APPENDIX

Order of Supreme Court of the State of New York, Appellate Division, First Judicial Department, Justice Gesmer, Denying Application for a Stay, No. 2025-00118 (Jan. 7, 2025) 1A

Decision and Order of Supreme Court of the State of New York, County of New York: Part 59, Justice Merchan, Denying Motion for Stay, No. 71543/23 (Jan. 6, 2025) 3A

DANY's Affirmation and Memorandum of Law in Support of Motions in Limine, No. 71543/23 (Feb. 22, 2024) 5A

President Donald J. Trump's Motions to Exclude Evidence and for an Adjournment Based on Presidential Immunity, No. 71543/23 (Mar. 7, 2024) 58A

Decision and Order of Supreme Court of the State of New York, County of New York: Part 59, Justice Merchan, Denying Defendant's Motion to Exclude Evidence and for an Adjournment on the Grounds of Presidential Immunity, No. 71543/23 (Apr. 3, 2024) 84A

Verified Article 78 Petition to Supreme Court of the State of New York, Appellate Division, First Judicial Department, by President Donald J. Trump seeking, *inter alia*, a Writ of Prohibition as to the April 3, 2024 Decision and Order, No. 2024-02413 (Apr. 10, 2024) 90A

Pre-Motion Letter from Todd Blanche to Justice Merchan Regarding Evidentiary Objections to Evidence Offered by DANY, No. 71543/23 (Apr. 15, 2024) ... 152A

Decision and Order of Supreme Court of the State of New York, Appellate Division, First Judicial Department Denying and Dismissing President Donald J. Trump's April 10, 2024 Article 78 Petition, No. 2024-02413 (May 23, 2024) 154A

President Donald J. Trump's Post-Trial Presidential Immunity Motion Seeking Vacatur of the Jury Verdict and Dismissal of the Indictment, No. 71543/23 (July 10, 2024) 158A

President Donald J. Trump's Motion to Dismiss Pursuant to CPL §§ 210.20(1)(h) and 210.40(1), No. 71543/23 (Dec. 2, 2024) 213A

Decision and Order of Supreme Court of the State of New York, County of New York: Part 59, Justice Merchan, Denying Defendant's Motion to Dismiss the

Indictment and Vacate the Jury's Verdict Pursuant to CPL § 330.30(1), No. 71543/23 (Dec. 16, 2024) 285A

Decision and Order of Supreme Court of the State of New York, County of New York: Part 59, Justice Merchan, Denying Defendant's Motion to Dismiss the Indictment and Vacate the Jury's Verdict Pursuant to CPL §§ 210.20(1)(h) and 210.40(1), and Resetting Sentencing for January 10, 2025, No. 71543/23 (Jan. 3, 2025) 326A

President Trump's Notice of Automatic Stay of Criminal Proceedings or, in the Alternative, Motion for Immediate Stay, No. 71543/23 (Jan. 5, 2025).....344A

Verified Article 78 Petition to Supreme Court of the State of New York, Appellate Division, First Judicial Department, by President Donald J. Trump challenging, *inter alia*, the December 16, 2024 and the January 3, 2025 Decisions and Orders, No. 2025-00118 (Jan. 6, 2025).....361A

President Donald J. Trump's Memorandum of Law in Support of Motion to Expedite Resolution of Article 78 Petition and to Stay Trial-Court Proceedings Pending Review of Claims of Presidential Immunity, No. 2025-00118 (Jan. 7, 2025) 402A

Opening Page of Exhibit GX 81, Consisting of the Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278e), as completed and filed with the United States Office of Government Ethics on Behalf of President Donald J. Trump, for Reporting Year 2017, Submitted into Evidence, No. 71543/23 .....427A

Exhibit GX 202, Consisting of a Text Message from February 13, 2018 from Michael Cohen to Maggie Haberman, Submitted into Evidence, No. 71543/23.....428A

Exhibit GX 207, Consisting of a June 13, 2018 email between Robert J. Costello and Michael Cohen, Submitted into Evidence, No. 71543/23 .....430A

Exhibit GX 260, Consisting of a Set of Text Messages from 2018, involving Michael Cohen, Submitted into Evidence, No. 71543/23 .....434A

Exhibits GX 407F, GX 407G, GX 407H, and GX 407I, Consisting of Certain Postings on Twitter in 2018 by President Donald J. Trump, Submitted into Evidence, No. 71543/23.....436A

Excerpts from the Transcript of Trial Proceedings, No. 71543/23 .....446A

SUMMARY STATEMENT ON APPLICATION FOR EXPEDITED SERVICE AND/OR INTERIM RELIEF

(SUBMITTED BY MOVING PARTY)

Date: January 7, 2025 Case # 2025-00118

Title of Matter: PEOPLE OF THE STATE OF NEW YORK, Respondent — DONALD J. TRUMP, Defendant-Movant

Index/Indict/Docket # 71543-23

Appeal by _____ from ☐ Order ☐ Judgment ☐ Decree of ☐ Supreme ☐ Surrogate's ☐ Family

County 100 Centre St., New York, NY 10013

Court entered on _____,20_____

Name of Judge _____

Notice of Appeal filed on _____,20_____

If from administrative determination, state agency _____

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

Provisions of ☐ order ☐ judgment ☐ decree appealed from _____

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

If applying for a stay, state reason why requested: N.Y. Supreme Court's Presidential immunity rulings are causing ongoing, irreparable harm by depriving President Trump of his constitutional rights

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

Has application been made to court below for this relief: No If "yes", state Disposition _____

Has there been any prior application here in this court: No If "yes", state dates and nature _____

Has adversary been advised of this application: Yes Does he/she consent: No

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(Do not write below this line)

DISPOSITION

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

Ellen Gesmer
Justice EG

January 7, 2024
Date

Motion Date 1/21/25 Opposition 1/14 Reply 1/21 10 am

EXPEDITE ✓ PHONE ATTORNEYS _____ DECISION BY _____

ALL PAPERS TO BE SERVED PERSONALLY.

ELH
Court Attorney

"Revised 10/19"

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** Defendant's Notice of Automatic Stay or In the Alternative, Motion for Immediate Stay Indictment No. 71543-23

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

By the affirmation of Todd Blanche, Esq., and accompanying memorandum of law dated January 5, 2025, Defendant gave "notice of automatic stay of criminal proceedings or, in the alternative, motion for immediate stay." Blanche Affirmation 1. Specifically, Defendant notified this Court "that he will initiate appellate proceedings on January 6, 2025, to challenge this Court's Orders of December 16, 2024, and January 3, 2025." Blanche Memorandum 1. Defendant claims that commencement of the appellate proceedings "immediately results in an automatic stay of proceedings in this Court under *Trump v. United States*, 603 U.S. 593 [2024]." Blanche Memorandum 1. In the alternative, "even if the filing [...] does not automatically stay these proceedings [...] the Court should grant an immediate stay of all pending proceedings, including the sentencing[.]" Blanche Memorandum 1-2.

By Memorandum dated January 6, 2025, the People oppose the notice of automatic stay and motion for immediate stay. The People argue in substance, that Defendant's appeals do not automatically stay this case and that this Court should not grant a discretionary stay. In support, the People submit that equities tip decisively in the People's favor and the Defendant will not be prejudiced by denial of a stay. Finally, it is the People's position that Defendant is unlikely to prevail on the merits of any interlocutory appeals.

This Court has considered Defendant's arguments in support of his motion and finds that they are for the most part, a repetition of the arguments he has raised numerous times in the past, including in his Criminal Procedure Law ("CPL") § 330.30(1) motion to vacate his conviction and dismiss the indictment; and his "Clayton Motion" to dismiss in the interests of justice, both of which this Court denied by Decision and Order dated December 16, 2024 and January 3, 2025, respectively.

Further, this Court finds that the authorities relied upon in the instant motion by the Defendant are for the most part, factually distinguishable from the actual record or legally inapplicable.

THEREFORE, Defendant's motion for a stay of these proceedings, including the sentencing hearing scheduled for January 10, 2025, is hereby DENIED.

Nothing in this Decision and Order shall be construed to in any way preclude Defendant from pursuing any, and all other forms of relief to which he may otherwise be entitled.

The foregoing constitutes the Decision and Order of the Court.

Dated: January 6, 2025
New York, New York

JAN 0 6 2025

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

HON. J. MERCHAN

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.	AFFIRMATION AND MEMORANDUM OF LAW IN SUPPORT OF MOTIONS IN LIMINE Ind. No. 71543-23

AFFIRMATION

Matthew Colangelo, an attorney admitted to practice before the courts of this state, affirms under penalty of perjury that:

1. I am an Assistant District Attorney in the New York County District Attorney's Office. I am assigned to the prosecution of the above-captioned case and am familiar with the facts and circumstances underlying the case.

2. I submit this affirmation in support of the People's motions in limine.

3. Defendant is charged with thirty-four counts of falsifying business records in the first degree, PL § 175.10. These charges arise from defendant's efforts to conceal an illegal scheme to influence the 2016 presidential election. As part of this scheme, defendant requested that an attorney who worked for his company pay $130,000 to an adult film actress shortly before the election to prevent her from publicizing an alleged sexual encounter with defendant. Defendant then reimbursed the attorney for the illegal payment through a series of monthly checks. Defendant caused business records associated with the repayments to be falsified to disguise his and others' criminal conduct.

4. Attached as Exhibit 1 is a true and correct copy of defendant's Witness Disclosure for Bradley A. Smith dated January 22, 2024.

5. Attached as Exhibit 2 is a true and correct copy of *United States v. Suarez*, No. 5:13-cr-420 (N.D. Ohio June 24, 2014).

6. Attached as Exhibit 3 is a true and correct copy of the signed engagement letter between Bradley A. Smith and Todd Blanche dated January 4, 2024, for *People v. Trump*, Ind. No. 71543-23.

7. Attached as Exhibit 4 is a true and correct copy of the Decision & Order in *People v. The Trump Corporation*, Ind. No. 1473/2021 (Sup. Ct. N.Y. Cnty. Jan. 5, 2022).

8. Attached as Exhibit 5 is a true and correct copy of the Hearing Transcript in *People v. The Trump Corporation*, Ind. No. 1473/2021 (Sup. Ct. N.Y. Cnty. Oct. 20, 2022).

9. Attached as Exhibit 6 is a true and correct copy of a document titled Expert Witness Disclosure, Professor Bradley A. Smith, in *United States v. Bankman-Fried*, No. 22 Cr. 673 (LAK), ECF No. 276-5.

10. Attached as Exhibit 7 is a true and correct copy of the Hearing Transcript in *People v. The Trump Corporation*, Ind. No. 1473/2021 (Sup. Ct. N.Y. Cnty. Oct. 21, 2022).

11. Attached as Exhibit 8 is a true and correct copy of the Judgment of Conviction in *United States v. Cohen*, No. 18-cr-602 (S.D.N.Y. Dec. 12, 2018).

12. Attached as Exhibit 9 is a true and correct copy of the Information in *United States v. Cohen*, No. 18-cr-602 (S.D.N.Y. Aug. 21, 2018).

13. Attached as Exhibit 10 is a true and correct copy of the Hearing Transcript in *United States v. Cohen*, No. 18-cr-602 (S.D.N.Y. Aug. 21, 2018).

14. Attached as Exhibit 11 is a true and correct copy of defendant's social media posts dated February 1, 2023, March 9, 2023, and March 27, 2023.

15. Attached as Exhibit 12 is a true and correct copy of a document titled Certification, *In the Matter of Donald J. Trump for President, Inc., et al.*, Federal Election Comm'n Matter Under Review 7324, 7332, 7364, & 7366 (Mar. 11, 2021).

16. Attached as Exhibit 13 is a true and correct copy of the Letter from Lynn Y. Tran, Assistant General Counsel, Federal Election Commission, to E. Stewart Crosland (June 1, 2021).

17. Attached as Exhibit 14 is a true and correct copy of a document titled Statement of Reasons of Chair Shana M. Broussard & Commissioner Ellen L. Weintraub, *In the Matter of Donald J. Trump for President, Inc., et al.*, Federal Election Comm'n Matter Under Review 7324, 7332, 7364, & 7366 (July 1, 2021).

18. Attached as Exhibit 15 is a true and correct copy of a document titled Statement of Reasons of Vice Chair Allen Dickerson et al., *In the Matter of Donald J. Trump for President, Inc., et al.*, Federal Election Comm'n Matter Under Review 7324, 7332, 7364, & 7366 (June 28, 2021).

19. Attached as Exhibit 16 is a true and correct copy of a document titled Certification, *In the Matter of Michael D. Cohen, et al.*, Federal Election Comm'n Matter Under Review 7313, 7319, & 7379 (Mar. 31, 2021).

20. Attached as Exhibit 17 is a true and correct copy of the Letter from Lynn Y. Tran, Assistant General Counsel, Federal Election Commission, to E. Stewart Crosland (Mar. 31, 2021).

21. Attached as Exhibit 18 is a true and correct copy of a document titled Statement of Reasons of Commissioners Sean J. Cooksey & James E. "Trey" Trainor III, *In the Matter of Michael Cohen, et al.*, Federal Election Comm'n Matter Under Review 7313, 7319, & 7379 (Apr. 26, 2021).

22. Attached as Exhibit 19 is a true and correct copy of the excerpted Hearing Transcript in *People by James v. Trump*, No. 452564/2022 (Sup. Ct. N.Y. Cnty. Jan. 11, 2024).

23. Attached as Exhibit 20 is a true and correct copy of the excerpted Trial Transcript in *People by James v. Trump*, No. 452564/2022 (Sup. Ct. N.Y. Cnty. Nov. 6, 2023).

24. Attached as Exhibit 21 is a true and correct copy of defendant's social media post dated October 7, 2016.

25. Attached as Exhibit 22 is a true and correct copy of Megan Twohey & Michael Barbaro, *Two Women Say Donald Trump Touched Them Inappropriately*, N.Y. Times, Oct. 12, 2016.

26. Attached as Exhibit 23 is a true and correct copy of Natasha Stoynoff, *Physically Attacked by Donald Trump—A PEOPLE Writer's Own Harrowing Story*, People Magazine, Oct. 12, 2016.

27. Attached as Exhibit 24 is a true and correct copy of defendant's social media posts dated October 15, 2016, October 16, 2016, and October 17, 2016.

MEMORANDUM OF LAW

Courts deciding whether to preclude or admit evidence must determine whether the evidence is relevant and, if so, whether it is admissible. *People v. Primo*, 96 N.Y.2d 351, 355 (2001). Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is material to the determination of the action. *People v. Lewis*, 69 N.Y.2d 321, 325 (1987). Irrelevant evidence is not admissible. *See id.* The court may exclude relevant evidence if its admission violates an exclusionary rule, *People v. Alvino*, 71 N.Y.2d 233, 241 (1987), or "if its probative value is outweighed by the prospect of trial delay, undue prejudice to the opposing party, confusing the issues or misleading the jury." *Primo*, 96 N.Y.2d at 355.

The Court has authority to consider pretrial motions *in limine* seeking evidentiary rulings based on both "the inherent power of a trial court to admit or exclude evidence" and the court's "inherent authority to manage the course of trials." *People v. Michael M.*, 162 Misc. 2d 803, 806-07 (Sup. Ct. Kings Cnty. 1994) (citing cases). Pretrial evidentiary rulings avoid the risk of presenting prejudicial, confusing, immaterial, or inadmissible evidence to the jury, *see State v. Metz*, 241 A.D.2d 192, 198 (1st Dep't 1998), and minimize delay and disruption during trial, *see Gallegos v. Elite Model Mgmt. Corp.*, 195 Misc. 2d 223, 226-27 (Sup. Ct. N.Y. Cnty. 2003).

For the reasons that follow, the People respectfully request that the Court grant the People's motions *in limine* to:

1. preclude defendant's proposed testimony from Bradley A. Smith regarding federal campaign finance law;
2. preclude the presentation of argument or introduction of evidence that the Federal Election Commission dismissed complaints alleging, or cleared defendant of, federal campaign finance violations;
3. preclude the presentation of argument or introduction of evidence regarding any purported decision by the United States Department of Justice not to charge defendant with campaign finance violations;
4. preclude the presentation of argument or introduction of evidence regarding defendant's claims of selective prosecution or government misconduct;
5. preclude the presentation of argument or introduction of evidence regarding federal prosecutors' purported views of Michael Cohen's credibility;
6. preclude argument regarding any alleged reliance on advice of counsel unless and until defendant establishes a sufficient factual predicate for that defense;

7. preclude evidence or argument regarding legal defenses the Court has already rejected; and

8. permit the introduction of potential *Molineux* evidence.

I. Motion to exclude witness testimony or argument regarding federal election laws.

A. Introduction.

Defendant intends to proffer witness testimony at trial from Bradley A. Smith about "industry norms, regulations, and practices" regarding "federal election laws," including campaign finance law. Ex. 1. The Court should exclude Mr. Smith's testimony because conclusions of law are not proper expert testimony; because his proposed testimony is irrelevant; and because the proposed testimony would improperly mislead and confuse the jury. Two different federal courts have precluded Mr. Smith's proposed testimony on campaign finance law in separate criminal prosecutions, and his testimony is just as improper here. *See United States v. Bankman-Fried*, No. 22-cr-673 (LAK), 2023 WL 6162865, at *3 (S.D.N.Y. Sept. 21, 2023); *United States v. Suarez*, No. 5:13-cr-420, slip op. at 1-2 (N.D. Ohio June 24, 2014) (Ex. 2).

B. Background.

On January 22, 2024, defendant disclosed his intent to call Bradley A. Smith, a law professor and former member of the Federal Election Commission, as a witness at trial. *See* Ex. 1. Defendant styled this disclosure as a "Witness Disclosure (Background / Non-Expert Testimony)," and stated that Mr. Smith may be called as a witness "to testify about background information regarding federal election laws." *Id.*

Defendant's disclosure states that "Mr. Smith's knowledge, skill, experience, training, and education are well beyond the ordinary lay person regarding federal election law, campaign finance law, and voting rights issues," but asserts that "Mr. Smith is not being called as an 'expert'

because the defense will not ask him to give an opinion but instead will call him to testify about industry norms, regulations, and practices." *Id.*

The signed engagement letter between Mr. Smith and defense counsel for this matter describes the "Scope of Engagement" as follows:

> Blanche Law is engaging me to provide, as requested, expert consultation in connection with litigation in the above-referenced matter, to provide required written reports to the court, and to provide expert testimony as necessary in both pre-trial and trial stages. If requested or approved by Blanche Law, I may also engage in commentary with media organizations covering the matter as part of this engagement. My services are requested for commentary on laws and regulations pertaining to campaign finance law and common campaign practices, and in particular to federal campaign finance law pursuant the [sic] Federal Election Campaign Act, 52 U.S.C. § 30301 [sic] et seq., and regulations issued thereunder, and to historical background on enforcement. The work may, as necessary, include additional research.

Ex. 3 at 1. Defendant is paying Mr. Smith $1,200 per hour for this engagement.[1] *Id.*

C. Argument.

1. Defendant's disclosure is properly considered a proffer of expert witness testimony, not lay witness testimony.

As an initial matter, the Court should treat Mr. Smith's proposed testimony as expert testimony, not lay testimony.

Defendant has proffered Mr. Smith's testimony on four broad topics:

- "That federal campaign finance laws provide (1) that a candidate cannot use campaign funds for personal expenses, (2) that if an expense does not 'arise out' of a campaign, it cannot be paid for using campaign funds, even if the expense would have an impact on the campaign, and (3) that an expenditure made by a candidate, or by a third-party on his behalf, must be reported as a campaign contribution only if it is a campaign contribution but not if it is a personal expenditure," Ex. 1 at 2;

[1] Defendant's retention of a witness to "engage in commentary with media organizations covering the matter" at a rate of $1,200 per hour, Ex. 3 at 1, raises separate concerns about potential efforts by defendant to taint the jury pool or otherwise prejudice these proceedings.

- "That at the time that Mr. Cohen made the payment to Stormy Daniels, there had never been a case in which someone was convicted of violating federal campaign finance laws by making a 'hush payment' to an alleged girlfriend or former lover (either directly or through a third party) using non-campaign funds, and that there had never been any finding by the Federal Election Commission that such conduct violates federal campaign finance law," *id.*;

- "That the federal prosecution of former U.S. Senator and vice-presidential nominee John Edwards is the one public case in which a 'hush payment' theory has been alleged. Further, that in that case, the federal charges—including those based on purported federal campaign finance law violations—were either rejected by the jury or dismissed by the government." *Id.*; and

- "That the Edwards prosecution was heavily criticized and resulted in a wide consensus, among the public, media, and legal scholars, that the conduct alleged did not violate federal campaign finance laws." *Id.*

On its face, this proposed testimony relates exclusively to the interpretation and application of federal campaign finance law, rather than any factual issues relevant to this case. The proposed topics call for opinion testimony by a specialist; Mr. Smith is not a percipient witness as to any event or conduct at issue in this prosecution.

Defendant's witness disclosure asserts that "Mr. Smith is not being called as an 'expert' because the defense will not ask him to give an opinion but instead will call him to testify about industry norms, regulations, and practices." Ex. 1. But testimony about campaign finance law from a law professor whom defendant himself describes as having "knowledge, skill, experience, training, and education" in that specialized field "well beyond the ordinary lay person," Ex. 1, is the very definition of expert opinion testimony. *See* Guide to N.Y. Evid. rule 7.01(1)(a), Opinion of Expert Witness. That defendant describes Mr. Smith's proposed testimony as relating to "industry norms, regulations, and practices" does not change this conclusion, because of course the relevant norms, regulations, and practices he is describing are all governed by federal law and regulations. And in any event, testimony regarding "industry norms" in any specialized field is generally treated as expert opinion testimony under New York law. *See, e.g.*, Prince, Richardson

on Evidence § 7-307 (noting that "standards within an industry" is the subject matter of expert testimony) (*citing, e.g.*, *Lugo v. LJN Toys*, 75 N.Y.2d 850, 852 (1990)); *see also Regan v. Eight Twenty Fifth Corp.*, 287 N.Y. 179, 182 (1941); *French v. Ehrenfeld*, 180 A.D.2d 895, 896 (3d Dep't 1992); *Bailey v. Baker's Air Force Gas Corp.*, 50 A.D.2d 129, 132 (3d Dep't 1975); *Berman v. H.J. Enters., Inc.*, 13 A.D.2d 199, 201 (1st Dep't 1961).

Indeed, the engagement letter between Mr. Smith and defense counsel in this case shows that he was retained at a $1,200-per-hour rate "as an expert consultant and witness" to provide "expert testimony as necessary in both pre-trial and trial stages" of this prosecution. Ex. 3. Where defendant retained a law professor and agreed to pay him $1,200 an hour to serve "as an expert consultant and witness" by providing "expert testimony" about his interpretation of campaign finance law (Ex. 3), on the basis of "knowledge, skill, experience, training, and education" that are "well beyond the ordinary lay person" (Ex. 1), the Court should reject defendant's claim that the witness is "not being called as an 'expert.'"[2] *Id.*

2. Mr. Smith's proposed testimony should be excluded in full because expert testimony as to a legal conclusion is impermissible.

The Court should preclude Mr. Smith's proffered testimony because defendant seeks to call him to testify about conclusions of law, and testimony regarding conclusions of law is impermissible. Just a few months ago, Judge Kaplan in the Southern District of New York precluded Mr. Smith's proposed testimony for the defendant regarding the application of federal campaign finance law to the government's prosecution of Sam Bankman-Fried on the ground that,

[2] For the reasons described below, Mr. Smith's improper testimony should be excluded in full. If his testimony is not precluded entirely, however, the Court should still conclude that he is an expert witness and should direct defendant to comply immediately and fully with all discovery obligations under CPL § 245.20(1)(f). Defendant should not be permitted to evade or delay reciprocal discovery by retaining a law professor "as an expert consultant and witness," Ex. 3, but then claiming that "he is not being called as an 'expert.'" Ex. 1.

among other reasons, "Mr. Smith's testimony is improper because he seeks to instruct the jury on issues of law." *Bankman-Fried*, 2023 WL 6162865, at *3. This Court should do the same.

Expert testimony is permitted where the Court determines that scientific, technical, medical, or other specialized knowledge is necessary to "help the finder of fact to understand the evidence or determine a fact in issue." Guide to N.Y. Evid. rule 7.01(1)(b), Opinion of Expert Witness; *see People v. Inoa*, 25 N.Y.3d 466, 472 (2015); *People v. Cronin*, 60 N.Y.2d 430, 432-33 (1983). But "[e]xpert opinion as to a legal conclusion is impermissible." *Colon v. Rent-A-Center, Inc.*, 276 A.D.2d 58, 61 (1st Dep't 2000) (citing *Marx & Co., Inc. v. Diners' Club Inc.*, 550 F.2d 505, 508-12 (2d Cir. 1977)); *see also Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*, 301 A.D.2d 63, 68-69 (1st Dep't 2002) ("An expert may not be utilized to offer opinion as to the legal standards which he believes should have governed a party's conduct."); *People v. Kirsh*, 176 A.D.2d 652, 653 (1st Dep't 1991) (trial court properly denied defendant's application to call an expert who would have offered opinion as to a legal defense), *leave denied*, 79 N.Y.2d 949 (1992); *People v. Johnson*, 76 A.D.2d 983, 984 (3d Dep't 1980) (same). Indeed, "[t]he rule prohibiting experts from providing their legal opinions or conclusions is 'so well-established that it is often deemed a basic premise or assumption of evidence law—a kind of axiomatic principle.'" *In re Initial Pub. Offering Sec. Litig.*, 174 F. Supp. 2d 61, 64 (S.D.N.Y. 2001) (quoting Tomas Baker, *The Impropriety of Expert Witness Testimony on the Law*, 40 U. Kan. L. Rev. 325, 352 (1992)).

Expert testimony as to a legal conclusion is properly excluded because it does not "help the finder of fact to . . . determine a fact in issue," Guide to N.Y. Evid. rule 7.01(1)(b), and instead improperly infringes on the Court's role. "Each courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards."

Burkhart v. Wash. Metro. Area Transit Auth., 112 F.3d 1207, 1213 (D.C. Cir. 1997) (trial court erred in admitting expert testimony that "consisted of impermissible legal conclusions rather than permissible factual opinions"). Courts routinely and properly exclude testimony that purports to explain the law to the jury. *See United States v. Stewart*, 433 F.3d 273, 311-12 (2d Cir. 2006) (trial court properly excluded defense expert testimony regarding legal principles because "[c]learly, an opinion that purports to explain the law to the jury trespasses on the trial judge's exclusive territory"); *Kirsh*, 176 A.D.2d at 653 ("Any instructions . . . as to a legal defense lay within the responsibility of the court"); *Johnson*, 76 A.D.2d at 984 (trial court properly excluded defense expert because "the proposed expert testimony involved interpretation and application of the Social Services Law and pertinent regulations and such was within the sole province of the court").

This Court had occasion to apply this principle very recently in connection with the proffered testimony of a defense expert in the *Trump Corporation* prosecution, during which the Court repeatedly noted that "this Court will not permit this trial to become a referendum on the Internal Revenue Code or a master class on taxation. The evidence at trial will be limited to what is relevant and necessary for the finders of fact to perform their duties – and nothing more." Decision & Order 3, *People v. The Trump Corporation*, Ind. No. 1473/2021 (Sup. Ct. N.Y. Cnty. Jan. 5, 2022) (Ex. 4); *see also* Hearing Tr. 33, *People v. The Trump Corporation*, Ind. No. 1473/2021 (Sup. Ct. N.Y. Cnty. Oct. 20, 2022) ("[A]s I said a long time ago, this trial is not going to turn into a master class on taxation, and I'm certainly not going to permit the jury to become confused by irrelevant issues.") (Ex. 5).

As noted in Part I.C.1 above, each of the four topics of Mr. Smith's proposed testimony relates exclusively to the interpretation and application of federal campaign finance law. Ex. 1. Testimony purporting to explain how campaign finance law applies to the election interference

scheme at issue in this prosecution would run afoul of the axiomatic principle that "[e]xpert opinion as to a legal conclusion is impermissible."[3] *Colon*, 276 A.D.2d at 61. Indeed, as noted above, a federal court very recently precluded Mr. Smith from testifying for the defense in a criminal trial—on topics much like those he proposes to testify about here—on the ground that his proffered testimony improperly sought to instruct the jury on the law.[4] *See Bankman-Fried*, 2023 WL 6162865, at *3. Mr. Smith's effort to instruct the jury on campaign finance law should get no more purchase in this case than it did before Judge Kaplan in the Southern District of New York. The Court should preclude Mr. Smith's proposed testimony here on the ground that it is improper legal instruction. *See id.*; *Russo*, 301 A.D.2d at 68-69; *Colon*, 276 A.D.2d at 61; *Kirsh*, 176 A.D.2d at 653; *Johnson*, 76 A.D.2d at 984.

3. Mr. Smith's proposed testimony should be excluded in full because it is irrelevant.

Mr. Smith's proposed testimony should be excluded on the entirely separate ground that it is irrelevant. Indeed, Mr. Smith was prohibited from testifying in a different federal criminal prosecution where the trial court held that Mr. Smith's views regarding federal campaign finance law were irrelevant to the defendants' own state of mind in that case. *See United States v. Suarez*, No. 5:13-cr-420, slip op. at 1-2 (N.D. Ohio June 24, 2014) (Ex. 2). Mr. Smith's testimony is just as irrelevant here.

[3] To the extent the Court treats Mr. Smith as a lay witness and not an expert witness, his testimony should still be excluded. The same reasons that bar expert testimony about legal matters also extend to lay testimony, including that it is the trial judge's exclusive role to instruct the jury on the law.

[4] Mr. Smith's expert witness disclosure in the *Bankman-Fried* prosecution is appended as Ex. 6 for comparison to his disclosure here. As in this case, Mr. Smith sought to testify regarding Federal Election Commission "rules and decisions governing the application and interpretation" of specific sections of the Federal Election Campaign Act, Ex. 6 at 2; as well as purportedly "[c]ommon, established, and well-known practices" for certain kinds of campaign contributions, Ex. 6 at 3.

Defendant is charged with thirty-four felonies for falsifying business records with the intent to commit, aid, or conceal the commission of another crime, in violation of Penal Law § 175.10. As pertinent here, the People may allege at trial that among the crimes defendant intended to commit, aid, or conceal are violations of the Federal Election Campaign Act ("FECA"). On that issue, the relevant question for the finder of fact is what defendant intended when he falsely described the reimbursements to Cohen for the Stormy Daniels payoffs as payments for legal services pursuant to a retainer agreement; and whether his intent in doing so included concealing Cohen's criminal violation of federal campaign finance law in connection with that payoff. Mr. Smith does not purport to have any direct evidence of defendant's state of mind. His proposed testimony about what unspecified others might have thought about the facts of a different case is thus irrelevant to the jury's factual findings regarding defendant's fraudulent intent here.

Mr. Smith's own proposed—and excluded—testimony in yet another criminal case again provides support for the exclusion of his testimony here. In *United States v. Suarez*, the defendant sought to introduce expert testimony from Mr. Smith to testify that "federal campaign laws are confusing to individuals who lack formal training," that "people often misunderstand the campaign laws," and that "it is reasonable for individuals to believe that the law allows 'straw man' donations." *Suarez*, slip op. at 1-2 (Ex. 2). The court held that "the expert testimony offered by Smith is inadmissible because it is not relevant." As the court explained:

> [W]hether the laws are commonly misunderstood does not weigh on whether defendants *in this case* intended to violate the campaign finance laws. What other individuals who may have contacted Smith knew or thought simply has no bearing on what defendants knew or thought. Because the evidence is not relevant, it will not be admitted.

Id. at 3. The exact same reasoning applies here. Mr. Smith proposes to testify that some among "the public, media, and legal scholars" thought the conduct alleged in the *United States v. Edwards* prosecution did not violate federal campaign finance laws; and the import of Mr. Smith's proposed

testimony on the other topics in his disclosure is that federal campaign finance law does not clearly criminalize some personal expenditures on other facts. Ex. 1. But the only relevant question in this case is whether—after Cohen made an illegal campaign contribution to defendant by paying $130,000 to Stormy Daniels to silence her on the eve of a presidential election—defendant intended to conceal that crime by falsely describing his reimbursements to Cohen as payments for legal services pursuant to a retainer. Mr. Smith's proposed testimony about industry norms, or about what other people might have thought the law would criminalize on other facts, "does not weigh on whether defendant[] *in this case* intended to violate [or conceal violations of] the campaign finance laws."[5] *Suarez*, slip op. at 3 (Ex. 2).

This Court reached the same conclusion as to the defense's proffered expert in the *Trump Corporation* prosecution, holding that the defendants were prohibited from offering expert testimony regarding what "any of the high managerial agents intended" because "He's an expert. He was not there. He did not speak to them. He cannot read their minds. He does not know what their intent was." *See* Hearing Tr. 14, *People v. The Trump Corporation*, Ind. No. 1473/2021 (Sup. Ct. N.Y. Cnty. Oct. 21, 2022) (Ex. 7). The same reasoning applies here, and the Court should exclude Mr. Smith's testimony in full as irrelevant.

4. Mr. Smith's proposed testimony about whether the Stormy Daniels payoff violated federal campaign finance law should be excluded because it would mislead and confuse the jury.

If the Court does not exclude Mr. Smith's proposed testimony in full for the reasons identified above, the Court should exclude his proposed testimony regarding whether the conduct

[5] And to the extent Mr. Smith did plan to testify regarding his speculative views of defendant's potential intent based on what Mr. Smith thinks others thought of the *Edwards* prosecution, that too would be wholly inadmissible and improper; it is settled law that an expert may not testify as to a defendant's intent. *See People v. Kincey*, 168 A.D.2d 231, 232 (1st Dep't 1990) ("It was highly improper and prejudicial to allow [an expert] to testify concerning the defendant's intent").

involved in Cohen's payoff to Stormy Daniels "violates federal campaign finance law"—the second topic in Mr. Smith's witness disclosure, *see* Ex. 1—because it would mislead and confuse the jury.

Michael Cohen pleaded guilty to and was convicted of two criminal counts of violating FECA in connection with the Karen McDougal and Stormy Daniels payoffs. *See* Judgment of Conviction, *United States v. Cohen*, No. 18-cr-602 (S.D.N.Y. Dec. 12, 2018) (the "*Cohen* Judgment") (Ex. 8). In connection with the Daniels payment in particular, Cohen was charged with and pleaded guilty to the offense of making an excessive campaign contribution in violation of 52 U.S.C. §§ 30116(a)(1)(A) and 30116(a)(7). *See* Information ¶¶ 24-44, *United States v. Cohen*, No. 18-cr-602 (S.D.N.Y. Aug. 21, 2018) (Ex. 9); Hearing Tr. 23-24, 27-28, *United States v. Cohen*, No. 18-cr-602 (S.D.N.Y. Aug. 21, 2018) (the "*Cohen* Hearing Tr.") (Ex. 10). The federal district court had an independent obligation to "assure itself . . . that the conduct to which the defendant admits is in fact an offense under the statutory provision under which he is pleading guilty." *United States v. Culbertson*, 670 F.3d 183, 191 (2d Cir. 2012). Mindful of that obligation, the district court accepted Cohen's guilty plea and adjudged Cohen guilty: "[B]ecause I find your plea is entered knowingly and voluntarily and is supported by an independent basis in fact containing each of the essential elements of the crimes, I accept your guilty plea and adjudge you guilty of the eight offenses to which you have just pleaded as charged in the information." *Cohen* Hearing Tr. 28 (Ex. 10); *see also Cohen* Judgment (Ex. 8).

Mr. Smith's proposed testimony—that "at the time Mr. Cohen made the payment to Stormy Daniels, there had never been a case in which someone was convicted of violating federal campaign finance laws by making a 'hush payment' to an alleged girlfriend or former lover (either indirectly or through a third party) using non-campaign funds," Ex. 1—appears intended to suggest

to the jury that the Daniels payoff was not a crime. But it was, in fact, a crime: a federal judge concluded that the conduct to which Cohen admitted "is in fact an offense" under FECA. *Culbertson*, 670 F.3d 183, 191 (2d Cir. 2012); and Cohen went to prison for it. *See Cohen* Judgment (Ex. 8). Expert testimony purporting to show that such conduct did not "violate[] federal campaign finance law" would therefore mislead the jury and should be excluded. *See, e.g.*, *People v. Corby*, 6 N.Y.3d 231, 234 (2005); *People v. Davis*, 43 N.Y.2d 17, 27 (1977).

5. Mr. Smith's proposed testimony about the *United States v. Edwards* prosecution should be excluded because it would mislead and confuse the jury.

Finally, and if the Court does not exclude Mr. Smith's proposed testimony in full for the reasons identified above, the Court should exclude the witness's proposed testimony regarding the *United States v. Edwards* prosecution—the third and fourth topics in Mr. Smith's witness disclosure, *see* Ex. 1—because it would mislead and confuse the jury.

The United States indicted former Senator and presidential candidate John Edwards in 2011 on four counts of acceptance and receipt of illegal campaign contributions in violation of FECA, 52 U.S.C. §§ 30116(a)(1)(A), 30116(f), 30109(d)(1)(A)(i). The indictment alleged that while running for President in 2007 and 2008, Edwards was engaged in an extramarital affair with a woman that resulted in her pregnancy. He allegedly sought to conceal the affair and pregnancy from the public out of concern that public disclosure would undermine his campaign. Edwards and a campaign staffer solicited money from several friends and campaign donors of Edwards, which was then sent to the woman to cover living expenses and medical care for the purpose of keeping her from disclosing the affair and pregnancy during the campaign. The government alleged that those donations were illegal contributions, and that Edwards was aware they were illegal contributions and intentionally violated the law by accepting and failing to disclose them. *See*

generally Government's Resp. to Def.'s Mot. to Dismiss 2-6, *United States v. Edwards*, No. 1:11-cr-161-1 (M.D.N.C. Sept. 26, 2011), ECF No. 59.

Edwards moved to dismiss the indictment on the ground that he was motivated by non-campaign-related, purely personal reasons to conceal the relationship, and that payments to conceal an affair for personal reasons do not become unlawfully campaign-related just because disclosure of the affair might also have the effect of damaging his candidacy for office. The government argued that under FECA and the Federal Election Commission's implementing regulations, third-party payments of expenses for a candidate's personal use are campaign contributions—and thus subject to FECA's donation limits and disclosure requirements—"unless the payment would have been made irrespective of the candidacy." *Id.* at 10 (quoting 11 C.F.R. § 113.1(g)(6)).

The district court denied the motion to dismiss without prejudice to it being raised after the close of the government's evidence at trial. *See* Hearing Tr. 4-5, *United States v. Edwards*, No. 1:11-cr-161-1 (M.D.N.C. Oct. 27, 2011), ECF No. 108. The defense moved again after the close of the government's case, and the court again denied the motion. *See* Trial Tr. 97, *United States v. Edwards*, No. 1:11-cr-161-1 (M.D.N.C. May 11, 2012), ECF No. 303. The court ultimately provided the following jury instructions (in relevant part): "The government does not have to prove that the sole or only purpose of the money was to influence the election. People rarely act with a single purpose in mind. . . . If you find beyond a reasonable doubt that one of her purposes was to influence an election, then that would be sufficient." *See* Final Jury Instructions 8-9, *United States v. Edwards*, No. 1:11-cr-161-1 (M.D.N.C. May 18, 2012), ECF No. 288. The jury then acquitted Edwards on the charges.

Thus, in the *Edwards* prosecution, the government's case was lost not on the legal sufficiency of the allegations but on the jury's factual findings at trial. And that jury verdict of acquittal has no legal import here. Apart from double jeopardy protection for the specific defendant in a given case, a jury acquittal does not establish legal precedent—it may reflect mistake, compromise, or lenity, *see United States v. Powell*, 469 U.S. 57, 65 (1984); and is in any event not a holding as to the law. The only conceivably relevant legal determinations from the *Edwards* case are the denials of the defendant's motions to dismiss and the trial court's jury instruction quoted above—all of which support the People here, and which Mr. Smith's proposed testimony conspicuously fails to address.

Here, the People intend to present evidence at trial showing that the Stormy Daniels payoff (and the other underlying federal campaign finance violations) were *not* purely personal; and that instead, at least one of the purposes of the entire hush money scheme was to influence the 2016 presidential election. Because testimony from Mr. Smith explaining that former Senator Edwards was acquitted at trial does not illuminate whether the payoff scheme here was intended in part to influence defendant's candidacy for the 2016 election, its admission could only mislead and confuse the jury. *See Corby*, 6 N.Y.3d at 234-35; *Primo*, 96 N.Y.2d at 356-57. The jury's factual findings about former Senator Edwards's motives following the presentation of evidence in that trial do not bear on defendant's motives here. And as noted, Mr. Smith's proposed testimony makes clear that he has nothing to say on the factual issue that was the dispositive factor in *Edwards*—namely, what was defendant's intent when he falsified the reimbursements to Cohen. Mr. Smith's testimony regarding the outcome of the *Edwards* trial should thus be excluded as misleading and confusing.

