Southern District of New York. Defendant argued, among other things, that the Supreme Court's intervening decision

in *Trump v. United States* supplied good cause for a second, untimely notice of removal. Ex. 5.

The district court (Hellerstein, J.) denied the motion in a written order. *New York v. Trump*, No. 23 Civ. 3773 (AKH), 2024 WL 4026026 (S.D.N.Y. Sept. 3, 2024). In doing so, the court concluded that *Trump v. United States* did not alter or affect the court’s “previous conclusion that the hush money payments were private, unofficial acts, outside the bounds of executive authority.” *Id.* at *2. For this and other reasons, the court concluded that “[g]ood cause has not been shown, and leave to remove the case is not granted.” *Id.*

Defendant appealed the denial of his motion to the U.S. Court of Appeals for the Second Circuit. That appeal is currently pending; defendant already filed his opening brief, and the People’s brief in response is due January 13, 2025.

E. Defendant’s Post-Trial Motion to Dismiss Pursuant to CPL § 210.40

On November 5, 2024, defendant was reelected as President of the United States. As a result of that election, defendant asked the District Attorney by letter dated November 8 to dismiss this prosecution and consent to a stay of trial court proceedings pending consideration of his dismissal request. The People asked Supreme Court for an adjournment to evaluate that request, which defendant joined, and which the Court granted on November 10. The People then advised the Court on November 19 that, after carefully evaluating defendant’s request, the People believed the appropriate course was for Supreme Court to set a briefing schedule for defendant to present his arguments for dismissal to the Court, and for the Court to adjourn further proceedings pending resolution of that motion. That day, defendant filed a premotion letter “to request permission to file a motion to dismiss . . . pursuant to CPL § 210.40.” Def.’s Ltr. (Nov. 19, 2024).

By order dated November 22, 2024, Supreme Court granted defendant’s motion for leave to file a motion to dismiss pursuant to CPL § 210.40; stayed decision on defendant’s fully briefed CPL § 330.30 motion “pending receipt of the papers from all parties submitted in accordance with the motion schedule” for defendant’s CPL § 210.40 motion; and stayed sentencing “to the extent that the November 26, 2024, date is adjourned.” Decision & Order (Nov. 22, 2024).

On December 2, 2024, defendant filed a *Clayton* motion with the trial court, requesting that it dismiss the indictment and vacate the jury’s verdict pursuant to CPL § 210.40. Defendant argued that dismissal in the interest of justice was warranted in light of his recent reelection under “[t]he Presidential immunity doctrine, the Presidential Transition Act, and the Supremacy Clause.” Ex. 6.

On January 3, 2025, the trial court denied defendant’s motion to dismiss and scheduled his sentencing for January 10, 2025—ten days before his inauguration. As relevant here, the trial court found that that defendant had no viable claim to be immune from sentencing on that date because “Presidential immunity from criminal process for a sitting president does not extend to a President-elect.” The court further noted that because there was “no legal impediment to sentencing,” and because “Presidential immunity will likely attach once Defendant takes his Oath of Office,” it was “incumbent” upon the court to schedule the sentencing for before defendant’s inauguration on January 20, 2025. The trial court observed that it had an obligation to “sentence Defendant within a reasonable time following verdict” and to permit defendant to “avail himself of every available appeal, a path he has made clear he intends to pursue but which only becomes fully available upon sentencing.” Ex. 7.

The court also noted that although it could not make a final “determination on sentencing” before allowing the parties to be heard, it intended “to not impose any sentence of incarceration.” Rather, after balancing the relevant concerns, including “the Presidential immunity doctrine,” the court stated that an unconditional discharge “appear[ed] to be the most viable solution to ensure finality and allow Defendant to pursue his appellate options.” It also permitted defendant to appear virtually for the January 10 sentencing. Ex. 7. Defendant has opted to appear virtually if sentencing is held on that date.

ARGUMENT

Defendant asserts that his filing of an article 78 petition to challenge two interlocutory orders of Supreme Court “immediately causes an automatic stay of proceedings” in this case, including the upcoming January 10 sentencing. Def.’s Mem. 1. Defendant is incorrect. His argument relies on inapposite case law from the federal courts, which employ very different procedures for interlocutory appeals in criminal cases. The particular immunity-based arguments that defendant has actually raised also do not support any automatic stay. And no discretionary stay of the January 10 sentencing is warranted either.

