No. 24A666

IN THE

Supreme Court of the United States

DONALD J. TRUMP,

Applicant,

v.

PEOPLE OF THE STATE OF NEW YORK, *et al.,*

Respondents.

ON EMERGENCY APPLICATION FOR STAY PENDING APPLICATION OF CRIMINAL PROCEEDINGS IN THE SUPREME COURT OF NEW YORK COUNTY, NEW YORK, PENDING THE RESOLUTION OF DONALD J. TRUMP'S INTERLOCUTORY APPEAL ON PRESIDENTIAL IMMUNITY

BRIEF OF *AMICI CURIAE* FORMER PUBLIC OFFICIALS AND LEGAL SCHOLARS IN SUPPORT OF RESPONDENTS

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INTEREST AND IDENTITY OF *AMICI CURIAE*[1]

State Democracy Defenders Action ("SDDA") is a bipartisan, nonprofit organization committed to upholding the rule of law, fighting against autocracy, and defending the Constitution. Donald B. Ayer, Ty Cobb, Tom Coleman, Barbara Comstock, Mickey Edwards, John Farmer Jr., Brian Frosh, Stuart M. Gerson, Barbara S. Gillers, Stephen Gillers, George Grasso, William Kristol, Philip Allen Lacovara, John McKay, Trevor Potter, Alan Charles Raul, Jonathan C. Rose, Claudine Schneider, Peter M. Shane, Christopher Shays, Olivia Troye, Stanley A. Twardy Jr., William Weld, and Christine Todd Whitman (collectively with SDDA, "*Amici*") are former prosecutors, elected officials, other government officials, and legal scholars who have collectively spent decades defending the Constitution, the interests of the American people, and the rule of law.

Amici have a strong interest in this case, due to their commitment to the integrity of the criminal justice system, their interests in preserving the proper scope of executive power, and in the faithful and equal enforcement of the criminal laws. The unique perspective of *amici*, informed by their public service and scholarship, make them well qualified to present arguments and perspectives to this Court that the parties alone are not likely to present.

Amici and their relevant background are listed below:

- **Donald B. Ayer**, Deputy Attorney General in the George H.W. Bush Administration from 1989 to 1990.

[1] This brief was not authored in whole or part by counsel for a party. No one other than *Amici* and their counsel made a monetary contribution to the preparation or submission of the brief.

- **Ty Cobb**, Special Counsel to the President in the Trump Administration from 2017 to 2018.
- **Tom Coleman**, Representative of the 6th District of Missouri from 1976 to 1993 (R).
- **Barbara Comstock**, Representative of the 10th District of Virginia from 2015 to 2019 (R).
- **Mickey Edwards**, Representative of the 5th District of Oklahoma from 1977 to 1993 (R).
- **John Farmer Jr.**, New Jersey Attorney General from 1999 to 2002 (R).
- **Brian Frosh**, Maryland Attorney General from 2015 to 2023 (D).
- **Stuart M. Gerson**, Assistant Attorney General for the Civil Division in the George H.W. Bush Administration from 1989 to 1993 and Acting United States Attorney General in the Clinton Administration in 1993.
- **Barbara S. Gillers**, Chair of the American Bar Association Standing Committee on Ethics and Professional Responsibility from 2017 to 2020.
- **Stephen Gillers**, Elihu Root Professor Emeritus at New York University School of Law.
- **George Grasso**, Judge for the New York City Criminal Court from 2010 to 2022.
- **William Kristol**, Chief of Staff to Vice President Dan Quayle from 1989 to 1993.
- **Philip Allen Lacovara**, Counsel to the Special Prosecutor, Watergate Special Prosecutor's Office from 1973 to 1974.
- **John McKay**, U.S. Attorney for the Western District of Washington in the George W. Bush Administration from 2001 to 2007.
- **Trevor Potter**, Chairman of the Federal Election Commission and Commissioner of the Federal Election Commission from 1991 to 1995.
- **Alan Chares Raul**, Associate Counsel to the President from 1986 to 1988.
- **Jonathan C. Rose**, Assistant Attorney General, Office of Legal Policy from 1981 to 1984 and Special Assistant to the President from 1971 to 1972.
- **Claudine Schneider**, Representative of Rhode Island from 1981 to 1991 (R).
- **Peter M. Shane**, Jacob E. Davis and Jacob E. Davis II Chair in Law Emeritus at The Ohio State University's Moritz College of Law and

Attorney-Adviser in the Office of Legal Counsel from 1979 to 1981.

- **Christopher Shays**, Representative of the 4th District of Connecticut from 1987 to 2009 (R).