II. Motion to exclude evidence or argument regarding the Federal Election Commission's dismissal of complaints against defendant.

A. Introduction.

The Federal Election Commission ("FEC") received a number of administrative complaints against defendant in connection with the hush money payoffs at issue in this prosecution and dismissed those complaints without investigation after the Commissioners deadlocked on tie votes regarding whether or not to proceed. Defendant has asserted in public statements and may seek to argue at trial that this prosecution is unwarranted because of those dismissals. *See* Ex. 11.[6] The Court should exclude any evidence or argument at trial regarding dismissal of the FEC complaints against defendant because those dismissals are not relevant to the determination of any legal question or fact in issue in this prosecution, and because evidence or argument regarding those dismissals would confuse and mislead the jury.

B. Background.

The FEC received and considered multiple complaints that defendant and others violated FECA in connection with the payoff scheme involving Daniels, McDougal, and Sajudin.[7] *See* 11

[6] *E.g.*, Ex. 11 at 1 (claiming that "[t]he FEC dopped the 'Horseface' Daniels Fake Witch Hunt, because they found no evidence of problems."); Ex. 11 at 3 (claiming that "[e]very Prosecutor, and the FEC, who looked at it, took a pass.").

[7] The FEC's compliance procedures are codified at 11 C.F.R. part 111. Under those procedures, "[a]ny person who believes that a violation of" FECA has occurred "may file a complaint in writing with the General Counsel" of the FEC. 11 C.F.R. § 111.4(a). The General Counsel reviews those complaints and makes a recommendation to the Commission "whether or not it should find reason to believe that a respondent has committed or is about to commit a violation of statutes or regulations over which the Commission has jurisdiction." 11 C.F.R. § 111.7(a). The Commissioners then vote on what is called a "reason to believe" finding, with an affirmative vote of four (out of six) Commissioners required to proceed to open an investigation. *Id.* § 111.9(a). If four Commissioners vote in favor of a reason-to-believe finding, an investigation is conducted and subsequent steps in the compliance process follow (including, if warranted, a "probable cause to believe" recommendation and finding, conciliation attempts, and civil litigation). *See id.* §§ 111.9(a), 111.10, 111.16–.19. Absent four votes at the reason-to-believe stage, no investigation

C.F.R. §§ 111.3(a), 111.4(a). As to defendant's culpability in connection with the McDougal and Sajudin payoffs, the six members of the FEC split three-three on whether there was reason to believe that defendant knowingly and willfully accepted prohibited contributions, and because the votes of four out of six members are required for a reason-to-believe finding, *see* 11 C.F.R. §§ 111.9(a), 111.10(a), the Commission closed the complaints before any investigation was conducted.[8] The three Commissioners who voted to dismiss did so *not* on the merits but instead as a matter of prosecutorial discretion, explaining that "[i]n choosing how to allocate the Commission's limited enforcement resources, we opted against pursuing the long odds of a successful enforcement in these matters" against Trump, and "instead voted to dismiss as an exercise of prosecutorial discretion." Statement of Reasons of Vice Chair Allen Dickerson et al., *In the Matter of Donald J. Trump for President, Inc., et al.*, Federal Election Comm'n Matter Under Review 7324, 7332, 7364, & 7366 (June 28, 2021) (Ex. 15).

The FEC resolved the complaints regarding defendant's involvement in the Daniels payoff in the same way. The FEC again stalemated (this time on a two-two vote among the four participating Commissioners) on the question whether there was reason to believe that defendant knowingly and willfully accepted excessive contributions from Cohen. *See* Certification, *In the Matter of Michael D. Cohen, et al.*, Federal Election Comm'n Matter Under Review 7313, 7319, & 7379 (Mar. 31, 2021) (Ex. 16); Letter from Lynn Y. Tran, Assistant General Counsel, Federal

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is conducted, and the FEC then generally "terminates its proceedings" and closes the matter. *See id.* § 111.9.

[8] *See* Certification, *In the Matter of Donald J. Trump for President, Inc., et al.*, Federal Election Comm'n Matter Under Review 7324, 7332, 7364, & 7366 (Mar. 11, 2021) (Ex. 12); Letter from Lynn Y. Tran, Assistant General Counsel, Federal Election Commission, to E. Stewart Crosland (June 1, 2021) (Ex. 13); Statement of Reasons of Chair Shana M. Broussard & Commissioner Ellen L. Weintraub, *In the Matter of Donald J. Trump for President, Inc., et al.*, Federal Election Comm'n Matter Under Review 7324, 7332, 7364, & 7366 (July 1, 2021) (Ex. 14).

Election Commission, to E. Stewart Crosland (Mar. 31, 2021) (Ex. 17); 11 C.F.R. § 111.9(a). The two Commissioners who voted to dismiss did so *not* on the merits but "as an exercise of prosecutorial discretion" because (1) the FEC faced an "extensive enforcement backlog"; (2) "a federal judge was sufficiently satisfied" that Cohen had explained the factual basis for his guilty plea to FECA violations "count by count, during his allocution"; and (3) Cohen had already "been punished by the government of the United States." Statement of Reasons of Commissioners Sean J. Cooksey & James E. "Trey" Trainor III, *In the Matter of Michael Cohen, et al.*, Federal Election Comm'n Matter Under Review 7313, 7319, & 7379 (Apr. 26, 2021) (Ex. 18). Accordingly, the two Commissioners concluded that "pursuing these matters further was not the best use of agency resources." *Id.* The Commission then closed the complaints without investigation.

C. Argument.

The Court should exclude evidence or argument regarding the FEC's dismissal of these complaints for three reasons. First, because the FEC dismissed the complaints against defendant at the reason-to-believe stage without any investigation after the Commissioners stalemated on tie votes regarding whether to proceed, defendant's public claims that the FEC "found no evidence of problems," Ex. 11, is based on demonstrably false and misleading premises about how the FEC conducts its enforcement matters. Argument or evidence purporting to show (falsely) that the FEC cleared defendant of FECA culpability would improperly confuse and mislead the jury and should be excluded. *See Corby*, 6 N.Y.3d at 234; *Davis*, 43 N.Y.2d at 27.

Second, the fact of the FEC dismissals should be excluded because it is irrelevant. The FEC's dismissal of administrative complaints against defendant without investigation does not make any fact regarding defendant's intent to defraud—or any other element of the charged offenses—more or less probable, particularly where the Commissioners who voted to dismiss did so not on the merits but as an exercise of prosecutorial discretion. *See Lewis*, 69 N.Y.2d at 325.

Evidence or argument regarding the FEC's dismissals should therefore be excluded as irrelevant. *See People v. Greene*, 16 A.D.3d 350, 350 (1st Dep't 2005); *People v. Griffin*, 173 A.D.2d 120, 124-25 (4th Dep't 1991), *aff'd*, 80 N.Y.2d 723 (1993).

Finally, even if the FEC dismissals did reflect some determination by that agency regarding whether defendant violated FECA—which they do not—the dismissals should be excluded for the separate reason that whether defendant himself committed another crime is not material to the jury's determination of defendant's intent to defraud, as this Court has repeatedly recognized in this case. *See* Decision & Order on Def.'s Omnibus Motions 12 (Feb. 15, 2024) (the "*Trump* Omnibus Decision"); Decision & Order on Mot. to Quash Def.'s Subpoena 10 (Dec. 18, 2023). Courts have upheld convictions under Penal Law § 175.10 even when the defendant was acquitted of the crimes that he intended to commit or conceal, so long as the evidence showed that, notwithstanding the acquittal, defendant falsified business records with the requisite general intent. *See, e.g.*, *People v. Holley*, 198 A.D.3d 1351, 1351-52 (4th Dep't 2021); *People v. Houghtaling*, 79 A.D.3d 1155, 1157-58 (3d Dep't 2010); *People v. McCumiskey*, 12 A.D.3d 1145, 1145-46 (4th Dep't 2004). And there is no requirement that a defendant intend to conceal the commission of *his own* crime; instead, "a person can commit First Degree Falsifying Business Records by falsifying records with the intent to cover up a crime committed by somebody else." *People v. Dove*, 15 Misc. 3d 1134(A), at *6 n.6 (Sup. Ct. Bronx Cnty. 2007) (citing *People v. Smithtown Gen. Hosp.*, 93 Misc. 2d 736, 736 (Sup. Ct. Suffolk Cnty. 1978)). The FEC dismissals of administrative complaints against defendant are thus not material to whether defendant acted with the requisite intent to conceal the commission of another crime. Evidence or argument regarding the FEC dismissals should be excluded.

III. Motion to exclude evidence or argument regarding any purported decision by the United States Department of Justice not to charge defendant with campaign finance violations.

A. Introduction.

Defendant has asserted in public statements and may seek to argue at trial that this prosecution is unwarranted because the United States Department of Justice did not indict him for federal campaign finance violations. *See* Ex. 11. The Court should exclude any evidence or argument regarding any purported decision by the Justice Department not to charge defendant with violating federal campaign finance law because it is irrelevant and would mislead the jury.

B. Argument.

Defendant has frequently claimed that the Justice Department previously examined his conduct and "found that I did nothing wrong." Ex. 11. That defendant was not indicted by the federal government in connection with the election interference scheme at issue here is probative of literally nothing relevant to this prosecution.

Defendant was the sitting President during the entire period that the federal government investigated the campaign finance violations to which Cohen pleaded guilty.[9] The Department of Justice "has long understood that a President is absolutely immune from arrest, indictment, and criminal prosecution while he remains in office." Brief for the United States as Amicus Curiae Supporting Petitioner at 11, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19-635). Thus, even assuming defendant was the target of a federal criminal investigation related to the campaign finance violations to which Cohen pleaded guilty, he could not have been indicted under the Justice

[9] Cohen pleaded guilty to federal campaign finance violations in August 2018, *see Cohen* Hearing Tr. 23-24, 27-28 (Ex. 10); and the federal government concluded its investigation into whether other individuals may be criminally liable for that conduct in July 2019. *See* Government's Letter 1 n.1, *United States v. Cohen*, No. 18-cr-602 (S.D.N.Y. July 18, 2019).

Department's longstanding approach. *Cf. CREW v. U.S. Dep't of Justice*, 45 F.4th 963, 968 (D.C. Cir. 2022) (noting that "[i]n light of the sitting President's immunity from criminal prosecution, [Special Counsel] Mueller declined to determine whether President Trump's potentially obstructive conduct" in connection with the investigation into Russian interference in the 2016 presidential election "constituted a crime").

Argument or evidence that defendant was not charged with campaign finance violations by the Justice Department would thus improperly confuse and mislead the jury and should be excluded. *See Corby*, 6 N.Y.3d at 234; *Davis*, 43 N.Y.2d at 27; *see also, e.g.*, *United States ex rel. Feldman v. van Gorp*, No. 03 Civ. 8135 (WHP), 2010 WL 2911606, at *2-3 (S.D.N.Y. July 8, 2010) (granting motion *in limine* to exclude evidence of the Justice Department's decision not to intervene in False Claims Act case as irrelevant, because "the government may have a host of reasons for not pursuing a claim" (quoting *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1360 n.17 (11th Cir. 2006))).

Such argument and evidence would also be irrelevant for the same reasons identified in Part II.C above: whether defendant himself violated FECA is not material to the jury's determination of defendant's intent to defraud. *Trump* Omnibus Decision 12; *see also People v. Taveras*, 12 N.Y.3d 21, 27 (2009); *People v. Thompson*, 124 A.D.3d 448, 449 (1st Dep't 2015); *Houghtaling*, 79 A.D.3d at 1157-58; *McCumiskey*, 12 A.D.3d at 1145.

IV. Motion to exclude evidence or argument regarding selective prosecution or government misconduct.

A. Introduction.

Defendant may seek to argue at trial that he has been singled out for prosecution based on impermissible considerations, and—relatedly—that the charges in the indictment are novel or unprecedented. Selective prosecution is not a valid trial defense, and the Court properly rejected

defendant's pretrial motion to dismiss on this basis. *Trump* Omnibus Decision 20-22. Because the presentation of evidence or argument purporting to show selective prosecution would risk confusing and misleading the jury and is not probative of defendant's guilt or innocence, the Court should exclude any evidence or argument regarding defendant's claim of selective prosecution, including argument that the prosecution is politically motivated or that the charges are novel or unusual.

B. Argument.

Defendant has repeatedly stated in court filings and public statements that this prosecution is based on impermissible motives and that he is being singled out for improper reasons. Defendant has also asserted in court filings and public statements that the charges in the indictment are "novel" or "unprecedented." *E.g.*, Def.'s Omnibus Mem. 29, 31. The Court should preclude defendant from presenting argument and introducing evidence of purported selective prosecution at trial because selective prosecution is not a valid trial defense, and because any selective prosecution argument at trial would serve no purpose other than to advance an improper jury nullification defense.

1. Selective prosecution is not a valid trial defense.

The Court of Appeals has emphasized that a defendant's claim of selective prosecution is not a valid trial defense and is instead a constitutional claim for dismissal that should be addressed before trial. "[I]n our State, the claim of unequal protection is treated not as an affirmative defense to criminal prosecution or the imposition of a regulatory sanction but rather as a motion to dismiss or quash the official action." *Matter of 303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 693 (1979) (citing *People v. Goodman*, 31 N.Y.2d 262, 268-69 (1972); *People v. Utica Daw's Drug Co.*, 16 A.D.2d 12, 15-18 (4th Dep't 1962)). That is because "[a] claim of discriminatory enforcement does not reach the issue of the guilt or innocence of the defendant." *Goodman*, 31 N.Y.2d at 269;

see also Utica Daw's Drug Co., 16 A.D.2d at 15-16. Thus, "the claim of discriminatory enforcement should not be considered as an affirmative defense to the criminal charge, to be determined together with the issue of guilt by the trier of fact, but, rather, should be addressed to the court *before trial* as a motion to dismiss the prosecution upon constitutional grounds." *Goodman*, 31 N.Y.2d at 268-69.

Here, defendant moved to dismiss the indictment on the ground that he was singled out for prosecution for impermissible reasons, and sought discovery and an evidentiary hearing on that claim. The People opposed, and the Court denied defendant's motion. *See Trump* Omnibus Decision 20-22. The presentation of any argument or evidence regarding defendant's claims of selective prosecution at trial would be irrelevant to any fact the jury needs to decide, and would instead confuse and mislead the jury and needlessly prolong the trial. Indeed, the Court of Appeals has expressly recognized—in directing that claims of discriminatory enforcement "should be addressed to the court by a pretrial motion to dismiss"—that permitting the introduction at trial of argument or evidence on selective prosecution risks "delay or confusion at trial." *Goodman*, 31 N.Y.2d at 269; *see People v. Decker*, 218 A.D.3d 1026, 1042 (3d Dep't 2023) (trial court properly precluded defendant from "exploring a collateral issue concerning any potential bias of the [Sheriff's Department], as the probative value of such evidence was outweighed by the danger that it could confuse or mislead the jury into deciding the case on issues beyond the evidence presented").

2. Argument regarding selective prosecution would improperly advance a jury nullification defense.

Second, argument or evidence purporting to show selective prosecution should be excluded because it would serve no purpose other than to advance an improper jury nullification defense. As noted above, the Court of Appeals has long held that selective prosecution "does not reach the

issue of the guilt or innocence of the defendant," *Goodman*, 31 N.Y.2d at 269; and this Court already considered and rejected defendant's request for dismissal on the basis of claimed constitutional violations. *See Trump* Omnibus Decision 20-22. Presenting argument or evidence purporting to show that defendant was unfairly singled out for prosecution for political or other improper reasons would thus serve no purpose other than to urge the jury to acquit even if the facts establish each element of the charged offenses. But jury nullification "is not a legally sanctioned function of the jury." *People v. Goetz*, 73 N.Y.2d 751, 752 (1998).

The Court should thus preclude defendant from mounting "a 'political' defense . . . and invit[ing] jury nullification by questioning the Government's motives." *United States v. Rosado*, 728 F.2d 89, 93 (2d Cir. 1984) (claims by the defendants that they were victims of political persecution were "matters far beyond the scope of legitimate issues in a criminal trial"); *see United States v. Regan*, 103 F.3d 1072, 1081 (2d Cir. 1997) (affirming district court's decision to preclude defendant from "introducing evidence at trial that the grand jury investigation was illegitimate," because "requir[ing] juries in perjury cases to evaluate the government's motives for bringing particular investigations . . . would add a new element to the crime"); *see also Decker*, 218 A.D.3d at 1042.

3. The Court should make clear that any holding that precludes argument regarding selective prosecution includes all versions of this claim that defendant has advanced in his frequent public comments on this case.

The Court should specify that any holding that precludes defendant from presenting argument and evidence of selective prosecution includes, but is not limited to, the following claims that defendant has advanced in his frequent public comments on this case.

1. Argument or evidence purporting to show that the indictment is novel, unusual, or unprecedented should be precluded because it would be irrelevant and would "improperly invite[] the jury to make legal determinations," which are "the exclusive province of the court." *United*

States v. Stewart, No. 03-cr-717 (MGC), 2004 WL 113506, at *1-2 (S.D.N.Y. Jan. 26, 2004) (granting motion *in limine* to preclude defendants from arguing that one of the counts in the indictment was "novel" or was "an unusual or unprecedented application of the securities laws"); *see United States v. Navarro*, 651 F. Supp. 3d 212, 242 (D.D.C. 2023) (granting the government's motion *in limine* to exclude argument that the charges in that case were "infrequent" or "unprecedented," because those arguments "simply repackage Defendant's selective prosecution defense" and "are not relevant to any element of the charged offenses or any valid defense"); *see also* Hearing Tr. 38-39, *People v. The Trump Corporation*, Ind. No. 1473/2021 (Sup. Ct. N.Y. Cnty. Oct. 20, 2022) (granting the People's motion *in limine* and holding that "the defendants are precluded from remarking during jury selection and in their opening statements that the charges are novel, unusual, or unprecedented") (Ex. 5).

2. Argument or evidence regarding former Special Assistant District Attorney Mark Pomerantz's purported views on this prosecution, as related in his book titled *People vs. Donald Trump: An Inside Account*, should be precluded because the selective prosecution claims defendant has cited that book to support were properly rejected in the Court's omnibus ruling, *see Trump* Omnibus Decision 21-22; and because any hearsay statements in that book are irrelevant to defendant's guilt or innocence in any event.

3. Argument or evidence regarding defendant's claims regarding the length of the People's investigation, his allegation of unconstitutional preindictment delay, and the related claim that this prosecution was somehow timed to interfere with defendant's presidential campaign,[10] should be

[10] *See, e.g.*, Hearing Tr. 12 (Feb. 15, 2024) (Defense counsel: "[I]t is completely election interference to say, you are going to sit in this courtroom, in Manhattan, when there is no reason for it."); *Former President Trump on Hush Money Case*, C-SPAN (Feb. 15, 2024), https://www.c-span.org/video/?533626-1/president-trump-hush-money-case (Defendant: "It's an election

precluded because those assertions "simply repackage Defendant's selective prosecution defense," *Navarro*, 651 F. Supp. 3d at 242; and could "confuse or mislead the jury into deciding the case on issues beyond the evidence presented." *Decker*, 218 A.D.3d at 1042; *see also Trump* Omnibus Decision 3-6 (rejecting defendant's motion to dismiss based on the claim of unconstitutional pre-indictment delay).

4. Argument or evidence referencing the purported motivations or personal and professional backgrounds of the District Attorney or counsel for the People in this case should be precluded because it does not support an affirmative defense to prosecution; does not reach the issue of defendant's guilt or innocence; risks confusing and misleading the jury; and improperly invites jury nullification. *See, e.g.*, *Goodman*, 31 N.Y.2d at 269; *Decker*, 218 A.D.3d at 1042; *Rosado*, 728 F.2d at 93. Evidence and argument regarding "the motivation and conduct" of counsel "are categorically irrelevant"; and "even if evidence of them had any slight relevance, it would be substantially outweighed by the capacity of such evidence and lawyer arguments to confuse the jury and create unfair prejudice." *Hart v. RCI Hospitality Holdings, Inc.*, 90 F. Supp. 3d 250, 271 (S.D.N.Y. 2015) (granting motion in limine); *see also United States v. Xiong*, 262 F.3d 672, 675 (7th Cir. 2001) (personal attacks on a party's counsel are "reprehensible" and "detract from the dignity of judicial proceedings").

5. Argument, questions, or evidence regarding potential punishment or other consequences of these proceedings[11] should be prohibited in front of the jury because it has no tendency to prove

interference case. Nobody's ever seen anything like it in this country, it's a disgrace. . . . They want to keep me nice and busy so I can't campaign so hard.").

[11] *See, e.g.*, Trial Tr. 3628:3-6, *People by James v. Trump*, No. 452564/2022 (Sup. Ct. N.Y. Cnty. Nov. 6, 2023) (Defendant: "And it is a shame what is going on. And we sit here all day, and it is election interference because you want to keep me in this courthouse all day long, and let's keep going.") (Ex. 20).

any material fact. *See Lewis*, 69 N.Y.2d at 325; *see also Shannon v. United States*, 512 U.S. 573, 579 (1994) ("Information regarding the consequences of a verdict is . . . irrelevant to the jury's task."); *Navarro*, 651 F. Supp. 3d at 242. Similarly, arguments or evidence that the charges in this case are not serious or should be considered misdemeanors, as defendant has frequently asserted in court filings and public statements, should likewise be precluded. Presenting argument or eliciting evidence regarding the claimed seriousness of the offense or the effect of these proceedings on defendant's outside commitments is also improper because it invites nullification and otherwise confuses the issues before the jury. *See Navarro*, 651 F. Supp. 3d at 242 (citing *United States v. Wade*, 962 F.3d 1004, 1012 (7th Cir. 2020)); *People v. Douglas*, 178 Misc. 2d 918, 926-28 (Sup. Ct. Bronx Cnty. 1998).

6. Argument or evidence regarding alleged bias or purported motivations of the Court and court staff should be precluded. Defendant prolifically attacks judges and court staff in his public comments,[12] and impugned the motives of the court on repeated occasions in the courtroom during court proceedings in the recent *People by James v. Trump* civil fraud trial.[13] Any such argument here would be irrelevant and would improperly invite the jury to reach a verdict based on something other than the evidence at trial. *Rosado*, 728 F.2d at 93.

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[12] *See, e.g.*, People's Mot. to Quash or for a Protective Order 3-4 (Nov. 9, 2023) (collecting statements); People's Mot. for a Protective Order 2-3, 7-12 (Apr. 24, 2023) (same).

[13] *See, e.g.*, Hearing Tr. 116, *People by James v. Trump*, No. 452564/2022 (Sup. Ct. N.Y. Cnty. Jan. 11, 2024) (Defendant to the Court: "You have your own agenda, I can certainly understand that. You can't listen for more than one minute.") (Ex. 19); Trial Tr. 3510:9-10, *People by James v. Trump*, No. 452564/2022 (Sup. Ct. N.Y. Cnty. Nov. 6, 2023) ("This is a very unfair trial, very, very.") (Ex. 20); *id.* at 3558:5-3559:13 ("I think it's fraudulent, the [court's] decision. I think it's fraudulent. The fraud is on the Court, not on me. . . . And how do you do that? How do you rule against somebody and call them a fraud, as the President of the United States, who did a great job. . . . It's a terrible thing you did. You knew nothing about me. You believed this political hack back there, and that's unfortunate.") (Ex. 20); *id.* at 3628:7-8 ("And we have a very hostile Judge, extremely hostile Judge, and it is sad.") (Ex. 20).

V. Motion to exclude evidence or argument regarding the federal government's purported views of Michael Cohen's credibility.

A. Introduction.

Defendant may argue or seek to introduce evidence of the Justice Department's purported views regarding Michael Cohen's credibility, including claims that he has lied to or withheld evidence from federal investigators or prosecutors in the past. Although Cohen and other witnesses may be subject to appropriate cross-examination on topics that properly go to their believability—subject to the Court's case-by-case assessment that such cross-examination is not irrelevant, prejudicial, or confusing—a witness may not be impeached based on the federal government's claimed hearsay opinions regarding credibility or prior bad acts. The Court should thus exclude argument or evidence regarding the Justice Department's purported views of Cohen's credibility.

B. Argument.

In multiple filings before this Court, defendant has cited Justice Department filings in Cohen's federal criminal case as evidence that Cohen lied to, made material false statements, or declined to provide full information to federal investigators or prosecutors. *See* Def.'s Mem. Opp. People's Mot. to Quash 10 (Nov. 30, 2023) (citing the Justice Department's 2019 opposition to Cohen's motion to reduce his sentence); Def.'s Mot. to Reargue 4-5 (Jan. 17, 2024) (citing the Justice Department's 2023 opposition to Cohen's motion for termination of supervised release). And in cross-examining Cohen during the *People by James v. Trump* civil fraud trial several months ago, counsel for Trump offered into evidence the federal government's 2018 sentencing memo from the *United States v. Cohen* prosecution (without objection by the Attorney General), and cross-examined Cohen on assertions by the federal government in that memo (again without objection). *See* Trial Tr. 2284-87, *People by James v. Trump*, No. 452564/2022 (Sup. Ct. N.Y. Cnty. Oct. 24, 2023). Because those observations by federal prosecutors are inadmissible hearsay

and improper opinion evidence regarding credibility, the Court should exclude at this trial argument or evidence purporting to describe the federal government's views of Cohen's credibility.

Hearsay is any out-of-court statement offered for its truth. *People v. Buie*, 86 N.Y.2d 501, 505 (1995). Memoranda or pleadings from court files offered for their truth are routinely excluded as inadmissible hearsay. *See, e.g.*, *2641 Concourse Co. v. City Univ. of New York*, 147 A.D.2d 379, 379 (1st Dep't 1989), *aff'g on op. below*, 135 Misc. 2d 464, 465-66 (N.Y. Ct. Cl. 1987); *Liberto v. Worcester Mut. Ins. Co.*, 87 A.D.2d 477, 478-79 (2d Dep't 1982); *People v. Brann*, 69 Misc. 3d 201, 207 (Sup. Ct. N.Y. Cnty. 2020). Evidence or argument based on the federal government's legal memoranda purporting to establish as true that Cohen lied to investigators or prosecutors should thus be excluded as inadmissible hearsay.

Evidence or argument regarding federal prosecutors' views of Cohen should separately be excluded because it would be improper opinion evidence. Opinion evidence is inadmissible as a general rule. *See* Prince, Richardson on Evidence § 7-101. Although there are exceptions to this general exclusion, *see* Guide to N.Y. Evid. rule 7.03(1) (Opinion of Lay Witness), opinion testimony regarding a witness's credibility is not among those exceptions because "[c]redibility is, as the cases have repeated and insisted from the dawn of the common law, a matter solely for the jury." *People v. Williams*, 6 N.Y.2d 18, 26 (1959).

Finally, the admission of evidence during cross-examination that purports to reflect federal prosecutors' views of Cohen's credibility as indicated in federal court filings would be an improper use of extrinsic evidence to challenge Cohen's credibility. "The general rule is that a party may not introduce extrinsic evidence on a collateral matter solely to impeach credibility." *Alvino*, 71

N.Y.2d at 248. The purposes of this rule are "judicial economy, to prevent needless multiplication of issues in a case, and to insure that the jury is not confused with irrelevant evidence." *Id.*

VI. Motion to preclude argument regarding any alleged reliance on advice of counsel unless and until defendant establishes a sufficient factual predicate at trial.

A. Introduction.

The People ask the Court to preclude improper argument, including in opening statements, regarding any alleged reliance on advice of counsel unless and until defendant establishes a sufficient factual predicate for the advice-of-counsel defense at trial.

B. Argument.

First, defendant has not shown the proper predicate for an advice-of-counsel defense. In order for any defendant to employ that defense, there must be "sufficient facts in the record" to establish that the defendant "honestly and in good faith sought the advice of counsel," "fully and honestly laid all the facts before his counsel," and "in good faith and honestly followed counsel's advice." *United States v. Scully*, 877 F.3d 464, 476 (2d Cir. 2017) (quoting *United States v. Colasuonno*, 697 F.3d 164, 181 (2d Cir. 2012)). There is no evidence that would support any of these facts. Defendant has identified Alan Garten, the Trump Organization's Chief Legal Officer, as a potential trial witness, but has not disclosed any statements from Mr. Garten pursuant to CPL § 245.20(4) or any other documents or records pursuant to CPL § 245.20(1)(o); and there is no other evidence that would support an advice-of-counsel defense.[14]

Second, New York law is clear that defendant's "own testimony establishing reliance on counsel's advice [is] a prerequisite to . . . the proposed defense of advice of counsel." *People v.*

[14] The Court has directed defendant "to provide notice and disclosure of his intent to rely on the defense of advice-of-counsel by March 11, 2024, and to produce all discoverable statements and communications within his possession or control by the same date." Decision & Order Regarding Advice-of-Counsel Defense 6 (Feb. 7, 2024).

Lurie, 249 A.D.2d 119, 124 (1st Dep't 1998), *leave denied*, 92 N.Y.2d 900 (1998), *habeas denied sub nom. Lurie v. Wittner*, 228 F.3d 113, 132-34 (2d Cir. 2000). Because defendant has no obligation to testify at trial—and because there is no way to confirm whether he will do so before he takes the stand—any argument that asserts reliance on an advice-of-counsel defense would be improper before defendant has met the necessary prerequisite through his own testimony.

Because there is currently no factual predicate to assert the advice-of-counsel defense, the Court should preclude any argument at trial suggesting otherwise—including in defendant's opening statement—until sufficient facts are established. *See United States v. Lacey*, No. CR-18-00422, 2023 WL 4746562, at *6-7 (D. Ariz. July 24, 2023) (holding that if evidence to support an advice-of-counsel defense has not been "disclosed or produced prior to opening statements, Defendants are precluded from making such early pronouncements," because "[t]o permit Defendants to tell the jury" that they relied on the advice of counsel absent a sufficient factual predicate "would present irrelevant evidence, could be factually misleading, would result in jury confusion, and would prejudice the Government"); *United States v. Charlemagne*, No. 8:15-cr-462, 2016 WL 11678620, at *2-3 (M.D. Fla. Sept. 2, 2016) (granting government's motion in limine to preclude reference to reliance on advice of counsel in opening statement, "without prejudice to Defendant's right to assert a good faith reliance on counsel defense if and when a proper predicate is laid and the attorney-client privilege is expressly waived by Defendant"); *United States v. King*, No. 3:06-cr-212, 2006 WL 3490805, at *8 (M.D. Fla. Dec. 1, 2006) (describing oral order granting government's motion in limine and ruling that "until Defendant could lay the proper predicate, Defendant could not argue that he relied on an attorney's advice").

VII. Motion to exclude evidence or argument regarding legal defenses the Court has already rejected.

The Court should exclude evidence or argument regarding legal defenses the Court has already rejected.

The Court's ruling on defendant's omnibus motions rejected various legal defenses, holding (among other things) that the People did not unconstitutionally delay bringing charges, *see Trump* Omnibus Decision 3-6; that a federal offense is a valid object crime for charges of first-degree falsifying business records, *id.* at 13-14; that New York Election Law § 17-152 applies to the charged conduct and is not preempted, *id.* at 15-16; that this prosecution was not motivated by an improper purpose, *id.* at 20-22; that the charges are timely under the statute of limitations, *id.* at 22-23; and that there are no violations of grand jury secrecy that affected the integrity of these proceedings, *id.* at 27-28.

Any argument or evidence that contradicts any of the Court's prior orders in this case should be excluded because questions of law are for the Court to decide. *See United States v. Gorham*, 523 F.2d 1088, 1098 (D.C. Cir. 1975) (it is "the duty of the court to expound the law and that of the jury to apply the law as thus declared to the facts as ascertained by them" (quoting *Sparf v. United States*, 156 U.S. 51, 106 (1895))); *Kirsh*, 176 A.D.2d at 653. And the introduction of evidence or argument regarding issues foreclosed by the Court's prior decisions would confuse the issues, mislead the jury, waste time, and cause undue delay.

VIII. Motion to introduce potential *Molineux* evidence.

The People respectfully request a pretrial ruling regarding the admissibility of three categories of potential *Molineux* evidence. *See People v. Ventimiglia*, 52 N.Y.2d 350, 362 (1981); *People v. Molineux*, 168 N.Y. 264 (1901).

First, the Court should permit the introduction of evidence regarding defendant's prior bad acts that relate to or were committed in the course of the underlying conspiracy to promote his election. This evidence is not *Molineux* evidence at all but is instead part of the *res gestae* of defendant's criminal conduct. To the extent the Court analyzes it under the *Molineux* doctrine, it is clearly admissible because it is highly relevant to material, non-propensity issues regarding defendant's intent to defraud.

Second, the Court should permit the introduction of evidence regarding (a) the Access Hollywood Tape, and (b) public allegations of sexual assault that followed the release of the Access Hollywood Tape in the fall of 2016. This evidence is probative of defendant's motive and intent, and provides necessary background and context to explain defendant's conduct to the jury.

Third, the Court should permit the introduction of evidence regarding defendant's prior bad acts that involve efforts to dissuade witnesses from cooperating with law enforcement—including through pressure campaigns, public harassment, and retaliation—because such evidence shows defendant's consciousness of guilt and corroborates his intent.

A. Legal standard.

Under the *Molineux* rule, "evidence of uncharged crimes is inadmissible where its *only* relevance is to show defendant's bad character or criminal propensity," because of the concern that the jury will convict defendant based on his criminal predisposition rather than his involvement in the charged misconduct. *People v. Agina*, 18 N.Y.3d 600, 603 (2012) (emphasis added). By contrast, "when the evidence of the other crimes is relevant to an issue other than the defendant's criminal tendency," the jury may properly consider such evidence to help flesh out its understanding of the charges against the defendant. *People v. Beam*, 57 N.Y.2d 241, 250 (1982). Thus, evidence of a defendant's uncharged crimes or other bad acts is admissible if (1) it is "relevant to some material issue in the case," and (2) "the trial court determines in its discretion that the probative value of the

evidence outweighs the risk of undue prejudice to the defendant." *People v. Frumusa*, 29 N.Y.3d 364, 369 (2017) (internal quotation marks omitted).

Evidence of a defendant's prior bad acts is generally relevant to a material issue when the evidence is probative of a defendant's "motive, intent, absence of mistake, identity, and common scheme or plan." *Molineux*, 168 N.Y. at 292-94. The categories that the Court of Appeals identified in *Molineux* are "merely illustrative," and "[t]here is no closed category of relevancy." Prince, Richardson on Evidence § 4-501 (citing cases). Accordingly, courts have also held that the People may introduce evidence of uncharged conduct to, for example, "complete a witness's narrative to assist the jury in their comprehension of the crime," *People v. Mendez*, 165 A.D.2d 751, 752 (1st Dep't 1990), or where the evidence is "inextricably interwoven with the narrative of events and was necessary background to explain to the jury the relationship" between the parties. *People v. Santiago*, 295 A.D.2d 214, 215 (1st Dep't 2002).

"Weighing the evidence's probative value against its potential prejudice to the defendant is a matter of discretion for the trial court." *People v. Morris*, 21 N.Y.3d 588, 595 (2013) (internal quotation marks omitted). To be sure, "almost all relevant, probative evidence" of prior bad acts "will be, in a sense, prejudicial," because "[e]vidence which helps establish a defendant's guilt can always be considered evidence that 'prejudices' him or her." *People v. Brewer*, 28 N.Y.3d 271, 277 (2016); *see also People v. Colavito*, 87 N.Y.2d 423, 429 (1996). "But the probative value of a piece of evidence is not automatically outweighed by prejudice merely because the evidence is compelling." *Brewer*, 28 N.Y.3d at 277. Instead, what makes *Molineux* testimony permissible "is that the damage resulted from something other than [the evidence's] tendency to prove propensity." *Id.*

B. The Court should permit the introduction of evidence regarding defendant's prior bad acts that relate to or were committed in the course of the underlying conspiracy to promote his election.

The People allege that defendant falsified business records as part of a criminal scheme to conceal damaging information from the voting public in advance of the 2016 presidential election. *Trump* Omnibus Decision 1-3, 6. To establish the intent-to-defraud element of the charged offenses under Penal Law § 175.10, the People will introduce evidence at trial regarding defendant's agreement with others to influence the 2016 presidential election by identifying and purchasing negative information about him to suppress its publication and benefit his electoral prospects, as well as evidence regarding the steps that were taken to carry out that unlawful agreement.

In particular, and as described in the People's prior filings in this case, the People will present evidence regarding:

- defendant's August 2015 meeting at Trump Tower with David Pecker and Michael Cohen, where they agreed that Pecker would help with defendant's presidential campaign by identifying and suppressing negative information about defendant, and by publishing positive stories about defendant and negative stories about defendant's competitors for the election, *see, e.g.*, *Trump* Omnibus Decision 1-2; People's Omnibus Opp. 3; People's Statement of Facts ¶¶ 7-9;

- the purchase of information from Dino Sajudin regarding an alleged out-of-wedlock child Trump had fathered with one of his housekeepers, *see* People's Omnibus Opp. 3-4, 8; People's Statement of Facts ¶¶ 10-11, 22-23;

- the purchase of information regarding an alleged extramarital relationship between Karen McDougal and defendant, *see Trump* Omnibus Decision 2; People's Omnibus Opp. 4-6, 8; People's Statement of Facts ¶¶ 12-15, 22-23;

- the purchase of information regarding an alleged sexual encounter between Stormy Daniels and defendant, *see Trump* Omnibus Decision 2-3; People's Omnibus Opp. 1, 6-8; People's Statement of Facts ¶¶ 3, 16-21; and

- AMI's publication of negative information about defendant's competitors for the election, as well as the publication of positive stories regarding defendant, *see* People's Omnibus Opp. 3; People's Statement of Facts ¶ 9.

As described below, this evidence is part of the *res gestae* of defendant's criminal conduct and is not properly considered *Molineux* evidence for that reason. For the avoidance of any doubt, however, the Court may also hold that even if this evidence does constitute evidence of prior uncharged crimes or bad acts under *Molineux*, it is admissible because it is inextricably interwoven with the narrative of events and is probative of defendant's intent, and because any prejudicial impact is outweighed by its probative value.

1. Evidence regarding the formation and execution of defendant's conspiracy with others to influence the 2016 presidential election is not *Molineux* because it is part of the *res gestae* of his criminal conduct.

Evidence regarding the Trump Tower agreement and the steps taken to implement that agreement is direct evidence of an element of the offense: namely, defendant's intent to defraud. First-degree falsifying business records requires that defendant's intent to defraud include "an intent to commit another crime or to aid or conceal the commission thereof." PL § 175.10. The People allege that defendant intended to commit or conceal election law crimes, including violations of Election Law § 17-152 and FECA. *See Trump* Omnibus Decision 12-16. The People must establish only that defendant *intended* to commit or conceal another crime. *Id.* at 12.

As the Court has already recognized, the evidence described above—including evidence of the August 2015 Trump Tower agreement; the payoffs to Sajudin, McDougal, and Daniels that were made because of the Trump Tower agreement; and AMI's publication of flattering stories about defendant paired with denigrating stories about his opponents—supports a finding that defendant intended to commit or conceal criminal conduct. *See id.* at 11-16. Thus, evidence regarding the agreement to promote defendant's election, as well as evidence of the steps taken to execute that agreement, is not *Molineux* evidence at all but is instead part of the *res gestae* of defendant's criminal conduct.

The Court of Appeals has explained that "the common thread in all *Molineux* cases is that the evidence sought to be admitted concerns a *separate* crime or bad act committed by the defendant. *Frumusa*, 29 N.Y.3d at 369-70. But "[w]here, as here, the evidence at issue is relevant to the very same crime for which the defendant is on trial, there is no danger that the jury will draw an improper inference of propensity because no separate crime or bad act committed by the defendant has been placed before the jury." *Id.* at 370. Evidence regarding the formation and execution of defendant's conspiracy with others to influence the 2016 presidential election is part of the *res gestae* of his criminal conduct and is admissible without regard to the *Molineux* doctrine. *See, e.g.*, *People v. Alfaro*, 19 N.Y.3d 1075, 1076 (2012) (affirming decision below that evidence was properly admitted where "the items were part of the 'res gestae' of the entire criminal transaction"); *People v. Delacruz*, 199 A.D.3d 614, 614 (1st Dep't 2021) (video of defendant displaying a gun and threatening the victim "did not constitute *Molineux* evidence" because it was instead "direct proof of defendant's specific criminal intent"); *People v. Robinson*, 200 A.D.2d 693, 694 (2d Dep't 1994) (affirming trial court's admission of facts that were "essential components of the res gestae").