I. No Automatic Stay Applies to This Proceeding.

Contrary to defendant’s claim, the mere fact that he has invoked presidential immunity in his article 78 petition does not entitle him to an automatic stay of further trial proceedings pending appeal. In support of his automatic-stay argument, defendant relies heavily on cases arising in the federal courts, including the Supreme Court’s discussion of presidential immunity in *Trump v. United States*, 603 U.S. 593 (2024), and that decision’s description of the federal courts’ treatment of claims of absolute and qualified immunity.

For at least two reasons, however, those cases have no application to this New York criminal proceeding. First, New York has adopted distinct rules for interlocutory appeals in criminal cases that foreclose any automatic stay. Second, defendant has not raised the type of immunity-based claim that would warrant an automatic stay even in the federal courts.

A. An automatic stay is procedurally unavailable.

Defendant’s argument for an automatic stay relies on federal cases addressing pretrial immunity claims. In the federal courts, defendants raising claims of immunity from suit have a statutory right to pursue an interlocutory appeal before trial to resolve threshold immunity issues. *See Trump*, 603 U.S. at 635; *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985); *Blassingame v. Trump*, 87 F.4th 1, 29 (D.C. Cir. 2023). In connection with such an interlocutory appeal, federal courts have recognized that a trial court should ordinarily stay proceedings pending appeal, under the federal procedural rule that an interlocutory appeal “divests the district court of its control over those aspects of the case involved in the appeal.” *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 740 (2023) (quotation marks omitted).

Those principles do not translate to New York criminal proceedings. Unlike the procedure in federal courts, New York law strictly limits interlocutory appeals in criminal cases. “It is fundamental that in the absence of a statute expressly authorizing a criminal appeal, there is no right to an appeal in a criminal case in this State.” *People v. DeJesus*, 54 N.Y.2d 447, 448 (1981); *see also People v. Stevens*, 91 N.Y.2d 270, 277 (1998) (same). CPL § 450.10 authorizes defendants to appeal only from a “judgment,” CPL § 450.10(1), a “sentence,” CPL § 450.10(2),(3), and orders denying motions pursuant to certain provisions of CPL § 440.10. CPL § 450.10(4), (5).¹ The statute does not authorize a defendant to appeal from an order denying a motion pursuant to CPL §§ 210.20, 210.40, or CPL § 330.30 prior to sentencing. In reliance on these principles, appellate courts have repeatedly dismissed appeals from orders denying dismissal of an indictment, holding that “[n]o appeal lies from” such an order, and that “[t]he issues involved may only be reviewed on appeal from a judgment of conviction.” *People v. Taylor*, 99 A.D.2d 820, 820 (2d Dep’t 1984); *see People v. Young*, 149 A.D.2d 916, 916 (4th Dep’t 1989); *People v. Adorno*, 112 A.D.2d 308, 308 (2d Dep’t 1985). Likewise, a “review of [a] determination” denying claims a defendant has advanced in a CPL § 330.30 motion “must await the defendant’s appeal as of right from the judgment of conviction.” *People v. Taylor*, 187 A.D.3d 58 (2d Dep’t 2020); *see also People v. Goodfriend*, 100 A.D.2d 781, 782 (1st Dep’t) (reversing on People’s appeal order granting defendant’s CPL § 330.30 motion, and refusing to review defendant’s additional claims

¹ Likewise, a defendant can seek permission to appeal to an intermediate appellate court only from certain orders entered pursuant to CPL 440 and from a sentence not appealable as of right. CPL 450.15.

because “[t]he defendant ha[d] no statutory right to appeal” in that situation), *aff’d*, 64 N.Y.2d 695, 698 (1984).

