No. 24A666

In the Supreme Court of the United States

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

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

REPLY IN SUPPORT OF APPLICATION FOR A STAY OF CRIMINAL PROCEEDINGS IN THE SUPREME COURT OF NEW YORK COUNTY, NEW YORK, PENDING THE RESOLUTION OF PRESIDENT TRUMP'S INTERLOCUTORY APPEAL ON PRESIDENTIAL IMMUNITY

BLANCHE LAW
Todd Blanche
Emil Bove
99 Wall St., Suite 4460
New York, NY 10005
(212) 716-1250
toddblanche@blanchelaw.com

JAMES OTIS LAW GROUP, LLC
D. John Sauer
Counsel of Record
William O. Scharf
Michael E. Talent
Kenneth C. Capps
13321 N. Outer Forty Rd.
Suite 300
St. Louis, Missouri 63017
(314) 562-0031
John.Sauer@james-otis.com

INTRODUCTION

Nothing in the New York District Attorney's (DANY's) opposition justifies denying President Trump's application. First, DANY claims this Court lacks jurisdiction or authority to act on the Petition. To the contrary, this Court has statutory authority under the All Writs Act and inherent authority, as reflected in its own Rule 23.3. On the equities, DANY downplays the importance of the Presidential transition and the need for an energetic executive. It is, however, indisputable that both are concerns of great national importance, and their constitutional nature trumps any State-related concerns. DANY also misreads this Court's precedents to argue that it need not reach the question of whether President Trump is entitled to interlocutory review of his immunity claims. Similarly, DANY's analysis of President Trump's claim that as President-elect he is immune from the criminal process completely disregards how this Court has said such claims must be evaluated. Finally, DANY does nothing to undermine President Trump's argument that official act evidence was improperly used to secure his conviction. Thus, President Trump's application should be granted and a stay should issue.

ARGUMENT

I. This Court Has Jurisdiction to Grant the Application.

DANY errs in claiming (at 13–15) that relief cannot issue because the Court lacks jurisdiction under 28 U.S.C. § 1257 or that President Trump failed to exhaust State court remedies. First, that argument assumes this Court can only issue a stay under 28 U.S.C. § 2101(f). Not so. The power to issue a stay pending appeal is inherent and "preserved in" the All Writs Act. *Nken* v. *Holder*, 556 U.S. 418, 426

(2009). Because this Court has "potential appellate jurisdiction over [the] federal questions" his application raises, President Trump is entitled to "seek … relief from this Court" "in … emergency circumstances" like this one. *Atl. Coast Line R.R. Co.* v. *Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 396 (1970). Indeed, this Court's Rule 23.3 expressly contemplates the issuance of stays in such situations by allowing them "in the most extraordinary circumstances." Issuing relief here is consistent with other cases where stays have issued despite pending proceedings in State appellate courts. *See CBS, Inc.* v. *Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers); *cf. Volkswagenwerk A.G.* v. *Falzon*, 461 U.S. 1303 (1983) (O'Connor, J., in chambers) (issuing a stay pending certiorari despite a stay application pending in the Michigan Supreme Court). There is no need for a final decision or exhaustion of remedies—though, the denial of relief by a judge of the New York Court of Appeals should suffice for both.

Indeed, that should suffice for § 2101(f). President Trump's appeal involves Presidential immunity, "a right 'separable from, and collateral to' the merits" of his criminal case and thus denial of his stay request—coupled with the imminence of his sentencing which makes any further attempt to receive relief impossible—is "a final judgment for purposes of [this Court's] jurisdiction." *Nat'l Socialist Party of Am.* v. *Village of Skokie*, 432 U.S. 43, 44 (1977) (per curiam) (quoting *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949)); *see also Neb. Press Ass'n* v. *Stuart*, 423 U.S. 1327, 1329 (1975) (Blackmun, J., in chambers).

In sum, this Court can—and should—grant President Trump's application.