2. In the alternative, evidence regarding defendant's conspiracy with others to influence the presidential election is centrally relevant to material issues in the case, and its probative value far outweighs any prejudicial effect.

To the extent the Court concludes that evidence regarding the formation and execution of defendant's conspiracy with others to influence the 2016 presidential election may be *Molineux* evidence, the Court should conclude that it is relevant to a material, non-propensity issue, and that the probative value of the evidence far outweighs the risk of undue prejudice. *See Frumusa*, 29 N.Y.3d at 370 (encouraging the People to bring possible evidentiary issues to the attention of the

court and defendant before trial, including where the *Molineux* doctrine may not need to be applied).

First, evidence of defendant's steps to conspire with others to help his candidacy by purchasing and suppressing damaging information is "inextricably interwoven with the narrative of events and [is] necessary background to explain to the jury" the criminal conduct defendant intended to commit or conceal. *Santiago*, 295 A.D.2d at 215. Defendant is charged with falsely stating in the business records of New York enterprises that his 2017 payments to Cohen were for legal services rendered pursuant to a retainer agreement, when in fact those payments were instead reimbursements for one part—the Stormy Daniels payoff—of the conspiracy to assist defendant's presidential campaign. Evidence regarding the Trump Tower agreement and the subsequent steps to execute the plan that was hatched at that meeting—which included the Daniels payoff—thus provides necessary background to explain the criminal conduct defendant intended to conceal when he falsified the business records at issue in this prosecution.[15] *See id.*; *see also, e.g.*, *People v. Vails*, 43 N.Y.2d 364, 367-69 (1977) (*Molineux* evidence is relevant where it shows "a concurrence of common features such that the acts proved can naturally be explained as caused by a general plan of which each act is but a part"); *People v. DeJesus*, 127 A.D.3d 589, 590 (1st Dep't 2015); *People v. Finkelstein*, 121 A.D.3d 615, 615-16 (1st Dep't 2014). Indeed, the Court's opinion on defendant's omnibus motions described this evidence "by way of background" when

[15] Relatedly, the People will also present evidence that the $420,000 reimbursement amount to Cohen was made up in part of a $50,000 request for reimbursement for expenses he claimed he incurred. *See* Trump Omnibus Decision 3; People's Omnibus Opp. 8; People's Statement of Facts ¶ 25. The People will elicit testimony that the $50,000 expense claim related to Cohen's payments to a tech firm, RedFinch Solutions, to rig an online poll ranking business leaders in defendant's favor. Because the RedFinch expense is a component of the total reimbursement amount for the payments at issue in this criminal prosecution, it is admissible for the same reasons described above: it is part of the *res gestae* of defendant's criminal conduct; and if the Court instead considers it *Molineux*, it is inextricably interwoven with the narrative of events.

introducing and describing the charged offenses. *Trump* Omnibus Decision 1-3; *see also People v. Till*, 87 N.Y.2d 835, 837 (1995) (evidence of prior bad acts admissible to provide necessary background information).

Second, and relatedly, this evidence is necessary to "complete the narrative" concerning the charged crimes. *Till*, 87 N.Y.2d at 837; *see also People v. Gines*, 36 N.Y.2d 932, 932-33 (1975). Evidence of the Trump Tower agreement and the steps the participants took to execute that agreement is all part of a single narrative that explains the illegal conduct defendant sought to conceal when he falsely described the payments to Cohen as payments for legal services instead of truthfully describing them as reimbursements for the Stormy Daniels payoff. *See, e.g.*, *Alfaro*, 19 N.Y.3d at 1075 (holding that items were properly admitted where, "[e]ven assuming that the subject items constituted prior uncharged crimes evidence under *Molineux*," they "completed the narrative of this particular criminal transaction"); *People v. Flambert*, 160 A.D.3d 605, 606 (1st Dep't 2018) (evidence admissible where it tends to "place the events in question in a believable context"). Indeed, each of the transactions that was pursued as a result of the Trump Tower agreement is so central to the conspiracy to influence the election that the conspiracy cannot be accurately understood without reference to each of the other transactions—to omit any of the episodes would be to present an incomplete and nonsensical narrative of the events that form the basis for the charged conduct. This evidence is thus admissible because it is necessary to "flesh out the narrative so there are no gaps in the story line provided to the jury." *People v. Leonard*, 29 N.Y.3d 1, 4 (2017); *People v. Green*, 35 N.Y.2d 437, 442 (1974) ("[S]ome cases are sufficiently complex that the jury would wander helpless, as in a maze, were the decisive occurrences not placed in some broader, expository context.").

Third, this evidence is highly probative of defendant's intent. In cases where the defendant's mental state cannot be "inferred from the commission of the act" alone, the *Molineux* doctrine is especially flexible in permitting the introduction of evidence that tends to show that the defendant acted with the requisite state of mind. *Alvino*, 71 N.Y.2d at 242-43 (citing cases). Cases involving fraudulent intent are paradigmatic cases where *Molineux* evidence has often been allowed, "because a fraudulent intent rarely can be established by direct evidence." *Matter of Brandon*, 55 N.Y.2d 206, 211 (1982); *see also People v. Rodriguez*, 17 N.Y.3d 486, 489 (2011). Here, evidence that defendant agreed with others to execute an illegal scheme to identify and purchase negative information about him in order to suppress its publication and benefit his electoral prospects is highly probative of defendant's mental state when he later falsified business records to cover up that scheme. *See People v. Leeson*, 12 N.Y.3d 823, 827 (2009) (*Molineux* evidence was relevant to defendant's state of mind when it "placed the charged conduct in context" (quoting *People v. Dorm*, 12 N.Y.3d 16, 19 (2009))); *People v. Ingram*, 71 N.Y.2d 474, 480 (evidence is admissible under the *Molineux* intent exception where it "makes the innocent explanation improbable"); *see also* Trump Omnibus Decision 18-19 (evidence that defendant intended to pay money "to prevent the publication of information that could have adversely affected his presidential aspirations" was material to defendant's intent to defraud).

Finally, evidence regarding the specific allegations defendant sought to suppress through the Sajudin, McDougal, and Daniels payoffs is relevant to defendant's motive. In each instance, the allegations that defendant sought to suppress—that he had an out-of-wedlock child; that he had an extramarital sexual relationship; that he had an extramarital sexual encounter with an adult film actress—are allegations that defendant knew could damage his candidacy. *See Trump* Omnibus Decision 1; People's Omnibus Opp. 3-8; People Statement of Facts ¶¶ 10-23. Evidence regarding

the nature of these allegations is critical evidence that supports defendant's motive in making false entries in the relevant business records in order to prevent disclosure of both the payoff scheme and the underlying information. *See, e.g.*, *People v. Frankline*, 27 N.Y.3d 1113, 1115 (2016) (evidence of a prior assault admissible to show motive for a subsequent assault); *Till*, 87 N.Y.2d at 837 (evidence of uncharged robbery was properly admitted where it "established a motive for defendant's attempt to kill or assault the off-duty police officer to avoid capture and punishment"); *People v. Johnson*, 137 A.D.3d 811, 812 (2d Dep't 2016) (*Molineux* testimony was properly admitted where "it was relevant to and probative of defendant's motive to commit the charged crimes").

The probative value of this evidence far outweighs any risk of "undue," *People v. Cass*, 18 N.Y.3d 553, 560 (2012), or "unfair," *Frankline*, 27 N.Y.3d at 1115, prejudice to defendant. As explained above, evidence that defendant conspired with others to unlawfully influence the 2016 presidential election could not be more probative: it bears directly on material issues involving defendant's state of mind when he later falsified business records to conceal that conspiracy, and separately provides necessary background to explain crucial context and complete the narrative regarding the charged crimes.

By contrast, the risk of undue prejudice to defendant is low. This evidence is centrally relevant to the jury's understanding of the charged offenses. "When evidence of uncharged crimes is relevant to some issue other than the defendant's criminal disposition," it is only when the evidence "is actually of slight value when compared to the possible prejudice to the accused" that it can be said its admission is an abuse of the trial court's discretion. *People v. Allweiss*, 48 N.Y.2d 40, 47 (1979); *see also Frumusa*, 29 N.Y.3d at 373 (evidence "was not unduly prejudicial" where, among other factors, "it was relevant to defendant's larcenous intent"); *Cass*, 18 N.Y.3d at 563

(evidence not unduly prejudicial where it had "a direct bearing" on the question of defendant's intent). And because the evidence is directly relevant to specific issues in the case, there is little risk the jury will overestimate its significance. *See Allweiss*, 48 N.Y.2d at 46.

The Court should therefore hold that evidence of defendant's prior acts is admissible where it relates to or was committed in the course of the underlying conspiracy to promote his election.

C. The Court should permit the introduction of evidence regarding the Access Hollywood Tape and subsequent public allegations by women that defendant sexually assaulted them.

The Court should also permit the introduction of evidence regarding (1) the Access Hollywood Tape; and (2) certain public allegations of sexual assault that followed the release of the Access Hollywood Tape in the fall of 2016. Each of these categories of evidence is probative of defendant's motive and intent, and provides necessary background information for the jury that places the charged offenses in context.

1. The Access Hollywood Tape.

On October 7, 2016, about one month before the 2016 presidential election, the Washington Post published a video recorded in 2005 that depicted defendant saying to the host of *Access Hollywood*: "You know I'm automatically attracted to beautiful – I just start kissing them. 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 pussy. You can do anything." *Carroll v. Trump*, 660 F. Supp. 3d 196, 200-01 (S.D.N.Y. 2023) (quoting the Access Hollywood Tape). In response, defendant issued public statements describing the tape as "locker room banter," Ex. 21, and drawing a distinction between words (which he admitted saying) and conduct (which he denied).[16]

[16] Both the Access Hollywood Tape and defendant's statements explaining his remarks on that tape (by distinguishing between words and conduct) are contained in video exhibits which the People will submit to the Court if the Court would like to review them in adjudicating this motion.

The Access Hollywood Tape is centrally relevant to critical issues in the case, and its probative value outweighs any risk of undue prejudice. The evidence at trial will show that after the release of the Access Hollywood Tape one month before the presidential election, defendant and his campaign staff were deeply concerned that the tape would harm his viability as a candidate and reduce his standing with female voters in particular. The release of the tape—and the accompanying concerns about its possible impact on the election—are thus directly related to the Stormy Daniels payoff, which was executed just a few weeks later. *See* People's Omnibus Opp. 6-7, 55; People's Statement of Facts ¶¶ 16-21. The Access Hollywood Tape is such a central component of defendant's conspiracy to influence the election that it is "inextricably interwoven with the narrative of events and [is] necessary background to explain to the jury" why the Daniels payoff was made when it was. *Santiago*, 295 A.D.2d at 215; *see also Vails*, 43 N.Y.3d at 367-69; *Green*, 35 N.Y.2d at 442. Omitting the Access Hollywood Tape would leave counterfactual and artificial "gaps in the story line presented to the jury," *Leonard*, 29 N.Y.3d at 4; the tape is necessary to "complete[] the narrative of this particular criminal transaction," *Alfaro*, 19 N.Y.3d at 1075, and "place the events in question in a believable context," *Flambert*, 160 A.D.3d at 606.

The Access Hollywood Tape is also relevant to defendant's intent and motive at the time he and his confederates executed the Daniels payoff and when he later sought to conceal it. *See Trump* Omnibus Decision 18-19. Evidence regarding the tape and its impact on the campaign supports the conclusion that defendant wanted to avoid further damaging disclosures immediately before the election, which makes other, "innocent explanation[s]" for the payoff and coverup "improbable." *Ingram*, 71 N.Y.2d at 480. The tape is highly relevant to defendant's motive for the same reason—it supports the conclusion that he suppressed the Daniels story and then concealed the payoff because he believed additional disclosures about an alleged sexual encounter with an

adult film actress, following immediately on the heels of the Access Hollywood Tape, would cost him votes. *Frankline*, 27 N.Y.3d at 1115; *Till*, 87 N.Y.2d at 837. Indeed, the release of the Access Hollywood Tape was so monumental to the campaign that the first draft of the non-disclosure agreement with Stormy Daniels was penned within four days. The motivation to complete the Daniels non-disclosure agreement cannot be understood without reference to the desperation facing defendant and his campaign in the wake of the tape's release.

The probative value of the Access Hollywood Tape outweighs any risk of undue prejudice. The Access Hollywood Tape and its impact on the campaign could not be more relevant to the Daniels payoff and subsequent coverup. As the Court of Appeals has explained, "[i]f the evidence has substantial probative value and is directly relevant to the purpose—other than to show criminal propensity—for which it is offered, the probative value of the evidence outweighs the danger of prejudice and the court may admit the evidence." *Cass*, 18 N.Y.3d at 560. And the prejudicial impact is low because the evidence is directly relevant to defendant's intent. *See id.* at 563; *see also Frumusa*, 29 N.Y.3d at 373. Indeed, a federal court recently held in a defamation case against Trump that the Access Hollywood Tape was admissible under Rule 404(b) of the Federal Rules of Evidence (the federal-law provision for "Other Crimes, Wrongs, or Acts") because it was relevant to the defendant's intent, and was not unduly prejudicial because "[t]here would be nothing inherently 'unfair' in receiving evidence that is uniquely probative" of defendant's state of mind. *Carroll v. Trump*, No. 20-cv-7311 (LAK), 2024 WL 97359, at *9-11 (S.D.N.Y. Jan. 9, 2024).

2. Public allegations of sexual assault that followed the release of the Access Hollywood Tape in the fall of 2016.

About five days after the Access Hollywood Tape was published, and following defendant's public explanation that the tape reflected only banter, not behavior, several women alleged in news reports that defendant had sexually assaulted them in the past. *See* Megan Twohey

& Michael Barbaro, *Two Women Say Donald Trump Touched Them Inappropriately*, N.Y. Times, Oct. 12, 2016 (Ex. 22); Natasha Stoynoff, *Physically Attacked by Donald Trump—A PEOPLE Writer's Own Harrowing Story*, People Magazine, Oct. 12, 2016 (Ex. 23). In public comments at campaign rallies and on social media, defendant denied the allegations of sexual assault and asserted that the allegations were being made to harm—and were harming—his standing with voters in general and women voters in particular.[17] Ex. 24.

As with the Access Hollywood Tape, evidence of these allegations and defendant's public response provides critical context for the charges the jury will consider, and is manifestly relevant to defendant's intent and motive in paying to silence Stormy Daniels and then concealing the payoff. As noted above, defendant's public comments in reaction to the allegations published on October 12, 2016 in the New York Times and People Magazine show his awareness and concern that the allegations risked his candidacy by hurting his standing with female voters. *E.g.*, Ex. 24 at 1 ("Nothing ever happened with any of these women. Totally made up nonsense to steal the election. Nobody has more respect for women than me!"); *id.* at 2 ("Polls close, but can you believe I lost large numbers of women voters based on made up events THAT NEVER HAPPENED. Media rigging election!"); *id.* at 3 ("Can't believe these totally phony stories, 100% made up by women (many already proven false) and pushed big time by press, have impact!"). Thus, this evidence not only provides important context and background, but also explains defendant's intent and motive in arranging the Stormy Daniels hush payment and subsequent coverup, because further disclosures of alleged sexual misconduct—and especially the disclosure of an alleged

[17] Defendant's comments at campaign rallies are contained in excerpted video exhibits which the People will submit to the Court if the Court would like to review them in adjudicating this motion.

sexual liaison with an adult film actress just weeks before Election Day—seriously risked his electoral prospects.

The risk of undue prejudice is low. First, this evidence would not be admitted to show that defendant in fact sexually assaulted the women who accused him of doing so; there is thus no propensity issue at play. *See Agina*, 18 N.Y.3d at 603 (*Molineux* evidence inadmissible "where its *only* relevance is to show defendant's bad character or criminal propensity" (emphasis added)). And appropriate limiting instructions would make clear to the jury that this evidence should be considered only for the fact that the allegations were made, not as evidence of defendant's character or as proof that the allegations are true. *See People v. Hernandez*, 103 A.D.3d 433, 434 (1st Dep't 2013) (prejudicial effect of *Molineux* evidence was minimized by the court's limiting instructions); *see also People v. Morris*, 21 N.Y.3d 588, 598 (2013) (jurors are presumed to follow a trial court's limiting instructions). Second, the People propose to admit evidence of only three accusations of sexual assault (the accusations that were reported in the New York Times and People Magazine articles published on October 12, 2016). There are public reports that more than dozen women accused defendant of sexual assault in the weeks following the release of the Access Hollywood Tape;[18] evidence of just a select few instances of those allegations—which defendant specifically referenced on the campaign trail in acknowledging the effect on his campaign—is not cumulative. *Cf. People v. Rodriguez*, 193 A.D.3d 554, 556 (1st Dep't 2021) (introducing a "significant quantum of evidence" is more likely to cause undue prejudice). Third, the risk of unfair prejudice is low where the allegations reported in the New York Times and People Magazine articles are not "any more sensational or disturbing" than other evidence that will be before the

[18] *See, e.g.*, Lindsay Kimble, *Everything You Need to Know About the Sexual Assault Allegations Against Donald Trump Before Election Day*, People Magazine, Nov. 1, 2016, https://people.com/politics/ every-sexual-assault-accusation-against-donald-trump/.

jury. *United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir. 1990); *see United States v. Siegel*, 717 F.2d 9, 16-17 (2d Cir. 1983).

D. The Court should permit the introduction of evidence regarding defendant's efforts to dissuade witnesses from cooperating with law enforcement, including through pressure campaigns, public harassment, and retaliation.

The Court should also permit the introduction of evidence regarding defendant's attempts to dissuade witnesses from cooperating with law enforcement because such evidence shows defendant's consciousness of guilt and corroborates his intent. This evidence falls into four categories:

- First, after the FBI executed a search warrant on Cohen's residences, office, and electronic devices in April 2018, defendant and others engaged in a public and private pressure campaign to ensure that Cohen did not cooperate with the federal investigation into campaign finance violations related to the McDougal and Daniels payoffs. *See* People's Statement of Facts ¶¶ 35-40. The People will introduce evidence of this pressure campaign and will elicit testimony regarding how these statements affected a witness.

- Second, defendant has singled out two of the People's witnesses—Michael Cohen and Stormy Daniels—with harassing comments on social media and in other public statements. The People will introduce evidence of these statements, and will elicit testimony from witnesses regarding the threats and harassment they received after defendant targeted them with these and other public attacks.

- Third, in April 2023, eight days after he was arraigned in this case, defendant sued Cohen in federal court in Florida seeking $500 million in damages based on allegations that Cohen "spread falsehoods" about defendant. The People will elicit witness testimony regarding that lawsuit and its effect on the witness.

- Fourth, the People will introduce evidence of past comments by defendant endorsing aggressive attacks on one's perceived opponents. For example, in one book, defendant wrote: "When somebody hurts you, just go after them as viciously and as violently as you can."[19] In another book, defendant wrote: "When you are wronged, go after those people because it is a good feeling and because other people will see you doing it."[20]

[19] Donald J. Trump, *Trump: How to Get Rich* 138 (2004).

[20] Donald J. Trump, *Think Big: Make it Happen in Business and in Life* 192 (2007).

This evidence is relevant to material, non-propensity issues in the case. Evidence of the pressure campaign against Cohen is probative of both defendant's effort to deter Cohen from cooperating with law enforcement, and of defendant's steps to intimidate Cohen and retaliate against him once he began doing so. *See, e.g.*, *Report on the Investigation into Russian Interference in the 2016 Presidential Election, Vol. II of II*, at 154-56 (Mar. 2019) ("The evidence concerning this sequence of events could support an inference that the President used inducements in the form of positive messages in an effort to get Cohen not to cooperate, and then turned to attacks and intimidation to deter the provision of information or undermine Cohen's credibility once Cohen began cooperating."), https://www.justice.gov/storage/report_volume2.pdf. The Court of Appeals has long recognized that efforts to coerce or harass witnesses can show consciousness of guilt. *See People v. Bennett*, 79 N.Y.2d 464, 469-70 (1992); *People v. Shilitano*, 218 N.Y. 161, 179 (1916) (evidence of "an effort to coerce witnesses and suppress evidence against the defendant" admissible to prove consciousness of guilt). And evidence of post-crime conduct that reflects a defendant's consciousness of guilt—including efforts at coercion, threats, or intimidation of witnesses—is admissible under the *Molineux* doctrine for that reason. *See, e.g.*, *People v. Parilla*, 211 A.D.3d 1609, 1610 (4th Dep't 2022) (efforts to bribe witness showed consciousness of guilt and were admissible under *Molineux*); *People v. Cotton*, 184 A.D.3d 1145, 1146 (4th Dep't 2020) (evidence of tampering or witness intimidation admissible under *Molineux* to show consciousness of guilt).

The same is true of the evidence that defendant has targeted Cohen and Daniels on social media and in other public statements with persistent, harassing, and denigrating comments. *See Cotton*, 184 A.D.3d at 1146; *People v. Pitt*, 170 A.D.3d 1282, 1284 (3d Dep't 2019) (threatening post-crime comments showed consciousness of guilt and were admissible under *Molineux*); *People*

v. Leitzsey, 173 A.D.2d 488, 488-89 (2d Dep't 1991) (same). And evidence that defendant sued Cohen just days after defendant's arraignment in this matter—and sought enormous money damages for claimed injuries based in part on Cohen's testimony before the grand jury—likewise is relevant to material issues in this case because it supports consciousness of guilt and therefore corroborates defendant's intent in connection with the charged conduct. *See, e.g.*, *People v. Lumaj*, 298 A.D.2d 335, 335 (1st Dep't 2002) (evidence of efforts to deter a witness from testifying was "clearly admissible as it demonstrated defendant's consciousness of guilt"); *People v. De Vivo*, 282 A.D.2d 770, 772 (3d Dep't 2001) (evidence of threats, retaliation, and efforts to get witnesses to change their testimony "is highly probative and was properly admitted as it was indicative of defendant's consciousness of guilt") (citing cases). The final category of evidence—defendant's prior statements that perceived opponents should be attacked "as viciously and as violently" as possible—is material and relevant for a non-propensity purpose because it provides context for witness testimony the People will elicit regarding the effect defendant's public attacks and harassment had on them.[21] *See Flambert*, 160 A.D.3d at 606.

Given the direct connection between this consciousness-of-guilt evidence and defendant's intent, its probative value outweighs the danger of any unfair prejudice. *See Lumaj*, 298 A.D.2d at 335; *Cotton*, 184 A.D.3d at 1146; *see generally Cass*, 18 N.Y.3d at 560. An appropriate limiting instruction that the jury is to consider this evidence only for consciousness of guilt and

[21] The evidence mentioned in this paragraph—defendant's public harassment of Cohen and Daniels; his $500 million lawsuit against Cohen; and his prior written statements endorsing retaliation against opponents—likely is not *Molineux* at all, and its admission at trial should be assessed just like any other evidence. *See People v. Hamilton*, 73 A.D.3d 408, 409 (1st Dep't 2010). The People include this evidence here for the avoidance of any doubt and to the extent the Court believes the *Molineux* doctrine does apply. *See Frumusa*, 29 N.Y.3d at 370.

corroboration of defendant's intent—not to show defendant's bad character or criminal propensity—will further reduce any risk of undue prejudice. *See Parilla*, 211 A.D.3d at 1610.

Dated: February 22, 2024

Respectfully submitted,

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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.	Index No. 71543-23

PRESIDENT DONALD J. TRUMP'S MOTIONS TO EXCLUDE EVIDENCE AND FOR AN ADJOURNMENT BASED ON PRESIDENTIAL IMMUNITY

TABLE OF CONTENTS

INTRODUCTION 1
BACKGROUND 3
DISCUSSION 5
I. President Trump Is Immune From State Prosecution Based On Official Acts 5
A. The Executive Vesting Clause And Supremacy Clause Require Presidential Immunity From State Prosecution For Official Acts 5
B. The Impeachment Judgment Clause Confirms Presidential Immunity 8
C. The President's Unique Role Requires Immunity From Prosecution Based On Official Acts 9
D. "The Presuppositions Of Our Political History" Support Presidential Immunity From Prosecution For Official Acts 10
E. Analogous Immunity Doctrines Support Presidential Immunity From Prosecution Based On Official Acts 13
F. Public Policy Considerations Support Presidential Immunity From Prosecution 16
II. The Court Should Adjourn The Trial Until The Supreme Court Decides *Trump v. United States* 18
III. The People Must Be Precluded From Offering Evidence Of President Trump's Official Acts 20
A. "Official Acts" Include Presidential Decisions On The "Outer Perimeter" 20
B. The Court Must Preclude Evidence Of Official Acts 21
CONCLUSION 24

INTRODUCTION

President Donald J. Trump respectfully submits this motion (1) for an adjournment of the trial pending review of the scope of the presidential immunity doctrine in *Trump v. United States*, which the Supreme Court agreed to hear on February 28, 2024, and is scheduled to be argued before the Court on April 25, 2024; and (2) to preclude evidence of President Trump's official acts at trial based on presidential immunity.

The Court must preclude the People from offering evidence at trial of President Trump's official acts as the Commander in Chief, which the People have not yet specified as the existing trial date approaches. However, in motions *in limine* recently filed on February 22, 2024, the People argued that they should be permitted to offer evidence at trial concerning a fictitious so-called "pressure campaign" by President Trump in 2018 relating to Michael Cohen. People's MILs at 50. Although the People did not describe the evidence they intend to offer in detail, it appears that the evidence includes public statements by President Trump and posts to his official Twitter account, as well as testimony from unspecified witnesses. *See id.* The People's recent proffer implicates presidential immunity because President Trump was President of the United States at the time of those actions in 2018. He made at least some of the 2018 statements at issue—and potentially all of them, though it is hard to be sure in light of the People's vague *in limine* description—in his official capacity as the nation's Chief Executive. Moreover, while it is clear that the People intend to offer documents and testimony relating to the period in 2017 when President Trump was in office, they have not provided sufficiently specific notice of the nature and extent of that evidence to allow President Trump or the Court to distinguish between personal and official acts.

Such distinctions are necessary and complex, as illustrated by the D.C. Circuit's recent guidance in *Blassingame v. Trump*, where the panel emphasized that President Trump is entitled to "every opportunity" to present this defense. 87 F.4th 1, 22 (D.C. Cir. 2023). This area of law is evolving in real time. Specifically, on February 28, 2024, the Supreme Court granted certiorari with respect to the following question: "Whether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office." *Trump v. United States*, 2024 WL 833184 (Feb. 28, 2024).

In addition, on March 4, 2024, a unanimous Supreme Court held that the Colorado Supreme Court had erred by excluding President Trump from Colorado's 2024 presidential primary ballot. *Trump v. Anderson*, 2024 WL 899207, at *2 (Mar. 4, 2024). The *Anderson* Court reasoned, in part, that states' "power over governance . . . does not extend to *federal* . . . candidates." *Id.* at *3 (emphasis in original). The Court's emphasis on federalism principles further supports the timing of this motion, and is relevant to the application of presidential immunity because "any effort . . . to retaliate against a President for official acts" would be "an unconstitutional attempt to 'influence' a superior sovereign 'exempt' from such obstacles." *Trump v. Vance*, 140 S. Ct. 2412, 2428 (2020) (citing *McCulloch v. Maryland*, 4 Wheat. 316, 417 (1819)).

Therefore, President Trump respectfully submits that an adjournment of the trial is appropriate to await further guidance from the Supreme Court, which should facilitate the appropriate application of the presidential immunity doctrine in this case to the evidence the People intend to offer at trial. Following the Supreme Court's guidance, and consistent with the remand in *Blassingame*, the Court should hold a hearing outside the presence of the jury to identify and preclude documentary and testimonial official-acts evidence based on presidential immunity.

BACKGROUND

As far as we can gather from the description of the so-called "pressure campaign" in the People's motions *in limine*, there are several types of evidence that implicate the concept of official acts for purposes of presidential immunity, and therefore must be precluded.

First, President Trump used his Twitter account, which was an official communications channel during his Presidency, to communicate with the public regarding matters of public concern. In 2018, such matters included Michael Cohen after the FBI executed search warrants targeting him. For example:

- On April 21, 2018, President Trump posted messages on his Twitter account that included the following: "Michael is a businessman for his own account/lawyer who I have always liked & respected. 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 Michael doing that despite the horrible Witch Hunt and the dishonest media." Ex. 1.

- On May 3, 2018, President Trump posted messages on his Twitter account that included the following: "Mr. Cohen, an attorney, received a monthly retainer, not from the campaign and having nothing to do with the campaign, from which he entered into, through reimbursement, a private contract between two parties, known as a non-disclosure agreement, or NDA. These agreements are . . . very common among celebrities and people of wealth. . . . Money from the campaign, or campaign contributions, played no rol[e] in this transaction." Ex. 2.

- On August 22, 2018, President Trump posted a message on his Twitter account that included the following: "I feel very badly for Paul Manafort and his wonderful family. 'Justice' took a 12 year old tax case, among other things, applied tremendous pressure on him and, unlike Michael Cohen, he refused to 'break' – make up stories in order to get a 'deal.' Such respect for a brave man." Ex. 3.

Second, President Trump made public statements on official premises and during media appearances. For example:

- On April 5, 2018, during statements to reporters on board Air Force One, President Trump directed reporters to "ask Michael Cohen" regarding the public allegations and added, "Michael is my attorney. And you'll have to ask Michael Cohen." Ex. 4.

- On April 26, 2018, during a telephone call aired on *Fox & Friends*, President Trump explained that Cohen "has a percentage of my overall legal work – a tiny, tiny little fraction. But Michael would represent me on some things. . . . [L]ike with this crazy Stormy Daniels deal he represented me. And, you know, from what I see he did absolutely nothing wrong. There were no campaign funds going into this." Ex. 5.

- On August 23, 2018, during an interview on *Fox & Friends*, President Trump stated: "If you look at President Obama, he had a massive campaign violation, but he had a different Attorney General and they viewed it a lot differently, you know. We have somebody that they seem to like to go after a lot of Republicans, but he settled his very easily. In fact I put that out fairly recently. So Obama had it, other people have it, almost everybody that runs for office has campaign violations, but what Michael Cohen pled to weren't even campaign related, they weren't crimes." Ex. 6.

Third, the People seem to want to offer documentary evidence that reflects official acts. This category appears to include a form that President Trump submitted to the U.S. Office of Government Ethics in 2018. Ex. 7.

Fourth, it appears that the People will seek to elicit testimony at trial relating to official acts. For example, [redacted] is on the People's witness list as of January 29, 2024. During grand jury testimony, [redacted]. Tr. 698. [redacted] Tr. 699. [redacted]. Tr. 704-06.

Similarly, [redacted]. Tr. 890-91, 916-17, 919-20. According to [redacted] Tr. 919. [redacted]. Tr. 924.

DISCUSSION

I. President Trump Is Immune From State Prosecution Based On Official Acts

For the reasons set forth below, President Trump is entitled to immunity from prosecution based on evidence of official acts that he undertook during his first term in Office.[1]

A. The Executive Vesting Clause And Supremacy Clause Require Presidential Immunity From State Prosecution For Official Acts

Under the Executive Vesting Clause of Article II, § 1, state courts and prosecutors lack authority to sit in judgment over a President's official acts. The Executive Vesting Clause provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1. Just as the Executive Vesting Clause prevents an Article III court from arrogating the "executive power" to itself based on the separation of powers,[2] state authorities

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[1] The D.C. Circuit recently erred in finding that President Trump was not entitled to presidential immunity in connection with the set of federal criminal charges pending in the District of Columbia. *See United States v. Trump*, 91 F.4th 1173, 1200 (D.C. Cir. 2024). The D.C. Circuit's analysis is not persuasive for many of the reasons discussed below and, as noted, will be reviewed by the Supreme Court pursuant to the February 28 grant of certiorari. *Trump v. United States*, 2024 WL 833184 (Feb. 28, 2024).

[2] *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 719 (1997) (Breyer, J., concurring) (reasoning that there is an "unbroken historical tradition . . . implicit in the separation of powers that a President may not be ordered by the Judiciary to perform particular Executive acts" (cleaned up)); *Chi. & S. Air Lines v. Waterman S.S. Corp*., 333 U.S. 103, 112 (1948) (reasoning that "whatever of this order emanates from the President is not susceptible of review by the Judicial Department"); *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866) ("[T]his court has no jurisdiction of a bill to enjoin the President in the performance of his official duties."); *In re Trump*, 958 F.3d 274, 297-98 (4th Cir. 2020), *cert. granted, judgment vacated sub nom. Trump v. D.C.*, 141 S. Ct. 1262 (2021) (Wilkinson, J., dissenting) ("Since *Mississippi*, the federal courts have continued this practice *without exception* and have not sustained a single injunction against the President in his official capacity." (italics in original)); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him, and have never submitted the President to declaratory relief.") (cleaned up). This is also the consistent litigation position of the U.S. Department of Justice. *See, e.g.*, Reply Brief for Pet'r at 4-6, *In re Trump*, No. 18-2486 (4th Cir. Feb. 21, 2019) (invoking "the separation-of-powers principle that 'courts have no jurisdiction of a bill to enjoin the President in the performance of his official duties'") (quoting *Mississippi*, 71 U.S. at 501) (cleaned up); DOJ Mem. at 25, ECF No. 28, *Missouri v. Biden*, No. 21 Civ. 287 (E.D. Mo. June 4, 2021) (same).

purporting to dictate how the President must exercise the executive power violate the Supremacy Clause and federalism principles. *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 691 n.13 (1997) (reasoning that "any direct control by a state court over the President, who has principal responsibility to ensure that those laws are 'faithfully executed,' Art. II, § 3, may implicate concerns that are quite different from the interbranch separation-of-powers questions addressed here," such as under "the Supremacy Clause"); *Mayo v. United States*, 319 U.S. 441, 445 (1943) ("[T]he activities of the Federal Government are free from regulation by any state."); *see also United States v. McLeod*, 385 F.2d 734, 751-52 (5th Cir. 1967) ("Both the Supremacy Clause and the general principles of our federal system of government dictate that a state grand jury may not investigate the operation of a federal agency. . . . [T]he investigation . . . is an interference with the proper governmental function of the United States . . . [and] an invasion of the sovereign powers of the United States of America.").

In *Marbury v. Madison*, Chief Justice Marshall described the presidential immunity doctrine as foundational and self-evident. "By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." *Marbury v. Madison*, 5 U.S. 137, 165-66 (1803). When it comes to the President's official acts, "whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion." *Id.* at 166. "[N]othing can be more perfectly clear than that" the President's discretionary "acts are only politically examinable." *Id.* "Questions . . . which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Id.* at 170. The President's official acts, therefore, "*can never be examinable by the courts*." *Id.* at 166 (emphasis added).

The Supremacy Clause prohibits state and local officials from using their powers to "defeat the legitimate operations" of the national government. *McCulloch v. Maryland*, 17 U.S. 316, 427 (1819). States may not impede "the measures of a government created by others as well as themselves, for the benefit of others in common with themselves." *Id.* at 435. The *McCulloch* court reasoned:

> If we apply the principle for which the state of Maryland contends [regarding state taxation], to the constitution, generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states.

Id. at 432. The *McCulloch* Court rejected that possibility.

In 1833, citing *Marbury*, Justice Story wrote that "[i]n the exercise of his political powers [the President] is to use his own discretion, and is accountable only to his country, and to his own conscience. His decision, in relation to these powers, is subject to no control; and his discretion, when exercised, is conclusive." 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, ch. 37, § 1563 (1833), https://lonang.com/library/reference/story-commentaries-us-constitution/sto-337. "It is incompatible with his constitutional position that [the President] be compelled personally to defend his executive actions before a court." *Franklin v. Massachusetts*, 505 U.S. 788, 827 (1992) (Scalia, J., concurring in part and concurring in the judgment); *cf. Martin v. Mott*, 25 U.S. 19, 32-33 (1827) (Story, J.) (holding that, "[w]hen the President exercises an authority confided to him by law," his official conduct cannot "be passed upon by a jury" or "upon the proofs submitted to a jury"); *see also Johnson v. Maryland*, 254 U.S. 51, 57 (1920) (reasoning that "immunity of the instruments of the United States from state control in the performance of their duties" prohibits prosecution of a post officer for violating a state license law); *Ohio v. Thomas*, 173 U.S. 276, 284 (1899) (prohibiting state criminal prosecution of federal officer for violating food regulations because "in the performance of that duty he was not subject to the

direction or control of the legislature of Ohio"); *In re Tarble*, 80 U.S. 397, 409 (1871) (reasoning that it is "manifest that the powers of the National government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty"); *McClung v. Silliman*, 19 U.S. 598, 605 (1821) (holding that state court cannot mandamus an officer of the United States because that officer's "conduct can only be controlled by the power that created him").

B. The Impeachment Judgment Clause Confirms Presidential Immunity

Presidential immunity from criminal prosecution for official acts draws support directly from the text of the Constitution, as the Impeachment Judgment Clause states that a President cannot be criminally prosecuted unless he is first impeached and convicted by the U.S. Senate.

The Impeachment Judgment Clause provides that "Judgment in Cases of Impeachment shall not extend further than to removal from Office . . . but *the Party convicted* shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. CONST. art. I, § 3, cl. 7 (emphasis added). Because the Constitution specifies that only "the Party *convicted*" by trial in the Senate may be "liable and subject to Indictment, Trial, Judgment and Punishment," *id.*, it plainly indicates that a President who is *not* convicted may *not* be subject to criminal prosecution. SCALIA & GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, § 10, at 107 (2012) ("When a car dealer promises a low financing rate to 'purchasers with good credit,' it is entirely clear that the rate is *not* available to purchasers with spotty credit.").

This was the understanding of the Founders. "James Wilson—who had participated in the Philadelphia Convention at which the document was drafted—explained that . . . the President . . . 'is amenable to [the laws] in his private character as a citizen, and in his public character by impeachment.'" *Jones*, 520 U.S. at 696 (quoting 2 J. ELLIOT, DEBATES ON THE FEDERAL

CONSTITUTION 480 (2d ed. 1863)) (cleaned up). "With respect to acts taken in his 'public character'—that is, official acts—the President may be disciplined principally by impeachment, not by private lawsuits for damages. But he is otherwise subject to the laws for his purely private acts." *Id.*; *see also* THE FEDERALIST No. 43 (J. Madison); THE FEDERALIST Nos. 65, 69, 77 (A. Hamilton) (Alexander Hamilton explaining in three essays that criminal prosecution of a President can occur only "afterwards," "after," "subsequent" to, and as a "consequence" of impeachment and conviction by the Senate).

As Justice Alito noted in *Vance*, "[t]he plain implication" of the Impeachment Judgment Clause "is that criminal prosecution, like removal from the Presidency and disqualification from other offices, is a consequence that can come about only after the Senate's judgment, not during or prior to the Senate trial." 140 S. Ct. at 2444 (Alito, J., dissenting). "This was how Hamilton explained the impeachment provisions in the Federalist Papers. He wrote that a President may 'be impeached, tried, and, upon conviction . . . *would afterwards be liable to prosecution and punishment in the ordinary course of law*.'" *Id.* (quoting THE FEDERALIST No. 69, p. 416 (C. Rossiter ed. 1961)); *see also* THE FEDERALIST No. 77, p. 464 (C. Rossiter ed. 1961) (A. Hamilton) (arguing that a President is "at all times liable to impeachment, trial, [and] dismission from office," but any other punishment must come only "by subsequent prosecution in the common course of law"); THE FEDERALIST NO. 65.

C. The President's Unique Role Requires Immunity From Prosecution Based On Official Acts

"The President occupies a unique position in the constitutional scheme." *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). Under Article II, § 1 of the Constitution, the President is "the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." *Id.* at 749-50. "Nor can the sheer prominence

of the President's office be ignored." *Id.* at 752-53. "In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for" criminal prosecution in countless federal, state, and local jurisdictions across the country. *Id.* at 753. "Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Id.* This "unique status under the Constitution distinguishes him from other executive officials." *Id.* at 750. As a result of "the singular importance of the President's duties," "diversion of his energies by concern with" criminal prosecution administered by the judicial branch "would raise unique risks to the effective functioning of government." *Id.* at 751; *see also* Brett Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN L. REV. 1454, 1461 (2009) ("[A] President who is concerned about an ongoing criminal investigation is almost inevitably going to do a worse job as President").