The absence of an interlocutory appeal does not deprive a New York criminal defendant of all appellate remedies during the pendency of a criminal case. But New York law channels such claims through C.P.L.R. article 78 proceedings—a collateral civil proceeding rather than a direct interlocutory appeal. *Compare Abney v. United States*, 431 U.S. 651, 659 (1977) (authorizing interlocutory appeal of order denying dismissal and double jeopardy grounds), *with Matter of Corbin v. Hillery*, 74 N.Y.2d 279, 285 n.3 (1989) (channeling double-jeopardy claims through a request for a writ of prohibition in an article 78 proceeding), *aff’d sub nom. Grady v. Corbin*, 495 U.S. 508 (1990).

For present purposes, the critical point is that there is no automatic stay from the mere filing of an article 78 petition, which is not an appeal and thus does not divest a criminal court of any jurisdiction. *Compare Coinbase*, 599 U.S. at 740; C.P.L.R. 5519(a) (providing for an automatic stay in certain civil appeals). Rather, a party to an article 78 proceeding must request a discretionary stay under C.P.L.R. 7805.

Defendant’s invocation of an automatic stay thus fails under New York law.

B. Defendant’s particular immunity arguments would not entitle him to an automatic stay in any event.

Even setting aside the procedural unavailability of an automatic stay, defendant has also not raised the type of immunity argument that would support a stay of trial proceedings even in federal court. To the extent that federal courts have recognized an automatic stay in the immunity context, they have done so only when (1) a defendant asserts an immunity from suit altogether (2) for his official conduct. But neither of the claims that Supreme Court rejected in its interlocutory orders raised this type of immunity argument.

First, defendant claims, in challenging Supreme Court’s denial of his CPL § 330.30 motion, that the court improperly admitted “evidence of immune official acts” during the trial, Def.’s Mem. 12, in violation of the Supreme Court’s ancillary holding in *Trump* that “testimony or private records of the President or his advisers probing [an] official act” are inadmissible at trial. 603 U.S. at 630-32. But even in the federal courts, this type of claim would not support an interlocutory appeal or an automatic stay pending appeal because it is not an argument that defendant is immune from suit on the underlying criminal charges; instead, the only argument was that certain evidence from his presidential term should not have been introduced. This distinction between an immunity claim and an evidentiary claim is important because in *Trump*, the Supreme Court only provided for “pretrial review” in connection with “[q]uestions about whether the President *may be held liable* for particular actions.” 603 U.S. at 636 (emphasis added). The Court never suggested that pretrial review (or a concomitant stay pending

appeal) was available for evidentiary claims based on immunity, since even a meritorious evidentiary claim would not render a defendant immune from criminal liability altogether. Rather, it would simply limit the nature and scope of the trial evidence. Thus, the justification for interlocutory appellate review of pretrial *immunity* claims does not apply to posttrial *evidentiary* claims, which do not by themselves preclude prosecution.

Second, defendant claims that his recent reelection as President immediately entitles him to absolute immunity from any criminal proceeding, even before his inauguration on January 20, 2025. But this type of “immunity” claim is very different from the claims of immunity that federal courts have recognized would support an interlocutory appeal and stay pending appeal.

Specifically, the federal courts have held that an interlocutory appeal is available when a public official claims immunity because a lawsuit seeks to hold him liable *for his official conduct*. For example, in the context of absolute and qualified immunity, the question is always whether a public official may be required to stand trial for “the consequences of official conduct.” *Mitchell*, 572 U.S. at 527. By contrast, “[t]he principal rationale for affording certain public servants immunity from suits . . . arising out of their official acts is inapplicable to unofficial conduct.” *Clinton v. Jones*, 520 U.S. 681, 692-93 (1997).

The Supreme Court has applied a similar distinction when it comes to presidential immunity. In *Trump v. United States*, the dispute was over whether defendant could be criminally prosecuted for “official acts during his tenure in office.” 603 U.S. at 606. For official acts—i.e., actions performed under the President’s official authority—the Court held that the President has at least presumptive immunity from criminal liability. *Id.* at 616. But “[a]s for a President’s unofficial acts, there is no immunity” from criminal liability at all. *Id.* at 615. Indeed, the lack of any protection for unofficial conduct is so clear that the Court held that a President can even be “subject to criminal prosecution for unofficial acts committed *while in office*.” *Id.* at 606 (emphasis added). And it was in the context of defendant’s “prosecution for . . . official acts” that the Supreme Court recognized that a “denial of immunity would be appealable before trial.” *Id.* at 635; *see also Blassingame v. Trump*, 87 F.4th 1, 30 (D.C. Cir. 2023) (in civil suit, recognizing that defendant was entitled to pre-trial process to resolve his immunity based on “the official actions of an office-holder”).