II. A Stay Is Appropriate.

A. The Equities Justify Relief.

DANY first argues the equities. It leads (at 16–17) by pointing to New York's policy of sentencing "without unreasonable delay" and the "strong judicial policy against federal interference with state criminal proceedings." But those do not trump the constitutional prohibition against "state judges and prosecutors … interfering with a President's official duties." *Trump* v. *Vance*, 591 U.S. 786, 806 (2020). DANY's use of official-act evidence threatens "to eviscerate" a President's immunity for his official acts. *Trump* v. *United States*, 603 U.S. 593, 631 (2024). The lack of interlocutory review of that action denigrates the Constitution's requirement that "criminal prohibitions cannot apply to certain Presidential conduct to begin with." *Id.* at 636. Likewise for President Trump's immunity as President-elect. The net result is a strike at the Founder's goal of creating "a 'vigorous' and 'energetic' Executive … to ensure 'good government.'" *Id.* at 610 (quoting THE FEDERALIST No. 70 (Alexander Hamilton)).

Furthermore, sentencing a President during his transition "creates a constitutionally intolerable risk of disruption to national security and America's vital interests." App.40. And if anything is to be taken from the trial court's decision to let President Trump appear virtually and its indication that it will not incarcerate him, it is that everyone agrees there *are* such risks. But letting the sentencing go forward sets the precedent that those are permissible risks. Thus, DANY's reliance on the trial court's discretion (at 17–18) is just an instance of a "promise[] of good faith" that does not "decide significant constitutional questions," *Trump*, 603 U.S. at

637, nor justify the resulting risks to the nation. Indeed, DANY's minimization of the sentencing cuts against its claim that there is some urgent need to sentence President Trump.

Nor is it a virtue that sentencing "will enable [President Trump] to file" a direct appeal. Opp.18. As the *amicus* brief from former Attorney General Meese and Professor Calabresi ably shows, that is nothing but an admission that criminal proceedings in this case will be ongoing *after* President Trump's inauguration as President. Thus, far from weighing against relief, that point weighs in favor of granting the application to avoid putting President Trump to the Hobson's Choice of waiving his immunity to criminal process (assuming it is waivable), *see A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 U.S. Op. O.L.C. 222 (2000), 2000 WL 33711291, at *29 ("2000 OLC Memo"), or not appealing his conviction.

In sum, President Trump, the constitutional structure, and the nation are irreparably harmed by letting the sentencing go forward while there are no little to no harms in staying it.

B. President Trump's Presidential Immunity Defense Entitles Him to an Automatic Stay.

DANY wrongly claims this case does not raise the question of whether an automatic stay is required in this context. First, DANY misreads (at 19) this Court's decision in *Trump*. This Court explained that the evidentiary use of official Presidential acts is inappropriate because "[i]t 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." 603 U.S. at 631. There is thus no distinction between attempting to hold a President criminally liable for such acts and using them as evidence.

Nor does the current posture of this case matter. *Contra* Opp.19–21. For one, there are still further proceedings: the sentencing. Then, there are direct appeals and thus potential future trial proceedings. Review and resolution of President Trump's immunity claim adjudicates the propriety of those proceedings, which necessitates a stay. *See*, *e.g.*, *Coinbase, Inc.* v. *Bielski*, 599 U.S. 736, 741 (2023). DANY also ignores that, in the qualified immunity context, this Court has rejected the argument that a defendant loses their right to an interlocutory appeal by moving past the pleadings stage. *See Behrens* v. *Pelletier*, 516 U.S. 299, 307 (1996) (*Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), "clearly establishes that an order rejecting the defense of qualified immunity at *either* the dismissal stage *or* the summary judgment stage" is subject to interlocutory review.). Likewise here, there is no reason to deny President Trump's right to interlocutory review because the criminal process has reached a particular, arbitrary point. Even more irrelevant is the trial court's suggestion that, as a matter of discretion, it is disinclined to impose a sentence of incarceration. DANY does not say that is binding. And that suggestion concedes the constitutional issue with sentencing President Trump generally and is little better than a "promise[] of good faith" that is not dispositive of the legal questions President Trump has raised. *Trump*, 603 U.S. at 637. *But see* Opp.20.