- **Olivia Troye**, Special Advisor, Homeland Security and Counterterrorism to Vice President Mike Pence from 2018 to 2020.

- **Stanley A. Twardy, Jr.**, United States Attorney for the District of Connecticut in the Reagan and George H.W Bush Administrations from 1985 to 1991.

- **William F. Weld**, Governor of Massachusetts from 1991 to 1997 (R).

- **Christine Todd Whitman**, Governor of New Jersey from 1994 to 2001 (R) and Administrator of the Environmental Protection Agency from 2001 to 2003.

SUMMARY OF ARGUMENT

Applicant Donald J. Trump, a former and future President who is currently a private citizen, seeks an emergency stay to avoid sentencing after being convicted by a jury of his peers for 34 separate felonies under New York criminal law. *Amici* respectfully submit this brief to oppose Applicant's attempt to avoid accountability.

First, there is no legal basis for the extraordinary relief that Applicant seeks in having this Court cut the line in both state and federal court. Applicant contends that "logic dictates" an automatic stay based on his claim of immunity, but neither logic nor—more importantly—legal precedent supports that conclusion. To the contrary, on the eve of this final stage of the 23-month criminal case, this Court should not disrupt the proceeding and circumvent both the ordinary process of the post-sentencing appeal in state court and the simultaneous pending federal appeal of Applicant's attempt to remove the case. Denying Applicant's emergency application poses no risk of irreparable harm. The trial court has signaled that it is likely to impose the most lenient sentence imaginable, an unconditional discharge with no restrictions or conditions.

Applicant faces no harm—and certainly no irreparable harm—from such a sentence that cannot be addressed on appeal as in every criminal case, and this Court can consider the merits of his arguments in the normal course.

Second, there is no President-elect immunity that protects Applicant. He was charged, tried, and convicted after he was out of office for unofficial conduct, and is scheduled to be sentenced before he resumes office. He claims, without any legal authority, that presidential immunity extends to him as President-elect. The clear reasoning underlying the doctrine of Presidential immunity, however, concerns the Constitutional responsibilities of a sitting President—responsibilities that begin and end precisely with the term of office.

Third, Applicant mistakenly contends that certain evidence of official conduct was admitted. Applicant's argument rests on the faulty premise that everything a President does while in office is official conduct, which is contrary to this Court's decision in *Trump v. United States,* 603 U.S. 593 (2024). As the trial court and the federal district court separately found after extensive litigation that evaluated the evidence through the lens of the *Trump* decision, the conduct Applicant challenges is *unofficial* conduct. Most of the evidence consists of private communications with private individuals about private matters totally unrelated to presidential duties or the functioning of the government. Other evidence was public record, the admission of which presents no "dangers of intrusion on the authority and functions of the Executive Branch." *Id.* at 595 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982)). Further, even assuming that any of the evidence in question should have been excluded, admission of such evidence was harmless, not reversible, error. In any event, the usual

appellate process is the appropriate mechanism to challenge these evidentiary rulings, and there is no legal basis to grant the extraordinary relief requested.

Fourth, to delay sentencing would subvert the rule of law by elevating a private citizen above the law, absolving him of sentencing for prior conduct because he subsequently won a presidential election. Applicant was convicted for conduct unrelated to the presidency in a trial that occurred when he was not President. He is scheduled to be sentenced before he serves as President again. There is no risk of interference with upcoming presidential duties and no threat to the functioning of the office of the President. The only reason for delaying sentencing is because of the continuing personal stigma associated with being sentenced following a conviction—which Applicant can challenge on appeal. Treating Applicant differently solely because he is about to be President violates the fundamental principle that no one is above the law.

ARGUMENT

I. There Is No Legal Basis for the Extraordinary Relief Sought

Applicant is not entitled to an emergency stay of his state court sentencing because he cannot show that he "will be irreparably injured absent a stay"—that is, injured in a way that the ordinary appeals process cannot address. *Nken v. Holder*, 556 U.S. 418, 426 (2009); *see also id.* at 435 (holding that "the burden of removal alone cannot constitute the requisite irreparable injury" because immigrants "may continue to pursue their petitions for review" after being removed). Nor has Applicant demonstrated why it is appropriate to concurrently petition this Court rather than to allow the New York appellate courts to consider the stay requests pending before them.

See Sup. Ct. R. 23 ("Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof.").