To be sure, a defendant need not *conclusively* establish that he was engaged in official conduct in order to raise a colorable immunity claim that would then support an automatic stay pending appeal. *Cf. Trump*, 603 U.S. at 617 (“Distinguishing the President’s official actions from his unofficial ones can be difficult.”); *Blassingame*, 87 F.4th at 30 (remanding for further pretrial proceedings on “the President’s official-act immunity”). But there must at least be a live dispute over whether the defendant’s conduct was official.

Here, by contrast, there is no such live dispute. The U.S. District Court for the Southern District of New York—in addressing the closely related question of whether the charged conduct involved “any act under color of office” for purposes of federal-officer removal, 28 U.S.C. § 1442(a)(1)—rightly concluded that the conduct charged “was purely a personal item of the President—a cover-up of an embarrassing event. Hush money paid to an adult film star is not related to a President’s official acts. It does not reflect in any way the color of the President’s official duties.” *New York v. Trump*, 683 F. Supp. 3d at 345. And since that ruling, defendant has never contested that the conduct underlying these criminal charges was wholly unofficial. *See* Dec. 16 Order 16 (“[T]his court need not decide whether the crimes of which defendant was convicted constitute official acts because Defendant concedes that they were decidedly unofficial.”). Defendant thus has not raised any plausible claim that he is immune from criminal prosecution for the unofficial conduct charged in the indictment, and accordingly is not entitled to an automatic stay on that ground.

Instead of asserting a claim of immunity based on his past official conduct, defendant’s *Clayton* motion instead took a different approach: he made the novel argument that his reelection as President conferred prospective immunity on him that entitled him to immediate dismissal of the criminal charges. *See Clayton* Mot. 35-41. And although defendant will not be inaugurated until January 20, he has made the conclusory claim that the temporary immunity of a sitting President “extends into the brief transition period during which the President-elect prepares to assume the Executive Power of the United States.” Def.’s Mem. 10.

This novel claim does not support any automatic stay because defendant’s invocation of President-elect immunity is utterly baseless. *See Coinbase, Inc. v. Bielski*, 599 U.S. 736, 745 (2023) (recognizing that trial courts may proceed when a defendant raises a patently meritless interlocutory appeal); *Behrens v. Pelletier*, 516 U.S. 299, 310-11 (1996) (recognizing that “frivolous” claims of qualified immunity on appeal will not stay trial-court proceedings); *Mitchell*, 472 U.S. at 525 (recognizing that only “a substantial claim of absolute immunity” may entitle the defendant to an interlocutory appeal “before final judgment”). Put simply, presidential immunity under Article II of the Constitution does not extend to the President-elect. Article II vests the entirety of the executive power in the incumbent President, *see Trump*, 603 U.S. at 607 (quoting U.S. Const. art. II, § 1, cl. 1), and the U.S. Supreme Court has long recognized that “only the incumbent is charged with performance of the executive duty under the Constitution.” *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 448 (1977). The President-elect is, by definition, not yet the President. The President-elect therefore does not perform any Article II functions under the Constitution, and there are no Article II functions that would be burdened by ordinary criminal process involving the President-elect. *See United States v. Williams*, 7 F. Supp. 2d 40, 51 (D.D.C. 1998) (holding that Presidential Transition Act “does not—and cannot—deem any of the President-elect’s actions ‘official’ before he

or she complies with the Oath and Affirmation Clause”), *vacated in part on other grounds sub nom. United States v. Schaffer*, 240 F.3d 35 (D.C. Cir. 2001).

The rationales that support presidential immunity from prosecution for official conduct also do not apply to the President-elect. “The ‘justifying purposes’” of presidential immunity for official actions “are to ensure that the President can undertake his constitutionally designated functions effectively, free from undue pressures or distortions.” *Trump*, 603 U.S. at 615-16 (quoting *Clinton v. Jones*, 520 U.S. 681, 694 & n.19 (1997), and *Nixon v. Fitzgerald*, 457 U.S. 731, 755 (1982)). But only the incumbent President has any “constitutionally designated functions,” *id.*, see *Nixon*, 433 U.S. at 448; and because the President-elect is not the President, there is no risk that “the President’s decisionmaking is . . . distorted” by a pre-existing criminal case against a defendant who later becomes the President-elect. *Trump*, 603 U.S. at 615.