Lastly, DANY concedes (at 20–22) that New York courts have the power to review President Trump's immunity claims on an interlocutory basis and issue a stay. But "[a] state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a valid excuse." *Howlett ex rel. Howlett* v. *Rose*, 496 U.S. 356, 369 (1990) (quotations omitted). President Trump has a constitutional right to Presidential immunity and immediate interlocutory review of that claim. *See Trump*, 603 U.S. at 636–37, 642. DANY points to no valid excuse for the New York court's refusal to honor both. Its argument admits the violation.

C. President Trump's Claim to Immunity During the Transition Justifies a Stay.

DANY argues at (22–24) that President Trump's claim that his immunity as a sitting President means he should receive immunity during the transition period is "baseless." That is hard to see on multiple levels. To start, contra DANY (at 22), that a "question has never been specifically decided" by a court does not render the issue frivolous. *Bell* v. *Hood*, 327 U.S. 678, 684 (1946).

Furthermore, that only the current incumbent is vested with the Executive power does not mean "there are no Article II functions that would be burdened by ordinary criminal process involving the President-elect." *Contra* Opp. 23. To the contrary, thwarting an efficacious transition impairs the vesting of Executive power in the President-elect, something that is obvious and that Congress acknowledged in the Presidential Transition Act. *See* App.30; *see also* App.30–31. It would be strange if, for example, a State was constitutionally allowed to prevent a President-elect from taking his oath of office because it rushed his trial and incarcerated him before his

inauguration. And even if the State released a President-elect to allow him to take his oath of office, it is illogical to say that incarcerating the President-elect will have no effect on his future exercise of executive power. Incarceration will surely impair his ability to set policy and to staff his administration. And President Trump has already pointed out the national security ramifications of DANY's position, *see* App.33, and to that DANY provided no answer. To say that such results do not offend Article II blinks reality, yet that is DANY's claim.

DANY's argument also ignores that criminal proceedings and their effects do not end with the criminal judgment or the inauguration. As to the former, direct appeals are available. Thus, DANY's position—as noted above—would require that President Trump choose between his immunity from criminal process once he is President or his right to appeal his sentence. During that time, "the public stigma and opprobrium occasioned by the initiation of criminal proceedings" as well as "the mental and physical burdens of assisting" with the appeal and potential future proceedings will persist and "compromise the President's ability to fulfill his constitutionally contemplated" roles. 2000 OLC Memo, at *19.

At core, DANY disregards this Court's "methodology … of constitutional balancing" in determining whether a particular act intrudes on the Executive power. *Id.* at *18 (gathering cases); *see Nixon* v. *Fitzgerald*, 457 U.S. 731, 754 (1982) ("[O]ur cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch."). That balancing is done by

considering "the special nature of the President's constitutional office and functions," *Fitzgerald*, 457 U.S. at 755, as opposed to being "as-applied" in a specific case since, as a constitutional matter, certain "prohibitions cannot apply to" the President and "certain Presidential conduct to begin with," *Trump*, 603 U.S. at 636; *see Vance*, 591 U.S. at 806 ("The Supremacy Clause prohibits state judges and prosecutors from interfering with a President's official duties."); *Fitzgerald*, 457 U.S. at 748–57 (doing the analysis in the civil context). As the above illustrates, allowing a State to subject a President-elect to the criminal process can cripple the vesting of Executive power in that person and its eventual exercise. This Court has routinely, and properly, prioritized "the effective functioning of government" over countervailing concerns. *Fitzgerald*, 457 U.S. at 751. It should do so here.