Unable to satisfy his burden, Applicant argues that precedent from this Court "effectively mandates an automatic stay." Br. at 13. The two cases he relies upon, however, do no such thing, because each involves immunity from *standing trial*, not from sentencing for a trial that has already occurred. *See Trump*, 603 U.S. at 635 (explaining that questions of immunity are reviewable before trial because the essence of immunity is the entitlement not to be subject to suit); *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) ("[A] defendant's claim of right not to stand trial … cannot be effectively vindicated after the trial has occurred") (citations omitted). These cases support, at most, an automatic stay for one round of immunity appeals, before a trial on the merits. This case is in a very different procedural posture, since the defendant has already stood trial. Neither case supports the contention that a defendant who claims immunity *after* he has already stood trial, been convicted, and had multiple state and federal courts decline to stay the case pending sentencing, is automatically entitled to a stay while he attempts, yet again, to sidestep the ordinary judicial process on the eve of sentencing. *See Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers) (noting the need for "extraordinary circumstances" to justify a stay pending appeal); *Edwards v. Hope Med. Grp. for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers) (describing the "especially heavy burden" for review of a district court judgment where the court of appeals has denied a motion for a stay).

Fundamentally, there is no legal basis for a stay because Applicant has not

adequately alleged "a significant possibility of reversal of the lower court's decision." *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974). Like many criminal defendants, Applicant believes his conviction was unjust and would prefer that it be reversed before he is sentenced. But that is not how our system works. Applicant is free to follow the usual process of appealing his conviction and sentence in state court after his case concludes, just as every other convicted defendant must do. He is also free to continue to pursue his appeal, pending before the Second Circuit, of the denial of his motion to remove the case to federal court, an appeal that includes the same substantive arguments of official-acts evidence and absolute immunity that he makes here. Each of those proceedings provides ample opportunity for Applicant to get a ruling, through the ordinary judicial process, on the issues he pushes this Court to prematurely decide. Accordingly, there is no legal basis to disturb the "longstanding public policy against federal court interference with state court proceedings." *Younger v. Harris*, 401 U.S. 37, 43 (1971).

There is also no factual basis for Applicant's claim of irreparable harm. Trial ended seven months ago, post-trial motion practice has concluded, and—in a remarkable example of the trial court's willingness to accommodate him—the trial court agreed that Applicant may appear virtually at sentencing, so there is no risk of "an extended proceeding" or other "impediments to 'the effective functioning of government'" *Trump*, 603 U.S. at 636-637 (quotations omitted).

Applicant also suggests that sentencing was sprung on him on short notice. Br. at 9 n.1. But sentencing has been scheduled and rescheduled multiple times at his request since the jury's verdict on May 30, 2024. Applicant also claims that his

upcoming sentence risks "constitutionally intolerable" restrictions on his liberty, Br. at 14, but that argument ignores the trial court's representation that "a sentence of an unconditional discharge appears to be the most viable solution to ensure finality and allow Defendant to pursue his appellate options." January 3, 2025 Decision and Order, at 17. Moreover, were the trial court to impose an appropriately harsher sentence than indicated on January 10, Applicant would still have ten days before inauguration to seek an emergency appeal—a timeframe several times longer than the "short fuse" of two days "without benefit of full briefing and oral argument" in which Applicant now asks this Court for redress. *Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (BARRETT, J., concurring) (denying application for injunctive relief).

The notion that an automatic stay applies in the context of a post-conviction, pre-sentence challenge to the admission of evidence is illogical. The principle underlying an automatic stay is to shield a defendant from the "extended proceeding" associated with standing trial. Before trial, unresolved questions of immunity may threaten irreparable harm in the form of a trial and a conviction where the defendant had immunity. Here, Applicant has already been convicted. And a potential remedy remains: Applicant can appeal to have the conviction overturned. There is no irreparable injury at this stage from the admission of the evidence Applicant (wrongly) contests, because the potential injury is reparable the same way any erroneous evidentiary ruling is—on appeal. Applicant is reaching for a new and unjustifiable theory of irreparable injury based on the mere opprobrium of announcing a sentence against the President-elect. American law affords that position no such special exception.

Applicant contends that a stay is justifiable where the underlying issues have

not been addressed by federal law, characterizing the need to resolve questions of immunity as involving "unprecedented and momentous questions about the powers of the President and the limits of his authority under the Constitution." Br. at 10-11. Here, however, the arguments are not novel but simply wrong. As discussed below, the issues do not concern presidential authority and power but rather the unofficial conduct of a private citizen. Applicant is not the President but the President-elect, a private citizen with no Constitutional authority. And as the U.S. district court ruled in remanding the case after it was removed to federal court, "the matter 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), *appeal dismissed sub nom. People v. Trump*, 2023 WL 9380793 (2d Cir. Nov. 15, 2023).