Finally, the advanced stage of this proceeding provides additional reason to conclude that the automatic stay that the U.S. Supreme Court recognized in *Trump* does not apply here. In recognizing the appealability “before trial” (*id.* at 635) of a “substantial claim of absolute immunity” based on official conduct (*Mitchell*, 472 U.S. at 525), the U.S. Supreme Court has made clear its concern for the possibility of “an extended proceeding” that “may render [the President] unduly cautious in the discharge of his official duties. *Trump*, 603 U.S. at 637. That concern is triply inapplicable here: (1) trial concluded more than seven months ago and there are mere days left in the trial court proceedings, which will conclude with sentencing on January 10, so there is no risk of an “extended proceeding”; (2) this case does not involve prosecution for official conduct, so there is no risk of any impact on defendant’s “discharge of his official duties”; and (3) sentencing is scheduled to occur before defendant’s inauguration, so the criminal proceeding will be over before defendant has any official duties in any event.

II. A Discretionary Stay Is Also Not Warranted.

Defendant has also established no basis for a discretionary stay of his forthcoming sentencing. As a general matter, there is a long-standing policy in this State against appellate interference with ongoing criminal prosecutions. *See, e.g., Kelly’s Rental v. City of New York*, 44 N.Y.2d 700, 702 (1978); *Matter of State v. King*, 36 N.Y.2d 59, 63 (1975); *see also* C.P.L. § 450.10(1) (generally prohibiting interlocutory appeals in criminal cases). Here, defendant has not come close to making the extraordinary showing that would be necessary to override this policy.

A. The public interest and the balance of the equities weigh decisively against any discretionary stay.

A stay pending appeal that would interrupt a pending criminal proceeding is a drastic remedy that is warranted only if a defendant shows that a stay would be in the

public interest and the balance of equities tips in his favor. Here, these equitable factors weigh heavily against the issuance of any stay that would prevent Supreme Court from proceeding to the sentencing on January 10.

First, there is a compelling public interest in proceeding to sentencing. New York law requires that the sentence “be pronounced without unreasonable delay.” CPL § 380.30(1). And the Court of Appeals has recognized that “[s]ociety, as well as the defendant, has an important interest in assuring prompt prosecution of those suspected of criminal activity.” *People v. Staley*, 41 N.Y.2d 789, 792 (1977). That societal interest supports proceeding to sentencing now.

Indeed, if defendant is ever to be sentenced in this proceeding, the least burdensome time to do so is now, before his inauguration on January 20, 2025. As Supreme Court has noted (Jan. 3 Order 17), and defendant has argued (pp. 11-12), sentencing a sitting President during his term in office raises heightened and potentially insuperable obstacles. Defendant has also vociferously objected to being sentenced after the end of his forthcoming presidential term. (Clayton Mot. 51-54). By contrast, sentencing on January 10 raises none of these concerns: defendant has no viable claim of presidential immunity from ordinary criminal process; he is not yet engaged in any official presidential functions that would be disrupted by the sentencing; and given Supreme Court’s accommodations, including the offer for defendant to appear virtually rather than in person, sentencing could proceed in a manner that is minimally disruptive to defendant’s transitional activities.

Second, proceeding to sentencing now is also consistent with defendant’s own litigation requests. As Supreme Court correctly noted (Jan. 3 Order 7), it was defendant who asked that sentencing be adjourned until after the presidential election. Implicit in that request was defendant’s “consent that he would face sentence during the window between the election and the taking of the oath of office.” *Id.*

As Supreme Court has also correctly observed (Jan. 3 Order 17), sentencing would also enable defendant to pursue the full panoply of appellate challenges that he has repeatedly indicated he intends to bring. In this interlocutory posture, defendant’s appellate arguments are limited to those that have some connection to his assertions of presidential immunity. By contrast, after sentencing, defendant would be entitled to raise a much broader range of objections—including not just the immunity-based claims that he has asserted in his CPL § 330.30 and *Clayton* motions, but also the various state-law and trial-based objections that he has preserved throughout this proceeding. Proceeding to sentencing would thus avoid the type of piecemeal appellate litigation that the CPL attempts to prevent by severely limiting interlocutory appeals.