DANY, by contrast, disregards that clear line in this Court's decision in favor of two foundational errors. It first errs as a matter of category by discussing official-act immunity as opposed to the immunity that derives from the fact a person is President or President-elect. *See* Opp.23 (discussing *Trump*). But the question relevant to the immunity of a President-elect is not the distortion of his decision-making *per se* but whether being the subject of criminal process "would unduly interfere with the ability of the executive branch to perform its constitutionally assigned duties." 2000 OLC Memo, at *29.[1] President Trump has shown that to be the case here. DANY's second error is in relying on the steps "the trial court … has

[1] DANY also references (at 23) the "limited" duration of this type of immunity. President-elect immunity, just like immunity for a sitting President, is limited to the time in which the criminal process would unduly hamper the executive branch: during the transition.

made" to accommodate President Trump. Opp.24. But besides admitting the constitutional problem with sentencing President Trump at all, that ignores this Court's conclusion that "as-applied challenges" are insufficient "to protect Article II interests." *Trump*, 603 U.S. at 635.

Thus, far from undermining President Trump's case, DANY's argument indicates that its position is out-of-step with this Court's precedent and that the State courts erred badly in denying President Trump immunity and a stay.

D. President Trump's Conviction Unlawfully Relies on Official Presidential Acts and Interlocutory Review Is Required to Rectify the Error.

DANY also takes issue (at 28–36) with President Trump's arguments that the evidence used at his trial constitutes official Presidential acts. President Trump showed otherwise in his application. *See* App.19–28.

As part of this argument, DANY re-ups (at 25) its claim that there is a meaningful distinction, for purposes of interlocutory review, between holding a President liable for his official acts and using those acts as evidence to impose liability. As discussed above, *Trump* says otherwise; both are the same in terms of their violation of the Vesting Clause. *See* 603 U.S. at 631. Anything less would "eviscerate" Presidential immunity as prosecutors could subject future Presidents to "extended" criminal proceedings by nominally relying on non-immune conduct while using official acts as evidence. *Id.* at 631, 636. Indeed, DANY gives up the game by arguing (at 25–26) that post-trial appeal is all that is necessary to vindicate President Trump's immunity claims. This Court expressly rejected that argument in *Trump*. *Id.* at 636–37.

DANY also re-ups its meritless view that because proceedings have reached sentencing, President Trump has somehow forfeited his right to interlocutory review of his immunity claims. *See* Opp.25. Not so. He can still appeal them and thus eliminate "the threat of . . . judgment, and imprisonment . . . ." *Trump*, 603 U.S. at 613.

Finally, DANY's arguments about harmless error and preservation (at 26–28) both fail. As to the former, President Trump pointed out that it is "part and parcel of the approach of providing 'as-applied challenges in the course of trial'" which this Court rejected in *Trump*. App.28. The latter is simply wrong. *See* App.2–5 (providing the history of objections before and during trial). Indeed, it is basically a claim that a member of a branch of Government can constitutionally authorize an encroachment upon that branch's authority. This Court has rightly rejected that. *See New York* v. *United States*, 505 U.S. 144, 182 (1992) (rejecting a "consent" argument for justifying laws that violate the horizontal or vertical separation of powers).

CONCLUSION

For those reasons, President Trump respectfully requests the Court to grant his application.

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Respectfully submitted,

BLANCHE LAW
Todd Blanche
Emil Bove
99 Wall St., Suite 4460
New York, NY 10005
(212) 716-1250
toddblanche@blanchelaw.com

JAMES OTIS LAW GROUP, LLC

/s/ D. John Sauer
D. John Sauer
Counsel of Record
William O. Scharf
Michael E. Talent
Kenneth C. Capps
13321 N. Outer Forty Rd., Suite 300
St. Louis, Missouri 63017
(314) 562-0031
John.Sauer@james-otis.com

Attorneys for President Donald J. Trump