II. There Is No President-Elect Immunity

Applicant asks this Court to immunize a private citizen from criminal prosecution. Such a ruling would place one person above the law even when he is not exercising any governmental authority, violating the rule of law and contradicting this Court's holding that "the President is not above the law" and that "the interests that underlie Presidential immunity seek to protect not the President himself, but the institution of the Presidency." *Trump* 603 U.S. at 632 & 642.[2] The request is meritless; presidential immunity cannot justify a stay of a state court criminal proceeding against an individual who currently holds no government office.

[2] *See also Trump*, 603 U.S. at 651 (Barrett, J., concurring) ("Properly conceived, the President's constitutional protection from prosecution is narrow.").

As Applicant tacitly acknowledges, there is no authority for "President-elect immunity." The only statutory authority relevant to this inquiry is the statute governing the President's term in office:

> The term of four years for which a President and Vice President shall be elected, shall, in all cases, commence on the 20th day of January next succeeding the day on which the votes of the electors have been given.

3 U.S.C.§ 101. Applicant is not the President and will not be until January 20, 2025, when his term "commences." To grant him immunity from criminal prosecution based on authority applicable only to the "sitting President" would be inconsistent with this statute and with the basic fact that the Constitution permits only one President at a time.

Because there is no support for President-elect immunity, Applicant relies on the asserted "reasoning" of a legal memorandum by the Office of Legal Counsel ("OLC"), *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 U.S. Op. O.L.C. 222, 2000 WL 33711291, at *28 (October 16, 2000) ("2000 OLC Memo" or "Memorandum"). But the 2000 OLC Memo states the opposite: that the "sitting President" is the ***only*** officer who can be insulated from criminal prosecution; not even the Vice President or any other government official—let alone a private individual—is entitled to such immunity.

The conclusion of the 2000 OLC Memo, stated immediately after its title, is:

> The indictment or criminal prosecution of a *sitting President* would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions.

2000 OLC Memo, at *1 (emphasis supplied). The Memorandum repeats the phrase "sitting President" eighty-four times, including in its title, not once referring to the

President-elect. And in *Trump*, this Court referred to the Memorandum as applying to "a sitting President." 603 U.S. at 616 n.2.

The reasoning of the 2000 OLC Memo also precludes the existence of President-elect immunity. The Memorandum analyzed in detail, and reaffirmed the reasoning and conclusions of, two earlier memoranda, (i) the 1973 memorandum issued by the OLC (Robert G. Dixon, Jr., Amenability of the President, Vice President, and other Civil Officers to Federal Criminal Prosecution While in Office, 1 Op. O.L.C. 285 (1973) ("1973 OLC Memo")), and (ii) the Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity (filed Oct. 5, 1973), *In re Proceedings of the Grand Jury Impaneled December 5, 1972: Application of Spiro T. Agnew, Vice President of the United States* (D. Md. 1973) (No. 73-965) ("SG Brief"), filed by then-Solicitor General Robert Bork. The OLC and then-Solicitor General Bork collectively concluded in 1973 that:

> (i) "all federal civil officers except the President are subject to indictment and criminal prosecution while still in office" but "the President is uniquely immune from such process"; and
>
> (ii) "consistent with the Constitution, the Vice President could be subject to indictment and criminal prosecution," but "the President, unlike the Vice President, could not constitutionally be subject to such criminal process while in office."

2000 OLC Memo, at *1.

Because the Vice President's constitutional function is, among other things, "to replace the President in certain extraordinary circumstances" (2000 OLC Memo, at *11) (citing SG Brief), which could present themselves at a moment's notice, the Vice President must be able to assume the duties of the President immediately. If the sitting Vice President is not immune from indictment and criminal prosecution, *a fortiori* a

President-elect who has not yet taken office is not immune.

Moreover, the 2000 OLC Memo also discusses at great length the "unique" duties of a "sitting President"—using the word "unique" eighteen times—and contrasts the President with other government officers, including judges and members of Congress. *See, e.g.*, 2000 OLC Memo, at *6 ("the institution of criminal proceedings against a sitting President would interfere with the President's unique official duties, most of which cannot be performed by anyone else.") (cleaned up). As then-Solicitor General Bork stated in the SG Brief, "[t]he President's immunity rests not only upon the matters just discussed but also upon his unique constitutional position and powers . . . . There are substantial reasons, embedded not only in the constitutional framework but in the exigencies of government, for distinguishing in this regard between the President and *all lesser officers* including the Vice President." 2000 OLG Memo, at *10 (quoting SG Brief at 7). As President-elect, Applicant is not an officer at all, and none of these considerations apply to the circumstances at hand.