Without immunity from criminal prosecution based on official acts, the President's political opponents will seek to influence and control his or her decisions via *de facto* extortion or blackmail with the threat, explicit or implicit, of indictment by a future, hostile Administration, for acts that do not warrant any such prosecution. This threat will hang like a millstone around every future President's neck, distorting Presidential decisionmaking, undermining the President's independence, and clouding the President's ability "to deal fearlessly and impartially with the duties of his office." *Fitzgerald*, 457 U.S. at 752 (cleaned up).

D. "The Presuppositions Of Our Political History" Support Presidential Immunity From Prosecution For Official Acts

"[T]he presuppositions of our political history," including "tradition[s] so well grounded in history and reason," help to define the scope of presidential immunity. *Fitzgerald*, 457 U.S. at 745. This history dates back to the founding and was upheld in *Marbury v. Madison*, as discussed

above. There, Charles Lee, who served as Attorney General under Presidents Washington and Adams, "declare[d] it to be [his] opinion, grounded on a comprehensive view of the subject, that the President is not amenable to *any court of judicature for the exercise of his high functions*, but is responsible only in the mode pointed out in the constitution," *i.e.*, by impeachment. *Marbury*, 5 U.S. at 149 (emphasis added).

Indeed, in 234 years from 1789 to 2023, no president was ever prosecuted for his official acts. "Such a lack of historical precedent is generally a telling indication of a severe constitutional problem with the asserted power." *Trump v. Anderson*, 2024 WL 899207, at *5 (Mar. 4, 2024) (cleaned up); *see also Seila Law, LLC v. CFPB*, 140 S. Ct. 2183, 2201 (2020) ("Perhaps the most telling indication of [a] severe constitutional problem . . . is [a] lack of historical precedent to support it." (cleaned up)).

The unbroken tradition of not exercising the supposed formidable power of criminally prosecuting a President for official acts—despite ample motive and opportunity to do so, over centuries—implies that the power does not exist. *See id.*; *see also, e.g.*, *NFIB v. OSHA*, 595 U.S. 109, 119 (2022) (per curiam); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010)). "[T]he longstanding 'practice of the government,' can inform our determination of 'what the law is.'" *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 525 (2014) (first quoting *McCulloch*, 17 U.S. at 401, and then quoting *Marbury*, 5 U.S. at 177). "That principle is neither new nor controversial," and this Court's "cases have continually confirmed [this] view." *Id.* (citing *Mistretta v. United States*, 488 U.S. 361, 401 (1989), and eight other cases from 1803 to 1981).

American history abounds with examples of presidents who were accused by political opponents of committing crimes through their official acts—yet none was ever prosecuted, until last year. These include, among many others, John Quincy Adams' alleged "corrupt bargain" in

appointing Henry Clay as Secretary of State;[3] President George W. Bush's allegedly false claim to Congress that Saddam Hussein possessed stockpiles of "weapons of mass destruction," which led to war in which thousands of Americans were killed;[4] and President Obama's alleged authorization of a drone strike that targeted and killed a U.S. citizen abroad (and his teenage son, also a U.S. citizen).[5] They also include, among many other examples, President Clinton's last-minute pardon of fugitive financier Marc Rich,[6] President Clinton's repeated use of airstrikes in the Middle East in August and November 1998 in an alleged attempt to distract attention from the Monica Lewinsky scandal,[7] President Biden's egregious mismanagement of the United States' border security, and President Biden's alleged "material support for terrorism" through both the funding of the UNRWA despite its documented history of direct support for terrorism, and release

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[3] *See, e.g.*, Jessie Kratz, *The 1824 Presidential Election and the "Corrupt Bargain"*, NAT'L ARCHIVES (Oct. 22, 2020), https://prologue.blogs.archives.gov/2020/10/22/the-1824-presidential-election-and-the-corrupt-bargain.

[4] *See, e.g.*, Gary L. Gregg II, *George W. Bush: Foreign Affairs*, UVA MILLER CENTER, https://millercenter.org/president/gwbush/foreign-affairs; Tim Arango, *Ex-Prosecutor's Book Accuses Bush of Murder*, N.Y. TIMES (July 7, 2008), https://www.nytimes.com/2008/07/07/business/media/07bugliosi.html.

[5] *See, e.g.*, Spencer Ackerman, *US Cited Controversial Law in Decision to Kill American Citizen by Drone*, THE GUARDIAN (June 23, 2014), https://www.theguardian.com/world/2014/jun/23/us-justification-drone-killing-american-citizen-awlaki.

[6] Andrew C. McCarthy, *The Wages of Prosecuting Presidents for their Official Acts*, NAT'L REV. (Dec. 9, 2023), https://www.nationalreview.com/2023/12/the-wages-of-prosecuting-presidents-over-their-official-acts.

[7] *See, e.g.*, *World Media Troubled by Clinton's Timing in Airstrikes*, CNN (Dec. 18, 1998), http://edition.cnn.com/WORLD/meast/9812/18/iraq.press/; Francis X. Clines and Steven Lee Myers, *Attack on Iraq; The Overview; Impeachment Vote in House Delayed As Clinton Launches Iraq Air Strike, Citing Military Need to Move Swiftly*, N.Y. TIMES (Dec. 17, 1998), https://www.nytimes.com/1998/12/17/world/attack-iraq-overview-impeachment-vote-house-delayed-clinton-launches-iraq-air.html.

of billions of dollars to Iran's terror-sponsoring regime.[8] Despite numerous examples of presidents committing allegedly "criminal" behavior in their official acts throughout American history, none was ever prosecuted in 234 years before 2023. The "presuppositions of our political history," *Fitzgerald*, 457 U.S. at 745, thus confirm that prosecutors and courts lack authority to prosecute and place a President on trial for official acts.

E. Analogous Immunity Doctrines Support Presidential Immunity From Prosecution Based On Official Acts

Analogous immunity doctrines strongly favor the conclusion that absolute presidential immunity extends to immunity from criminal prosecution for official acts. *See Vance*, 140 S. Ct. at 2426 (noting the *Fitzgerald* Court's "careful analogy to the common law absolute immunity of judges and prosecutors").

In their common-law origins, immunity doctrines extended to both civil and criminal liability: "The immunity of federal executive officials began as a means of protecting them in the execution of their federal statutory duties from criminal or civil actions based on state law." *Butz v. Economou*, 438 U.S. 478, 489 (1978) (citation omitted). Common-law immunity doctrines

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[8] *See, e.g.*, Jason Willick, *The Eyebrow-Raising Line in the Trump Immunity Opinion*, WASH. POST (Feb. 7, 2024), https://www.washingtonpost.com/opinions/2024/02/07/trump-immunity-decision-disclaimer; Andrew C. McCarthy, *Thoughts on Biden's Funding of Terror-Sponsoring UNRWA and D.C. Circuit's Delay on Trump Immunity*, NAT'L REVIEW (Jan. 31, 2024), https://www.nationalreview.com/corner/thoughts-on-bidens-funding-of-terror-sponsoring-unrwa-and-d-c-circuits-delay-on-trump-immunity ("When President Biden insisted on restarting funding for UNRWA, to the tune of over $1 billion since 2021, there was abundant, well-known evidence, going back decades, that UNRWA provides material support to terrorism. It was not just a hypothetical possibility that Biden's funding might end up facilitating Hamas's operations. There were notorious cases over the years of UNRWA terror support."); The Editorial Board, *Hamas Was Right Under Unrwa's Nose*, WALL ST. J. (Feb. 11, 2024), https://www.wsj.com/articles/hamas-was-right-under-unrwas-nose-tunnels-gaza-israel-war-f715d219?mod=opinion_lead_pos2 ("Israel has provided evidence that 12 Unrwa employees took part in the Oct. 7 massacre, and that 1,200 are affiliated with or members of Hamas and Islamic Jihad.").

encompass the "privilege . . . to be free from arrest or civil process," *i.e.*, criminal and civil proceedings alike. *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951).

Members of Congress are immune from criminal prosecution for acts within the scope of their legislative duties. *See United States v. Johnson*, 383 U.S. 169, 179 (1966) ("The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature."). Speech and debate immunity resembles presidential immunity because it serves a unique role in preserving the separation of powers in our constitutional structure. *See Tenney*, 341 U.S. at 376. "[I]t is apparent from the history of the [Speech and Debate] clause that the privilege was not born primarily of a desire to avoid private suits . . . , but rather to *prevent intimidation by the executive and accountability before a possibly hostile judiciary*." *Johnson*, 383 U.S. at 180-81 (emphasis added). Thus, *Johnson* held that criminal prosecution for official acts—not civil liability—was the "chief fear" that led to the adoption of legislative immunity. *Id.* at 182; *see also Gravel v. United States*, 408 U.S. 606, 624 (1972) (reasoning that acts "within the sphere of legitimate legislative activity" "may not be made the basis for a civil or criminal judgment against a Member"). Presidential immunity serves no less important a role in "our scheme of government," *Tenney*, 341 U.S. at 377, than legislative immunity.

Likewise, absolute judicial immunity protects state and federal judges from criminal prosecution, as well as civil suits, based on their official judicial acts—excepting cases involving judicial bribery and extortion, which have long been held not to constitute judicial acts. *See Spalding v. Vilas*, 161 U.S. 483, 494 (1896) ("The doctrine which holds a judge exempt from a civil suit or indictment for any act done or omitted to be done by him, sitting as judge, has a deep root in the common law." (cleaned up)); *see also Alvarez v. Snyder*, 264 A.D.2d 27, 34 (1st Dep't

2000) ("[F]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." (cleaned up)); *Weitzner v. New York City Dep't of Soc. Servs.*, 212 A.D.2d 414, 414 (1st Dep't 1995) ("[I]mmunity is absolute where the conduct is judicial or quasi-judicial in nature.").

"This immunity applies even when the judge is accused of acting maliciously and corruptly." *Pierson v. Ray*, 386 U.S. 547, 554 (1967); *see also Fitzgerald*, 457 U.S. at 745-46; *Moskovits v. New York*, 206 A.D.3d 535, 536 (1st Dep't 2022) ("[T]he court correctly held the claim is barred by the doctrine of judicial immunity, which extends to all [j]udges and encompasses all judicial acts, even if such acts are in excess of their jurisdiction and are alleged to have been done maliciously or corruptly." (cleaned up)). In the few cases where prosecutors have brought criminal charges against judges for their judicial acts, courts have rejected them. *See, e.g.*, *United States v. Chaplin*, 54 F. Supp. 926, 928 (S.D. Cal. 1944) (holding that judicial immunity barred the criminal prosecution of a judge who was "acting in his judicial capacity and within his jurisdiction in imposing sentence and probation upon a person charged with an offense in his court to which the defendant has pleaded guilty"). Reviewing many authorities, *Chaplin* concluded that absolute immunity shielded the judge from criminal prosecution as well as civil suit. *Id.* at 934 (holding that criminal prosecution of judges for judicial acts "would . . . destroy the independence of the judiciary and mark the beginning of the end of an independent and fearless judiciary"); *cf. Salomon v. Mahoney*, 271 A.D. 478, 479-80 (1st Dep't 1946) ("The immunity of judges for statements made and acts done in their judicial capacity is for sound reasons of public interest and policy a fundamental principle of our jurisprudence on which rests the independence of the administration of justice."). The exact same reasoning applies to President Trump and all Presidents.

F. Public Policy Considerations Support Presidential Immunity From Prosecution

In considering presidential immunity, the Supreme Court "has weighed concerns of public policy, especially as illuminated by our history and the structure of our government." *Fitzgerald*, 457 U.S. at 747-48 (citations omitted). Here, public policy overwhelmingly supports a finding of immunity from prosecution based on evidence of official acts.

First, robust immunity is appropriate for officials who have "especially sensitive duties." *Fitzgerald*, 457 U.S. at 746. The President's duties are "highly sensitive." *Id.* at 756.

Second, immunity is most appropriate for officials from whom "bold and unhesitating action" is required. *Fitzgerald*, 457 U.S. at 745.[9] "[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties," and subject them "to the constant dread of retaliation." *Barr v. Matteo*, 360 U.S. 564, 571-72 (1959) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.)); *see also id.* at 571 (expressing concern that suits would "inhibit the fearless, vigorous, and effective administration of policies of government"). In *Vance*, the Supreme Court noted this concern was central to its adoption of absolute immunity for the President, holding that *Fitzgerald* "conclud[ed]

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[9] Similarly, in the context of immunity under the Speech or Debate Clause, which includes criminal immunity, "[t]here is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause. In scrutinizing this criminal prosecution, then, we look particularly to the prophylactic purposes of the clause." *Johnson*, 383 U.S. at 182. The Supreme Court has thus emphasized that criminal as well as civil immunity is essential for a legislator to have the freedom to exercise bold and unhesitating action in his or her legislative acts, which is itself essential to preserving the legislative "independence" required by the separation of powers: "The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature." *Id.* at 179.

that a President . . . must deal fearlessly and impartially with the duties of his office—not be made unduly cautious in the discharge of [those] duties by the prospect of civil liability for official acts." 140 S. Ct. at 2426 (cleaned up). The threat of criminal prosecution poses a greater risk of deterring bold and unhesitating action than the threat of civil suit.

Third, "[f]requently acting under serious constraints of time and even information," a President inevitably makes many important decisions, and "[d]efending these decisions, often years after they were made, could impose unique and intolerable burdens . . . ." *Imbler v. Pachtman*, 424 U.S. 409, 425-26 (1976). The President's "focus should not be blurred by even the subconscious knowledge" of the risk of future prosecution. *Id.* at 427. And "[t]here is no question that a criminal prosecution holds far greater potential for distracting a President and diminishing his ability to carry out his responsibilities than does the average civil suit." *Vance*, 140 S. Ct. at 2452 (Alito, J., dissenting). Far more than civil liability, the threat of criminal prosecution undermines the President's "maximum ability to deal fearlessly and impartially with the duties of his office." *Fitzgerald*, 457 U.S. at 752 (citation and quotation marks omitted).

Fourth, another key purpose of immunity for senior officials is to "prevent them being harassed by vexatious actions." *Spalding*, 161 U.S. at 495 (quotation omitted); *see also Vance*, 140 S. Ct. at 2452 (Alito, J., dissenting) (expressing concern that the subpoena "threaten[ed] to impair the functioning of the Presidency and provides no real protection against the use of the subpoena power by the Nation's 2,300+ local prosecutors"). The President, as the most high-profile government official in the country, is most likely to draw politically motivated ire, and most likely to be targeted for harassment by vexatious actions. *See Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 369 (2004) (recognizing "the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its

constitutional duties."). The rationale of *Vance*, 140 S. Ct. at 2426, provides additional support for a finding of official immunity—as *Fitzgerald*, *Spalding*, *Butz*, *Imbler*, and similar cases held. Without immunity from criminal prosecution based on official acts, the presidency will cease to function and that will erode the bedrock of our republic.

II. The Court Should Adjourn The Trial Until The Supreme Court Decides *Trump v. United States*

While the concept of presidential immunity is firmly established, the doctrine's scope presents a "serious and unsettled question of law." *Fitzgerald*, 457 U.S. at 743. Therefore, the Court should adjourn the trial until the Supreme Court resolves *Trump v. United States* for several reasons.

While adjournments are "ordinarily committed to the sound discretion of the trial court," "in particular situations, when the protection of fundamental rights has been involved in requests for adjournments, that discretionary power has been more narrowly construed." *People v. Spears*, 64 N.Y.2d 698, 699-700 (1984); *see also People v. Foy*, 32 N.Y.2d 473, 477 (1973) (recognizing that "mere inconvenience is not sufficient ground for denying an adjournment when to do so would abridge a basic right"). Because of the importance of the Presidency in the constitutional order, as well as the Supremacy Clause and related federalism principles implicated here, the adjournment is warranted to ensure proper adjudication of the presidential immunity defense and to prevent improper evidence of official acts from being used in the unprecedented fashion apparently contemplated by the People.

Waiting to try the case until after the Supreme Court addresses the question before it—following oral argument just next month—will likely simplify the application of the defense to evidentiary issues raised by the People's motions *in limine*. *See Mook v. Homesafe Am., Inc.*, 144 A.D.3d 1116, 1117 (2d Dep't 2016) ("[A] prior determination in the criminal proceeding could

have collateral estoppel effect in this action, thereby simplifying the issues."). Specifically, as discussed below, the scope of "official acts" for purposes of applying presidential immunity is a developing area of the law that the Supreme Court is expected to address, at least to a certain extent, in *Trump v. United States*. *See Gen. Aniline & Film Corp. v. Bayer Co.*, 305 N.Y. 479, 485 (1953) (reasoning that "considerations of comity and orderly procedure" are relevant to stay application); *cf. Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 63 n.18 (1997) (explaining that "in the interest of uniformity and to discourage forum shopping, the Arizona appeals court decided to defer to the federal litigation, forgoing independent analysis," including "stay[ing] proceedings pending our decision in this case"); *Aquino v. United States*, 2020 WL 1847783, at *1 (S.D.N.Y. Apr. 13, 2020) (noting that defendant's "motion has been the subject of judicial stays pending decisions of appellate courts").

The adjournment would also "avoid[] the unnecessary risk of inconsistent adjudications as to the defenses asserted" by President Trump in state and federal courts relating to the presidential immunity doctrine. *Goodridge v. Fernandez*, 121 A.D.2d 942, 945 (1st Dep't 1986); *Belopolsky v. Renew Data Corp.*, 41 A.D.3d 322, 322 (1st Dep't 2007) (finding no abuse of discretion in stay, "[u]pon due consideration of the goals of judicial economy, orderly procedure and the prevention of inequitable results," where "the determination of the prior action may dispose of or limit issues which are involved in the subsequent action"); *Schneider v. Lazard Freres & Co.*, 159 A.D.2d 291, 293-94 (1st Dep't 1990) ("[W]e stay the New York action because the Delaware action raises numerous possibilities for the application of collateral estoppel . . . .").

Finally, the adjournment would mitigate the risk that an error in the application of this complex federal-law issue could require the Court, the parties, the State, the City, and the County to expend the resources necessary to re-try the case.

III. The People Must Be Precluded From Offering Evidence Of President Trump's Official Acts

The Court should preclude the People from offering evidence at trial that Your Honor determines, following a hearing outside the presence of the jury, constituted an "official act" during President Trump's first term in Office.

A. "Official Acts" Include Presidential Decisions On The "Outer Perimeter"

The presidential immunity doctrine is "capacious by design." *Blassingame*, 87 F.4th at 12. President Trump is entitled to immunity "for acts within the 'outer perimeter' of his official responsibility." *Fitzgerald*, 457 U.S. at 756 (quoting *Barr*, 360 U.S. at 575). This "outer perimeter" includes presidential actions that "can reasonably be understood as the official actions of an office-holder," where it is "reasonable to think he was exercising his official responsibilities as President." *Blassingame*, 87 F.4th at 30. "The decisions from which [*Fitzgerald*] drew the outer-perimeter test make evident that a President's official responsibilities encompass more than just those acts falling within the office's express constitutional and statutory authority," and also include even "discretionary acts" within the "concept of duty" associated with the Presidency. *Id.* at 13 (cleaned up).

> Put somewhat differently: an act lies within the outer perimeter of an official's duties if it is the kind of act not manifestly or palpably beyond [the official's] authority, but rather having more or less connection with the general matters committed by law to his control or supervision.

Id. (cleaned up).

"[T]he President's actions do not fall beyond the outer perimeter of official responsibility merely because they are unlawful or taken for a forbidden purpose." *Blassingame*, 87 F.4th at 14. The Supreme Court has so held, repeatedly. *See, e.g.*, *Fitzgerald*, 457 U.S. at 756 (rejecting a rule that would permit "an inquiry into the President's motives" as "highly intrusive"); *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (reasoning that judicial "immunity applies even when the judge is

accused of acting maliciously and corruptly"); *Barr*, 360 U.S. at 575 ("The claim of an unworthy purpose does not destroy the privilege."); *Spalding*, 161 U.S. at 498 (holding that immunity does not turn on "any personal motive that might be alleged to have prompted his action"); *Bradley v. Fisher*, 80 U.S. 335, 354 (1871) (holding that immunity "cannot be affected by any consideration of the motives with which the acts are done").

B. The Court Must Preclude Evidence Of Official Acts

President Trump is entitled to "every opportunity" to prevent official-acts evidence from being used against him at trial, and the Court must preclude such evidence. *Blassingame*, 87 F.4th at 22.

In assessing whether immunity applies, the Court must look to the "nature of the act itself." *Stump v. Sparkman*, 435 U.S. 349, 362 (1978). "[T]here is not always a clear line between [the President's] personal and official affairs." *Trump v. Mazars USA, LLP*, 591 U.S. 848, 868 (2020). The issue is whether the action can "reasonably be understood" as official. *Blassingame*, 87 F.4th at 21 (quoting *Trump v. Hawaii*, 585 U.S. 667, 705 (2018)). "[T]he inquiry does not consist of trying to identify speech that would benefit a president politically." *Id.* at 22 (cleaned up). "When an appropriately objective, context-specific assessment yields no sufficiently clear answer in either direction, the President, in our view, should be afforded immunity." *Blassingame*, 87 F.4th at 21.

In the current procedural posture, *Blassingame* and other immunity authorities require the Court to preclude the People from offering evidence at trial of President Trump's official acts. For example, in *Johnson*, the Supreme Court held that, in a case involving "a criminal statute of general application," the prosecutors could "not draw in question the legislative acts of the defendant member of Congress or his motives for performing them" under the Speech or Debate Clause. 383 U.S. at 185. "[A]ll references to this aspect of the conspiracy" had to be "eliminated" so that the case was "wholly purged of elements offensive to the Speech or Debate Clause." *Id.*

Under these appropriate standards, President Trump's social media posts and public statements—while acting as President and viewed in context—fell within the outer perimeter of his Presidential duty, to which communicating with the public on matters of public concern was central. *See, e.g.*, Exs. 1-6; *Hawaii*, 585 U.S. at 701 ("The President of the United States possesses an extraordinary power to speak to his fellow citizens . . . ."); *see also Council on Am. Islamic Rels. v. Ballenger,* 444 F.3d 659, 665-666 (D.C. Cir. 2006) ("A Member's ability to do his job as a legislator effectively is tied, as in this case, to the Member's relationship with the public and in particular his constituents and colleagues in the Congress. In other words, there was a clear nexus between the congressman answering a reporter's question about the congressman's personal life and the congressman's ability to carry out his representative responsibilities effectively. To that extent, service in the United States Congress is not a job like any other." (cleaned up)); *see also Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009) ("A government entity has the right to speak for itself. . . . . [I]t is entitled to say what it wishes, and to select the views that it wants to express." (cleaned up)); *Barr*, 360 U.S. at 574-75 (finding agency head immune from libel suit where commenting on, *inter alia*, "his own integrity in his public capacity," which "had been directly and severely challenged in charges made on the floor of the Senate and given wide publicity"); JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY 4 (2017) ("Today it is taken for granted that presidents have a *duty* constantly to defend themselves publicly . . . And for many, this presidential 'function' is not one duty among many, but rather the heart of the presidency—its essential task.") (emphasis in original).

President Trump's April 5, 2018 statement from Air Force One is a powerful example of the manner in which the context of the statement—here, the location—bears on the analysis. *See* Ex. 4; *Blassingame*, 87 F.4th at 22 ("[S]everal objective considerations strongly suggest that the

speech was—and was treated by the President and executive branch as—part of an official event, regardless of whether what was said or how it was conceived might have borne some subjective connection to enhancing President Trump's re-election prospects.").

With respect to President Trump's social media posts, *e.g.*, Exs. 1-3, the official-acts conclusion is supported by the fact that his Twitter account was "one of the White House's main vehicles for conducting official business." *Knight First Amend. Inst. v. Trump*, 928 F.3d 226, 232 (2d Cir. 2019), *judgment vacated as moot*, 141 S. Ct. 1220 (2021); *see also Blassingame*, 87 F.4th at 21 (reasoning that "if an activity is organized and promoted by official White House channels," "it is more likely an official presidential undertaking"). Indeed, the Second Circuit held "that the evidence of the official nature of the Account is overwhelming." *Knight First Amend. Inst.*, 928 F.3d at 234.

The Office of Government Ethics ("OGE"), "established by the Ethics in Government Act of 1978, provides overall leadership and oversight of the executive branch ethics program, which is designed to prevent and resolve conflicts of interest."[10] Because OGE regulates Executive Branch personnel, President Trump's communications with OGE during his first term were also official acts and are therefore also inadmissible at trial. *See, e.g.*, Ex. 7.

Finally, there is no constitutionally significant distinction to be drawn between documents and testimony for purposes of presidential immunity. Thus, the Court must preclude the People from eliciting testimony relating to official-acts communications by President Trump, such as those disclosed in grand jury testimony by [redacted] and [redacted]. The same rule applies, to the extent President Trump's statements were official in nature, for other witnesses.

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[10] U.S. OFFICE OF GOV'T ETHICS, OGE AGENCY PROFILE 4 (2020), https://www.oge.gov/web/OGE.nsf/0/0DCB095C47EB209D85258610005CA2D3/$FILE/2020%20OGE%20Profile%20Book%20(Final).pdf.

CONCLUSION

For the foregoing reasons, the Court should (1) adjourn the trial pending Supreme Court review of the scope of the presidential immunity doctrine in *Trump v. United States*, which is scheduled to be argued before the Supreme Court on April 25, 2024; and (2) following an evidentiary hearing outside the presence of the jury, preclude evidence of President Trump's official acts at trial based on presidential immunity.

Dated: March 7, 2024
New York, N.Y.

By: /s/ Todd Blanche

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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 ON DEFENDANT'S MOTION TO EXCLUDE EVIDENCE AND FOR AN ADJOURNMENT ON THE GROUNDS OF PRESIDENTIAL IMMUNITY Ind. No. 71543/2023

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

On April 4, 2023, the Defendant was arraigned before this Court on an indictment charging him with 34 counts of Falsifying Business Records in the First Degree, in violation of Penal Law § 175.10.

On May 4, 2023, the Defendant filed a notice of removal to federal court. *People v. Trump*, SD NY No. 23-CV-03773 (AKH), ECF No. 1. In opposing the People's motion to remand the case back to New York County Supreme Court, Defendant, while arguing that he "...has more than adequately demonstrated a federal defense entitling him to Supremacy Clause immunity," made clear in that same section that he was fully aware of the defense of presidential immunity. *Id.* at ECF No. 34 at pgs. 21-23.

On October 5, 2023, Defendant moved to dismiss the indictment in *United States v. Trump*, US Dist Ct, DDC No. 23-CR-257 (TSC), where he is charged with four criminal counts stemming from actions he allegedly engaged in to interfere with the 2020 presidential election. *United States v. Trump*, US Dist Ct, DDC 23 CR 257, (TSC) ECF No. 74. In his motion, he argued among other things, that the federal charges should be dismissed on the grounds of presidential immunity, that the "scope of criminal immunity includes all actions that fall within the 'outer perimeter' of the President's official duties," and that "making public statements, including tweets, about matters of national concern is an official action that lies at the heart of Presidential duties." *Id.* at pgs. 21, 28. The motion was denied by Judge Tanya S. Chutkan on December 1, 2023. *Id.* at ECF No. 171. Defendant appealed on December 7, 2023. On February 6, 2024, after further briefing by the parties, the United States Court of Appeals, District of Columbia Circuit, upheld Judge Chutkan's decision. *United States v. Trump*, 91

F4th 1173 [DC Cir 2024]. On February 28, 2024, the Supreme Court granted *certiorari* in the matter of *Trump v. United States*, --Sct-- 2024 WL 833184 [2024], Defendant's Memo at pg. 2.

On February 22, 2024, Defendant filed his motions *in limine* in the instant matter. Attached to the motions was the Affirmation of Todd Blanche, (hereinafter "Blanche MIL Affirmation"), which contained numerous exhibits. Exhibit 5 contained statements purportedly made by Defendant, which the People intend to introduce at trial. Defendant sought to preclude the "94 statements allegedly made by President Trump in various forms of media…" Motions *in limine* (hereinafter "Defendant's MIL"). Defendant's MIL at pgs. 40-43. On February 22, 2024, the People also filed their motions *in limine* (hereinafter "People's MIL"), wherein the People argued that this Court should "permit the introduction of evidence regarding the defendant's attempts to dissuade witnesses from cooperating with law enforcement because such evidence shows defendant's consciousness of guilt and corroborates his intent." People's MIL at pg. 50. The People specifically noted that "defendant has targeted Cohen and Daniels on social media and in other public statements with persistent, harassing, and denigrating comments." *Id.* at pg. 51.

On February 29, 2024, Defendant responded to the People's motions *in limine* (hereinafter "Defendant's MIL Opposition"). In his response, Defendant argued that the People "must pre-clear" the evidence of a purported pressure campaign against witnesses with the Court prior to its introduction at trial. Defendant's MIL Opposition at pg. 29. Specifically, Defendant argued that the "People need to identify the witness(es) in question, the substance of the proffered testimony, and any related exhibits they seek to offer. *Id.*

On March 7, 2024, Defendant filed the instant motion to exclude evidence and for an adjournment based on presidential immunity (hereinafter "Defendant's Memo"). At the time Defendant's Memo was filed, trial was set to commence on March 25, 2024. On March 13, 2024, the People filed their motion in opposition (hereinafter "People's Opposition.").

CONTENTIONS OF THE PARTIES

Defendant seeks (1) "an adjournment of the trial pending review of the scope of the presidential immunity doctrine in *Trump v. United States*" and (2) preclusion of "evidence of President Trump's official acts at trial based on presential immunity." Defendant argues that he is (1) immune from state prosecution based on official acts, (2) the instant matter should be adjourned in light of the recent action by the Supreme Court of the United States of America granting *certiorari*, and (3) that the People should be precluded from offering evidence of President Trump's official acts. Specifically, the

Defendant argues that he is entitled to immunity "for acts within the 'outer perimeter' of his official responsibility." Defendant's Motion at pg. 20, citing to *Nixon v. Fitzgerald*, 457 US 371 (1982).

The People cite to Criminal Procedure Law ("CPL") § 255.20(3) and argue that Defendant's motion must be denied as untimely. They further argue that Defendant's claim of presidential immunity is "not a basis for precluding evidence that is otherwise relevant and admissible." People's Opposition at pg. 5. The People also argue that the Defendant provides no authority to support his claim that immunity can "preclude the introduction of evidence of official presidential acts in a criminal proceeding, even if that evidence is otherwise relevant and admissible for charges to which no immunity attaches." *Id.* at 9. Finally, the People note that although Defendant argues that presidential immunity applies to potential *Molineux* evidence, he does *not* argue that the defense applies to the charged conduct at the heart of the instant Indictment. *Id.*

DISCUSSION

For the following reasons, Defendant's motion is DENIED as untimely.

"Except as otherwise expressly provided by law, whether the defendant is represented by counsel or elects to proceed pro se, all pre-trial motions shall be served or filed within forty-five days after arraignment and before commencement of trial, or within such additional time as the court may fix upon application of the defendant made prior to the entry of judgment." CPL § 255.20(1). The court must entertain and decide on its merits an appropriate pre-trial motion based upon "grounds of which the defendant could not, with due diligence, have previously been aware, or which, for other good cause, could not reasonably have been raised" within the period specified by CPL § 255.20(1). CPL § 255.20(3). A court may summarily deny a motion that is filed late. William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, CPL § 255.20

A court's decision on the issue of timeliness is discretionary. *See People v. Marte*, 197 AD3d 411 [1st Dept 2021]. In reviewing the excuses proffered by the Defendant for the timing of his motion, this Court finds that they are inadequate and not convincing. *Id.* at 414. Defendant appears to justify the timing of the filing on the basis of two events: (1) the filing of the People's motions *in limine* on February 22, 2024, which indicated their intent to offer at trial evidence that Defendant engaged in an alleged "pressure campaign" against certain witnesses and (2) the February 28, 2024, decision by the United States Supreme Court to grant Defendant certiorari in *Trump v. United States*, --Sct-- 2024 WL 833184 [2024], where the issue of presidential immunity will presumably be decided. Defendant's Memo at pgs. 1-2.

Those two reasons, even when considered in tandem, as Defendant does, fail to explain why Defendant waited long past the statutory period allotted by CPL § 255.20. The Defendant had ample notice that the People were in possession of, and intended to use, the various statements allegedly made by Defendant on social media, in public, and in various interviews. He was also well aware that the defense of presidential immunity, even if unsuccessful, might be available to him. For example, and as discussed more fully below, Defendant fully briefed the issue of presidential immunity in his motion to dismiss the matter of *United States v. Trump*, US Dist Ct, DDC 23 CR 257, (TSC) (hereinafter "Federal Insurrection Matter") on October 5, 2023. He also demonstrated awareness that the defense was available to him when he attempted to remove the instant matter to federal court on May 4, 2023, in *People v. Trump*, SD NY No. 23-CV-03773 (AKH). Nonetheless, Defendant chose not to raise the defense of presidential immunity until well past the 45-day period provided by statute. He also did not raise it in his omnibus motion, in his motions *in limine* or in his response to the People's motions *in limine*. Defendant's decision is unjustifiable and renders this motion untimely. Further, and as an aside, the fact that the Defendant waited until a mere 17 days prior to the scheduled trial date of March 25, 2024, to file the motion, raises real questions about the sincerity and actual purpose of the motion. After all, Defendant had already briefed the same issue in federal court and he was in possession of, and aware that, the People intended to offer the relevant evidence at trial that entire time. The circumstances, viewed as a whole, test this Court's credulity.

Turning specifically to Defendant's availability of the defense of presidential immunity. The procedural history of the instant matter, together with the procedural history of the Federal Insurrection Matter, leave no doubt that Defendant was aware that the defense, even if unsuccessful, was available to him well before March 7, 2024, when this motion was filed. On October 5, 2023, the Defendant moved to dismiss his Federal Insurrection Matter on the grounds of presidential immunity. *United States v. Trump*, 2023 WL 8359833, 23cr257, TSC ECF No. 74. In his motion papers therein, he specifically argued that that his actions as president were on the "outer perimeter," that is, "the law provides absolute immunity 'for acts within the 'outer perimeter' of [the President's] official responsibility." *Id.* at pg. 1, *citing to Nixon v. Fitzgerald*, 457 US 731, 756 [1982]. The "outer perimeter" of Presidential duties, the Defendant argued, "encircles a vast swath of territory, because the scope of the President's duty and authority in our constitutional system is uniquely and extraordinarily broad." *Id.* at pg. 22. He also took the position that "...making public statements on matters of public concern especially where they relate to a core federal function such as the administration of a federal election – unquestionably falls within the scope of the President's official duties." *Id.* at pg. 28. Those

arguments are substantially similar to arguments he presents now – five months later. *See* Defendant's Memo at pgs. 3, 20, 22. Defendant's awareness of the availability of the defense is further demonstrated in arguments he has made in this very proceeding. For example, when he attempted to remove this case to federal court, Defendant argued that he "is immune from state prosecution for actions taken as a result of his role as president." *People v. Trump*, 23cv03773 (AKH) at ECF No. 34 at pg. 21. Nonetheless, Defendant strategically waited until March 7, 2024, to raise the defense.

Turning next to Defendant's knowledge of the People's intention to introduce evidence of his alleged "pressure campaign" against certain witnesses. This Court finds that Defendant was indeed aware and had notice of the People's intent, well before he filed this motion, and he has failed to demonstrate good cause for the late filing. He has also failed to persuade this Court that it should consider the motion in the interest of justice. *People v. Roberts*, 76 Misc3d 448 [Sup Ct, NY County 2022]. The People note in their opposition, that the alleged "pressure campaign" was expressly referred to and discussed in the statement of facts which accompanied the Indictment in this matter, as well as in the grand jury minutes, all of which were provided to Defendant in and around April and May 2023. People's Opposition at pg. 3. That Defendant had notice of the statements cannot possibly be disputed. For example, in the instant motion, Defendant references three tweets that the People intend to introduce at trial as *Molineux* evidence. *See* Defendant's Memo at pg. 3. However, the three tweets (among other statements) were referenced in Defendant's *own exhibit* attached to his motions *in limine*. Exhibit 5 of Blanche MIL Affirmation. Indeed, Defendant argued in his motions *in limine*, that the very same statements should be "precluded … until [the People have] established their relevance and admissibility outside the presence of the jury." Defendant's Memo in Support of his Motions *in Limine* at pgs. 40-43. Rather than make the argument, as Defendant does now, that the admissions should be precluded on the grounds of presidential immunity, Defendant argued then that the statements should be precluded on relevance and evidentiary grounds.

CONCLUSION

This Court finds that Defendant had myriad opportunities to raise the claim of presidential immunity well before March 7, 2024. Defendant could have done so in his omnibus motions on September 29, 2023, which were filed a mere six days before he briefed the same issue in his Federal Insurrection Matter and several months *after* he brought his motion for removal to federal court on

May 4, 2023. Further, the Defendant could have expanded his argument on this topic in his motions *in limine* or in his opposition to the People's motions *in limine* – but he did not.

Lastly, having addressed the issue of timeliness and turning to Defendant's motion for preclusion of the People's evidence of the alleged "pressure campaign," the Court reminds Defendant that it already ruled on this issue in its Decision and Order on Defendant's Motions *in Limine* at pgs. 7-8

Defendant's motion is **DENIED** in its entirety as untimely. The Court declines to consider whether the doctrine of presidential immunity precludes the introduction of evidence of purported official presidential acts in a criminal proceeding[1].

The foregoing constitutes the Decision and Order of this Court.

April 3, 2024
New York, New York

APR 03 2024

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

HON. J. MERCHAN

[1] As the People have noted in their Memo, the Defendant does not appear to raise a claim of presidential immunity as to the underlying facts that make out the charges of Falsifying Business Records in the First Degree. Therefore, his argument here is not the same as his argument in the Federal Insurrection Matter where the issue of "absolute immunity from federal criminal liability" was presented in the context of the underlying criminal conduct that serves as the basis for that indictment.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

In the Matter of the Application of: DONALD J. TRUMP, Petitioner, For a Judgment Under Article 78 of the CPLR -against- THE HONORABLE JUAN M. MERCHAN, A.J.S.C., and PEOPLE FOR THE STATE OF NEW YORK by ALVIN L. BRAGG, JR., MANHATTAN DISTRICT ATTORNEY, Respondents.	Cas No 2024-0241 **VERIFIED ARTICLE 78 PETITION**

TO APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK:

Petitioner, President Donald J. Trump, by his attorneys, Blanche Law PLLC, alleges the following as and for his Verified Petition against The Honorable Juan M. Merchan, A.J.S.C. ("Justice Merchan") and the People of the State of New York, by Alvin L. Bragg, Jr., Manhattan District Attorney ("DANY," and together with Justice Merchan, "Respondents"):

PRELIMINARY STATEMENT

1. President Trump brings this Article 78 proceeding to redress three ongoing constitutional violations that, if not promptly addressed through prohibition, would render any trial in *People v. Trump*, Ind. No. 71543-23 fundamentally unfair and result in irreparable harm to the constitutional rights of President Trump and the public.

2. First, Justice Merchan has exceeded his authority by declining to recuse himself notwithstanding a prohibited interest in the proceedings and strong appearances of impropriety, in violation of constitutional due process, Judiciary Law § 14, and 22 NYCRR §§ 100.2, 100.3.

3. Justice Merchan's daughter has a direct financial interest in these proceedings because of her ownership stake and leadership role at Authentic Campaigns, Inc. Authentic services exclusively Democrat clients. Based on public disbursements data, Authentic is the #21 ranked vendor in the country in connection with the 2024 election. President Biden and Vice President Harris are long-term clients of Authentic and Ms. Merchan, along with many other politicians and entities who are actively campaigning and advocating against President Trump. Authentic's clients disbursed more than $18 million to the company between the return of the Indictment and the present. At least six of Authentic's clients used fundraising solicitations that referenced the proceedings Justice Merchan is presiding over, including around the time of the Indictment, President Trump's arraignment, and/or following the Court's denial of President Trump's first recusal motion in August 2023.

4. Justice Merchan's interest in these proceedings by virtue of the close relationship with an immediate relative, and Ms. Merchan's ongoing receipt of commercial and reputational benefits based on the manner in which Justice Merchan has conducted these proceedings, requires recusal based on an actual conflict and an unacceptable appearance of impropriety.

5. As President Trump noted to Justice Merchan, the necessary and appropriate outcome is illustrated by the fact that it would be completely unacceptable to most New Yorkers if the judge presiding over these proceedings had an adult child who worked at WinRed or MAGA Inc.

6. Justice Merchan has not addressed President Trump's April 3, 2024 motion based on these and other facts, and has instead continued to issue substantive rulings and move the case toward jury selection beginning on April 15. Accordingly, recourse to this Court through this special proceeding was necessary as the trial date approaches.