Third, defendant will not be seriously prejudiced by proceeding to sentencing on January 10. The sentencing hearing itself will impose minimal burdens on defendant because Supreme Court has allowed him to appear virtually, and in the People’s

experience, it would be feasible to complete sentencing in less than an hour. In addition, the court has declared its intent to impose “a sentence of an unconditional discharge” (Jan. 3 Order 17), which will prevent defendant from being subject to any ongoing criminal supervision or other obligations during his presidential term. And sentencing will not foreclose defendant from pursuing any of his challenges to this criminal proceeding on appeal, including the claims of presidential immunity that are the basis of his current stay request.

Defendant’s claim that the January 10 sentencing is somehow being “rushed,” Def.’s Mem. 5, is not supported by the record. Defendant was convicted on May 30, 2024, and originally scheduled to be sentenced on July 11, 2024. Every adjournment of the sentencing date since then has been to accommodate defendant’s requests for more time—including more time for post-trial briefing and more time to get past the date of the presidential election. Moreover, although the scheduled sentencing is now only a few days away, there are no more trial court proceedings left to complete or pending motions to be decided, especially since the pre-sentence report was completed “months ago.” Jan. 3 Order 7 n.5. Thus, far from rushing to sentencing, Supreme Court has instead bent over backwards to give defendant ample time after the trial and before sentencing to fully litigate his various post-trial motions.

B. Defendant is unlikely to succeed on the merits.

These equitable considerations alone would warrant denial of any discretionary stay. But a stay should further be denied because defendant is unlikely to obtain any interlocutory relief.

1. Supreme Court’s ruling on defendant’s CPL § 330.30 motion was correct.

Supreme Court correctly denied defendant’s CPL § 330.30 motion to vacate his conviction and dismiss the indictment. *See* Dec. 16 Order. The following summarizes the issue; for this Court’s convenience, the People also attach their submission below, which contains their full response to defendant’s motion.

As noted, the U.S. Supreme Court issued its decision in *Trump v. United States*, 144 S. Ct. 2312 (2024), on July 1, 2024. In addition to holding that the President may not be directly prosecuted for certain official acts committed during his Presidency, the Court also limited the use of evidence of “official conduct for which the President is immune,” “even on charges that purport to be based only on his unofficial conduct.” *Id.* at 2341. In light of that ruling, defendant moved on July 10, 2024 to vacate his conviction under CPL § 330.30(1) based on the allegedly improper admission of certain evidence at trial that he claimed concerned official acts for which he enjoyed presidential immunity.

CPL § 330.30(1) authorizes a trial court to set aside a guilty verdict based on “[a]ny ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court.” A trial court may not set aside a verdict based on an alleged error that was not properly preserved at trial. *See, e.g., People v. Everson*, 100 N.Y.2d 609, 610 (2003); *People v. Sudol*, 89 A.D.3d 499, 499-500 (1st Dep’t 2011). Under these standards, the Court properly denied defendant’s motion on three independent grounds.

First, defendant failed to preserve any immunity-based objection to most of the evidence that was the subject of his CPL § 330.30 motion. *See* Dec. 16 Order 9-16. The Court correctly held that defendant preserved an objection to only three narrow categories of evidence: (1) Hope Hicks’s testimony about “statements by Defendant while he was President of the United States,” *id.* at 12; (2) a financial disclosure form defendant submitted to the federal Office of Government Ethics in 2018 (People’s 81), *id.* at 13; and (3) four social media posts defendant posted publicly to his Twitter account while he was President (People’s 407-F, 407-G, 407-H, and 407-I), *see id.* at 14 & n.11. As to *all* of the remaining evidence that defendant later claimed was erroneously admitted because of official-acts immunity, he raised no objection during trial, including as to (1) other testimony from Hope Hicks about events that occurred while she was the White House Communications Director; (2) testimony from Madeleine Westerhout about office process and procedures when she worked in the White House; (3) testimony from Michael Cohen about why he lied to Congress; and (4) testimony from Cohen about conversations he had with third parties about Federal Election Commission investigations. *See id.* at 8, 14. The quantum of purportedly improper evidence that was subject to a valid objection was thus vanishingly small, as Supreme Court correctly recognized.