Further, the 2000 OLC Memo based its conclusion on the "unique aspects of the *Office* of the President" and undue interference with "the conduct of the *Presidency*," not the individual—much less a person who is not yet, but will become, the President. 2000 OLC Memo, at *6-7, and 26 (emphasis supplied). Similarly, this Court's decision in *Trump* focused explicitly on the need to protect the "office" of the President, not the individual himself:

> The justifying purposes of the immunity we recognized in *Fitzgerald*, and the one we recognize today, are not that the President must be immune because he is the President; rather, *they are to ensure that the President can undertake his constitutionally designated functions effectively*, free from undue pressures or distortions. .... [I]t [is] the *nature of the function performed, not the*

> *identity of the actor* who perform[s] it, that inform[s] our immunity analysis.

Trump, 603 U.S. at 615-16 (emphasis supplied) (quotations and citations omitted).

Until January 20, 2025, Applicant is not the President. Granting a President-elect immunity would elevate him, as an individual, above the law, rather than protect the constitutional functions of the Office. The 2000 OLC Memo therefore provides no support for granting immunity for a President-elect.

Applicant also relies on two other sources of authority: (i) the Presidential Transition Act (3 U.S.C. § 102 note), and (ii) another OLC memorandum, *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*, 25 U.S. Op. Off. Legal Counsel 7, 2001 WL 34058234 (2001) ("2001 OLC Memo"). Both are inapposite.

The Presidential Transition Act does not concern immunity for either a President or President-elect. Nor does it imbue the President-elect with any powers or duties. Rather, the Act's purpose is to ensure that the *current, outgoing* administration provides support to the incoming administration. Other than disclosure requirements for the President-elect related to financing, the Act primarily provides for the sitting President and the General Services Administration, among others, to provide office space, funds, and other support for the incoming President-elect and his personnel, and requires the sitting President and current officers to endeavor to promote an orderly transition. *See, e.g.*, 3 U.S.C. § 102 note (section 2, "Purpose of This Act"). None of that remotely affords Applicant the relief he seeks here.

The 2001 OLC Memo is similarly irrelevant. It concerns only reimbursement of

funds expended by a President-elect before the General Services Administration determines he is the apparent successful candidate.

The most any of the sources cited by Applicant shows is that the President-elect is an important person and will hold a very important office. Of that, there can be no question. But "[n]o man in this country is so high that he is above the law." *United States v. Lee*, 106 U.S. 196, 220 (1882). Importance does not entitle a person to immunity. Winning the election entitles the President-elect to funding and support from the current administration during the transition period, but it does not elevate him above the position of any other private citizen under the law.

III. Applicant Misstates and Misapplies the Holding of *Trump v. United States* Regarding Official Act Evidence

Applicant incorrectly argues that his conviction was marred by admission of evidence of official presidential acts, in violation of the evidentiary exclusion recognized by this Court in *Trump*. This argument does not support his application for a stay because it is a substantive challenge to his conviction that he is free to make through the normal appeals process. The argument also fails on the merits, because it is based on a misstatement and misapplication of *Trump* to this case. Moreover, based on an extensive review of the record in the trial over which he presided, the trial court found that even if any or all of the contested evidence did constitute official acts subject to immunity, their admission would have been harmless error, compared to the totality of evidence against the defendant.

A. *Trump v. United States* Established Immunity Only for Official Conduct

In *Trump*, this Court held that "the nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office." 603 U.S. at 606. It articulated three crucial principles. *First*, there is "no immunity" for "unofficial acts." *Id.* at 593. *Second*, where the President exercises "core constitutional powers" *Id.* or takes "actions on subjects within his 'conclusive and preclusive' constitutional authority, [the] immunity must be absolute." *Id.* at 606 & 609. *Finally*, for non-core-constitutional powers, where the President "acts within the outer perimeter of his official responsibility," there is "a presumptive immunity from criminal prosecution." *Id.* at 595. The President's actions are in the "outer perimeter" of his official responsibilities so long as they are "not manifestly or palpably beyond [his] authority." *Id.* at 596 (quoting *Blassingame v. Trump*, 87 F.4th 1, 13 (D.C. Cir. 2023)). In such cases, a presumptive immunity exists but may be rebutted if "applying a criminal prohibition to [the official] act would pose no 'dangers of intrusion on the authority and functions of the Executive Branch.'" *Id.* at 595 (quoting *Fitzgerald*, 457 U.S. at 754).