7. In connection with a prior recusal motion, filed in August 2023, Justice Merchan ruled that President Trump's arguments were "speculative." As discussed herein, while we disputed that reasoning at the time, it is now demonstrably incorrect.

8. In the August 2023 decision, Justice Merchan relied on a May 4, 2023 ethics opinion from the Advisory Committee on Judicial Ethics, which found "nothing in [Justice Merchan's] inquiry to suggest that the outcome of the case could have any effect on the judge's relative, the relative's business, or any of their interests." Justice Merchan refused to provide the parties with the substance of the "inquiry" that led to the ethics opinion, and recent developments led the defense to file the second recusal motion.

9. Specifically, on March 27, 2024, the Office of Court Administration issued a public statement on behalf of Justice Merchan relating to a social media account used at some point by Ms. Merchan, which contained posts reflecting hostility and animosity toward President Trump. In the statement, Justice Merchan indicated that Ms. Merchan "deleted" the account in April 2023—the same month as his undisclosed ethics "inquiry." The statement therefore suggests that Ms. Merchan destroyed evidence of bias during the same month that Justice Merchan solicited feedback from the Advisory Committee. Based on that suggestion, President Trump renewed his examination of Authentic and its clients, which led to the discovery of additional strong, recent evidence supporting the motion.

10. Under these circumstances, the second recusal motion was timely and appropriate, and recusal is required to protect the integrity of the proceedings and the institutions involved.

11. Second, Justice Merchan has exceeded his authority through a series of rulings, including as recently as an April 5, 2024 email, in which he improperly restricted President Trump's ability to file motions and other applications during the trial.

12. Collectively, these restrictions require President Trump to provide DANY with up to 48 hours' notice of a mere request to file a motion, which is limited to a single page. DANY gets an additional 24 hours to respond to the request. And Justice Merchan may—or may not—authorize President Trump to file the motion at all, which then requires additional time for briefing from both sides. Thus, the current restrictions allow, at minimum, a 72-hour delay before President Trump can even file a motion, and Justice Merchan has reserved the right to summarily deny an application to file a motion without actual briefing. Such a procedure has no basis in law, and is completely unworkable in a trial setting where President Trump must defend himself in real time as DANY presents evidence.

13. Justice Merchan purported to rely on CPL § 255.20 to impose these restrictions, but that provision is limited to "pre-trial motions," as defined in CPL § 255.10, and has no bearing on evidentiary applications during the trial that are critical to President Trump's defense. This is not just a procedural error. Justice Merchan's ruling exceeded his authority by placing limitations on President Trump's constitutional right to defend himself.

14. In addition, the restrictions on defense motions delay public filing and docketing of defense applications for days, at least. In one egregious example, Justice Merchan has delayed the docketing of exhibits appended to March 21, 2024 evidentiary submissions, which he relied on to deny a defense motion following a March 25, 2024 hearing, until at least May 1, 2024. These

delays violate President Trump's Sixth Amendment right to a public trial, which attaches to pre-trial proceedings as well, and the First Amendment rights of the public and the press to access these proceedings.

15. Several major news organizations were concerned enough about these developments that they retained counsel and, on March 22, 2024, submitted a letter to Justice Merchan expressing concerns about sealing procedures and public access. Justice Merchan never directly addressed the submission. Based on these additional constitutional problems relating to public-trial and open-access rights, relief in the form of prohibition is appropriate with respect to Justice Merchan's restrictions on the filing of defense motions during the trial.

16. Third, Justice Merchan exceeded his authority by issuing an order on April 3, 2024, in which he refused to consider evidentiary objections to DANY's trial evidence based on the presidential immunity doctrine.

17. The presidential immunity doctrine is rooted in the text of the U.S. Constitution. In this unprecedented case, the doctrine requires that DANY not be permitted to offer evidence at trial that is based on President Trump's "official acts" while he was President of the United States between 2017 and 2020.

18. Justice Merchan acknowledged that President Trump's argument was evidentiary in nature, in that the defense was seeking to "exclude" evidence at trial. However, as with the restrictions on other defense motions, Justice Merchan exceeded his authority by relying on CPL § 255.20 as a basis for denying the motion as untimely.

19. On its face, CPL § 255.20 did not apply to President Trump's motion to exclude evidence based on the presidential immunity doctrine. Nor is there any rule of law that authorized Justice Merchan to deem a defense argument waived because President Trump did not raise it in

separate motions *in limine*. President Trump would have been well within his rights to refrain from previewing this evidentiary challenge to his trial adversaries, and raising it contemporaneously when DANY offered the evidence at issue. He therefore cannot be punished for raising the argument prior to trial, which is the result of Justice Merchan's ruling.

20. In fact, the timing of President Trump's motion was driven by DANY's motions *in limine* describing their anticipated trial evidence and recent events at the U.S. Supreme Court. On February 28, 2024, in *Trump v. United States*, the Supreme Court agreed to address "[w]hether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office." On March 4, 2024, in *Trump v. Anderson*, the Court emphasized federalism principles, which in this case counsel in favor of preventing local prosecutors from relying on official-acts evidence at a criminal trial of a former President. Based on these developments, President Trump timely filed the motion on March 7, 2024, including a request that Justice Merchan hold the case in abeyance until the Supreme Court resolves *Trump v. United States*.

21. Justice Merchan abused his discretion under the unprecedented circumstances in this case, including the prosecution of a former President who is at the same time the leading candidate in the 2024 Presidential election, by refusing to adjourn the trial until *Trump v. United States* is decided. Prohibition of the ruling is warranted on that basis.

22. More importantly, Justice Merchan cannot refuse to even address an important issue that the Supreme Court has said it will shortly resolve. Prohibition of Justice Merchan's presidential immunity ruling is necessary because of the ramifications for the institution of the Presidency that would follow from a trial judge refusing to permit a former President recourse to the doctrine in support of his defense in a criminal prosecution.

23. Finally, the three rulings at issue in this Article 78 proceeding necessarily implicate President Trump's protected campaign advocacy, and the corresponding First Amendment right of the American people to hear and engage with that advocacy. Justice Merchan's rulings threaten to divert President Trump from his leading candidacy to participate in a fundamentally unfair criminal trial, and to permit Authentic, DANY, and their clients and allies to use the trial proceedings to unfairly and improperly attack President Trump's fitness for office. As discussed below, if unabated, that course of action would result in constitutional violations and irreparable harm. Accordingly, the causes of action set forth herein must be resolved before the trial is permitted to proceed.

JURISDICTION AND VENUE

24. This Court has jurisdiction pursuant to CPLR §§ 7804(b) and 506(b)(1).

25. Venue in this Court is proper pursuant to CPLR § 506(b)(1) because the action, in the course of which the matter sought to be enforced or restrained originated, is triable in Supreme Court, New York County.

THE PARTIES

26. Petitioner, President Donald J. Trump, is a defendant in the matter captioned *People v. Trump*, Indictment No. 71543-23, currently pending before Supreme Court, New York County Criminal Division, and the front-running candidate for the 2024 Presidential election.

27. Respondent The Honorable Juan M. Merchan, A.J.S.C, is an Acting Justice of the Supreme Court, New York County. Justice Merchan is the Justice presiding in the matter captioned *People v. Trump*, Ind. No. 71543-23.

28. Respondent Alvin L. Bragg, Jr., Manhattan District Attorney, for the People of the State of New York, is responsible for the prosecution of the matter captioned *People v. Trump*,

Ind. No. 71543-23.

FACTS COMMON TO ALL CAUSES OF ACTION

I. The Discovery Protective Order

29. DANY initiated the underlying criminal action, captioned *People v. Trump*, Indictment No. 71543-23, in Supreme Court, New York County on March 30, 2023, following a five-year investigation that former Special District Attorney Mark Pomerantz dubbed the "zombie" case.

30. DANY charged President Trump with 34 counts of felony falsifying business records, in violation of Penal Law § 175.10. A copy of the Indictment and DANY's "Statement of Facts" are annexed hereto as Exhibit 1.

31. On April 24, 2023, DANY filed a motion for a protective order pursuant to CPL § 245.70, which is annexed hereto as Exhibit 2.

32. President Trump opposed the motion on May 1, 2023. On May 2, 2023, President Trump joined in an opposition filed by various news organizations, annexed hereto as Exhibit 3, including to the extent that the proposed protective order "require[d] the advance sealing or redaction of court filings or their exhibits in this case," and "require[d] any Party to seek consent from the opposing party before filing any motion in unredacted form on the public docket." A copy of President Trump's May 2, 2023 opposition filing is annexed hereto as Exhibit 4.

33. During a hearing on May 4, 2023, Justice Merchan addressed DANY's motion for a protective order. The transcript of the hearing is annexed hereto as Exhibit 5. At the hearing, Justice Merchan explained that he would require that, every time "one side wishes to file a document," the filer must provide the document to the adversary and wait 48 hours for the adversary to propose redactions. Ex. 5 at 46.

34. On May 8, 2023, over President Trump's objection, Justice Merchan entered a protective order in substantially the form proposed by DANY. The Protective Order is annexed hereto as Exhibit 6.

35. The Protective Order restricts the "disseminat[ion]" and "disclos[ure]" of "Covered Materials," which include discovery produced by DANY, as well as "correspondence provided to or exchanged with defense counsel of record on the above-captioned matter," "without prior approval from the Court . . . ." Ex. 6.

36. Justice Merchan and DANY have routinely relied on the Protective Order to withhold from the public substantive case-related communications between Justice Merchan and the parties that affect President Trump's rights, including letters and emails. For example, several formal written requests for relief by the defense, including the defense's June 20, 2023 letter requesting the opportunity to file a short reply regarding recusal of Justice Merchan from this case, a January 29, 2024 request for a one-day adjournment of the February 15, 2024 conference, and a March 22, 2024 request relating to DANY's non-public evidentiary filing on the same day, have not been made a part of the public record. The Court has also declined to publicly file, *inter alia*, Justice Merchan's June 21, 2023 email ruling denying the defense leave to file a reply, and email rulings by Justice Merchan on November 15, November 28, and December 6, 2023, concerning the redaction of defense submissions prior to public filing.

II. The First Recusal Motion

37. On May 31, 2023, President Trump filed a motion asking Justice Merchan to recuse himself based on "actual or perceived impartiality." A copy of President Trump's motion is annexed hereto as Exhibit 7.

38. President Trump's first recusal motion relied on two issues:

> (1) the political and financial interest of [Justice Merchan's] daughter in Authentic Campaigns creates an actual or perceived conflict of interest because rulings and decisions Your Honor will be required to make in this case may result in a financial benefit to Your Honor's daughter; and (2) Your Honor's role in a prior case encouraging Allen Weisselberg to cooperate against President Trump and his interests shows a preconceived bias against President Trump.

Ex. 7 at 1.

39. Regarding Justice Merchan's daughter, President Trump argued that her company, Authentic, worked with "a roster of progressive causes and Democrat elected officials, including the Biden-Harris campaign, Kamala Harris for the People, and Hakeem Jeffries to name a few." Ex. 7 at 5. President Trump pointed out that Authentic's website included links to articles with titles such as "Authentic CEO talks to New York Times about President Trump scamming people online." *Id.* at 6.

40. The defense subsequently learned that Justice Merchan sought an ethics opinion from the Advisory Committee on Judicial Ethics. *See* Op. 23-54 (May 4, 2023) (released June 2023). On June 20, 2023, defense counsel submitted a letter to the Court requesting leave to file a short reply memorandum of law in further support of the motion for recusal. In addition, defense counsel requested that Justice Merchan provide the defense with a copy of the letter sent to the Advisory Committee on Judicial Ethics. Justice Merchan denied defense counsel's request on June 21, 2023, by email.

41. Justice Merchan denied the recusal motion in an August 11, 2023 ruling, which is annexed hereto as Exhibit 8. Justice Merchan ruled, incorrectly, that President Trump's concerns were "remote, speculative, 'possible or contingent.'" Ex. 8 at 2.

42. Justice Merchan attached to his August 11, 2023 ruling the May 4, 2023 ethics opinion from the Advisory Committee. Ex. 8 at 8-11. Justice Merchan rejected President Trump's request that he disclose the substance of his inquiry, stating only that the inquiry was filed on or

about April 15, 2023. *See* Ex. 8 at 1 n.2. Relying on that undisclosed "inquiry" the ethics opinion stated: "We see nothing in the inquiry to suggest that the outcome of the case could have any effect on the judge's relative, the relative's business, or any of their interests." *Id.* at 11.

III. The Trial Schedule And Omnibus Motions

43. By email dated May 11, 2023, Justice Merchan scheduled the trial to commence on March 25, 2024.

44. DANY did not produce *any* discovery until May 23, 2023, and did not begin producing the bulk of discovery until June 8. On the same day, DANY submitted a motion for a protective order pursuant to CPL § 245.70(1) & (2) to delay the production of additional discovery, including discoverable internal DANY emails, and the filing of DANY's initial certificate of compliance by forty-six days—until July 24, 2023. DANY's motion is annexed hereto as Exhibit 9.

45. On June 22, 2023, President Trump opposed DANY's request for a 46-day extension, which was made in in addition to the 30 days they already received under CPL § 245.10(1)(a). Further, in light of DANY's delays in completing discovery, President Trump also requested a 30-day extension of the deadline to file omnibus motions pursuant to CPL § 255.20. A copy of President Trump's opposition is annexed hereto as Exhibit 10.

46. On June 23, 2023, the Court continued DANY's discovery deadlines until July 24, 2023, and extended the deadline for omnibus motions until September 29, 2023. A copy of the Protective Order is annexed hereto as Exhibit 11.

47. On August 30, 2023, defense counsel submitted a letter to the Court requesting a status conference to discuss the March 25, 2024 trial date and a potential scheduling conflict with a separate criminal proceeding brought in the District of Columbia. Defense counsel also

requested a 30-day extension to the filing deadline for omnibus motions. Justice Merchan denied the requests by letter on September 1, 2023, a copy of which is attached hereto as Exhibit 12.

48. On September 29, 2023, President Trump timely filed omnibus pretrial motions as directed pursuant to the schedule set by Justice Merchan, which included requests for hearings on critical factual issues relating to pre-indictment delay, selective prosecution, and grand jury secrecy violations. A copy of President Trump's omnibus pretrial motions are annexed hereto as Exhibit 13.

49. On October 3, 2023, President Trump filed a motion for reconsideration of the Court's September 1, 2023 ruling, asking Justice Merchan to schedule a status conference to discuss conflicting schedules in *United States v. Trump*, No. 23 Cr. 257 (D.D.C.) (the "D.C. Case") and *United States v. Trump*, No. 23 Cr. 80101 (S.D. Fla.) (the "Florida Case"), including the fact that the court in the D.C. Case scheduled trial to commence on March 4, 2024, after reportedly speaking with Justice Merchan. President Trump further requested that Justice Merchan place on the record the substance of his communications with the court in the D.C. Case. President Trump's motion for reconsideration is annexed hereto as Exhibit 14.

50. By letter dated November 9, 2023, which is annexed hereto as Exhibit 15, Justice Merchan denied President Trump's motion for reconsideration. Justice Merchan reasoned that the request for a conference was "premature" and noted that "[t]his Court previously expressed its willingness to entertain Defendant's request [for an adjournment] and remains willing to do so." Justice Merchan insisted that "February 15, 2024, the next scheduled court date, would be a more appropriate time to discuss scheduling and possibly modify the schedule . . . ."

51. On January 29, 2024, defense counsel requested a one-day adjournment of the conference scheduled for February 15 due to a conflicting hearing scheduled in *Georgia v. Trump,*

et al., Indictment No. 23SC188947. Defense counsel explained the impracticalities of rescheduling the proceeding in Georgia and emphasized President Trump's constitutional right to be present at both proceedings. Justice Merchan denied the request by letter on January 30, 2024, alleging—incorrectly—that the defense had "attempted to adjourn the February 15th conference several times before." A copy of Justice Merchan's letter is annexed hereto as Exhibit 16.

52. On February 15, 2024, Justice Merchan denied President Trump's pretrial motions, declining to hold hearings on the critical factual issues raised by President Trump relating to pre-indictment delay, selective prosecution, and grand jury secrecy violations. Justice Merchan's Decision and Order is attached hereto as Exhibit 17.

53. At a hearing on February 15, 2024, Justice Merchan began by announcing that "we're moving ahead to jury selection on March 25th." Later in the hearing, Justice Merchan permitted defense counsel to present arguments seeking an adjournment of that date, but he rejected the arguments in a conclusory and dismissive fashion. The transcript of the hearing is annexed hereto as Exhibit 18.

IV. President Trump's *Touhy* Request Relating To Michael Cohen

54. President Trump successfully obtained evidence from the U.S. Attorney's Office for the Southern District of New York (the "USAO-SDNY") concerning criminal conduct and other lies by DANY witness Michael Cohen. President Trump initiated this process through a subpoena on January 18, 2024, which the USAO-SDNY rejected as unenforceable based on sovereign immunity in a letter annexed hereto as Exhibit 19.

55. President Trump followed up on the subpoena with a request pursuant to 28 C.F.R. §§ 16.21 – 16.29 and *United States ex. rel Touhy v. Ragen*, 340 U.S. 462 (1951) (the "First *Touhy* Request") in a January 22, 2024 letter annexed hereto, without enclosures, as Exhibit 20.

56. DANY opposed the First *Touhy* Request in letters to the USAO-SDNY beginning on February 7, 2024. DANY's opposition submissions are annexed hereto as Exhibit 21.

57. On February 23, 2024, the USAO-SDNY granted, in part, the First *Touhy* Request in a letter annexed hereto as Exhibit 22.

58. Ultimately, between March 4 and March 15, 2024, the USAO-SDNY provided approximately 196,556 pages of documents relating to Cohen.

V. Motions *In Limine* And Additional Pretrial Motions By The Parties

59. On February 22, 2024, the parties filed motions *in limine* pursuant to a deadline set previously by Justice Merchan. DANY's motions *in limine* are annexed hereto as Exhibit 23.

60. Also on February 22, 2024, without prior notice or permission, DANY filed motions for a gag order against President Trump and for certain relief relating to jury selection.

61. On February 29, 2024, the parties filed briefs in opposition to the pending motions *in limine*. President Trump's opposition to DANY's motions *in limine* is annexed hereto as Exhibit 24.

62. On March 4, 2024, President Trump filed a brief in opposition to DANY's motion for a gag order.

63. Also on March 4, 2024, DANY submitted to Justice Merchan an unauthorized reply relating to the motion for a gag order. Justice Merchan did not at any point address the unauthorized nature of the filing.

64. In two decisions on March 18, 2024, Justice Merchan granted in part and denied in part motions *in limine* filed by DANY and President Trump. The decisions are annexed hereto as Exhibits 25 and 26.

VI. The Presidential Immunity Motion

65. In DANY's February 22, 2024 motions *in limine*, DANY argued that they should be permitted to offer evidence at trial concerning a fictitious so-called "pressure campaign" by President Trump in 2018—while he was President—relating to Mr. Cohen. Ex. 23 at 50. Justice Merchan subsequently reserved decision regarding the admissibility of this evidence. Ex. 25 at 13.

66. On February 28, 2024, the Supreme Court of the United States agreed to address the following question in connection with the D.C. Case: "Whether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office." *Trump v. United States*, 2024 WL 833184 (Feb. 28, 2024). Argument is scheduled for April 25, 2024.

67. Prior to the Supreme Court granting certiorari in *Trump v. United States*, the trial court in the D.C. Case, as well as the U.S. Court of Appeals for the District of Columbia Circuit, had incorrectly rejected President Trump's arguments based on the presidential immunity doctrine. *See United States v. Trump*, 91 F.4th 1173 (D.C. Cir. Feb. 6, 2024); *United States v. Trump*, 2023 WL 8359833 (D.D.C. Dec. 1, 2023).

68. On March 4, 2024, the Supreme Court issued its decision in *Trump v. Anderson*, 144 S. Ct. 662 (2024). In *Anderson*, while interpreting the Fourteenth Amendment of the U.S. Constitution, the Supreme Court noted "heightened concerns" regarding "state enforcement of Section 3 with respect to the Presidency," and observed that "in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest." *Id.* at 670 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983)). The *Anderson* Court also

emphasized that "power over governance . . . does not extend to *federal* . . . candidates." *Id.* at 667.

69. On March 7, 2024, President Trump filed a motion based on the presidential immunity doctrine to preclude evidence of President Trump's "official acts" at trial, and for an adjournment of the trial date pending the Supreme Court's review of the presidential immunity doctrine in *Trump v. United States*. The motion is annexed hereto as Exhibit 27. In the motion, President Trump argued that Justice Merchan should "preclude the People from offering evidence at trial of President Trump's official acts as the Commander in Chief, which the People have not yet specified as the existing trial date approaches." Ex. 27 at 1.

70. DANY filed a brief in opposition to the motion on March 13, 2024, which is annexed hereto as Exhibit 28.

71. On April 3, 2024, Justice Merchan denied President Trump's motion based on presidential immunity. The decision is annexed hereto as Exhibit 29. Notwithstanding the fact that President Trump's motion was based on *evidentiary* issues that would be necessary at the upcoming trial with respect to exhibits DANY had not yet fully identified, Justice Merchan ruled that the motion was "DENIED in its entirety as untimely" and "decline[d] to consider whether the doctrine of presidential immunity precludes the introduction of evidence of purported official acts in a criminal proceeding." Ex. 29 at 6.

72. DANY intends to offer evidence at trial concerning President Trump's official acts as the Commander in Chief. The following are some examples from DANY's current exhibit list:

a. A form that President Trump submitted to the U.S. Office of Government Ethics in 2018, which is annexed hereto as Exhibit 30.

b. A transcript of an April 5, 2018 CBS News interview with President Trump aboard Air Force One, which is annexed hereto as Exhibit 31.

c. An archive of President Trump's Twitter posts, maintained by the National Archives and Records Administration, annexed hereto as Exhibits 32 – 35.

d. A transcript of an October 17, 2018 Oval Office interview with President Trump, which is annexed hereto as Exhibit 36.

VII. Justice Merchan's March 8, 2024 "Order On The Filing Of Future Motions"

73. On March 8, 2024, at approximately 4:10 p.m., Justice Merchan issued a "Court Order On The Filing Of Future Motions" (the "PML Order"), which is annexed hereto as Exhibit 37. In the PML Order, notwithstanding President Trump's explicit discussion in the presidential immunity motion of the Supreme Court's recent rulings in *Trump v. United States* and *Trump v. Anderson*, Justice Merchan asserted—counter-factually—that "Defendant does not explain the reason for the late filing, a mere two and a half weeks before jury selection is set to begin." The PML Order made no reference to the unexplained timing of DANY's February 22 motions for a gag order and relating to jury selection.

74. The PML Order directed that, "[e]ffective immediately," the parties were required to obtain leave of the court to file additional motions by submitting a one-page "pre-motion letter" that "set forth the basis for the motion and the relief that is being sought." The PML Order permitted the other party one day to respond to a pre-motion letter and asserted that "[i]n appropriate cases, the Court may exercise its discretion to construe the pre-motion letter, along with the opposition letter, if any, as the motion itself." Ex. 37.

VIII. President Trump's Submissions Pursuant To The PML Order

75. On the evening of March 8, 2024, pursuant to the PML Order, President Trump submitted via email to Justice Merchan a pre-motion letter seeking leave to file a motion for discovery sanctions relating to, *inter alia*, (a) DANY's failure to produce materials that President Trump obtained based on the First *Touhy* Request, and (b) DANY's March 4, 2024 production of a 110-minute documentary relating to Ms. Clifford and a large volume of materials obtained from the USAO-SDNY. The pre-motion letter enclosed the briefing associated with the proposed motion, which defense counsel had been in the process of finalizing prior to the issuance of the March 8 Order. The pre-motion letter and its enclosures are annexed hereto as Exhibit 38.

76. At approximately 9:17 p.m. on March 8, 2024, Justice Merchan responded to defense counsel's email as follows:

> Mr. Blanche, it appears you misunderstood this Court's earlier Order. You've attached what you refer to as a premotion letter, but you also attach an affirmation, a notice of motion and a 48 page motion. Further, you indicate that you will communicate with the People regarding redactions prior to filing.
>
> Your premotion letter is accepted. If the People wish to respond, they will be given until Monday to do so. I will then decide whether to permit you to file a motion. To be crystal clear, so there is no confusion, your motion is not accepted at this time and you may not file a motion unless and until this Court expressly authorizes you to do so. Therefore, nothing should be filed with the Court, redacted or otherwise. - JMM

Justice Merchan's email is annexed hereto as Exhibit 39. Thus, in the email, Justice Merchan not only forbid President Trump from filing a motion, but also ruled that "nothing"—not even the pre-motion letter—could be filed publicly.

77. On March 10, 2024, President Trump submitted via email to Justice Merchan three pre-motion letters. In the first pre-motion letter, which is annexed hereto as Exhibit 40, the defense sought permission to file a motion to vacate the PML Order because it violates, *inter alia*, CPL § 255.20(3), which provides that "the court must entertain and decide on its merits, at anytime

before the end of the trial, any appropriate pre-trial motion based upon grounds of which the defendant could not, with due diligence, have been previously aware, or which, for other good cause shown . . . ." President Trump enclosed with the pre-motion letter a copy of the proposed motion papers.

78. In President Trump's second pre-motion letter on March 10, 2024, which is annexed hereto as Exhibit 41, the defense sought permission to file a motion for "(1) unsealing and public access to all pleadings, orders, and written communications that have involved the Court and the parties, including communications sent by letter and substantive email, and (2) simultaneous public access of all future pleadings, orders, and written communications except to the extent redactions are required by the protective order or law." President Trump enclosed with the pre-motion letter a copy of the proposed motion papers.

79. In President Trump's third pre-motion letter on March 10, 2024, which is annexed hereto as Exhibit 42, the defense sought permission to file a motion for an adjournment of the trial date due to extensive pretrial publicity based on, *inter alia*, a survey completed on March 8, 2024, a media study that included quantitative analysis of news articles concerning President Trump, which was completed on March 10, 2024, and Ms. Clifford's plan to release her sensational and inflammatory documentary on March 18, 2024, *i.e.*, one week prior to the then-scheduled start of jury selection on March 25, 2024.

80. DANY repeatedly and improperly sought to leverage the PML Order by urging Justice Merchan to preclude President Trump's ability to file motions at all, as distinct from opposing the motions on the merits.

81. On March 11, 2024, DANY filed a letter arguing that Justice Merchan "should deny leave to file a motion for discovery sanctions." The letter is annexed hereto as Exhibit 43.

82. On March 12, 2024, DANY filed letters arguing that Justice Merchan should deny leave to President Trump to file motions to vacate the PML Order and for public access to the proceedings in *People v. Trump*. The letters are annexed hereto as Exhibits 44 and 45.

83. Also on March 12, 2024, with significant irony relative to DANY's ardent position about proceeding with the March 25 trial date, DANY filed a pre-motion letter seeking leave to file a motion for an adjournment of their deadline to disclose trial exhibits from March 15 until March 25. The letter is annexed hereto as Exhibit 46.

IX. DANY's Consent To An Adjournment Of The Trial Date

84. On March 12, 2024, Justice Merchan granted President Trump leave to file the motion for discovery sanctions.

85. On March 14, 2024, DANY submitted to Justice Merchan a "Notice," which is annexed hereto as Exhibit 47, taking the position that "the People do not oppose a brief adjournment of up to 30 days to permit sufficient time for [President Trump] to review" more than "73,000 pages of records" that had been produced by the USAO-SDNY since March 4, 2024.

86. In response to DANY's Notice, President Trump submitted a letter that is annexed hereto as Exhibit 48. President Trump's response requested a hearing on factual disputes relating to the pending motion for discovery sanctions.

87. On March 15, 2024, DANY sent Justice Merchan a "Supplemental Notice," which is annexed hereto as Exhibit 49. In the Supplemental Notice, DANY informed Justice Merchan that the USAO-SDNY had produced approximately 31,000 more pages of documents, in addition to the approximately 73,000 pages referenced in DANY's Notice on March 14, 2024, and that the USAO-SDNY planned to produce approximately 15,000 more pages that day. DANY speculated,

without basis, that the "vast majority" 119,000 pages of documents they referenced "are likely to be unrelated to the subject matter of this case and not within the People's prior requests."

X. Pre-Hearing Submissions Regarding The USAO-SDNY Productions

88. On March 15, 2024, Justice Merchan sent the parties a letter, which is annexed hereto as Exhibit 50, scheduling a hearing on March 25, 2024 regarding "alleged discovery violations related to the production of records by USAO-SDNY – only." In the same letter, Justice Merchan adjourned the start of the trial until April 15. *Id.* at 2. Justice Merchan also ordered the parties to submit by March 21 "detailed timeline[s] of the events surrounding the requests and ultimate production of documents by the USAO-SDNY" and to submit all related "correspondence," including "letters, subpoenas, e-mails, notes, messages, etc." *Id.* at 3.

89. On March 18, 2024, DANY filed opposition briefs relating to President Trump's motion for discovery sanctions, including a brief addressing the issues with the recent productions from the USAO-SDNY. DANY's briefs are annexed hereto as Exhibits 51 and 52.

90. On March 18, 2024, President Trump submitted a supplemental pre-motion letter renewing his March 10, 2024 request for permission to file a motion for an adjournment based on prejudicial pretrial publicity. The letter, without enclosures, is annexed hereto as Exhibit 53.

91. On March 20, 2024, President Trump submitted a second request to the USAO-SDNY pursuant to 28 C.F.R. §§ 16.21 – 16.29 and *Touhy* (the "Second *Touhy* Request"), which is annexed hereto as Exhibit 54. The Second *Touhy* Request sought materials relating to Ms. Clifford.

92. On March 20, 2024, DANY sought leave from Justice Merchan via email to withhold from President Trump certain materials relating to the March 25 hearing on the basis of "work product," "law enforcement sensitive," and "other protected information."

93. In response to DANY's March 20, 2024 email, President Trump submitted a letter objecting to DANY's request to withhold materials from the defense and proceed *ex parte*. The letter, which includes DANY's email, is annexed hereto as Exhibit 55.

94. On March 20, 2024, over President Trump's objection, Justice Merchan granted DANY's request to make *ex parte* submissions and withhold materials from President Trump in connection with the March 25 hearing. Justice Merchan's email, which is annexed hereto as Exhibit 56, stated:

> My intention was that both parties submit unredacted documents for in camera review and for the Court's use at the hearing. The parties should exchange among yourselves the timelines and documentation with whatever redactions and privileges are being asserted.
>
> Please bear in mind that it may be necessary for you to introduce and display relevant documents in open court to support your respective arguments. Anything introduced into evidence and displayed in open court should contain the necessary redactions. The Court will have and will rely upon the unredacted exhibits. Thank you, JMM

95. On March 21, 2024, President Trump timely filed a submission in response to Justice Merchan's March 15 letter. At approximately 11:36 p.m. on March 21, 2024, DANY informed defense counsel that they would not provide President Trump with redacted copies of their filing, which DANY submitted to Justice Merchan on an *ex parte* basis that night.

96. On March 22, 2024, President Trump submitted a letter to Justice Merchan objecting to DANY's failure to timely provide a copy of their submission to the defense, and requested that DANY be required to provide President Trump with a copy of whatever they had submitted to Justice Merchan because subsequent redactions were untimely. DANY subsequently submitted to the defense a redacted timeline and a set of 170 exhibits, of which more than 100 were redacted. Justice Merchan did not rule on President Trump's application regarding the heavily redacted and untimely submission.

97. On March 22, 2024, counsel representing several major news organizations submitted a letter to Justice Merchan regarding President Trump's March 10, 2024 pre-motion letter concerning sealing procedures and public access. *See* Ex. 41. The letter from counsel for the news organizations is annexed hereto as Exhibit 57. The letter stated, *inter alia*: "The News Organizations write to reiterate that these proceedings—and substantive filings in connection with them—are presumptively open and to urge the Court to take the measures outlined in the Motion to ensure timely public access to these proceedings and filings." *Id.* at 1.

XI. The March 25, 2024 Hearing On The Defense Motion For Discovery Sanctions

98. At approximately 10:57 p.m. on March 24, 2024, the USAO-SDNY notified President Trump and DANY by letter that the USAO-SDNY had granted in part President Trump's Second *Touhy* request for records relating to Ms. Clifford. The letter is annexed hereto as Exhibit 58.

99. At the hearing on March 25, 2024, Justice Merchan denied President Trump's motion for discovery sanctions and scheduled jury selection to commence on April 15. The transcript from the hearing is annexed hereto as Exhibit 59, and it reflects the following improper actions:

a. Justice Merchan ruled that the USAO-SDNY's March 24, 2024 decision to grant the Second *Touhy* Request relating to Ms. Clifford was not "relevant to the hearing," despite the fact that it reflected another instance where DANY failed to obtain and produce statements by a key witness. Ex. 59 at 11.

b. Justice Merchan ruled that "there really are not significant questions of fact to be resolved" based on the "exhibits," despite the fact that President Trump had not been permitted to see significant portions of DANY's exhibits. *Id*. at 9.

c. Justice Merchan failed to make findings relating to DANY's withholding of certain portions of the evidence that DANY submitted to the court on March 21, 2024—and the resulting *ex parte* proceedings—in connection with the hearing. At one point in the hearing, Justice Merchan asked defense counsel, "Did you review the exhibits that the People provided in their time line?" but failed to acknowledge that DANY did not provide the defense with all of the exhibits to which Justice Merchan was referring. *Id*. at 42.

d. Only after defense counsel re-raised the pending March 10, 2024 pre-motion letter relating to the proposed motion concerning prejudicial pretrial publicity did Justice Merchan agree to deem the motion filed as of March 25. Ex. 59 at 56-58. Justice Merchan provided DANY until April 1 to oppose the motion, and indicated that he planned to give the motion short shrift by concluding the proceeding with the comment: "See you all on the 15th [of April]."

100. Following the hearing on March 25, 2024, DANY supplemented its disclosures regarding exhibits that DANY plans to offer in its case-in-chief. DANY's disclosures regarding exhibits are annexed hereto as Exhibit 60.

XII. Post-Hearing Rulings Regarding Motion Procedures And Public Access

101. On March 26, 2024, Justice Merchan denied President Trump's motion to vacate the PML Order. *See* Ex. 40. The decision is annexed hereto as Exhibit 61. Justice Merchan did not address or defend the violation of the Sixth Amendment caused by the portion of the PML Order that contemplated forbidding the defense from filing a motion based on a one-page pre-motion letter.

102. On March 26, 2024, Justice Merchan issued a Decision and Order denying what the court described as President Trump's "Motion for Public Proceedings." *See* Ex. 41. The decision is annexed hereto as Exhibit 62. In the ruling, Justice Merchan asserted that "it is the

Court's understanding that everything that is normally maintained in a court file is currently contained in the public file." *Id.* at 2. Justice Merchan invited President Trump to "identify [any] document to the Court and to the People" that the defense believed was "not in the court file" but "normally" should be. *Id.*

103. On March 27, 2024, President Trump submitted a letter to Justice Merchan and DANY concerning 41 items that were missing from the court file, including "decisions, orders, motions, responsive filings, notices, letters, and substantive emails." The letter is annexed hereto as Exhibit 63.

104. On March 28, 2024, Justice Merchan responded via email to President Trump's March 27 letter, instructing the defense to "submit copies to the People for their review, proposed redactions and opposition, if any," and "forward hard copies to the Court so that I can get a head start on my review." Justice Merchan's email is annexed hereto as Exhibit 64.

105. On March 29, 2024, after President Trump provided hard copies of the documents at issue to DANY and Justice Merchan, DANY sent an email to Justice Merchan objecting to the public filing of 22 of the 41 filings at issue. The email is annexed hereto as Exhibit 65. In the email, DANY asserted that exhibits to the parties' March 21, 2024 filings, for use at the March 25, 2024 hearing on President Trump's motion for discovery sanctions, "were submitted to the Court to identify exhibits in advance of the March 25 hearing, but were never offered or received into evidence." Ex. 65 at 1. DANY also argued that "[t]here is no basis to publicly file" those materials, and that, "[s]ince these emails, letters, and proposed hearing exhibits should not be publicly filed, we do not plan to propose redactions for these 22 filings." *Id.*

106. On March 29, 2024, Justice Merchan responded to DANY's email by ruling, in pertinent part and improperly, the exhibits to the March 21, 2024 filings "were not introduced into evidence at the hearing and should therefore not be in the court file." The email is annexed hereto as Exhibit 66.

107. On April 1, 2024, President Trump submitted a pre-motion letter "seeking leave to lodge objections to factual and legal misstatements in the People's March 29, 2024 email, and the Court's responsive email ruling." The letter is annexed hereto as Exhibit 67.

108. On April 2, 2024, DANY sent the defense an email regarding proposed redactions relating to the April 1, 2024 pre-motion letter. The email is annexed hereto as Exhibit 68. In the email, DANY asserted that "it is unclear whether the Court has authorized the public filing of pre-motion letters before he has accepted them."

109. On April 5, 2024, Justice Merchan sent the parties an email ruling, which is annexed hereto as Exhibit 69. With respect to the 22 disputed items, including exhibits from the March 21, 2024 submissions, Justice Merchan directed that, "[b]y May 1, 2024, the parties may submit their respective positions as to why the disputed items should or should not be entered into the public docket."

110. Subsequently on April 5, 2024, Justice Merchan sent the parties another email, which is annexed hereto as Exhibit 70. The email instructed that, "EFFECTIVE IMMEDIATELY, please do not email your pre-motion letters, motions, and other forms of relief (including but not limited to letter motions) being sought with the Court, nor should there be any email communications to the Court regarding the intent to file such motions or seeking such relief." However, Justice Merchan also instructed the parties to continue to comply with the 48-hour rule associated with the March 8 Protective Order: "Please still adhere to this Court's instructions

regarding conferring with one another regarding redactions prior to filing. Once the Court renders a decision, it will file on the public docket and email a courtesy copy to the parties immediately thereafter." *Id.*

XIII. Post-Hearing Rulings Regarding Motion Procedures And Public Access

111. In late-March 2024, the media identified an X (formerly Twitter) account that had been used by Justice Merchan's daughter and included a photograph of President Trump behind bars.

112. On or about March 27, 2024, the media reported a public statement by Al Baker, the Director of Communications for New York's Office of Court Administration:

> The X, formerly Twitter, account being attributed to Judge Merchan's daughter no longer belongs to her since she deleted it approximately a year ago . . . It is not linked to her email address, nor has she posted under that screen name since she deleted the account. Rather, it represents the reconstitution, last April, and manipulation of an account she long ago abandoned.

113. The statement on behalf of Justice Merchan was the court's second extrajudicial statement in March 2024. On March 17, 2024, in the article annexed hereto as Exhibit 71, the Associated Press disclosed that Justice Merchan had participated in an interview with the media "last week." According to reports of the interview, Justice Merchan indicated that the court "wouldn't talk about the case," but did so anyway. *Id.* at 2. Justice Merchan reportedly stated that (1) "getting ready for the historic trial is 'intense'"; (2) the Court is "striving 'to make sure that I've done everything I could to be prepared and to make sure that we dispense justice'"; and (3) "'There's no agenda here . . . . We want to follow the law. We want justice to be done. . . . That's all we want.'" *Id.*

114. The reference in the March 27, 2024 statement to Ms. Merchan having "deleted" the X account "last April" was particularly significant because that is the same month that Justice

Merchan sent his undisclosed "inquiry" to the Advisory Committee on Judicial Ethics. *See* Ex. 8 at 1 n.2.

115. On April 1, 2024, President Trump submitted a pre-motion letter seeking permission to file a recusal motion. The letter is annexed hereto as Exhibit 72. In the letter, President Trump relied on the March 27, 2024 statement, recent social media posts by Authentic where the company "market[ed] its connections to President Biden and Vice President Harris while deriding President Trump," and the fact that Ms. Merchan was "making money by supporting the creation and dissemination of campaign advocacy for President Trump's opponent, political rivals, and the Democrat party."

116. On April 2, 2024, DANY filed a letter urging Justice Merchan to "summarily deny defendant's recusal reargument on the merits," *i.e.*, to not even let President Trump file the motion. The letter is annexed hereto as Exhibit 73. Later that afternoon, Justice Merchan informed the parties that President Trump would be permitted to file the motion, as requested, on April 3, 2024.