Second, all of defendant’s evidentiary arguments were meritless in any event. *See id.* at 16 (noting that “[d]espite Defendant’s failure to preserve the objections he raises in the instant motion [except as noted above], this Court will nonetheless consider his motion on the merits, in its entirety”). The evidence defendant challenged in his post-trial motion either concerned unofficial conduct that is not subject to any immunity, or is a matter of public record that is not subject to preclusion. *See also id.* at 16-35 (rejecting defendant’s arguments on the merits). And as Supreme Court properly recognized, in many instances defendant himself first elicited testimony on the subject matter he later opposed in his post-trial motion, *see id.* at 22-23; and the objected-to testimony was in almost every instance heavily corroborated by testimony that could not be subject to any evidentiary objection at all, *see id.* at 21.

Third, the Court correctly concluded that even if some of this evidence were improperly admitted (which it was not), any error was harmless in light of the overwhelming evidence of defendant’s guilt. *See id.* at 35-38. As the Court recognized, the trial record contains “overwhelming evidence of guilt,” including the “invoices,

general ledger entries, recorded phone conversations, text messages, e-mails, Mr. Weisselberg's handwritten notes, and video footage"; testimony from Michael Cohen, David Pecker, Stormy Daniels, Jeff McConney, Keith Davidson, and Gary Farro, among others; not to mention "Defendant's own words." *Id.* at 38. Thus, if any error occurred through the introduction of official-acts evidence, it was harmless in light of this mountain of evidence proving defendant's guilt beyond all reasonable doubt. *See People v. Crimmins*, 36 N.Y.2d 230, 237 (1975). Defendant is not likely to succeed in his challenge to the Court's denial of his CPL § 330.30 motion.

2. The Court's ruling on defendant's *Clayton* motion was correct.

Likewise, the Court properly denied defendant's *Clayton* motion. The following summarizes the issue; for this Court's convenience, the People also attach their submission below, which contains their full response to defendant's motion.

As an initial matter, and as the Court recognized, the "primary issue" presented in that motion is "whether a President-elect must be afforded the same immunity protections from a state prosecution as a sitting President." Jan. 3 Order 4. For the reasons described above, the answer to this question is no. "[T]he Constitution dictates that only a President, after taking the oath of office, has the authority of the Chief Executive; a President-elect does not." Jan. 3 Order 5; *see also Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 448 (1977) ("[O]nly the incumbent is charged with performance of the executive duty under the Constitution.").

Apart from defendant's novel and creative claim of President-elect immunity, none of the other *Clayton* factors support dismissal either. CPL § 210.40 authorizes dismissal only when there is "some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment or count would constitute or result in injustice." *Id.* § 210.40(1). Dismissal in the interest of justice is an "extraordinary remedy" that "should be exercised sparingly," *People v. Hernandez*, 198 A.D.3d 545, 545 (1st Dep't 2021), and is appropriate only in "that rare and unusual case where it cries out for fundamental justice beyond the confines of conventional considerations." *People v. Williams*, 145 A.D.3d 100, 107 (1st Dep't 2016) (quoting *People v. Harmon*, 181 A.D.2d 34, 36 (1st Dep't 1992)).

The Court properly concluded after analyzing the ten *Clayton* factors that *none* support dismissal of the indictment or vacatur of the jury verdict. *See* Jan. 3 Order 10-16. The crimes that the jury convicted defendant of committing are serious offenses that caused extensive harm to the sanctity of the electoral process and to the integrity of New York's financial marketplace. *See* CPL §§ 210.40(1)(a), (b). Defendant falsified business records to "conceal a conspiracy to promote a presidential election by unlawful means," Jan. 3 Order 10—a crime Supreme Court aptly described as "the premeditated and continuous deception by the leader of the free world." *Id.* To vacate

the jury’s verdict—particularly given the seriousness of defendant’s crimes—would “cause immeasurable damage to the citizenry’s confidence in the Rule of Law.” *Id.*; see CPL § 210.40(1)(g).