The immunity recognized by *Trump* is a "limited one," not the "far broader immunity" that Applicant had requested. *Id.* at 632; *accord id.* at 651 (Barrett, J., concurring in part) ("[T]he President's constitutional protection from prosecution is narrow."). "The President, charged with enforcing federal criminal laws, is not above them." *Id.* at 614. Indeed, the Court made clear that there is "a compelling . . . [countervailing] 'public interest in fair and effective law enforcement.'" *Id.* (quoting *Trump v. Vance*, 591 U.S. 786, 808 (2020)).

In addition to providing an immunity from criminal liability based on official presidential actions, *Trump* in Section III.C held that where a President is indicted for acts that do not constitute official conduct, the government may not introduce evidence of the President's official acts at trial, since allowing such official act evidence would "permit a prosecutor to do indirectly what he cannot do directly—invite the jury to examine acts for which a President is immune from prosecution to nonetheless prove his liability on any charge." *Id.* at 631.

To determine whether particular evidence is subject to exclusion, the key question is whether the evidence concerns "official or unofficial conduct." *Id.* at 615. Evidence of unofficial acts is admissible (subject to standard evidentiary rules). Evidence of official acts is inadmissible when those acts involve core presidential functions and thus trigger absolute immunity. Evidence of non-core official acts can be admitted if it "does not pose 'dangers of intrusion on the authority and functions of the Executive Branch.'" *Id.* at 595 (citation omitted).[3]

B. Applicant Misstates and Misapplies the Evidentiary Exclusion

Underlying Applicant's brief is the premise that virtually all actions undertaken by a President—and certainly all his conduct here—must be deemed "official" and thus excluded under *Trump*. That argument is inconsistent with *Trump* itself and other relevant precedents.

As the Court highlighted in *Trump*, "not everything the President does is official." *Id.* at 600. Presidential immunity (like other immunities) is grounded in the functions

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[3] In assessing whether presidential conduct is official or unofficial, "courts may not inquire into the President's motives." *Trump*, 603 U.S. at 596. "Nor may courts deem an action unofficial merely because it allegedly violates a generally applicable law." *Id.*

of the office, not the identity of the officeholder. *See Clinton v. Jones*, 520 U.S. 681, 694-95 (1997); *Blassingame*, 87 F.4th at 14; *see also Barrett v. Harrington*, 130 F.3d 246, 261 (6th Cir. 1997) (applying same principle to judicial immunity); *Hutchinson v. Proxmire*, 443 U.S. 111, 131-32 (1979) (applying same principle to congressional immunity).

For example, where the sitting President "speaks in an unofficial capacity—perhaps as a candidate for office or party leader," his statements are not covered by immunity (and thus not excluded from evidence). *Trump*, 603 U.S. at 598. To discern whether a statement is an official act, an "objective analysis of 'content, form, and context' will necessarily inform the inquiry." *Id.* (citation omitted). Many presidential communications may fall "comfortably within the outer perimeter of his official responsibilities," such as statements that "advance the public interest" or seek to "comfort the Nation in the wake of an emergency or tragedy." *Id.* at 629. But as courts have recognized, statements about purely personal matters (such as sexual misconduct and private retaliation) do not evoke presidential immunity. *See Carroll v. Trump*, 680 F. Supp. 3d 491, 507 (S.D.N.Y. 2023), *aff'd in part, appeal dismissed in part*, 88 F.4th 418 (2d Cir. 2023) ("Subjecting the president to damages liability for making a personal attack that is unrelated to the president's official responsibilities would not threaten to distract the president from his or her official duties."). In the same vein, when the President "acts in his capacity as a candidate for re-election, he acts as office-*seeker*, not office-*holder*," and his conduct is not shielded by presidential immunity. *See Blassingame*, 87 F.4th at 17 (emphasis in original).

It follows from these principles that presidential immunity does not apply to

private communications with private individuals about private subject matter unrelated to the operation or administration of the government. As Judge Katsas has noted, "the President acts unofficially when he speaks with a first cousin, an old college friend, a business associate, or the teachers of his school-age children—even if they happen to discuss matters of public concern." *Id.* at 32 (Katsas, J., concurring). Applied here, this reasoning forcefully undercuts Applicant's claim that presidential immunity shields his personal dealings with private individuals like Michael Cohen, his private attorney on private matters. *See id.* at 21 (majority opinion).

That is not the only limitation on presidential immunity. In *Trump*, while discussing a hypothetical involving bribery, the Court recognized that "of course the prosecutor may point to the public record to show the fact that the President performed [an] official act," as well as "evidence of what the President allegedly demanded, received, accepted, or agreed to receive or accept in return for being influenced in the performance of the act." *Id.* at 632 n.3. Accordingly, evidence is not precluded by *Trump* where it is available to the public at large in a public record, even if it concerns conduct that might qualify as an official act.