117. On April 3, 2024, President Trump filed the recusal motion, which is annexed hereto as Exhibit 74, and an affirmation in support of the motion, which is annexed hereto as Exhibit 75. In the motion papers, President Trump identified, among other things, (1) more than $18 million in disbursements to Authentic by Democrat-affiliated politicians and entities since this case was initiated, *see* Ex. 74 at 29; (2) six Authentic clients who had referenced this case in fundraising solicitations, including around the time the Indictment was returned, when President Trump was arraigned by Justice Merchan, and/or following Justice Merchan's denial of President Trump's first recusal motion, *see id*. at 26; (3) social media posts and public statements by Authentic and its personnel marketing connections to President Trump's political opponents, such as President Biden and Vice President Harris, *see id*. at 30-34; (4) posts from the allegedly deleted

X account used by Ms. Merchan, which reflected animus toward President Trump, *see id*. at 5-7; and (5) a 2019 podcast in which Ms. Merchan described a conversation with Justice Merchan reflecting criticism and bias of President Trump and his social media practices, *see id*. at 4.

118. On April 5, 2024, DANY filed an opposition to the recusal motion. DANY's opposition is annexed hereto as Exhibit 76.

119. On April 5, 2024, President Trump submitted two pre-motion letters seeking permission to file motions to enforce subpoenas served on Ms. Clifford and former Supervising Rackets Investigator Jeremy Rosenberg in New York on March 18 and March 20, 2024, respectively. Copies of President Trump's pre-motion letters are annexed hereto as Exhibits 77 and 78.

120. The subpoena to Ms. Clifford seeks records regarding the production, release, compensation, and related disclosures to DANY concerning Ms. Clifford's "Stormy" documentary. Ex. 77 at Ex. A. The subpoena to Mr. Rosenberg seeks certain discoverable records relating to his improperly conducted and improperly maintained communications with Mr. Cohen and his attorneys, as well as with former Special Assistant District Attorney Pomerantz. Ex. 78 at Ex. A.

121. DANY filed letters opposing President Trump's pre-motion letters on April 8, 2024, which are annexed hereto as Exhibits 79 and 80.

AS AND FOR A FIRST CAUSE OF ACTION
(For Judgment Pursuant to CPLR 7803)

122. Petitioner repeats and realleges each and every allegation in the foregoing paragraphs as if fully set forth herein.

123. In this First Cause of Action, President Trump seeks prohibition of Justice Merchan's August 11, 2023 decision denying President Trump's recusal motion, Ex. 8, and an

order prohibiting Justice Merchan from continuing to preside over *People v. Trump*, Ind. No. 71543-23, in light of a prohibited interest and the unacceptable appearance of impropriety, all in violation of due process and New York law.

124. Section 7803(2) of the CPLR authorizes a petitioner to raise in a special proceeding whether a "body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction."

125. Section 7803(2) is a codification of the common-law writ of prohibition and is available "both to restrain an unwarranted assumption of jurisdiction and to prevent a court from exceeding its authorized powers in a proceeding over which it has jurisdiction." *La Rocca v. Lane*, 37 N.Y.2d 575, 578-79 (1975); *see also Soares v. Carter*, 25 N.Y.3d 1011, 1013 (2015); *Johnson v. Sackett*, 109 A.D.3d 427, 428-29 (1st Dep't 2013).

126. "[A]buses of power may be identified by their impact upon the entire proceeding as distinguished from an error in a proceeding itself proper." *Holtzman v. Goldman*, 71 N.Y.2d 564, 569 (1988) (holding that prohibition was available to a petitioner challenging the imposition of a non-appealable trial order of dismissal on the merits) (internal citations omitted); *see also Rush v. Mordue*, 68 N.Y.2d 348, 353-54 (1986) (holding that prohibition was available to petitioner seeking to restrain perjury prosecution where he had been given transactional immunity for the challenged testimony).

127. "Prohibition may lie . . . where the claim is substantial, implicates a fundamental constitutional right, and where the harm caused by the arrogation of power could not be adequately redressed through the ordinary channels of appeal." *Rush*, 68 N.Y.2d at 354; *see also Fischetti v. Scherer*, 44 A.D.3d 89, 91 (2nd Dep't 2007) (holding that prohibition was available to attorney for criminal defendant challenging an order precluding him from publishing the name of the

complainant); *La Rocca*, 37 N.Y.2d at 579 (holding that prohibition was available to a Roman Catholic priest seeking to restrain respondent Justice from requiring him to change his clerical garb pursuant to the Free Exercise Clause).

128. For the foregoing reasons, this First Cause of Action pursuant to CPLR § 7803(2) in the nature of prohibition is an appropriate means of challenging Justice Merchan's refusal to recuse himself.

129. "[T]he floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997) (cleaned up).

130. "The right of every person accused of crime to have a fair and impartial trial before an unbiased court and an unprejudiced jury is a fundamental principle of criminal jurisprudence." *People v. De Jesus*, 42 N.Y.2d 519, 523 (1977) (quoting *People v. McLaughlin*, 150 N.Y. 365, 375 (1896)); *see also People v. Novak*, 30 N.Y.3d 222, 225 (2017) ("The right to an impartial jurist is a 'basic requirement of due process.'" (quoting *In re Murchison*, 349 U.S. 133, 136 (1955))).

131. Further, "disqualification under [Judiciary Law § 14] deprives the judge of jurisdiction." *Harkness Apartment Owners Corp. v. Abdus-Salaam*, 232 A.D.2d 309, 310 (1st Dep't 1996) (quoting *Wilcox v. Supreme Council Royal Arcanum*, 210 N.Y. 370, 377 (1914)).

132. Justice Merchan's refusal to recuse himself, and decision to instead continue making substantive decisions without regard to President Trump's pending recusal motion, violates President Trump's due process rights and exceeds Justice Merchan's authority under Judiciary Law § 14, as well as 22 NYCRR §§ 100.2 and 100.3.

133. For example, since President Trump sought leave to file the recusal motion through an April 1, 2024 pre-motion letter, Justice Merchan has (1) on April 3, 2023, improperly denied

President Trump's motion to exclude trial evidence based on the presidential immunity doctrine, *see* Ex. 29; (2) on April 5, 2024, issued a substantive order via email that further restricts President Trump's ability to defend himself by filing motions, in violation of the First and Sixth Amendments, as discussed below in the Second Cause of Action, Ex. 70; (3) on April 5, 2024, granted a motion to quash a defense subpoena seeking important extrinsic evidence of motive to lie, bias, and hostility towards President Trump harbored by Ms. Clifford, *see* Guide to N.Y. Evid. Rule 6.13; and (4) on April 8, 2024, sent the parties a letter with substantive rulings regarding the conduct of jury selection beginning on April 15, which plainly foreshadows Justice Merchan's intent to deny the recusal motion notwithstanding the issues raised herein.

134. Under the unique circumstances of this case, the refusal to recuse is not redressable on any direct appeal. President Trump is the leading candidate in the 2024 Presidential election and Justice Merchan has scheduled a trial that will restrict President Trump's ability to campaign.

135. Any direct appeal would be insufficient because these proceedings, conducted by a judge with an interest in the outcome and subject to significant appearances of impropriety, are restricting President Trump's ability to engage in protected First Amendment campaign advocacy. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162 (2014) (reasoning that campaign speech has its "fullest and most urgent application precisely to the conduct of campaigns for political office" (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971))).

136. Direct appeal would also be insufficient because diverting President Trump from the campaign trail in connection with proceedings suffering from such conflicts harms the First Amendment rights of the public to hear President Trump's campaign advocacy. *See Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (reasoning that the First Amendment's "protection afforded is to the communication, to its source and to its recipients

both"); *see also Packingham v. North Carolina*, 582 U.S. 98, 104 (2017) (recognizing the right to "speak and listen, and then . . . speak and listen once more," as a "fundamental principle of the First Amendment").

137. For President Trump and the public, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 67 (2020) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

138. Accordingly, prohibition lies to challenge Justice Merchan's refusal to recuse himself.

139. For the foregoing reasons, prohibition is necessary and appropriate because Justice Merchan has a disqualifying interest in the proceedings and there is an unacceptable appearance of impropriety.

140. Ms. Merchan is the president and owner of a company, Authentic, that has made millions of dollars from clients who are vocal opponents of President Trump, will continue to make more money on that basis as the case proceeds, and is marketing its connections to President Trump's political rivals during the pendency of the case—all while Authentic's Democrat-affiliated clients have solicited donations using electronic communications that reference the proceedings before Justice Merchan.

141. Contrary to DANY's assertions in its opposition to the recusal motion, such a motion is never untimely and Justice Merchan had discretion to consider it. *See* Ex. 76 at 1; *People v. Godbold*, 117 A.D.3d 565, 566 (2014) (1st Dep't 2014) (holding that trial court "had discretion" to consider a motion that "was essentially for renewal rather than reargument"); *People v. Jean Baptiste*, 70 Misc. 3d 706, 708 (N.Y. City Crim. Ct. 2020) ("[I]n a criminal case 'a trial court's

inherent power to correct its own mistakes includes the power to grant leave to reargue, where appropriate'" (quoting *People v. Defreitas*, 48 Misc. 3d 569, 576 (Crim. Ct. N.Y. Cnty. 2015))).

142. Justice demands that potential conflicts and appearances of impropriety be addressed as they arise in order to promote fundamental fairness, and to ensure the parties and the public of the integrity of the proceedings.

143. In any event, three recent developments strongly support President Trump's renewal of the recusal motion on April 3, 2024. *See* Ex. 74.

144. First, since Justice Merchan's August 11, 2023 recusal ruling, President Trump has become the presumptive Republican nominee and the leading candidate in the 2024 Presidential election. The trial that the Court has scheduled will impede President Trump's efforts to campaign against President Biden and Vice President Harris—whose status Authentic actively markets to generate new business—and to support the campaigns of other politicians who are direct opponents of Authentic's clients.

145. Second, on March 17, 2024, the Associated Press reported an interview with Justice Merchan in which he made extrajudicial comments about the case, including that he found preparations for the upcoming trial to be "intense" and that he planned to "dispense justice." Ex. 74 at 17; Ex. 75 ¶ 74. These reported statements by Justice Merchan raise questions about compliance with 22 NYCRR § 100.3(B)(8), which requires that "[a] judge shall not make any public comment about a pending or impending proceeding," and raise further concerns about appearances of impropriety.

146. Third, on March 27, 2024, Justice Merchan caused the Office of Court Administration to issue a statement relating to an X account used by Ms. Merchan, which had included a photograph of President Trump behind bars. Ex. 75 ¶ 58. In the statement, the Office

of Court Administration claimed that Ms. Merchan had "deleted" her X account in approximately April 2023. *Id.* Thus, Ms. Merchan apparently "deleted" an X account that contained posts reflecting hostility toward President Trump during the same month that Justice Merchan solicited an ethics opinion regarding recusal in a letter containing information that the Court declined to disclose to the defense or the public. *See* Ex. 8 at 1 n.2.

147. Based on these developments, President Trump and defense counsel conducted further investigation of Ms. Merchan's background and Authentic's activities. Although Justice Merchan ruled in August 2023 that President Trump's recusal arguments were "remote" and "speculative," Ex. 8 at 2, which was not correct at the time, it is certainly not the case now, as proven by the evidence that has since been uncovered.

148. During a 2019 podcast, Ms. Merchan described a conversation with Justice Merchan that included discussion of President Trump. Ex. 75 ¶ 4. Ms. Merchan recalled that Justice Merchan stated that he "hate[s] that politicians use Twitter" because he believes that it is "unprofessional" and "not how a politician should behave themselves." *Id.* Ms. Merchan confirmed during the podcast that she told Justice Merchan that when President Trump "tweets anything that he thinks," "that's not what he should be using [Twitter] for." *Id.* Evidence from the podcast of this conversation between Justice Merchan and Ms. Merchan is particularly problematic in light of the fact that DANY intends to offer evidence of President Trump's social media posts at trial. Ms. Merchan's comments attributed a public, biased view of that evidence from Justice Merchan, the same judge who—in the absence of recusal—would be called upon to determine whether the evidence of President Trump'is relevant, unduly prejudicial, and otherwise admissible (including with respect to President Trump's presidential immunity objections, as discussed in the Third Cause Of Action below).

149. Ms. Merchan is a "partner," "president," and "part-owner" of Authentic. Ex. 75 ¶¶ 5, 32.

150. Authentic is the #21-ranked vendor in the country in connection with the 2024 election cycle, based on expenditures by candidates, parties, PACs and others reported to the Federal Election Commission. Ex. 75 ¶ 65.

151. Authentic's website confirms that the company's clients consist almost exclusively of politicians and entities associated with the Democrat party and opponents of President Trump, including "Biden Harris," "Kamala Harris for President," "Governor Kathy Hochul," "Adam Schiff For Senate," "Rep. Barbara Lee," "Minority Leader Hakeem Jeffries," "Rep. Lauren Underwood," the "Senate Majority PAC," and the "House Majority PAC." Ex. 75 ¶ 53(b).

152. Authentic received over $29 million in disbursements from Democrat-affiliated and left-leaning political entities between 2021 and 2022, including "Schiff for Congress" ($9.06 million), Senate Majority PAC ($6.04 million), Jeffries for Congress ($1.2 million), Lauren Underwood for Congress ($1.08 million), and Barabara Lee for Congress ($562,420). *See* Ex. 74 at 20.

153. Ms. Merchan has worked with President Biden since at least 2020, and Ms. Merchan's work for Vice President Harris dates back to at least 2019. *See* Ex. 75 ¶¶ 2, 6.

154. Between July 2023 and November 2023, Authentic has received $211,035.00 from the "Fight Like Hell PAC," which Michigan Governor Gretchen Whitmer has declared to be "focus[ing] the next two years on supporting President Biden and Vice President Harris' re-election campaign." *See* Ex. 75 ¶ 68.

155. The "client" list on Authentic's website includes "Priorities USA." Ex. 75 ¶ 53(b). In April 2023, *i.e.*, the same month as President Trump's arraignment, Priorities USA announced

that it would pledge "$75 million towards digital mobilization and persuasion programming in six battleground states" in order to "support President Biden and Vice President Kamala Harris on their path to reelection in 2024 and bolster Democrats' presence to diverse audiences of voters online." *Id.* ¶ 73. Priorities USA has also stated that its "plan" is "to remind voters of President Biden's impact and contrast his record with the agenda of dangerous MAGA Republicans" by "reaching voters where they are: online." *Id.*

156. At least six Authentic clients have solicited donations using electronic communications that referenced the prosecution of President Trump that Justice Merchan is overseeing, including communications around the time of the Indictment, the arraignment, and/or following the Court's denial of President Trump's recusal motion.

157. The Indictment of President Trump was returned on March 30, 2023. Between March 30 and April 1, 2023, Congressman Adam Schiff, Congressman Hakeem Jeffries, Congresswoman Lauren Underwood, Congresswoman Barbara Lee, the Senate Majority PAC, and the House Majority PAC sent electronic fundraising solicitations that referenced the Indictment in this case via email and X. *See* Ex. 75 at ¶¶ 8-16.

158. President Trump was arraigned on April 4, 2023. Beginning the day before that proceeding, Congressman Schiff disseminated case-related communications via Facebook and TikTok. *See* Ex. 75 at ¶¶ 17, 21-22, 24.

159. After the Court denied President Trump's recusal motion in August 2023, Congressman Schiff caused another TikTok video to be posted in which he mischaracterized the People's allegations against President Trump. Ex. 75 ¶ 31.

160. On August 31, 2023, the Senate Majority PAC sent an email solicitation that referenced "91 charges" and "indictments in four different jurisdictions," including this case. *Id*. ¶ 33.

161. Authentic received over $18 million in disbursements from Democrat-affiliated and left-leaning political entities between the filing of the Indictment on March 30, 2023 and the present, including Schiff for Congress ($10.27 million), Senate Majority PAC ($998,045), Lauren Underwood for Congress ($115,050), and Barabara Lee for Congress ($19,661), and Jeffries for Congress ($35). Ex. 74 at 29; Ex. 75 ¶ 66.

162. Authentic is also actively promoting its connections to President Trump's opponents and rivals, including President Biden and Vice President Harris. For example, in separate posts during the fall of 2023, Authentic wished each of them "Happy Birthday." Ex. 75 ¶¶ 38-39. Authentic called attention to the fact that the company had been "part of" President Biden's "journey to the White House," and sought to demonstrate its clout to like-minded potential clients by posting a video of Vice President Harris visiting the company's "DC office to celebrate the launch of her presidential campaign in 2019," which Ms. Merchan worked on as well. *Id.* ¶¶ 6, 38, 54.

163. By at least December 2023, Authentic started to actively promote a communications strategy of "incorporat[ing] salient political players," including those Authentic viewed as "negative," in order to "gin up interest in our work." Ex. 75 ¶ 41. One of the graphics that Authentic used in that promotional piece contained an image of President Trump with a "Donate" button and a caption that read "Defeat Trump's allies." *Id.*

164. In February 2024, the company made at least two posts to its Instagram account that included criticism of President Trump. Ex. 75 ¶¶ 45-46.

165. Last month, Authentic's CEO mischaracterized President Trump as "an actor who fundamentally doesn't care about our democracy & is just trying to sow civil unrest," and wrongly argued that President Trump was "more dangerous than a run-of-the-mill bad-faith actor." Ex. 75 ¶ 47.

166. In light of the foregoing, recusal is mandatory as a matter of constitutional due process, Judiciary Law § 14, 22 NYCRR § 100.2, and 22 NYCRR § 100.3.

167. In order "to prevent even the probability of unfairness," "no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. at 136. "That interest cannot be defined with precision. Circumstances and relationships must be considered." *Id.*; *see also Novak*, 30 N.Y.3d at 225-26 ("Under federal constitutional jurisprudence, courts evaluate whether a serious risk of actual bias, based on objective perceptions and considering all the circumstances alleged, rises to an unconstitutional level." (cleaned up)).

168. Because President Trump's argument is based in part on "a constitutional matter," *i.e.*, due process, "the People's argument that [Justice Merchan] committed no statutory violation misses the mark." *Novak*, 30 N.Y.3d at 226.

169. Justice Merchan's refusal to recuse himself, however, constitutes a violation of Judiciary Law § 14 as well because he has a prohibited "interest" in the proceedings. Authentic has clients who are opponents and rivals of President Trump, and those clients appear to have paid the company (and thus Ms. Merchan) for services used in connection with case-specific fundraising solicitations. The Court's close relationship with Ms. Merchan as an immediate relative, as evidenced by the use of the Court's facilities to address public scrutiny on Ms. Merchan's X account, supports the conclusion that the Court "has an interest that could be

substantially affected by the proceeding." 22 NYCRR § 100.3(E)(1)(d)(iii). This is one of the situations where the Court "shall disqualify" itself. *Id.* § 100.3(E)(1).

170. "Not only must judges actually be neutral, they must appear so as well." *People v. Towns*, 33 N.Y.3d 326, 331 (2019) (citation omitted). In *Johnson v. Hornblass*, this Court "suggest[ed]" that even in the absence of a disqualifying interest, "the 'appearance of justice' might be better served by his recusal." 93 A.D.2d 732, 733 (1st Dep't 1983); *see also Merola v. Walsh*, 75 A.D.2d 163, 166 (1st Dep't 1980) ("[W]e strongly suggest that, in the interests of both propriety and justice, the trial court recuse itself, and permit the jury selection and trial to proceed *de novo* before another Justice.").

171. The Court's suggestion in *Hornblass* was consistent with 22 NYCRR § 100.2, which uses the mandatory "shall." "A judge *shall* . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *Id.* § 100.2(A) (emphasis added). And a judge "*shall not* allow family . . . relationships to influence the judge's judicial conduct or judgment." *Id.* § 100.2(B) (emphasis added). "Nor *shall* a judge convey or permit others to convey the impression that they are in a special position to influence the judge." *Id.* § 100.2(C) (emphasis added). Justice Merchan's refusal to recuse himself under the circumstances presented violates each of these commands under 22 NYCRR § 100.2

172. For all of the foregoing reasons, prohibition is appropriate with respect to Justice Merchan's refusal to recuse because that course of action violates constitutional due process, Judiciary Law § 14, and 22 NYCRR §§ 100.2, 100.3.

AS AND FOR A SECOND CAUSE OF ACTION
(For Judgment Pursuant to CPLR 7803)

173. Petitioner repeats and realleges each and every allegation in the foregoing paragraphs as if fully set forth herein.

174. In this Second Cause of Action, President Trump seeks prohibition of the enforcement of three rulings, *i.e.*, the "Defense Motion Restrictions," that exceeded Justice Merchan's authority and violate constitutional rights of President Trump, the public, and the press: (1) the May 8, 2023 Protective Order, Ex. 6, as interpreted at the May 4, 2023 hearing to require 48 hours' notice to the opposing side for proposed redactions, Ex. 5 at 46; (2) the March 8, 2024 PML Order, Ex. 37, as interpreted by Justice Merchan's March 8, 2024 email to authorize the court to prohibit submissions from being filed publicly and to prohibit motions from being filed at all, Ex. 39; and (3) Justice Merchan's April 5, 2024 email requiring that the 48-hour conferral period precede the public filing of a pre-motion letter, Ex. 70.

175. For the foregoing reasons, this Second Cause of Action pursuant to CPLR § 7803(2) in the nature of prohibition is an appropriate means of challenging the Defense Motion Restrictions because Justice Merchan exceeded his authority and the rulings violate President Trump's right to defend himself, President Trump's right to a public trial, the rights of the public and the press to open proceedings, and the public's constitutional right to President Trump's campaign advocacy.

176. Prohibition is appropriate to "prevent a court from exceeding its authorized powers." *Pirro v. Angiolillo*, 89 N.Y.2d 351, 355 (1996) (cleaned up).

177. No authority under New York law authorizes Justice Merchan to prevent President Trump from filing motions, to delay the filing of such motions in a manner that adversely impacts defense strategy, or to withhold judicial documents from the public. Because the Defense Motion Restrictions have that effect, Justice Merchan has exceeded his authorized powers in the underlying criminal proceeding. *See Pirro*, 89 N.Y.2d at 355-56 ("Since petitioner's contention

was that the Judge was without the power to alter Cohen's term of incarceration, her choice of a CPLR 7801 proceeding to test the merits of her position was the correct one.").

178. Prohibition is also appropriate based on the "impact" of the Defense Motion Restrictions "upon the entire proceeding." *Holtzman*, 71 N.Y.2d at 569. Justice Merchan's rulings have improperly restricted President Trump's ability to defend himself throughout the case, including during one of the most critical junctures in the proceeding—the trial.

179. "The other important consideration is the harm that would flow from the enforcement of the Judge's unauthorized order." *Pirro*, 89 N.Y.2d at 359. As in *Pirro*, "[i]n this case, the harm would be substantial and would, in fact, implicate the public interest." *Id.* Specifically, "[i]f the enforcement of the Judge's unauthorized order[s] is not prohibited," President Trump will lose constitutional rights to a fair and public trial and to defend himself. *Id*.

180. The availability of prohibition is further supported by the fact that the Defense Motion Restrictions have First Amendment implications. First, requiring prolonged and inappropriate sealing of judicial records restricts President Trump's ability to comment on arguments that are central to his defense, which is crucial in the context of the criminal case as well as in connection with his leading campaign for the Presidency. With respect to President Trump's protected campaign advocacy, tens of millions of American voters have a right to hear President Trump's campaign speech, including arguments regarding the proceedings and responses to court filings. *See Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (reasoning that the First Amendment's "protection afforded is to the communication, to its source and to its recipients both"); *see also Packingham v. North Carolina*, 582 U.S. 98, 104 (2017) (recognizing the right to "speak and listen, and then . . . speak and listen once more," as a "fundamental principle of the First Amendment").

181. Second, under the First Amendment and at common law, the public and the press have a presumptive right of access to court filings. "The First Amendment to the United States Constitution guarantees the press and the public a right of access to trial proceedings. Without the right to attend trials, 'which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated." *Courtroom Television Network LLC v. New York*, 5 N.Y.3d 222, 229 (2005) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980)). "In New York, the press, like the public, has a right of access to criminal proceedings," and "[a]ny exception to a public trial should be narrowly construed." *Id.* at 231. "This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for 'what transpires in the court room is public property.'" *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947) (cleaned up)). "The 'unqualified prohibitions laid down by the framers were intended to give to liberty of the press . . . the broadest scope that could be countenanced in an orderly society.'" *Id.* (quoting *Bridges v. State of California*, 314 U.S. 252, 265 (1941)). Thus, "where there was 'no threat or menace to the integrity of the trial,'" *id.* (quoting *Craig*, 331 U.S. at 337), the Supreme Court has "consistently required that the press have a free hand" in covering criminal proceedings. *Id.*

182. Once again, the First Amendment violations resulting from Justice Merchan's orders, "unquestionably constitute[] irreparable injury." *Roman Cath. Diocese of Brooklyn*, 592 U.S. at 67.

183. Because of the irreparable nature of the injuries, these ongoing harms are not redressable after any verdict.

184. This is particularly true in light of the fact that the Defense Motion Restrictions are causing these harms during the leadup to the 2024 Presidential election. The First Amendment

injuries to the democratic process that the Defense Motion Restrictions cause to President Trump, as the leading candidate, and the American people, as the intended recipients of his campaign speech, cannot be adequately remedied in the context of a direct appeal in a criminal case.

185. Under these circumstances, "[t]he appealability or nonappealability of an issue is not dispositive." *Holtzman*, 71 N.Y.2d at 570.

186. Accordingly, prohibition lies to challenge the Defense Motion Restrictions.

187. For the foregoing reasons, prohibition is necessary and appropriate because the Defense Motion Restrictions, as applied, exceed Justice Merchan's authority and violate constitutional rights of President Trump, the public, and the press.

188. The Defense Motion Restrictions violate President Trump's ability to present a complete defense.

189. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (cleaned up); *see also Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.").

190. The Defense Motion Restrictions violate President Trump's right to present a complete defense because they contemplate a delay of 72 hours or more before President Trump can file a motion or application related to the admissibility of evidence or argument at trial. Specifically, the Defense Motion Restrictions require the following sequence: First, President Trump must provide 48 hours' notice to DANY before even filing a pre-motion letter. *See* Ex. 70. Second, DANY is afforded an additional 24 hours to respond to the pre-motion letter. *See* Ex. 37.

Third, consistent with the PML Order, and as Justice Merchan made clear in his March 8, 2024 email, Ex. 39, the court may then delay President Trump's ability to seek relief further by refusing to authorize the filing.

191. President Trump has already been prejudiced by this process. On March 10, 2024, the defense submitted a pre-motion letter seeking permission to file a motion for an adjournment based on prejudicial pretrial publicity. *See* Ex. 42. After Justice Merchan declined to rule on the application, President Trump submitted a supplemental pre-motion letter on March 18, based on additional evidence of prejudicial pretrial publicity, which attached the completed Survey and Media Study that were central to the anticipated motion. *See* Ex. 53. Justice Merchan still declined to authorize the filing on the motion. Only after being prompted by defense counsel at the March 25, 2024 hearing did Justice Merchan deem the motion filed, and he allowed DANY a full week to respond notwithstanding that they received the papers on March 18. *See* Ex. 59 at 56-58. Justice Merchan never ruled at all on President Trump's letter seeking sanctions for DANY's failure to timely provide a copy of its March 21, 2024 evidentiary submission. Finally, on April 8, 2024, without a ruling from Justice Merchan on the adjournment motion, President Trump sought a change of venue in this Court pursuant to CPL § 230.20. DANY argued that the motion was untimely because the Survey and Media Study had been completed in early March, and the Court denied President Trump's application for interim relief.

192. Justice Merchan has also applied the Defense Motion Restrictions in a rigid and arbitrary fashion. For example, Justice Merchan has threatened defense counsel with contempt proceedings for attaching anticipated motions to pre-motion letters, which is a step defense counsel took in good faith in an effort to make the process associated with the Defense Motion Restrictions more efficient and quicker. *See* Ex. 61 at 3-4.

193. Collectively, the Defense Motion Restrictions are unworkable in a trial environment, where delaying President Trump's ability to file an application by hours, much less days, could lead to a finding that an evidentiary argument was waived. Justice Merchan exceeded his authority, in violation of President Trump's right to present a complete defense, by imposing these Restrictions.

194. "Neither the court nor the parties may restructure the [CPL] to adopt a procedure that is more convenient for them at the moment by waiving its clear provisions." *People v. Lawrence*, 64 N.Y.2d 200, 207 (1984). "[T]he language of the Constitution leaves little room for doubt that the authority to regulate practice and procedure in the courts lies principally with the Legislature." *Cohn v. Borchard Affiliations*, 25 N.Y.2d 237, 247 (1969); *see also A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1, 5 (1986) ("Under the State Constitution the authority to regulate practice and procedure in the courts is delegated primarily to the Legislature."). "To the extent that the courts may have some discretion to adjust their procedures in areas involving the inherent nature of the judicial function, the courts may not exercise that discretion in a manner that conflicts with existing legislative command." *People v. Mezon*, 80 N.Y.2d 155, 159 (1992) (cleaned up).

195. New York's legislature has not authorized the Defense Motion Restrictions. The fact that Justice Merchan has acted in excess of his authority is clear from the fact that he relied on CPL § 255.20 when denying President Trump's motion to vacate the PML Order, which is one of the central components of the Defense Motion Restrictions. *See* Ex. 61 at 2. Section 255.20 is limited to "pre-trial motions," which is a term that is defined in § 255.10. The term "pre-trial motions," for purposes of § 255.20, is limited to: motions to dismiss, CPL § 255.10(1)(a)-(b); discovery motions under Article 245, CPL § 255.10(c); motions for bills of particulars, CPL

§ 255.10(d); motions for removal, CPL § 255.10(e); suppression motions, CPL § 255.10(f); and severance motions, CPL § 255.10(g).

196. Thus, CPL § 255.20 does not support the categorical nature of the Defense Motion Restrictions, as applied by Justice Merchan. *See Holtzman*, 71 N.Y.2d at 571 ("The Criminal Procedure Law carefully specifies the instances in which the Legislature has granted trial courts the power to dismiss and none is applicable here. The petition should, therefore, be granted."); *see also Pirro*, 89 N.Y.2d at 356 n.4 (describing "consistent treatment of sentencing dispositions outside the statutory prescriptions as flaws rising to the level of jurisdictional defects" by Court of Appeals).

197. Section 255.20 does not address, for example, motions to enforce subpoenas, recusal motions, or evidentiary applications. Moreover, even to the extent § 255.20 could be interpreted in that broad a fashion, contrary to its text, § 255.20(3) requires that trial courts "*must entertain and decide on its merits*, at any-time before the end of the trial, an[y] appropriate pre-trial motion [a] based upon grounds of which the defendant could not, with due diligence, have been previously aware, or [b] which, for other good cause, could not reasonably have been raised within the period specified" in CPL § 255.20(1). *Id.* § 255.20(3) (emphasis added); *see also People v. Huang*, 248 A.D.2d 73, 76 (1st Dep't 1998) ("[U]nder CPL 255.20(3), even after the trial has begun, *the trial court must* entertain a belated motion if it is 'based upon grounds of which the defendant could not, with due diligence, have been previously aware, or which, for other good cause, could not reasonably have been raised' within the specified time limits of CPL 255.20(1) and (2)." (emphasis added)).

198. In addition to violating President Trump's right to present a complete defense, the Defense Motion Restrictions violate President Trump's constitutional right to a public trial.

199. The right to a "public trial" is guaranteed by the Sixth Amendment to the United States Constitution. "The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet." *In re Oliver*, 333 U.S. 257, 269 (1948). "All of these institutions obviously symbolized a menace to liberty." *Id.*; *see also United States v. Doe*, 63 F.3d 121, 126 (2d Cir. 1995) ("[O]penness has come to be seen as an indispensable attribute of an Anglo-American trial, which assures the accused a fair trial and discourages perjury, the misconduct of participants, and decisions based on secret bias or partiality." (cleaned up)).

200. The Sixth Amendment's "public-trial guarantee" was "created for the benefit of the defendant." *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979). This and other Sixth Amendment rights, "applicable to the States through the Fourteenth [Amendment], surrounds a criminal trial with guarantees . . . that have as their overriding purpose the protection of the accused from prosecutorial and judicial abuses." *Id.* at 379.

201. Under New York law, "[t]he constitutional right to a public trial has long been regarded as a fundamental privilege of the defendant in a criminal prosecution." *People v. Reid*, 40 N.Y.3d 198, 202 (2023) (cleaned up). "A violation of the right to an open trial is not subject to harmless error analysis and a per se rule of reversal irrespective of prejudice is the only realistic means to implement this important constitutional guarantee." *People v. Roberts*, 31 N.Y.3d 406, 425 (2018) (cleaned up); *see also Johnson v. United States*, 520 U.S. 461, 468 (1997) (including the right to a public trial as among the class of structural defects affecting the framework within which a trial proceeds).

202. The Defense Motion Restrictions exceed Justice Merchan's authority because the Restrictions violate these public-trial rights by delaying public docketing of defense applications for at least 48 hours, and potentially much longer. For example, Justice Merchan allowed DANY to submit exhibits to the Court on March 21, 2024, including redactions that have resulted in unexplained *ex parte* submissions, which Justice Merchan relied on to deny President Trump's motion for discovery sanctions at the March 25 hearing, *see* Ex. 59 at 6. In response to President Trump's challenge to the sealing and *ex parte* proceedings, Justice Merchan indicated in an email that the parties did not need to address the issue for nearly a month, until May 1, 2024. *See* Ex. 69.

203. The Sixth Amendment right to a public trial "applies not only to the evidence phase of a criminal trial, but also to other adversary proceedings, such as a pretrial suppression hearing." *Ayala v. Speckard*, 131 F.3d 62, 69 (2d Cir. 1997) (cleaned up); *see also United States v. Abuhamra*, 389 F.3d 309, 323 (2d Cir. 2004) ("While the Sixth Amendment speaks only of a public trial, the Supreme Court has construed this right expansively to apply to a range of criminal proceedings, including jury selection; suppression hearings; and even pre-indictment probable cause hearings." (cleaned up)).

204. In light of President Trump's status as the leading candidate in the 2024 Presidential election, there are First Amendment implications for any limitations on his ability to defend himself—in public—in this case.

205. President Trump's Sixth Amendment right to a public trial is also "complemented by an implicit, qualified First Amendment right of the press and the public of access to a criminal trial." *Ayala*, 131 F.3d at 69; *see also Waller v. Georgia*, 467 U.S. 39, 46 (1984) ("[T]here can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public

trial than the implicit First Amendment right of the press and public. The central aim of a criminal proceeding must be to try the accused fairly."); *Mosallem v. Berenson*, 76 A.D.3d 345, 348-49 (1st Dep't 2010) ("We have recognized the broad constitutional presumption, arising from the First and Sixth Amendments, as applied to the States by the Fourteenth Amendment, that both the public and the press are generally entitled to have access to court proceedings.").

206. "New York has also recognized a common law right of access to court records, deriving from federal decisional law . . . under which the public has a presumptive right, subject to the court's exercise of sound discretion, *to view all nonconfidential material in the court's file*." *People v. Arthur*, 178 Misc. 2d 419, 421 (Sup. Ct. N.Y. Cnty. 1998) (emphasis added). "[E]very part of every brief filed to influence a judicial decision qualifies as a 'judicial record.'" *League of Women Voters v. Newby*, 963 F.3d 130, 136 (D.C. Cir. 2020) (cleaned up); *see also, e.g.*, *United States v. Gerena*, 869 F.2d 82, 85 (2d Cir. 1989) (extending right of access to "briefs and memoranda" filed in connection with pre-trial and post-trial motions); *In re New York Times Co.*, 834 F.2d 1152, 1153-54 (2d Cir. 1987) (applying right of access to motion papers); *Application of NBC*, 635 F.2d 945, 949 (2d Cir. 1980) ("The existence of the common law right to inspect and copy judicial records is beyond dispute.").

207. By delaying public disclosure of President Trump's applications, including pre-motion letters, the Defense Motion Restrictions violate these constitutional rights. For example, absent "specific, on the record findings," it is constitutionally unacceptable—and exceeds Justice Merchan's authority—to maintain exhibits to the March 21, 2024 filings under seal until on or after May 1, 2024. *In re New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987); *Brown v. Maxwell*, 929 F.3d 41, 49-50 (2d Cir. 2019) (reasoning that judicial records include documents that are "relevant to the performance of the judicial function" or "would reasonably

have the tendency to influence a district court's ruling on a motion or in the exercise of its supervisory powers, without regard to which way the court ultimately rules or whether the document ultimately in fact influences the court's decision" (cleaned up)).

208. It is not enough that materials subject to the Defense Motion Restrictions may be "later available to the public and the press." *United States v. Alcantara*, 396 F.3d 189, 201 (2d Cir. 2005). Such a procedure "does not satisfy the First Amendment right of access." *Id.*

209. "Transparency is pivotal to public perception of the judiciary's legitimacy and independence." *United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008). In addition to violating President Trump's right to present a complete defense, the Defense Motion Restrictions violate President Trump's public-trial right and the corresponding public-access rights of the public and the media under the First Amendment. Such harms are ongoing and "irreparable." *Roman Cath. Diocese of Brooklyn*, 592 U.S. at 67.

210. For all of the foregoing reasons, the Defense Motion Restrictions—as specified above—should be annulled and vacated insofar as they exceed Justice Merchan's jurisdiction under the First and Sixth Amendments to the United States Constitution and related New York State law.

AS AND FOR A THIRD CAUSE OF ACTION
(For Judgment Pursuant to CPLR 7803)

211. Petitioner repeats and realleges each and every allegation in the foregoing paragraphs as if fully set forth herein.

212. In this Third Cause of Action, President Trump seeks prohibition of the enforcement of Justice Merchan's April 3, 2024 decision "declin[ing] to consider whether the doctrine of presidential immunity precludes the introduction of evidence of purported official presidential acts in a criminal proceeding." Ex. 29 (the "Presidential Immunity Decision").

213. Based on the authorities set forth above, prohibition lies to challenge the Presidential Immunity Decision.

214. Specifically, through the Presidential Immunity Decision, Justice Merchan acted "in excess of jurisdiction," C.P.L.R. § 7803(2); "exceed[ed]" his "authorized powers," *La Rocca*, 37 N.Y.2d at 578-79; and engaged in an "abuse[] of power" that will have an "impact upon the entire proceeding," *Holtzman*, 71 N.Y.2d at 569.

215. In addition, this Third Cause of Action "implicates a fundamental constitutional right" and "cannot be adequately redressed through the ordinary channels of appeal." *Rush*, 68 N.Y.2d at 354.

216. Finally, as with President Trump's Second Cause of Action, "the harm that would flow from the enforcement of the Judge's unauthorized order . . . would be substantial and would, in fact, implicate the public interest." *Pirro*, 89 N.Y.2d at 359.

217. Accordingly, prohibition lies to challenge the Presidential Immunity Decision.

218. For the foregoing reasons, prohibition is necessary and appropriate because the Presidential Immunity Decision violates President Trump's Sixth Amendment right to a complete defense by purporting to foreclose an important evidentiary objection, which is based on the Constitution and a central part of President Trump's trial defense in response to DANY's unprecedented prosecution.

219. The presidential immunity doctrine, as applied in this case, is based on three Clauses of the United States Constitution.

220. First, the Executive Vesting Clause provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1. Based on

this Clause, a President's official acts "can never be examinable by the courts." *Marbury v. Madison*, 5 U.S. 137, 66 (1803).

221. Second, the Supremacy Clause prohibits state and local officials from using their powers to "defeat the legitimate operations" of the national government. *McCulloch v. Maryland*, 17 U.S. 316, 427 (1819). States may not impede "the measures of a government created by others as well as themselves, for the benefit of others in common with themselves." *Id.* at 435.

222. Third, the Impeachment Judgment Clause provides that "Judgment in Cases of Impeachment shall not extend further than to removal from Office . . . but *the Party convicted* shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. CONST. art. I, § 3, cl. 7 (emphasis added). Because the Constitution specifies that only "the Party *convicted*" by trial in the Senate may be "liable and subject to Indictment, Trial, Judgment and Punishment," *id.*, it follows that a President who is *not* convicted may *not* be subject to criminal prosecution. SCALIA & GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, § 10, at 107 (2012) ("When a car dealer promises a low financing rate to 'purchasers with good credit,' it is entirely clear that the rate is *not* available to purchasers with spotty credit.").

223. Pursuant to these authorities, state courts and prosecutors lack authority to sit in judgment over a President's "official acts." *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 696 (1997) ("With respect to acts taken in his 'public character'—that is, official acts—the President may be disciplined principally by impeachment, not by private lawsuits for damages." (cleaned up)); *Mayo v. United States*, 319 U.S. 441, 445 (1943) ("[T]he activities of the Federal Government are free from regulation by any state."); *see also United States v. McLeod*, 385 F.2d 734, 751-52 (5th Cir. 1967) ("Both the Supremacy Clause and the general principles of our federal system of government dictate that a state grand jury may not investigate the operation of a federal agency. .