In addition, the evidence of defendant’s guilt is overwhelming. See CPL § 210.40(1)(c). The trial record overwhelmingly established that defendant made or caused false entries in the business records of an enterprise, and did so with the intent to defraud that included the intent to commit or conceal another crime. See People’s Mem. Opp. Clayton Motion 39-48 (Dec. 9, 2024); People’s Mem. Opp. Post-Trial Mot. 39-60 (July 24, 2024). Supreme Court has repeatedly evaluated that evidence and concluded—correctly—that it strongly supports the jury’s verdict. See Jan. 3 Order 10-11 (“[A] total of 22 witnesses testified at trial, and over 500 exhibits were admitted, all of which supported the jury’s verdict.”); Dec. 16 Order 38 (holding that if any evidence were improperly admitted, that error was harmless “in light of the overwhelming evidence of guilt”).

And notwithstanding defendant’s past and upcoming service as President, his history, character, and condition—and especially his open disregard for the justice system—do not support dismissal. See CPL § 210.40(1)(d). As Supreme Court recognized, defendant has pursued “unrelenting and unsubstantiated attacks against the integrity and legitimacy of this process, individual prosecutors, witnesses, and the Rule of Law”; and “has gone to great lengths to broadcast on social media and other forums his lack of respect for judges, juries, grand juries, and the justice system as a whole.” Jan. 3 Order 10-11; see also People’s Mem. Opp. Clayton Motion 48-57 (Dec. 9, 2024). This conduct resulted in ten findings of criminal contempt by this Court during trial, and similar conduct has resulted in contempt findings and court sanctions in other proceedings as well. See Decision & Order on Contempt, *People v. Trump*, 2024 N.Y. Slip Op. 24148, at *2 (Sup. Ct. N.Y. Cnty. Apr. 30, 2024); Decision & Order on Contempt, *People v. Trump*, 83 Misc.3d 1202(A), at *3 (Sup. Ct. N.Y. Cnty. May 6, 2024); Jan. 3 Order 11-12 & n.8 (citing cases).

There is no evidence of any law enforcement misconduct, see CPL § 210.40(1)(e), and defendant’s arguments to the contrary are—as Supreme Court correctly recognized—“unsupported” claims that “mischaracterize the record” and have largely “been raised previously and rejected” by the Court. Jan. 3 Order 12-13. The remaining factors, as the Court painstakingly explained, likewise do not support dismissal. See *id.* at 13-16 (holding that public confidence in the justice system would be undermined by dismissal, and rejecting—again—defendant’s arguments that the jury pool was tainted and that the Court should have recused itself). Defendant is not likely to succeed on his appeal from the Court’s denial of his Clayton motion.

The People stand ready to file a further brief opposing defendant’s request for a stay. In the meantime, this Court should deny any interim relief.

Sincerely,

/s/ Steven C. Wu

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Appendix L

(SUBMITTED BY MOVING PARTY)

Case # 2025-00118

Index/Indict/Docket # 71543-23

Appeal by _____ from Order ☐ Judgment ☐ of Supreme ☐ Surrogate's ☐ Family ☐ Court entered on _____, 20____

County 100 Centre St., New York, NY 10013

Notice of Appeal
filed on .20

Nature of Article 78 Petition on Order to Show Cause relating to N.Y. Supreme Court's
action incorrect Presidential immunity rulings dated Dec. 16, 2024 and Jan. 3, 2025
or proceeding

This application by appellant respondent is for Expedited resolution of President Trump's Article 78 Petition and immediate stay of any further criminal proceedings in the Supreme Court pending resolution of the Petition

Has any undertaking been posted No If "yes", state amount and type _____

If "yes", state dates
and nature

Does he/she
consent **No**

Appearing by _____

28 Liberty St., NY, NY 10005 / (212) 416-8020 / appeals.nyc@ag.ny.gov

After consideration of the papers submitted and the extensive oral argument, movant's application for an interim stay is denied.

Justice

Date _____

ALL PAPERS TO BE SERVED PERSONALLY.

Court Attorney