Applied here, that understanding refutes Applicant's claims concerning his statements on social media and the 2017 Office of Government Ethics ("OGE") Form 278e, a publicly filed financial disclosure form (also required to be filed by a broad swath of officials and even candidates, and thus not an official Presidential act for that reason as well). That evidence is all drawn from the public record and poses no danger of intrusion on the authority and functions of the Executive Branch.

Indeed, correctly applying *Trump*'s framework establishes that none of the

categories of evidence Applicant challenges are official presidential acts.

First, as noted above, and as the trial court found, tweets made by Applicant concerning his personal opinion about Cohen, his private attorney, and a private contract between Cohen and Stormy Daniels related to the hush-money payments to Daniels, are not official acts under *Trump*. Indeed, his brief does not discuss the tweets in question with specificity, further reflecting Applicant's reliance on a categorical, rather than context-specific, analysis of his communications. Applicant cites *Lindke v. Freed,* 601 U.S. 187, 202 (2024), but that decision refutes rather than reinforces his argument. As the Court there noted in its discussion of the similar issue of whether a public official's statements constituted state action, some public "officials may look like they are always on the clock, making it tempting to characterize every encounter as part of the job. But the state-action doctrine avoids such broad-brush assumptions—for good reason. While public officials can act on behalf of the State, they are also private citizens with their own constitutional rights." *Lindke*, 601 U.S. at 196. The Court later added: "the distinction between private conduct and state action turns on substance, not labels…." *Id.* at 197. Applicant's tweets about such private matters do not rise to the level of official acts. *See New York v. Donald J. Trump*, 2024 WL 5295022, at *32-35 (Sup. Ct. NY Cnty. December 16, 2024).

Second, Applicant challenges admission of evidence regarding communications with and observations by White House aides Hope Hicks and Madeleine Westerhout. But testimony by aides concerning their superior's habits or routine practices, such as speaking on the phone and using hard copies instead of electronic documents, are not evidence of specific acts, much less official acts under *Trump*. This is especially so

where the testimony, as here, concerned his handling of his private affairs, not government business. *See* December 16, 2024 Decision and Order, at 18-25.

Similarly, although Hicks served as White House Communications Director, communications with her about matters such as the press coverage of Daniels or an article discussing Cohen's payments, do not involve official acts, particularly where the subject matter of those discussions related to Applicant's behavior "as office-*seeker*, not office-*holder*," which is not shielded by presidential immunity, *see Blassingame*, 87 F.4th at 17 (emphasis in original); *see also Trump*. 603 U.S. at 629-630. And while Hicks' job description involved communications, Applicant points to no testimony from Hicks concerning specific discussions between her and Applicant about how or what to communicate with the public using the "bully pulpit," underscoring the discussions' non-official nature.[4]

Third, as noted above, Applicant also challenges certain aspects of Cohen's testimony, but this too did not involve Applicant's acts as President. Cohen's testimony about his discussions about pardons with third parties such as Robert Costello or his own hopes for a pardon was not testimony about the President's official acts. Similarly, Cohen's testimony regarding investigations by the Federal Elections Commission ("FEC") concerned conduct in the 2016 presidential campaign, and also involved communications with private attorneys or other individuals acting in private capacities. *See* December 16, 2024 Decision and Order, at 26-32.

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[4] *Clinton v. Jones* does not support Applicant's argument. There, although the Supreme Court recognized that President Clinton had argued that an alleged defamatory statement made by his agents about Paula Jones while he was President was immune from civil liability because it involved outer-perimeter official acts, neither the Supreme Court nor lower courts addressed the merits of whether the communications in question were official acts. 520 U.S. at 686 n. 3. Applicant does not contend otherwise. *See* Br. at 21.

Fourth, Applicant points to admission of evidence concerning the OGE form. As noted above, these forms are matters of public record not subject to immunity under *Trump*. *Id*. at 632 n.3. Moreover, these forms are also not unique to the President but required of a broad array of officials and even candidates, and thus submitting them is not a presidential act. *See* December 16, 2024 Decision and Order, at 25-26.