. . [T]he investigation . . . is an interference with the proper governmental function of the United States . . . [and] an invasion of the sovereign powers of the United States of America.").

224. The presidential immunity doctrine is "capacious by design." *Blassingame v. Trump*, 87 F.4th 1, 12 (D.C. Cir. 2023). In 234 years from 1789 to 2023, no president was ever prosecuted based on evidence of his official acts. "Such a lack of historical precedent is generally a telling indication of a severe constitutional problem with the asserted power." *Trump v. Anderson*, 600 U.S. 100, 114 (2024) (cleaned up).

225. "[T]here is not always a clear line between [the President's] personal and official affairs." *Trump v. Mazars USA, LLP*, 591 U.S. 848, 868 (2020). The issue is whether the action can "reasonably be understood" as official. *Blassingame*, 87 F.4th at 21 (quoting *Trump v. Hawaii*, 585 U.S. 667, 705 (2018)). "[T]he inquiry does not consist of trying to identify speech that would benefit a president politically." *Id.* at 22 (cleaned up). "When an appropriately objective, context-specific assessment yields no sufficiently clear answer in either direction, the President . . . should be afforded immunity." *Id.* at 21.

226. For example, in *Blassingame*, the D.C. Circuit held that President Trump "must be afforded" an "opportunity to dispute the plaintiffs' allegations bearing on the immunity question or to introduce his own facts pertaining to the issue." 87 F.4th at 29. The court remanded the case with instructions to allow President Trump to litigate—as a threshold question in the case—whether the allegations involved official acts.

227. In *United States v. Johnson*, the Supreme Court held that, in a case involving "a criminal statute of general application," the prosecutors could "not draw in question the legislative acts of the defendant member of Congress or his motives for performing them" under the Speech or Debate Clause. *United States v. Johnson*, 383 U.S. 169, 185 (1966). "[A]ll references to this

aspect of the conspiracy" had to be "eliminated" so that the case was "wholly purged of elements offensive to the Speech or Debate Clause." *Id.* Thus, *Johnson* is a criminal case where an immunity doctrine—there, legislative immunity—foreclosed "legislative acts" evidence at trial. The same holds for evidentiary applications of the presidential immunity doctrine.

228. Justice Merchan exceeded his authority in the Presidential Immunity Decision by denying President Trump the "opportunity" prescribed in *Blassingame*. Indeed, President Trump is entitled to "every opportunity" to prevent official-acts evidence from being used against him at trial. *Blassingame*, 87 F.4th at 22. "[I]mmunity cannot serve its intended purpose if it is withheld when a President would need it most." *Id.* at 29; *see also id.* at 14 ("[T]he President's official immunity insulates all of his official actions from civil damages liability, regardless of their legality or his motives.").

229. In the Presidential Immunity Decision, Justice Merchan wrongly credited DANY's position that President Trump's motion "must be denied as untimely" pursuant to CPL § 255.20(3), and improperly faulted President Trump for "wait[ing] long past the statutory period allotted by CPL § 255.20." Ex. 29 at 3-4.

230. As noted above, however, CPL § 255.20 is limited to "pre-trial motions." In the Presidential Immunity Decision, Justice Merchan recognized that President Trump's motion was one to "exclude" evidence of official acts at trial—including in the title of the Decision and Order. Ex. 29 at 1; *see also id.* at 2 (describing the "instant motion" as one to "exclude evidence"). Under CPL § 255.10, such a motion is not a "pre-trial motion," it is an evidentiary motion.

231. Therefore, Justice Merchan exceeded his authority by relying on CPL § 255.20 to deny the motion based on flawed procedural reasoning without addressing the merits of this important issue.

232. To the extent Justice Merchan denied the motion because President Trump failed to raise the argument in his February 22, 2024 motions *in limine*, *see* Ex. 29 at 6, that reasoning also exceeded his authority.

233. No rule of law supports Justice Merchan's suggestion that evidentiary arguments not presented in a motion *in limine* are waived at trial. *See Wilkinson v. Brit. Airways*, 292 A.D.2d 263, 264 (1st Dep't 2002) ("[T]here is no requirement that an in limine motion be made in writing and be in accordance with CPLR 2214.").

234. Motions *in limine* seek, "at best, an advisory opinion." *Credendino v. State*, 211 A.D.3d 807 (2nd Dep't 2022); *see also* Guide to N.Y. Evid. Rule 1.13(1) ("Absent undue prejudice to a party, a judge may revisit his or her own evidentiary rulings during trial."). Justice Merchan recognized this reality in his *in limine* rulings, including that he is free to "revisit" *in limine* rulings during the trial. Ex. 26 at 5 (reasoning in decision on defense motion *in limine* that "the Court can revisit this ruling if either side opens the door in a way that warrants this Court's reconsideration").

235. Whether on an *in limine* basis or during the trial, Justice Merchan has a mandatory obligation to resolve questions concerning the admissibility of evidence. Trial courts "*shall* decide any preliminary question as to the admissibility of evidence . . . ." Guide to N.Y. Evid. Rule 1.07(2) (emphasis added).

236. "In a criminal proceeding, a court's discretion in evidentiary rulings is circumscribed by the rules of evidence and the defendant's constitutional right to present a defense." Guide to N.Y. Evid. Rule 1.07(2); *see also People v. Jin Cheng Lin*, 26 N.Y.3d 701, 727 (2016) (same); *People v. Hudy*, 73 N.Y.2d 40, 56 (1988) (same).

237. Based on these authorities, President Trump would have been within his rights to "choos[e] instead to defer any objections until the witnesses actually testified" regarding official-

acts evidence. *People v. Oguendo*, 305 A.D.2d 140, 140 (1st Dep't 2003); *see also Paus v. 565 Equities, Inc.*, 215 A.D.3d 495, 495-96 (1st Dep't 2023) ("*Prior motions in limine were not required* to invoke CPLR 3117(a)(3), and any objections to the testimony used could be ruled upon during the cross-examinations." (emphasis added)).

238. President Trump's constitutional rights are violated "by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (cleaned up).

239. Accordingly, Justice Merchan exceeded his authority by foreclosing President Trump from making the evidentiary objection based on the presidential immunity doctrine.

240. Prohibition is necessary and appropriate because "the harm that would flow from the enforcement of the Judge's unauthorized order" would be enormous. *Pirro*, 89 N.Y.2d at 359.

241. As illustrated by DANY's current exhibit list, the prosecution is planning to offer evidence of President Trump's official acts at trial, which would chill future Presidents' efforts to perform their duties.

242. DANY's proffered official-acts evidence includes posts from President Trump's X account. *See* Ex. 34. The account was "one of the White House's main vehicles for conducting official business." *Knight First Amend. Inst. v. Trump*, 928 F.3d 226, 232 (2d Cir. 2019), *judgment vacated as moot*, 141 S. Ct. 1220 (2021); *see also Blassingame*, 87 F.4th at 21 (reasoning that "if an activity is organized and promoted by official White House channels," "it is more likely an official presidential undertaking"). Indeed, the Second Circuit held "that the evidence of the official nature of the Account is overwhelming." *Knight First Amend. Inst.*, 928 F.3d at 234. Based on the Presidential Immunity Decision, Justice Merchan and DANY would ignore this

critical fact, and DANY would instead be permitted to offer official-acts evidence from President Trump's X account to support their theory of the prosecution.

243. DANY also plans to offer submissions by and on behalf of President Trump to the Office of Government Ethics during his presidency. *See* Ex. 30. The submissions are official acts because President Trump made them, as President, in his "official capacity as office-holder." *Blassingame*, 87 F.4th at 5. Thus, DANY should not be permitted to offer such evidence, and President Trump must be allowed to lodge appropriate objections to its admission during the trial.

244. In addition, DANY plans to offer official-acts evidence in the form of testimony by witnesses regarding actions that President Trump took as President of the United States. For the same reasons, under *Blassingame* and *Johnson*, such official-acts evidence is inadmissible in a criminal prosecution of a former President.

245. To proceed otherwise, as contemplated by Justice Merchan's Presidential Immunity Decision, would augment risks and incentives that negatively impact futures Presidents' execution of their duties. Specifically, refusing to recognize presidential immunity as a basis for precluding official-acts evidence could lead to "[c]ognizance of this personal vulnerability" by future Presidents—to criminal prosecution—which "frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982); *see also* Brett Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN L. REV. 1454, 1461 (2009) ("[A] President who is concerned about an ongoing criminal investigation is almost inevitably going to do a worse job as President").

246. The Supreme Court has "recognize[d], as does the [former] district attorney, that harassing subpoenas could, under certain circumstances, threaten the independence or

effectiveness of the Executive." *Trump v. Vance*, 140 S. Ct. 2412, 2428 (2020). The *Vance* Court also noted that "we cannot ignore the possibility that state prosecutors may have political motivations." *Id.*

247. Irrespective of motive, Justice Merchan's Presidential Immunity Decision has a similar result, in that it reflects a decision without basis in the procedural rules cited that purports to deny a former President of the United States recourse to an important evidentiary argument that supports his defense in criminal proceedings. Under the Presidential Immunity Decision, if it is enforced during the trial, the risks of potential harassment and undue interference imposed on President Trump by Justice Merchan would impact the conduct of all future Commanders In Chief.

248. Finally, under the unique circumstances presented, Justice Merchan exceeded his authority and abused his discretion by taking the additional step of denying President Trump's request for an adjournment until the Supreme Court resolves *Trump v. United States*, which is scheduled to be argued on April 25, 2024.

249. While the concept of presidential immunity is firmly established, the doctrine's scope presents a "serious and unsettled question of law." *Fitzgerald*, 457 U.S. at 743. At argument on April 25, 2024—just 10 days after the scheduled start of jury selection—the Supreme Court will grapple with the issues of "[w]hether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office." *Trump v. United States*, 2024 WL 833184 (Feb. 28, 2024).

250. "[I]n particular situations, when the protection of fundamental rights has been involved in requests for adjournments, that discretionary power has been more narrowly construed." *People v. Spears*, 64 N.Y.2d 698, 699-700 (1984); *cf. Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 63 n.18 (1997) (explaining that "in the interest of uniformity and to

discourage forum shopping, the Arizona appeals court decided to defer to the federal litigation, forgoing independent analysis," including "stay[ing] proceedings pending our decision in this case"); *Aquino v. United States*, 2020 WL 1847783, at *1 (S.D.N.Y. Apr. 13, 2020) (noting that defendant's "motion has been the subject of judicial stays pending decisions of appellate courts").

251. For all of the foregoing reasons, the Presidential Immunity Decision should be annulled and vacated insofar as the Decision exceeded Justice Merchan's jurisdiction under the Sixth Amendment to the United States Constitution and related New York State law by foreclosing important evidentiary objections based on the Executive Vesting Clause, the Supremacy Clause, and the Impeachment Judgment Clause.

WHEREFORE, Petitioner respectfully requests that this Court grant judgment in his favor as follows:

(a) On the First Cause of Action, finding that the refusal by Respondent Justice Juan M. Merchan to recuse himself, including in response to a pending April 3, 2024 motion by President Trump, is in excess of Supreme Court's jurisdiction under CPLR § 7803(2);

(b) On the Second Cause of Action, finding that a series of restrictions imposed by Justice Merchan on President Trump's ability to file motions and include rulings and submissions in the public record, are in excess of Supreme Court's jurisdiction under CPLR § 7803(2);

(c) On the Third Cause of Action, finding that Justice Merchan's ruling that President Trump is foreclosed from relying on the presidential immunity doctrine as an evidentiary objection at trial is in excess of Supreme Court's jurisdiction under CPLR § 7803(2); and

(d) granting such further and additional relief as the court deems just and proper.

Dated: New York, New York
April 10, 2024

Respectfully submitted,

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Attorneys for President Donald J. Trump

VERIFICATION

I, Todd Blanche, am a member of Blanche Law PLLC, attorneys for President Donald J. Trump, Petitioner, in the above-captioned Article 78 proceeding. I have read the foregoing Verified Petition and know the contents thereof. The same are true to my knowledge, except to matters therein stated to be alleged on information and belief and as to those matters, I believe it to be true.

Dated: New York, New York
April 10, 2024

Todd Blanche

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

April 15, 2024

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

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

Dear Justice Merchan:

We respectfully submit this pre-motion letter, as discussed prior to jury selection on April 15, 2024, regarding our evidentiary objection to DANY offering evidence of President Trump's official acts during the trial. We respectfully incorporate by reference our March 7, 2024 motion on presidential immunity (the "Motion"), and ask that this letter and the Motion be treated as our full submission on these issues unless further briefing would assist the Court.

For the reasons stated in the Motion, President Trump is entitled to immunity from prosecution for his official acts. *See* Mot. at 5-17. In *Blassingame v. Trump*, 87 F.4th 1 (D.C. Cir. 2023), the D.C. Circuit instructed a trial court in a civil case to perform the "task" of "distinguish[ing] between official acts and private acts." *Id.* at 20. "The potential difficulty of meting out that distinction in some situations, then, cannot justify simply giving up on the enterprise altogether." *Id.* Similarly, when interpreting the analogous doctrine of legislative immunity, the Supreme Court characterized proof of an official act—a congressman's speech—as "inadmissible evidence" at a trial that also involved proof of non-official acts. *United States v. Johnson*, 383 U.S. 169, 177 (1966). The "bulk of the evidence" in *Johnson* did not present a "substantial question" regarding exclusion because the other proof related to private activities such as "financial transactions with the other co-conspirators." *Id.* at 172. However, evidence of the congressional speech presented a "constitutional problem" and should have been precluded at trial. *Id.* In *United States v. Brewster*, the Supreme Court characterized *Johnson* as "as a unanimous holding that a Member of Congress may be prosecuted under a criminal statute provided that the Government's case *does not rely on legislative acts* or the motivation for legislative acts." 408 U.S. 501, 512 (1972) (emphasis added).

The logic of *Johnson* and *Brewster*, applied under analogous circumstances in connection with the presidential immunity doctrine in *Blassingame*, requires preclusion of official-acts evidence at President Trump's trial. *See* Mot. at 20-23. Specifically, the Court should preclude (1) the "Executive Branch Personnel Public Financial Disclosure Report" that President Trump submitted to the Office of Government Ethics on May 15, 2018, marked People's Exhibit 81; (2) the 2018 social media posts to the Twitter account that President Trump used during his time in the White House, marked People's Exhibits 407-G – 407-I; and (3) witness testimony regarding President Trump's official acts during his first term in Office, such as anticipated testimony from former White House staff regarding their communications with President Trump during his first term. For example, in *Blassingame*, the D.C. Circuit explained that "if an activity is organized and promoted by official White House channels and government officials and funded with public resources, it is more likely an official presidential undertaking." *Trump*, 87 F.4th at 21. The Twitter account at issue in People's Exhibits 407-G – 407-I was "one of the White House's main vehicles for conducting official business." *Knight First Amend. Inst. v. Trump*, 928 F.3d 226, 232 (2d Cir. 2019). In addition, speaking on matters of public concern is an official act. *See Council on Am. Islamic Rels. v. Ballenger*, 444 F.3d 659, 665-66 (D.C. Cir. 2006) ("A Member's ability to do his job as a legislator effectively is tied, as in this case, to the Member's relationship with the public and in particular his constituents and colleagues in the Congress. In other words, there was a clear nexus between the congressman answering a reporter's question about the congressman's personal life and the congressman's ability to carry out his representative responsibilities effectively." (cleaned up)); *see also* Mot. at 22 (citing additional authorities).

Finally, there is no procedural impediment to this application. On April 3, 2024, the Court denied President Trump's presidential immunity motion as untimely based on CPL § 255.20. However, that provision is limited to "pre-trial motion[s]," which, as defined in CPL § 255.10, does not apply to motions to preclude evidence. Moreover, President Trump was not required to raise this evidentiary objection prior to trial, but he elected to do so after the Supreme Court granted certiorari in *Trump v. United States*, 2024 WL 833184 (Feb. 28, 2024). In any event, the historical significance of this issue and the fact that it is under consideration by the Supreme Court warrants the Court exercising discretion to address the objection on the merits for purposes of any necessary appellate review.

Respectfully Submitted,

/s/ Todd Blanche
Todd Blanche
Emil Bove
Blanche Law PLLC

Attorneys for President Donald J. Trump

Enclosure

Cc: DANY attorneys of record

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Oing, J.P., Shulman, Rosado, Michael, JJ.

2457 M-1953

In the Matter of DONALD J. TRUMP,
Petitioner,

-against-

HON. JUAN M. MERCHAN, etc., et al.,
Respondents.

———————

CONSTITUTIONAL SCHOLARS, ETHICS EXPERTS AND FORMER PUBLIC OFFICIALS: TY COBB, STEPHEN GILLERS, BARBARA S. GILLERS, PHILIP LACOVARA, JOHN MCKAY, FERN M. SMITH, LAURENCE TRIBE, WILLIAM F. WELD AND ELLEN YAROSHEFSKY,
Amici Curiae.

Index No. 71543/23
Case No. 2024-02413

Blanche Law PLLC, New York (Todd Blanche of counsel), for petitioner.

David Nocenti, Office of Court Administration, New York (Lisa Evans of counsel), for Hon. Juan M. Merchan, respondent.

Alvin L. Bragg, Jr., District Attorney, New York (Steven C. Wu of counsel), for the People of the State of New York and Alvin L. Bragg, Jr., respondent.

Bryan Cave Leighton Paisner LLP, New York (Eric Rieder of counsel), for amici curiae.

Petition seeking relief in the nature of a writ of prohibition and an order finding that the court acted in excess of its jurisdiction by denying petitioner's motion seeking recusal, by issuing orders requiring pre-motion letters setting forth the basis of proposed motions and a conferral period for proposed redactions, and by denying petitioner's motion to exclude certain evidence based on the doctrine of presidential

immunity, unanimously denied, and the proceeding commenced pursuant to CPLR article 78, dismissed, without costs.

Petitioner's CPLR article 78 challenge to the court's August 11, 2023 order, which denied his motion seeking recusal, is time-barred (*see* CPLR 217[1]). The petition was also filed prior to the court's subsequent order denying his second motion seeking recusal, and thus, any challenge to the subsequent order was not ripe at the time of filing.

In any event, petitioner has failed to establish that the court acted in excess of its jurisdiction by denying his motion. The court had jurisdiction to consider and decide petitioner's recusal motion in the first instance, and a review of the court's discretionary determination may occur in a direct appeal (*see Matter of Herskowitz v Tompkins*, 184 AD2d 402, 403 [1st Dept 1992], *appeal dismissed* 80 NY2d 1023 [1992]; *Matter of Concord Assoc., L.P. v LaBuda*, 121 AD3d 1270, 1271-1272 [3d Dept 2014]; *Matter of Daniels v Lewis*, 95 AD3d 1011, 1012 [2d Dept 2012]). Petitioner also has not established that he has a clear right to recusal pursuant to Judiciary Law § 14 (*see Matter of Kyle v Lebovits*, 58 AD3d 521 [1st Dept 2009]; *Ralis v Ralis*, 146 AD3d 831, 833 [2d Dept 2017]).

As for the court's March 8, 2024 order, petitioner does not dispute that the court had authority to implement docket-management measures, including requiring the submission of pre-motion letters allowing the court to preview the parties' potential motions in advance of filing. Indeed, the court has general discretion to manage its docket in the interest of judicial economy (*see Favourite Ltd. v Cico*, — NY3d —, —2024 NY Slip Op 01496, *5 [2024]). Any ambiguity in the court's initial order concerning whether it could deny petitioner the right to file a motion was later clarified when the

court specifically stated that its order did not deny either party the right to file any motion. Petitioner's remaining contentions concerning the March 8, 2024 order are not the proper subject of article 78 review. Without opining on the merits of the argument, to the extent petitioner argues that the court's discretionary docket-management measures constituted an improvident exercise of discretion, such argument may be raised in a direct appeal. Again, without opining on the merits of the argument, petitioner's contention that the court's docket-management measures either conflicted with CPL 255.20 or interfered with his ability to present a complete defense may also be raised in a direct appeal (*see Matter of Veloz v Rothwax*, 65 NY2d 902, 903-904 [1985]; *see also Matter of Lipari v Owens*, 70 NY2d 731, 733 [1987]).

Regarding petitioner's challenge to the court's April 5, 2024 order requiring a brief conferral period to address potential redactions in advance of motion filings, we find that the order constituted a discretionary docket management order.

As to petitioner's challenge to the court's order denying, as untimely, petitioner's motion to exclude evidence based on the doctrine of presidential immunity and for an adjournment of trial, the trial court had discretion whether to hear and decide petitioner's motion (*see* CPL 255.20[3]; *People v Marte*, 197 AD3d 411, 413 [1st Dept 2021]). The decision whether to grant an adjournment was also within the court's sound discretion (*see e.g. Schneyer v Silberg*, 156 AD2d 200, 201 [1st Dept 1989], *appeal dismissed* 77 NY2d 872 [1991]). Prohibition does not lie to review the exercise of discretion in this criminal matter (*see Matter of Blumen v McGann*, 18 AD3d 870, 870 [2d Dept 2005]; *Matter of Quackenbush v Monroe*, 87 AD2d 720, 720 [3d Dept 1982], *lv denied* 56 NY2d 505 [1982]).

Finally, even if petitioner had established that the court exceeded its jurisdiction in issuing one of these orders, the extraordinary remedy of prohibition is not granted as of right, but only in the court's sound discretion (*see Matter of Holtzman v Goldman*, 71 NY2d 564, 568-569 [1988]; *Matter of Brown v Schulman*, 246 AD2d 648, 648 [2d Dept 1998]). Exercise of such discretion would not be warranted in this case, where relief would interfere with the normal trial and appellate procedures, and, without opining on the merits, the matters herein identified by petitioner may be raised in a direct appeal (*Holtzman*, 71 NY2d at 569).

We have considered petitioner's remaining arguments and find them unavailing.

M-1953 – Matter of Trump v The Honorable Juan M. Merchan, et al.

Motion to file amicus curiae brief, granted.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: May 23, 2024

Susanna Molina Rojas
Clerk of the Court

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.	Index No. 71543-23

PRESIDENT DONALD J. TRUMP'S POST-TRIAL PRESIDENTIAL IMMUNITY MOTION

TABLE OF CONTENTS

INTRODUCTION 1
RELEVANT FACTS 4
I. Pre-Trial Litigation Regarding Presidential Immunity 4
A. President Trump's Pre-Trial Motion 4
B. President Trump's Article 78 Proceeding 5
C. President Trump's Renewed Presidential Immunity Objection 6
II. Trial 8
A. Presidential Immunity Objections 8
B. Testimony Of Hope Hicks (White House Communications Director) 9
C. Testimony Of Madeleine Westerhout (Special Assistant To The President) 11
D. Testimony Regarding The Special Counsel's Office And Congressional Investigations And The Pardon Power 12
E. Testimony Regarding President Trump's Response To FEC Inquiries 13
F. Presidential Twitter Posts And Related Testimony 14
G. President Trump's Disclosures To The Office Of Government Ethics 16
III. DANY's Summation 17
APPLICABLE LAW 18
I. CPL § 330.30 18
II. Presidential Immunity 19
A. *Trump v. United States* 20
B. The Supremacy Clause 23
DISCUSSION 26
I. DANY Violated The Federal Constitution By Relying On Official-Acts Evidence 26
A. President Trump's Official Communications With Hope Hicks 26
B. Westerhout's Observations Of President Trump Exercising Presidential Authority 31
C. President Trump's Official Public Statements Via Twitter 33
D. President Trump's Official Acts In Response To FEC Inquiries 37
E. Official-Acts Evidence Relating To Investigations By Congress And Prosecutors 39
F. President Trump's Official Disclosures On OGE Form 278e 40
II. Use Of Official-Acts Evidence In Grand Jury Proceedings Requires Dismissal Of The Indictment 41
III. Use Of Official-Acts Evidence Requires Vacatur Of The Jury's Verdicts 43
A. Presidential Immunity Errors Are Never Harmless 44

B. The Harmless-Error Doctrine Cannot Save The Trial Result 46
1. DANY's Evidence Was Weak 46
2. The Official-Acts Evidence Was Critical To DANY's Trial Presentation 50
3. As A Matter Of Law, The Errors Had A Causal Effect On The Jury 51
CONCLUSION 52

INTRODUCTION

President Donald J. Trump respectfully submits this motion to dismiss the Indictment and vacate the jury's verdicts based on the Presidential immunity doctrine articulated last week by the Supreme Court of the United States and the Supremacy Clause.[1]

No President of the United States has ever been treated as unfairly and unlawfully as District Attorney Bragg has acted towards President Trump in connection with the biased investigation, extraordinarily delayed charging decision, and baseless prosecution that give rise to this motion. These politically motivated actions are prime examples of the type of "factional strife" that "the Framers intended to avoid": one-sided lawfare that risks the "enfeebling of the Presidency and our Government" and the establishment of an "Executive Branch that cannibalizes itself." *Trump v. United States*, 2024 WL 3237603, at *24 (July 1, 2024). Previously abstract risks of local hostilities giving rise to unethical targeting of federal officials have come to pass in New York County as part of concerted—yet unsuccessful—efforts to hinder President Trump's leading campaign in the 2024 Presidential election and to restrict the constitutionally protected political speech of President Trump and the American people.[2]

"'Haste makes waste' is an old adage. It has survived because it is right so often." *Kusay v. United States*, 62 F.3d 192, 195 (7th Cir. 1995). Like Special Counsel Jack Smith, DANY

[1] Due to the significance of the issues raised in this motion, President Trump respectfully requests permission to file a reply to DANY's July 24, 2024 opposition by July 31, 2024.

[2] *See, e.g.*, Gregg Jarrett, *The New York Judge Who Gagged Trump Should Recuse Himself*, Gregg Jarrett L. Blog (Apr. 3, 2024), https://thegreggjarrett.com/the-new-york-judge-who-gagged-trump-should-recuse-himself; Andrew C. McCarthy, *The Injustice of the Trump Gag Order*, Nat'l Rev. (Apr. 2, 2024, 2:47 PM), https://www.nationalreview.com/2024/04/the-injustice-of-the-trump-gag-order; Andrew C. McCarthy, *Trump Goads Judge Merchan into Gagging Him*, Nat'l Rev. (Mar. 30, 2024, 6:30 AM), https://www.nationalreview.com/2024/03/trump-goads-judge-merchan-into-gagging-him; Jonathan Turley, *The Gag and the Goad: Trump Should Appeal Latest Gag Order*, Res Ipsa Loquitur Blog (Mar. 27, 2024), https://jonathanturley.org/2024/03/27/the-gag-and-the-goad-trump-should-appeal-latest-gag-order.

insisted on proceeding on a "highly expedited basis" as part of the election-interference mission driven by President Biden and his associates. *Trump*, 2024 WL 3237603, at *13. Rather than wait for the Supreme Court's guidance, the prosecutors scoffed with hubris at President Trump's immunity motions and insisted on rushing to trial despite the fact that "no court has ever been faced with the question of a President's immunity from prosecution." *Id.* at 23.[3] DANY urged this Court to front-run the Supreme Court on a federal constitutional issue with grave implications for the operation of the federal government and the relationships between state and federal officials. The record is clear: DANY was wrong, very wrong.

Be that as it may, Your Honor now has the authority to address these injustices, and the Court is duty-bound to do so in light of the Supreme Court's decision. Under *Trump*, DANY violated the Presidential immunity doctrine and the Supremacy Clause by relying on evidence relating to President Trump's official acts in 2017 and 2018 to unfairly prejudice President Trump in this unprecedented and unfounded prosecution relating to purported business records. Much of the unconstitutional official-acts evidence concerned actions taken pursuant to "core" Executive power for which "absolute" immunity applies. 2024 WL 3237603, at *8. Overall, the

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[3] *See, e.g.*, Andrew C. McCarthy, *Judge Merchan Abruptly Labels Trump Case 'Federal Insurrection Matter'*, Nat'l Rev. (Apr. 4, 2024, 9:07 AM), https://www.nationalreview.com/corner/judge-merchan-abruptly-labels-trump-case-federal-insurrection-matter; Andrew C. McCarthy, *Trump's Imminent Criminal Trial: April 15 in Manhattan*, Nat'l Rev. (Mar. 25, 2024, 7:28 PM), https://www.nationalreview.com/corner/trumps-imminent-criminal-trial-april-15-in-manhattan; *see also* Jonathan Turley, *The Constitutional Abyss: Justices Signal a Desire to Avoid Both Cliffs on Presidential Immunity*, Res Ipsa Loquitur Blog (Apr. 26, 2024), https://jonathanturley.org/2024/04/26/free-fall-or-controlled-descent-justices-signal-a-desire-to-avoid-both-cliffs-on-presidential-immunity; David B. Rivkin, Jr., & Elizabeth Price Foley, *What's at Stake in the Trump Immunity Case*, Wall St. J. (Apr. 24, 2024, 5:21 PM), https://www.wsj.com/articles/whats-at-stake-in-the-trump-immunity-case-president-supreme-court-1f00dc9c; Andrew C. McCarthy, *The Biden DOJ Special Counsel's Indifference to Trump's Fair-Trial Rights*, Nat'l Rev. (Mar. 9, 2024, 6:30 AM), https://www.nationalreview.com/2024/03/the-biden-doj-special-counsels-indifference-to-trumps-fair-trial-rights.

impermissible official-acts evidence included President Trump's private conversations with the White House Communications Director; observations by the Director of Oval Office Operations regarding President Trump's preferences and practices in the Oval Office, and with respect to national security matters such as use of Air Force One and Marine One as well as secure calls in the White House Situation Room; allegations of conversations regarding the pardon power; and official communications by President Trump using a Twitter account that has been recognized as a formal channel of White House communication in the Trump Administration.

Because of the implications for the institution of the Presidency, the use of official-acts evidence was a structural error under the federal Constitution that tainted DANY's grand jury proceedings as well as the trial. These transgressions resulted in the type of deeply prejudicial error that strikes at the core of the government's function and cannot be addressed through harmless-error analysis. Even if it were otherwise, DANY's proof could not withstand that test. This case turned on a single witness, Michael Cohen. Clearly concerned about the credibility of Cohen and their other financially motivated star witness, Stormy Daniels—one a serial perjurer with an axe to grind, and the other bent on recasting her fictious narrative in even more nefarious terms—DANY concocted a dubious theory of a 2018 "pressure campaign" by President Trump so that they could falsely claim to the jury that people like Hope Hicks and Madeleine Westerhout provided some measure of corroboration for testimony that the prosecutors themselves struggled to credit. At bottom, the "pressure campaign" theory turned on DANY's efforts to assign a criminal motive to actions that President Trump took in 2018 as the Commander in Chief responsible for the entire Executive Branch. The decision in *Trump* forecloses inquiry into those motives, and the objective inquiry required by the Supreme Court places this evidence squarely within the category of official acts committed to the unreviewable discretion of the President by

Article II of the Constitution, related congressional action, and historical practices. The Supreme Court's decision "applies equally to all occupants of the Oval Office, regardless of politics, policy, or party." *Trump*, 2024 WL 3237603, at *25. In order to vindicate the Presidential immunity doctrine, and protect the interests implicated by its underpinnings, the jury's verdicts must be vacated and the Indictment dismissed.

RELEVANT FACTS

I. Pre-Trial Litigation Regarding Presidential Immunity

A. President Trump's Pre-Trial Motion

On February 28, 2024, the Supreme Court granted certiorari in *Trump v. United States* with respect to the following question: "Whether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office." 2024 WL 833184 (Feb. 28, 2024). Less than a week beforehand, DANY had previewed their intention to present evidence of a so-called "pressure campaign" by President Trump—while he was in office—in 2018. Ex. 1 at 50.

On March 7, 2024, just six business days after the Supreme Court's decision to grant certiorari, President Trump filed a motion to exclude evidence of President Trump's official acts at trial and for an adjournment so that the Supreme Court could first address the issue in *Trump*. Ex. 2. President Trump requested "an evidentiary hearing outside the presence of the jury" and argued that the Court should "preclude evidence of President Trump's official acts at trial based on presidential immunity." *Id.* at 24. President Trump specifically challenged the admissibility of the following evidence:

- 2018 social media posts in which President Trump "used his Twitter account, which was an official communications channel during his Presidency, to communicate with the public regarding matters of public concern." *Id.* at 3.

- President Trump's "public statements on official premises and during media appearances." *Id.*

- "[D]ocumentary evidence that reflects official acts," including the Form 278e Executive Branch Personnel Public Financial Disclosure Report relating to transactions in 2017, which President Trump signed in May 2018 and submitted to the Office of Government Ethics ("OGE"). *Id.* at 4.

- "[T]estimony at trial relating to official acts," including testimony from Hope Hicks and Cohen. *Id.*

As to the timing of the motion, President Trump pointed to the Supreme Court's recent grant of certiorari in the *Trump* matter and the Supreme Court's emphasis on analogous federalism principles in *Trump v. Anderson*, 601 U.S. 100 (2024).

In a March 13, 2024 opposition submission, DANY wrongfully argued that the motion was "untimely" and "meritless." Ex. 3 at 1, 2. Regarding timeliness, DANY cited CPL § 255.20(1). *See id.* at 2. On the merits, DANY argued that (1) "there is no categorical bar to using evidence of immunized conduct in a trial involving non-immunized conduct"; and (2) the evidence at issue did not constitute official acts. *Id.*

The Court denied the motion in a six-page Decision and Order issued on April 3, 2024. Ex. 4. Citing CPL § 255.20(1), the Court "decline[d] 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.

B. President Trump's Article 78 Proceeding

On April 10, 2024, President Trump filed a Verified Article 78 Petition seeking a writ of prohibition as to, *inter alia*, the Court's April 3, 2024 Decision and Order. *See Trump v. Merchan*, Case No. 2024-02413 (1st Dep't Apr. 10, 2024). On the same day, the First Department denied a related application for a stay of proceedings pending resolution of the Petition. *Id.* NYSCEF Doc. Nos. 7 (application) & 10 (order).

In an April 17, 2024 opposition filing, DANY claimed, *inter alia*, that [redacted] *Id.* NYSCEF Doc. No. 13 ¶ 45. DANY argued that [redacted] *Id.* ¶ 49. Finally, DANY asserted [redacted] *Id.* ¶ 50 (cleaned up). All of these claims have now been explicitly rejected by the Supreme Court in *Trump*.

On May 23, 2024, the First Department concluded that "prohibition does not lie" with respect to President Trump's immunity argument. *Id.* NYSCEF Doc. No. 21 at 3. In language that has since been contradicted and abrogated by the Supreme Court, the First Department suggested that "direct appeal" was sufficient to protect President Trump's rights on this issue. *Compare id*., *with Trump*, 2024 WL 3237603, at *21-22 (reasoning that there is a "need" for "pretrial review" and "appeal[] before trial" of presidential immunity questions).

C. President Trump's Renewed Presidential Immunity Objection

On April 15, 2024, the first day of jury selection, DANY made an offer of proof regarding the purported "pressure campaign" evidence referenced in their February 2024 motions *in limine*. *See* Tr. 41-46; *see also* Ex. 1 (DANY MILs) at 13. The "first category" consisted of "tweets and communications with Michael Cohen" by "then President Trump," including communications via Robert Costello as "a back channel of communication with President Trump, which was critical to maintain." *Id.* at 41-42. DANY argued that "[t]hese are the defendant's own words publicly broadcast, tweeted out for the world to see, and he should not be able to prevent the jury from

hearing them now." *Id.* at 46. In response, defense counsel notified the Court that we intended to make an additional submission regarding Presidential immunity. *Id.* at 53. The Court responded, in pertinent part:

> If the argument is that tweets that your client sent out while he was President cannot be used because they somehow constitute an official presidential act, it's going to be hard to convince me that something that he tweeted out to millions of people voluntarily cannot be used in court when it's not being presented as a crime. It's just being used as an act, something that he did. But we'll wait until we get that submission.

Id. at 55.

Following the proceedings on April 15, 2024, President Trump submitted a premotion letter reiterating the "evidentiary objection" to official-acts evidence based on Presidential immunity. Ex. 5. The letter specifically objected to (1) the OGE Form 278e, which DANY had marked as GX 81; (2) the 2018 Twitter posts marked GXs 407-F – 407-I; and (3) "witness testimony regarding President Trump's official acts during his first term in Office." *Id.*[4] On the issue of timeliness, President Trump pointed out that the discretionary deadlines in CPL § 255.20 did not apply because a motion to preclude evidence is not a "pre-trial motion" as defined in CPL § 255.10. Ex. 5.[5]

DANY responded to the premotion letter on April 16, 2024. Ex. 6. They incorrectly claimed that President Trump had "forfeited" the Presidential immunity argument, but made no serious effort to defend their prior timeliness claim regarding CPL § 255.20. Ex. 6. DANY conceded that President Trump could "make appropriate objections during trial as the evidence comes in, if merited." *Id.* Nevertheless, DANY stubbornly insisted—with tremendous and

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[4] All trial exhibits cited herein are attached to the July 10, 2024 Affirmation of Todd Blanche.

[5] In addition, the Supreme Court's February 28, 2024 grant of certiorari with respect to an "unprecedented and momentous" question of "lasting significance," *Trump*, 2024 WL 3237603, at *13, *24, was "good cause" for the timing of President Trump's initial motion. CPL § 255.20(3).

unwarranted arrogance, and in great tension with positions taken by several Supreme Court Justices just days later at the oral argument—that Presidential immunity "does not exist," "there is no corresponding evidentiary privilege," and President Trump "was not acting in an official capacity." *Id.*

On April 19, 2024, the Court ruled that its reasoning "remains the same" and was "unchanged." Tr. 802. The Court added:

> . . . . We 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.
>
> So that matter is decided and will not be addressed any further.

Tr. 802.

II. Trial

A. Presidential Immunity Objections

Defense counsel renewed the Presidential immunity objection at trial multiple times, including prior to Hicks's testimony. Tr. 2121. DANY incorrectly responded that "the rule of inadmissibility that Mr. Bove just described does not exist and is not a rule," and claimed falsely that "analogous" caselaw existed holding "the exact opposite." Tr. 2121-22. The Court responded:

> I believe I ruled on this as well.
>
> So the objection is noted. I don't think you need to object as to each question.

Tr. 2122.

During the testimony of former Trump Organization Assistant Controller Jeff McConney, defense counsel objected on Presidential-immunity grounds to President Trump's OGE Form 278e for 2017, GX 81. Tr. 2370. The following colloquy occurred in response to the objection:

> MR. COLANGELO: So, for the same reasons I believe we briefed and argued previously, there is no evidentiary inadmissibility doctrine for official acts.

> And, in any event, the regulations require the filing of the OGE Form 278 for presidential candidates, candidates for Federal office and Federal officials, for reasons including for the purpose of ensuring compliance with the Federal Conflict of Interest Law.
>
> It is not a document entitled to any evidentiary exclusion at all.
>
> THE COURT: I agree.

Tr. 2370; *see also* Tr. 3168 ("MR. BLANCHE: Your Honor, the same objection as discussed last week.").

B. Testimony Of Hope Hicks (White House Communications Director)

DANY used its subpoena power to require Hope Hicks to testify about her interactions with President Trump during his first term in office. *See* Tr. 2127.

At the start of President Trump's term, Hicks joined the Administration as President Trump's Director of Strategic Communications. Tr. 2207-08. In that role, Hicks's responsibilities included working to "showcase" President Trump's "accomplishments" and "the agenda of the Administration." Tr. 2208. In August 2017, Hicks became the White House Communications Director. Tr. 2208. Between January 2017 and March 2018, Hicks worked in close proximity to the Oval Office. Tr. 2208-09. She spoke with President Trump "[e]very day." Tr. 2210.

As White House Communications Director, Hicks was responsible for

> coordinating all of the communication efforts for the Administration from the White House throughout all of the agencies, and making sure that each of [the] principals of the agencies and the agencies themselves were prioritizing Mr. Trump's agenda, and that we were all working together to maximize the impact of any positive messages that we were trying to get out and share with the American people, and, you know, capitalize on any opportunities to showcase Mr. Trump and his work, the President in a good light.

Tr. 2210.

Hicks testified about her official-capacity communications with President Trump and the press concerning the January 12, 2018 *Wall Street Journal* article that was admitted at trial as

Government Exhibit 181. *See* Tr. 2215-16. Hicks explained that the *Wall Street Journal* contacted either herself or "another press communications team member" prior to publishing the story. Tr. 2215. The article included two comments from an unidentified "White House official." GX 181 at 2, 4. DANY elicited the identity of the "White House official" and asked Hicks the following:

> Q And as the Communications Director at the time – withdrawn. Did you discuss this statement with Mr. Trump before it was issued?
>
> A Yes.

Tr. 2218-19. Hicks testified that, after the article was published, she spoke to President Trump about "how to respond to the story, how he would like a team to respond to the story." Tr. 2217.