Further, even assuming certain aspects of the evidence challenged could be seen as falling within the outer perimeter of his Presidential authority, none are acts within his preclusive and exclusive power under Article II of the Constitution. And any such "presumptively immune" acts are not immune—and thus not excluded—where applying a criminal prohibition to the act would pose no "dangers of intrusion on the authority and functions of the Executive Branch." *Trump*, 603 U.S. at 595 (quoting *Fitzgerald*, 457 U.S., at 754). Here, none of the allegedly immune conduct as to which evidence was admitted would risk intruding on the authority and functions of the Executive Branch by altering presidential behavior. For example, admitting evidence of Applicant's filing of a non-discretionary form would not risk altering presidential behavior, since the forms are mandatory. Evidence of Applicant's organizational preferences and patterns of behavior, as in Westerhout's testimony, would not cause a President to alter any Executive Branch functions. Nor would Hicks' testimony about Applicant's personal conduct or subject matter related to his prior candidacy. Similarly, admission of Applicant's tweets at issue here would not affect Presidential behavior, since they involve private, unofficial matters, and raise no risk of intruding into Executive Branch functions. The same conclusion applies to private-attorney Cohen's communications with private individuals or with Applicant about private

matters.

The trial court reached its conclusions after carefully considering each category of evidence challenged by Applicant. *See* December 16, 2024 Decision and Order, at 16-35. Though it found that certain of Applicant's evidentiary objections had not been preserved, it nonetheless considered each category of challenged evidence on the merits. The trial court also found that even if all of the contested evidence did constitute official acts subject to immunity, its admission would have been harmless error, in light of the size and significance of that evidence compared to the totality of evidence introduced at the trial over which he presided.

Applicant fails to demonstrate that harmless-error analysis would not apply in this case. Courts regularly apply harmless-error analysis even to errors involving constitutional rights. The U.S. Supreme Court has "repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, 'most constitutional errors can be harmless.'" *Washington v. Recuenco*, 548 U.S. 212, 218 (2006) (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999)); *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993). Even the most fundamental constitutional rights are subject to "a strong presumption" that harmless-error review applies so long as "the defendant had counsel and was tried by an impartial adjudicator." *Rose v. Clark*, 478 U.S. 570, 578–79 (1986). Here, where Applicant's only basis for complaint is his allegation that certain evidence was improperly submitted to the jury, that strong presumption in favor of harmless-error analysis holds.[5]

[5] *See Milton v. Wainwright*, 407 U.S. 371, 372 (1972) (applying harmless-error analysis where evidence was admitted in violation of Fifth and Sixth Amendments); *Arizona v. Fulminante*, 499 U.S.

As detailed by Justice Merchan, the trial court "carefully scrutinized the trial record," listing numerous categories of evidence supporting conviction that were not challenged on Presidential immunity grounds. December 16, 2024 Decision and Order, at 38. Even if this Court held any of the challenged evidence inadmissible, the conviction should still be upheld because the remaining evidence of guilt is overwhelming. *See Milton*, 407 U.S. at 377 ("[W]e do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court.").

IV. Delaying Sentencing Because Applicant Won the Election Would Subvert the Rule of Law

Over seven months ago, a jury unanimously voted to convict Applicant for criminal violations of New York law for conduct unrelated to the presidency in a trial that occurred when he was not president. The presiding judge has scheduled sentencing prior to the inauguration. He has indicated his plans to order an unconditional discharge at the sentencing, which means no prison time, no probation, no fine or other further obligations for Applicant. This is far from the "constitutionally intolerable" restriction on liberty that he alleges. Br. at 14. There is no legitimate argument that moving forward with the sentencing will interfere with Applicant's ability to do his job in the White House. Indeed, the trial court has scheduled the sentencing hearing for before inauguration, and the judge has indicated he will order an unconditional discharge so that this case does not interfere with the Presidency.

As this Court has found, there are reasons for treating Presidents differently from other citizens when it comes to legal actions that are based on their official actions

279, 308-10 (1991) (holding harmless-error analysis applicable even to admission of involuntary confession in violation of Fifth and Fourteenth Amendments); *Chapman v. California*, 386 U.S. 18, 23–24 (1967) (Fifth Amendment privilege against self-incrimination); *Deck v. Missouri*, 544 U.S. 622, 635 (2005) (shackling defendant before jury); *Brecht*, 507 U.S. at 629-30 ((violation of *Miranda* rights).

as President or are commenced while they are President. These reasons are centered on the principle that the President has singularly unique responsibilities and allowing legal actions to go forward that interfere with the Presidency are against the public interest in certain circumstances. Here, however, the public interest tilts in the other direction. Stopping Friday's sentencing hearing would not be treating a *sitting* President differently from other citizens but a *future* President differently, even though future Presidents do not have additional constitutional rights and responsibilities as compared to other citizens. Providing Applicant as President-elect a last-minute reprieve would undermine the jury's verdict and serve as a manifest injustice because it would violate one of our Nation's most fundamental precepts—that no person is above the law.

CONCLUSION

For the reasons set forth above, *Amici* respectfully submit that the Court deny the Emergency Application for Stay.

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Respectfully submitted,

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