In January 2018, an organization known as Common Cause made a complaint relating to President Trump and Cohen to the FEC. *See, e.g.*, GX 201. In approximately mid-February 2018, Hicks spoke to President Trump about a *New York Times* article that included a statement from Cohen "saying that he had, in fact, made this payment, um, without Mr. Trump's knowledge." Tr. 2219. Hicks testified that

> . . . President Trump was saying he spoke to Michael, and that Michael had paid this woman to protect him from a false allegation, um, and that – you know, Michael felt like it was his job to protect him, and that's what he was doing. And he did it out of the kindness of his own heart. He never told anybody about it. You know. And he was continuing to try to protect him up until the point where he felt he had to state what was true.
>
> [. . .]
>
> He wanted to know how it was playing, and just my thoughts and opinion about this story versus having the story – a different kind of story before the campaign had Michael not made that payment.

Tr. 2219-21.

Prior to trial, DANY "refreshed" Hicks's memory regarding Karen McDougal's March 20, 2018 lawsuit against AMI. Tr. 2211. At trial, DANY offered a March 20, 2018 text exchange

between Hicks and Madeleine Westerhout that included a message from Westerhout purporting to reflect a request from President Trump: "Hey- the president wants to know if you called David pecker again." GX 319; *see also* Tr. 2212-13.

DANY also elicited testimony from Hicks about official-capacity conversations with President Trump regarding McDougal's March 2018 CNN interview around the time McDougal sued AMI. Tr. 2214-15. Hicks testified:

> To be clear, I did speak to Mr. Trump. I was the Communications Director. This was a major interview. Yes. We just spoke about the news coverage of the interview, how it was playing out.

Tr. 2214-15.

C. Testimony Of Madeleine Westerhout (Special Assistant To The President)

Madeleine Westerhout served as an aide to President Trump at the White House with a variety of titles during his first term, including Executive Assistant, Director of Oval Office Operations, and Special Assistant to the President. Tr. 2973, 2985.

Like Hicks, DANY used subpoena authority to require Westerhout to testify. Tr. 2974. Ms. Mangold elicited information from Westerhout about the following Presidential practices:

- President Trump "liked speaking with people in person or on the phone." Tr. 2986.
- President Trump took "[a] lot" of calls each day, "as early as 6 in the morning" until "late into the night." Tr. 2986-87.
- The "complicated process" for calling "the President of the United States," included "[c]alls that were more secure that might need to be on a secure line" conducted via the Situation Room. Tr. 2987-88.
- President Trump did not use a computer or email account in the White House, and "[h]e liked hard copy documents." Tr. 2988.
- President Trump "liked to read" and "moved his working space into a room off of the side of the Oval Office," which was "really his working office," because he "wanted to keep the Resolute Desk very pristine and kind of keep that more for meetings." Tr. 2988-89.

- President Trump used an "organization system" and brought "a lot of papers and often brought things back and forth to his residence or Air Force One or Marine One." Tr. 2989.

- President Trump "preferred to sign things himself," "liked to use a Sharpie or a felt-tip pen," and typically read things before signing them. Tr. 2989-90.

- Regarding social media, Westerhout testified that President Trump and Dan Scavino shared access to the @realdonaldtrump account. Tr. 2991. DANY elicited that President Trump occasionally dictated posts to Westerhout, and asked about President Trump's "particular preferences" for posting. Tr. 2991-92.

DANY also elicited testimony from Westerhout regarding her extensive contacts with Trump Organization personnel, at President Trump's direction, while she was working in the White House. *E.g.*, Tr. 2995-96. For example, DANY offered an email exchange from January 24, 2017, in which Westerhout used her White House email account to ask Rona Graff for contact information for people that President Trump "frequently spoke to." GX 68. Westerhout testified that she made the request because "the President would often ask" her to initiate calls, and she wanted to have a list of "people that he either spoke to often or might want to speak to." Tr. 2999.

Regarding the above-referenced March 20, 2018 text exchange with Hicks, Westerhout testified, like Hicks, that she had "recently been refreshed" by DANY. Tr. 3006.

D. Testimony Regarding The Special Counsel's Office And Congressional Investigations And The Pardon Power

By the summer of 2017, the media had reported that Special Counsel Robert Mueller was conducting a far-flung and ultimately fruitless investigation into actions by President Trump, as President, in response to Mueller's investigation of alleged interference by Russia in the 2016 election. *See, e.g.*, Tr. 4075.[6] In April 2018, as noted above, the FBI executed search warrants

[6] *See also* 2 Robert S. Mueller, III, DOJ, Report on the Investigation into Russian Interference in the 2016 Presidential Election (2019), https://www.justice.gov/storage/report_volume2.pdf (referring to a "variety of actions" by "the President of the United States" in connection with "the ongoing FBI investigation into Russia's interference in the 2016 presidential election and related matters").

targeting Cohen in a public fashion. In addition, between August and October 2017, Cohen made false statements in private meetings and public testimony before the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence.

At trial, Cohen claimed that he lied to Congress because he "was staying on Mr. Trump's message that there was no Russia-Russia-Russia and, again, in coordination with the Joint Defense Team, that's what was preferred." Tr. 3550. Cohen also testified that he "felt" he "needed" what Ms. Hoffinger described as "the power of the President" to "protect" him in connection with his lies to Congress. Tr. 3549.

DANY also elicited pardon-related testimony from Cohen in connection with an email that Robert Costello sent Cohen on June 13, 2018, after it was clear that Cohen was being investigated by federal authorities. GX 207. Costello wrote to Cohen in the email, in pertinent part: "What you do next is for you to decide, but if that choice requires any discussion with my friends client, you have the opportunity to convey that this evening, but only if you so decide." GX 207. Ms. Hoffinger offered Cohen's opinion to the jury on what Costello was referring to, and Cohen testified: "potential pre-pardons, I believe." Tr. 3603; *see also* Tr. 3835 ("I spoke to my attorney about it because we had seen on television President Trump talking about, potentially, pre-pardoning everybody and putting an end to this, what I deemed to be a nightmare.").

E. Testimony Regarding President Trump's Response To FEC Inquiries

On February 6, 2018, Cohen texted a reporter from the *New York Times* that President Trump "just approved me responding to [FEC] complaint and statement. Please start writing and I will call you soon." GX 260. DANY offered evidence of Cohen's subsequent public statement regarding the FEC complaint on February 13, 2018. GX 202. Jay Sekulow subsequently texted Cohen that President Trump "says thanks for what you do." GX 217. At trial, Cohen explained

that he "was instructed . . . by Mr. Trump, to keep in touch with Jay Sekulow because he was in contact with Mr. Trump." Tr. 3571. Cohen opined that the text message "referred [to] President Donald Trump" and "the statement that [Cohen] was putting out to the press on the FEC." Tr. 3573.

Cohen also testified that he spoke to AMI's Chairman and CEO, David Pecker, regarding a related FEC inquiry. Cohen testified that he told Pecker "that the matter is going to be taken care of and the person, of course, who is going to be able to do it is Jeff Sessions." Tr. 3577. With respect to that conversation, Ms. Hoffinger elicited that President Trump had purportedly "told" Cohen that then-Attorney General Sessions would address the matter. Tr. 3577.

F. Presidential Twitter Posts And Related Testimony

DANY offered evidence of five sets of posts from 2018 on President Trump's official White House Twitter account during his first term. *See* GXs 407-F – 407-I.[7]

In the first set of posts that DANY offered, dated April 21, 2018, President Trump criticized the *New York Times* for "going out of their way to destroy Michael Cohen and his relationship with me in the hope that he will 'flip.'" GX 407-F. At trial, Ms. Hoffinger elicited that Cohen was "raided by the FBI" days earlier on April 9. Tr. 3582. Ms. Hoffinger later showed the April 21 posts to Cohen, who opined that the posts were directed "[t]o me" as a message to "[s]tay loyal," "[d]on't flip," "I have you." Tr. 3587-88. DANY also offered evidence of communications between Cohen and attorney Robert Costello on the day of the April 21, 2018 posts. GX 205; Tr. 3598-99. In the email, Costello characterized the post as containing "very positive comments

[7] DANY admitted social media posts—over President Trump's objection—through the testimony of a paralegal without first-hand knowledge of the timing of the posts, the appearance of the posts at the time they were authorized and uploaded to the account, or Twitter's records-keeping practices. *E.g.*, Tr. 2091-93.

about you from the White House." GX 205. Cohen testified that he interpreted the email to refer to communications from "the President." Tr. 3599; *see also* Tr. 3600 ("It let me know that I was still important to the team and stay the course, that the President had my back.").

With respect to the second set of Twitter posts, Ms. Hoffinger elicited testimony from Daniels that in April 2018 President Trump characterized a sketch released by Daniels and Michael Avenatti relating to Daniels's alleged encounter with a fictitious assailant in 2011 as "essentially a con job." Tr. 2708. Through a series of leading questions, Ms. Hoffinger then basically testified that Daniels brought a defamation claim against President Trump relating to the post, which was dismissed with costs awarded to President Trump because the court deemed the post "rhetorical hyperbole" or "something like just an exaggeration." Tr. 2708-09.

In the third set of posts, dated May 3, 2018, President Trump explained that Cohen had been paid via "monthly retainer, not from the campaign and having nothing to do with the campaign," in connection with "a private contract between two parties, known as a non-disclosure agreement, or NDA." GX 407-G. The posts included, among other things: "Prior to its violation by Ms. Clifford and her attorney, this was a private agreement. Money from the campaign, or campaign contributions, played no rol[e] in this transaction." *Id.* at 3.

The fourth and fifth posts were both dated August 22, 2018. *See* GXs 407-H, 407-I. The fourth post stated: "If anyone is looking for a good lawyer, I would strongly suggest that you don't retain the services of Michael Cohen!" GX 407-H. The fifth post stated:

> I feel very badly for Paul Manafort and his wonderful family. "Justice" took a 12 year old tax case, among other things, applied tremendous pressure on him and, unlike Michael Cohen, he refused to "break" – make up stories in order to get a "deal." Such respect for a brave man!

GX 407-I. Regarding these posts, DANY asked Cohen the following question:

> What, if any, effect did it have on you at the time to have the President of the United States tweeting this about you the day after you pled guilty?

Tr. 3618. Cohen responded that the posts "caused a lot of angst, anxiety." *Id.*

G. President Trump's Disclosures To The Office Of Government Ethics

During the testimony of Jeffrey McConney, DANY offered President Trump's disclosures on OGE Form 278e for the period in 2017 while he was serving as President. GX 81; *see also* Tr. 2365-76. President Trump signed the form, as President, on May 15, 2018. GX 81 at 1. President Trump made the following disclosure in the Form:

> In the interest of transparency, while not required to be disclosed as 'reportable liabilities' on Part 8, in 2016 expenses were incurred by one of Donald J. Trump's attorneys, Michael Cohen. Mr. Cohen sought reimbursement of those expenses and Mr. Trump fully reimbursed Mr. Cohen in 2017. The category of value would be $100,001 – $250,000 and the interest rate would be zero.

Id. at 45.[8] DANY argued that this disclosure was relevant and admissible as an "admission" by President Trump. Tr. 2371.

OGE concluded that President Trump was "in compliance with applicable laws and regulations (subject to any comments below [on the Form])." GX 81 at 1. The Comment box on the Form stated:

> Note 3 to Page 8: OGE has concluded that the information related to the payment made by Mr. Cohen is required to be reported and that the information provided meets the disclosure requirement for a reportable liability.

Id.

[8] Part 8 of OGE Form 278e calls for disclosure of "your own liabilities and those of your spouse and dependent children," "owed to any creditor that exceeded $10,000, in aggregate, at any time during the reporting period." *See* OGE Form 278e: Part 8 Liabilities, OGE, https://www.oge.gov/web/278eGuide.nsf/Part_8.

III. DANY's Summation

During DANY's summation, Mr. Steinglass repeatedly emphasized inadmissible official-acts testimony. He cited Hicks and Westerhout as examples of witnesses that DANY believed provided "damaging," "utterly devastating" testimony, with "critical pieces of the puzzle," because "they have no motive to fabricate." Tr. 4598. Mr. Steinglass later described Hicks and President Trump's "own employees," such as Westerhout, as well as President Trump's "own Tweets," as the "corroborating testimony that tends to connect the Defendant to this crime." Tr. 4621.

Mr. Steinglass emphasized President Trump's "fascinating conversation with Hope Hicks" following the January 2018 *Wall Street Journal* article, GX 181. Tr. 4747. At that point in the summation, he read part of Hicks's testimony to the jury, and argued that it was "devastating" because it came from President Trump's "own Communications Director." Tr. 4747. Mr. Steinglass revisited the official-acts testimony toward the end of the summation. Tr. 4806 ("[W]hen the story finally broke, in 2018, the Defendant explicitly told Ms. Hicks that it's better that the story came out now than before the election.").

Regarding President Trump's attack on Cohen's credibility, Mr. Steinglass argued that Cohen's 2017 "lies" to Congress "had to do with the Mueller Investigation, and it had to do with the investigation into the Russia probe." Tr. 4610. Mr. Steinglass argued that Cohen's 2018 public statement regarding the FEC investigation was an effort "to fall on the sword to protect the President," and he characterized Sekulow's text message to Cohen as "recognition for [Cohen's] efforts on the Defendant's behalf." Tr. 4750. Mr. Steinglass also made explicit the argument that in February 2018, Sekulow was communicating with Cohen on behalf of "Client/President Trump . . . ." Tr. 4789.

Mr. Steinglass asserted that the substance of an April 2018 call between Cohen and President Trump consisted of: "Don't worry. I'm the President of the United States. There is nothing here. Everything is going to be okay. Stay tough. You are going to be okay." Tr. 4755. With respect to President Trump's April 2018 Twitter post, GX 407-F, Mr. Steinglass reminded the jury of Cohen's opinion that President Trump "was communicating with him, without picking up the phone directly at this point, to send [Cohen] the message: Stay in the fold. Don't flip." Tr. 4756. DANY also called attention to President Trump's May 3, 2018 Twitter post, GX 407-G, and linked the post with the disclosure in the OGE Form 278e that President Trump signed on May 15, 2018, GX 81. Tr. 4790.

Finally, Mr. Steinglass argued, incorrectly, that the "clear message" from President Trump's official-act Tweets in August 2018, GX 407-H and 407-I, was "Cooperate, and you will face the wrath of Donald Trump." Tr. 4766.

APPLICABLE LAW

I. CPL § 330.30

Pursuant to CPL § 330.30(1), "[a]t any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the 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." The Presidential immunity arguments discussed herein are appropriately before the Court under this provision because they would warrant relief "if raised upon an appeal from a prospective judgment of conviction." *Id.*; *see also People v. Hardy*, 4 N.Y.3d 192, 197 (2005) ("Because this appeal was not yet final at the time the Supreme Court decided *Crawford*, defendant is entitled to invoke *Crawford*, and we are compelled to apply it."); *People v. Favor*, 82 N.Y.2d 254, 260-61 (1993) ("Traditional common-law methodology contemplates that cases on direct

appeal will generally be decided in accordance with the law as it exists at the time the appellate decision is made.").

"[U]nless the proof of the defendant's guilt, without reference to the error, is overwhelming"—which it was not here, as explained below—"there is no occasion for consideration of any doctrine of harmless error." *People v. Crimmins*, 36 N.Y.2d 230, 241 (1975). Moreover, "[c]onstitutional error may be harmless only if it is harmless beyond a reasonable doubt, that is, there is no reasonable possibility that the erroneously admitted evidence contributed to the conviction." *People v. Hamlin*, 71 N.Y.2d 750, 756 (1988). This standard requires consideration of "the quantum and nature of the evidence" and "the causal effect the error may nevertheless have had on the jury." *Id.*

II. Presidential Immunity

As explained below in Part I.A, the Supreme Court held in *Trump* that prosecutors cannot use evidence of a former President's official acts in a criminal prosecution. This prohibition forbids the use of official-acts evidence even where the *actus reus* of the crime at issue is unofficial. Presidential immunity is absolute with respect to a President's exercise of core powers arising from the Constitution, and it is *at least* presumptive as to official acts within the outer perimeter of Presidential power, *i.e.*, actions that are not palpably beyond a President's authority. Where presumptive immunity applies, prosecutors bear the burden of rebutting the presumption by showing that a criminal prosecution involving evidence of the official act would pose no dangers of intrusion on the Executive Branch.

In this case, however, DANY waived the right to seek to rebut the official-acts presumption by rushing to trial over President Trump's objection. The purpose of the Presidential immunity doctrine is to ensure that Presidents can perform their extremely demanding functions without fear

of a future criminal prosecution. The *Trump* Court addressed the separation-of-powers concerns arising from a federal court reviewing a President's official acts through the prism of generally applicable criminal statutes enacted by Congress. In this state prosecution, as discussed below in Part II.B, concerns about encroachment on the institution of the Presidency under the Supremacy Clause are even greater where a local elected prosecutor seeks to investigate, prosecute, and convict a former President based in part on evidence of his official acts. As a result, the harms caused by DANY's course of action are irreparable. The appropriate remedy is dismissal.

A. *Trump v. United States*

The Supreme Court held in *Trump* that the purpose of Presidential immunity is "to ensure that the President can undertake his constitutionally designated functions effectively, free from undue pressures or distortions." 2024 WL 3237603, at *12 (citing *Clinton v. Jones*, 520 U.S. 681, 694 & n.19 (1997)). Based on that imperative, a former President "may not be prosecuted for exercising his core constitutional powers, and he is entitled, *at a minimum*, to a presumptive immunity from prosecution for all his official acts." *Id.* at *25 (emphasis added); *see also id.* at *8 ("[T]he nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office.").

Contrary to arguments DANY made prior to and during the trial, the Presidential immunity doctrine recognized in *Trump* forbids prosecutors from using evidence of a President's official acts at any stage. "[E]ven on charges that purport to be based only on his unofficial conduct," prosecutors may not "invite the jury to examine acts for which a President is immune from prosecution to nonetheless prove his liability on any charge." 2024 WL 3237603, at *19. The reason for this rule is that use of official-acts evidence would "eviscerate the immunity" that the Supreme Court "recognized," and would unacceptably "heighten the prospect that the President's

official decisionmaking will be distorted." *Id.* Furthermore, "[a]llowing prosecutors to ask or suggest that the jury probe official acts for which the President is immune would . . . raise a unique risk"—which was fully and unconstitutionally realized at trial in this case—"that the jurors' deliberations will be prejudiced by their views of the President's policies and performance while in office." *Id.* at *20.

The *Trump* Court discussed immunity based on two categories of a President's official acts: actions pursuant to the President's "core" powers under the Constitution, and actions within the "outer perimeter" of a President's discretionary authority. *See* 2024 WL 3237603, at *8. The President's "core powers," to which "absolute" immunity attaches, are those that that are based on "'the Constitution itself.'" *Id.* at *9 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)); *see also id.* ("[T]he President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority."). "The exclusive constitutional authority of the President disables the Congress from acting upon the subject." *Id.* (cleaned up). "When the President exercises such [core] authority, he may act even when the measures he takes are incompatible with the expressed or implied will of Congress." *Id.* (cleaned up).

The second category of official acts discussed in *Trump* are those within the "outer perimeter" of the President's "official responsibility." 2024 WL 3237603, at *12; *see also Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982) ("In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility."). The outer perimeter extends to all Presidential actions that "are not manifestly

or palpably beyond his authority," and includes actions that are "not obviously connected to a particular constitutional or statutory provision." *Trump*, 2024 WL 3237603, at *13 (cleaned up).

For official acts within the "outer perimeter," the President is "at least" entitled to "*presumptive* immunity from criminal prosecution." *Trump*, 2024 WL 3237603, at *12 (emphasis in original). The *Trump* Court expressly did "not decide" whether outer-perimeter immunity "must be absolute, or instead whether a presumptive immunity is sufficient," and instead remanded the case to the federal district court to address that issue in the first instance. *Id.* at *8. "It is ultimately the Government's burden to rebut the presumption of immunity." *Id.* at *16. Where the presumption applies, "[a]t a minimum, the President must therefore be immune from prosecution for an official act 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 *12 (quoting *Fitzgerald*, 457 U.S. at 754).

Here, however, any efforts by DANY to rebut the presumption would be untimely. This is so because "[q]uestions about whether the President may be held liable for particular actions . . . must be addressed at the outset of a proceeding." *Trump*, 2024 WL 3237603, at *22. Having rushed the case to trial over President Trump's objection, while these very issues were under review in Supreme Court proceedings that now require this litigation, District Attorney Bragg should not be permitted to try to clean up the mess he created after the fact. The harm resulting from DANY's actions is irreparable because it will cause future Presidents to be "unduly cautious in the discharge of his official duties" and to fear "[v]ulnerability to the burden of a trial and to the inevitable danger of its outcome." *Id.* (cleaned up). Under these circumstances, the only appropriate remedy is dismissal.

Finally, even if the Court is inclined to address matters of first impression by allowing DANY to try to rebut the presumption of immunity, the *Trump* decision placed important limitations on that inquiry. In *Trump*, the Supreme Court remanded for further determinations on "[c]ritical threshold issues" regarding "how to differentiate between a President's official and unofficial actions." 2024 WL 3237603, at *13. The Court made clear, however, that "courts may not inquire into the President's motives." *Id.* at *14; *see also id.* ("[W]e must not confuse 'the issue of a power's validity with the cause it is invoked to promote,' but must instead focus on the 'enduring consequences upon the balanced power structure of our Republic.'" (quoting *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring)). "Such an inquiry would risk exposing even the most obvious instances of official conduct to judicial examination on the mere allegation of improper purpose, thereby intruding on the Article II interests that immunity seeks to protect." *Id.* "Nor may courts deem an action unofficial merely because it allegedly violates a generally applicable law." *Id.* at *14. "Otherwise, Presidents would be subject to trial on every allegation that an action was unlawful, depriving immunity of its intended effect." *Id.* (cleaned up).

B. The Supremacy Clause

The "justifying purposes" of the Presidential immunity doctrine recognized in *Trump* are "to ensure that the President can undertake his constitutionally designated functions effectively, free from undue pressures or distortions." 2024 WL 3237603, at *12. *Trump* arose in the context of a federal prosecution, where the "undue pressures or distortions" on the President's Article II powers arose in the context of review by Article III courts of allegations relating to generally applicable criminal laws enacted by Congress. In this prosecution under state law, the justifying purposes of Presidential immunity under the *Trump* decision apply with even greater force based on the Supremacy Clause.

Although *Clinton* arose in the context of federal civil litigation, the Supreme Court noted that "any direct control by a state court over the President, who has principal responsibility to ensure that those laws are 'faithfully executed,' Art. II, § 3, may implicate concerns that are quite different from the interbranch separation-of-powers questions addressed here." 520 U.S. at 691 n.13. In that regard, the Court reasoned that a President facing litigation in a "state forum" would "presumably rely on federalism and comity concerns" and "the interest in protecting federal officials from possible local prejudice." *Id.* at 691; *see also Trump v. Vance*, 140 S. Ct. 2412, 2428 (2020) ("We recognize, as does the district attorney, that harassing subpoenas could, under certain circumstances, threaten the independence or effectiveness of the Executive."); *Willingham v. Morgan*, 395 U.S. 402, 405 (1969) (reasoning that, "[o]bviously, the [first] removal provision was an attempt to protect federal officers from interference by hostile state courts," and "periods of national stress spawned similar enactments"). "If a sitting President is intensely unpopular in a particular district—and that is a common condition—targeting the President may be an alluring and effective electoral strategy. But it is a strategy that would undermine our constitutional structure." *Vance*, 140 S. Ct. at 2447 (Alito, J., dissenting).

The concerns referenced in *Clinton* and *Vance* derive from the federal Constitution, which "guarantees the entire independence of the General [federal] Government from any control by the respective States." *Anderson*, 601 U.S. at 111 (cleaned up); *see also Mayo v. United States*, 319 U.S. 441, 445 (1943) ("[T]he activities of the Federal Government are free from regulation by any state."); *In re Tarble*, 80 U.S. 397, 401 (1871) ("[W]henever any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the national government have supremacy until the validity of the different enactments and authorities are determined by the tribunals of the United States."); *M'Culloch v. Maryland*, 17 U.S.

316, 427 (1819) ("It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.").

As relevant here, "[t]he Supremacy Clause prohibits state judges and prosecutors from interfering with a President's official duties." *Vance*, 140 S. Ct. at 2428. The Supreme Court has applied the Supremacy Clause in that fashion to unelected federal employees since the 1800s. *See Johnson v. Maryland*, 254 U.S. 51, 56-57 (1920) ("[E]ven the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States."); *Ohio v. Thomas*, 173 U.S. 276, 283 (1899) ("The government is but claiming that its own officers, when discharging duties under federal authority pursuant to and by virtue of valid federal laws, are not subject to arrest or other liability under the laws of the state in which their duties are performed."); *Cunningham v. Neagle*, 135 U.S. 1, 75 (1890) ("[I]f the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if, in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the state of California."); *Tennessee v. Davis*, 100 U.S. 257, 258 (1879) (reasoning that federal officials cannot be "arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess . . . .").

Consistent with these Supremacy Clause authorities—before the political motivations driving this case overtook basic prosecutorial ethics—the former District Attorney recognized in *Vance* that there is a "prohibition on state investigation of *official* presidential conduct." Ex. 7 at 10 (emphasis in original). Echoing the purpose of the Presidential immunity recognized in *Trump*

v. United States, DANY recognized that the Supremacy Clause "precludes the States from directly interfering with a President's (and other federal officials') *official* acts." *Id.* at 14 (emphasis in original). "[S]uch immunity turns on whether a State is attempting to dictate how a federal officer carries out an official function." *Id.* at 15. In *Vance*, DANY conceded that "stigmatic burdens" could arise from a prosecution of a President based on official acts:

> An "indictment and criminal prosecution," the Moss Memo reasoned, creates a "distinctive and serious stigma" that would "threaten the President's ability to act as the Nation's leader in both the domestic and foreign spheres."

Id. at 28 (Randolph D. Moss, Asst. Atty. Gen., *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 O.L.C. Op. 222, 254 (Oct. 16, 2000)). "When a State attempts to regulate a federal official's exercise of federal powers, its actions necessarily conflict with supreme federal authority, and the Supremacy Clause resolves the conflict in favor of the federal government." *Id.* at 16.

DISCUSSION

I. DANY Violated The Federal Constitution By Relying On Official-Acts Evidence

In grand jury proceedings and at trial, DANY violated the Presidential immunity doctrine recognized in *Trump* and the Supremacy Clause by relying on evidence of President Trump's official acts.

A. President Trump's Official Communications With Hope Hicks

All of Hicks's testimony concerning events in 2018, when she was serving as the White House Communications Director, concerned official acts based on core Article II authority for which President Trump is entitled to absolute immunity. *Trump* specifically forbids prosecutors from offering "testimony" from a President's "advisers" for the purpose of "probing the official act." 2024 WL 3237603, at *20 n.3. Thus, Hicks's testimony was categorically inadmissible in

both grand jury proceedings and at trial, and this evidence violated the Presidential immunity doctrine.

As the White House Communications Director, Hicks was one of the key subordinates who President Trump relied upon to help him exercise Article II authority under, *inter alia*, the Executive Vesting Clause and the Take Care Clause. *See Myers v. United States*, 272 U.S. 52, 117 (1926) ("The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates."); *see also Trump*, 2024 WL 3237603, at *8 ("Domestically, he must 'take Care that the Laws be faithfully executed,' § 3, and he bears responsibility for the actions of the many departments and agencies within the Executive Branch."). President Trump's 2018 conversations with Hicks also involved efforts by President Trump to "supervise" someone who was "wield[ing] executive power on his behalf," which is an authority that "'follows from the text of Article II.'" *Trump*, 2024 WL 3237603, at *9 (quoting *Seila Law LLC v. CFPB*, 591 U.S. 197, 204 (2020)). As a result of the multiple sources of constitutional authority upon which President Trump's interactions with his White House Communications Director were based, he is entitled to absolute immunity with respect to that evidence. *See id.* at *13 ("Certain allegations . . . are readily categorized in light of the nature of the President's official relationship to the office held by that individual.").

Because President Trump's interactions with Hicks were based on core authorities, where Presidential immunity is absolute, no further inquiry is necessary or permitted. However, it is equally clear that President Trump's discussions with Hicks relating to 2018 media coverage of Daniels, McDougal, and an FEC inquiry relating to Cohen fit comfortably within the outer-perimeter Presidential authority of "speaking to . . . the American people." *Trump*, 2024 WL

3237603, at *13; *see also id.* at *15 (recognizing that official acts include efforts "to advance the President's agenda in Congress *and beyond*" (emphasis added)); *see also Trump v. Hawaii*, 585 U.S. 667, 701 (2018) ("The President of the United States possesses an extraordinary power to speak to his fellow citizens and on their behalf.").

In 2018, President Trump was working to communicate with the media and the public—as President—regarding the issues discussed in the *Wall Street Journal* and *New York Times* articles that Hicks addressed at trial. During that timeframe, President Trump was also providing guidance and information to Hicks so that she could facilitate those efforts by speaking on behalf of the President. Hicks confirmed this at trial when she explained that her job responsibilities as Communications Director included "coordinating all of the communication efforts for the Administration from the White House throughout all of the agencies," "shar[ing] with the American people" information concerning President Trump's "work," and portraying the President "in a good light." Tr. 2210.

This testimony concerned efforts by President Trump to work with Hicks to use the "long-recognized aspect of Presidential power" known as the "bully pulpit" to "persuade Americans, including by speaking forcefully or critically, in ways that the President believes would advance the public interest." *Trump*, 2024 WL 3237603, at *18.[9] In *Clinton*, the Supreme Court recognized that statements by "various persons authorized to speak for the President publicly," during Clinton's Presidency, "arguably may involve conduct within the outer perimeter of the President's official responsibilities." 520 U.S. at 685-86. The Court recognized that proposition

[9] The term "bully pulpit" was "coined by President Theodore Roosevelt to denote a President's excellent (*i.e.*, 'bully') position (*i.e.*, his 'pulpit') to persuade the public." *Murthy v. Missouri*, 2024 WL 3165801, at *31 (June 26, 2024) (Alito, J., dissenting).

notwithstanding the fact that President Clinton's governmental and private "agents"[10] had "publicly branded [Paula Jones] a liar by denying that the incident had occurred." *Id.* at 685. Although the *Clinton* Court did not address the outer-perimeter question, *see id.* at 686 n.3, the *Trump* Court largely resolved it: "[E]ven when no specific federal responsibility requires his communication," the President can "encourage" others "to act in a manner that promotes the President's view of the public good." 2024 WL 3237603, at *17; *cf. Barr v. Matteo*, 360 U.S. 564, 575 (1959) ("[T]he same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority.").

Even if the Court had strained to give DANY the benefit of applying only "presumptive immunity" to the official-acts testimony from Hicks—which would find no support in *Trump*—DANY could not meet its "burden" of rebutting the presumption. *Trump*, 2024 WL 3237603, at *12, *16. In that analysis, the Court "may not inquire into the President's motives." *Id.* at *14. "Nor may courts deem an action unofficial merely because it allegedly violates a generally applicable law." *Id.* Rather, what matters for purposes of presumptive Presidential immunity is that "[a]pplying a criminal prohibition" to intrude on a President's sensitive internal communications with a confidential adviser such as the White House Communications Director

[10] Paula Jones alleged that President Clinton, "through his White House aides, stated that her account of the hotel room incident was untrue and a 'cheap political trick,' and that Dee Dee Myers, then-White House Spokeswoman, said of plaintiff's allegations, 'It's just not true.'" *Jones v. Clinton*, 974 F. Supp. 712, 717-18 (E.D. Ark. 1997) (quoting civil complaint); *see also Jones v. Clinton*, 72 F.3d 1354, 1359 n.7 (8th Cir. 1996). Jones also alleged that President Clinton "hired an attorney who, as the President's agent, said that her account 'is really just another effort to rewrite the results of the election' and 'distract the President from his agenda,' and who asked rhetorically, 'Why are these claims being brought now, three years after the fact?'" 974 F. Supp. at 718.

must plainly pose "no dangers"—none—"of intrusion on the authority and functions of the Executive Branch." *Id.* at *12 (cleaned up). That could not be said in this instance.

"[S]pecial considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 385 (2004); *see also Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993) ("This Article II right to confidential communications attaches not only to direct communications with the President, but also to discussions between his senior advisers."). Recognizing that President Trump's communications with Hicks were official acts is a "sound application of a principle that makes one master in his own house." *Humphrey's Executor v. United States*, 295 U.S. 602, 630 (1935). A President must be able to provide information to, and seek advice from, his Communications Director in order to address matters of public concern. *See United States v. Nixon*, 418 U.S. 683, 708 (1974) ("A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately."). Holding the "pall of potential prosecution" over those types of Presidential communications would result in the President being "chilled from taking the bold and unhesitating action required of an independent Executive." *Trump*, 2024 WL 3237603, at *11 (cleaned up); *see also Clinton*, 997 F.2d at 909 ("The ability to discuss matters confidentially is surely an important condition to the exercise of executive power. Without it, the President's performance of any of his duties—textually explicit or implicit in Article II's grant of executive power—would be made more difficult."); Saikrishna B. Prakash, *Fragmented Features of the Constitution's Unitary Executive*, 45 Willamette L. Rev. 701, 716 (2009) (reasoning that without the Executive Office of the President, "the President would be greatly weakened in his struggle to instantiate his

preferences within the executive branch"). Therefore, whether the immunity is absolute or presumptive, DANY should have been barred from using evidence of President Trump's interactions with Hicks.

B. Westerhout's Observations Of President Trump Exercising Presidential Authority

DANY violated the Presidential immunity doctrine by offering testimony from Westerhout regarding President Trump's exercise of Article II authority in the Oval Office, including with respect to national security matters, and her work on his behalf.

Presidential authority under the Executive Vesting Clause includes "supervisory" responsibilities and the "management of the Executive Branch." *Fitzgerald*, 457 U.S. at 750. Westerhout was, in the words of Mr. Steinglass, President Trump's "loyal White House Assistant." Tr. 4737. The "assistance of close aides" such as Westerhout is necessary the functioning of the Presidency to address "extraordinary administrative complexity and near-incalculable presidential responsibilities." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2273 (2001). Congress has authorized Presidents to rely upon such aids, including pursuant to 3 U.S.C. § 105(a)(1), which permits Presidents "to appoint and fix the pay of employees in the White House Office without regard to any other provision of law regulating the employment or compensation of persons in the Government service."[11]

DANY forced Westerhout to provide details of how President Trump operated the Executive Branch, including as to national security matters, based on observations that she made while sitting outside the Oval Office. *See* Tr. 2985 ("Did you also make an effort to learn Mr. Trump's preferences by observing him while you were sitting in the Outer Oval?"). This invasive

[11] The highest-ranking staff are commissioned with the titles "Assistant to the President," "Deputy Assistant to the President," and "Special Assistant to the President," in that order.

compelled testimony included information regarding President Trump's official-capacity "work habits," "preferences," "relationships and contacts," and "social media" practices at the White House. Tr. 2986. For example, Ms. Mangold elicited testimony from Westerhout regarding (1) President Trump's transportation of documents between the Oval Office, the White House "residence," "Air Force One," and "Marine One," Tr. 2989; and (2) calls via "a secure line" in the "[S]ituation [R]oom," Tr. 2988; and (3) President Trump's work with Scavino to use the @realdonaldtrump Twitter account for official White House communications, Tr. 2991-92.

Westerhout described work that she did to collect contact information so that she could assist President Trump more efficiently. Tr. 2995-96. The list of contacts that DANY offered into evidence included individuals who later served in the Trump Administration, including Steven Mnuchin (Treasury Secretary), Carl Icahn (Special Advisor to the President), and Pam Bondi (White House communications staff). *See* GX 69. Finally, DANY "refreshed" both Westerhout and Hicks regarding a March 2018 text message that they exchanged as White House advisers working on behalf of President Trump: "Hey- the president wants to know if you called David pecker again." GX 319; Tr. 2212-13, 3006-08. Not surprisingly, Westerhout explained that it was not "unusual" during that period for her to communicate with Hicks on behalf of President Trump regarding those types of issues. Tr. 3008. Indeed, communications between President Trump's aides and advisers was necessary to the orderly functioning of the Presidency.

Westerhout's description of President Trump's practices with respect to Air Force One, Marine One, and the Situation Room concerned the "core" Commander In Chief power, Art. II, § 2, cl. 1, for which "absolute" immunity applies. *See Trump*, 2024 WL 3237603, at *8. President Trump was "at least" entitled to "presumptive immunity" with respect to Westerhout's testimony regarding her work with President Trump and her observations of him exercising his Article II

authority. *Id.* at *12. The testimony described official acts by and on behalf of President Trump that fit comfortably within the outer perimeter of Presidential power. None of these details regarding President Trump's Administration involved actions that were "manifestly or palpably beyond his authority," which is the boundary of that perimeter. *Id.* at *13 (cleaned up). Nor would DANY have been able to rebut any presumption that was deemed appropriate, had the question been addressed as *Trump* requires, because the prospect of biased local prosecutors using official-acts testimony regarding a President's personal preferences during his or her administration, and his or her communications with confidential assistants, presents an unacceptable risk of "undue pressures or distortions" to a President's work on behalf of the American people. *Id.* at *12.

C. President Trump's Official Public Statements Via Twitter

DANY improperly used official-acts evidence relating to Tweets attributed to President Trump in 2018, which were posted to a Twitter account that President Trump used as an official channel of White House communication. *See* GXs 407-F – 407-I; Tr. 2708-09.

The *Trump* Court recognized that President Trump's "communications in the form of Tweets," using the same account that DANY put at issue in this case, were consistent with the President's "'extraordinary power to speak to his fellow citizens.'" 2024 WL 3237603, at *18 (quoting *Hawaii*, 585 U.S. at 701). This "long-recognized aspect of Presidential power" arises from the Executive Vesting Clause and the Take Care Clause, and President Trump is therefore entitled to absolute immunity with respect to these Tweets. *Id.*

During discussion relating to President Trump's Twitter account, in addition to *Hawaii*, the Supreme Court also cited the recent decision in *Lindke v. Freed*. *See Trump*, 2024 WL 3237603, at *18. In *Lindke*, the Supreme Court reasoned that "context can make clear that a social-media account purports to speak for the government." 601 U.S. 187, 202 (2024). Here, that

context conclusively supports President Trump's position. "The public presentation of the [@realDonaldTrump Twitter] Account and the webpage associated with it bear all the trappings of an official, state-run account." *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). President Trump used the account as "one of the White House's main vehicles for conducting official business." *Id.* at 232.

In addition to the appearance of the account and the official manner in which President Trump was using it in 2018, the official-acts conclusion is further supported by the fact that President Trump relied on a White House employee to help him operate the account. *See Trump*, 2024 WL 3237603, at *19 ("Knowing, for instance, . . . who was involved in transmitting the electronic communications . . . could be relevant to the classification of each communication."); *Lindke*, 601 U.S. at 203 ("[A]n official who uses government staff to make a post will be hard pressed to deny that he was conducting government business."). Specifically, Scavino, the White House Director of Social Media, was a "staff member" and "one of the President's very trusted advisors," who was authorized to make posts on the account subject to President Trump's approval. Tr. 2172, 2983. Scavino "did a lot of the President's communications, and especially helped the President get tweets out and other statements." Tr. 2983-84.

At trial, DANY relied on false opinions from Cohen and Daniels to try to suggest that these tweets were directed at them, individually, rather than what they objectively were: communications with the American people regarding matters of public concern bearing on President Trump's credibility as the Commander in Chief. The opinions of Cohen and Daniels are entitled to no weight in the official-acts analysis required by the Presidential immunity doctrine. *See Trump*, 2024 WL 3237603, at *14 ("In dividing official from unofficial conduct, courts may

not inquire into the President's motives."). The objective context is that each Tweet followed a public event that President Trump addressed through public statements via an official communications channel "in a manner that promote[d] the President's view of the public good" and that President Trump "believe[d] would advance the public interest." *Id.* at *17, *18; *see also Snyder v. Phelps*, 562 U.S. 443, 453 (2011) ("Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public. The arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." (cleaned up)).

For example, Ms. Hoffinger used Cohen to connect President Trump's April 21, 2018 Twitter post to the FBI's search targeting Cohen on April 9, 2018. Tr. 3582; *see also* GX 407-F. Ms. Hoffinger used Daniels to position the second post in April 2018 as a response to Daniels' false public claims that President Trump and his associates had sent someone to intimidate her in 2011. Tr. 2708. On their face, the May 3, 2018 posts addressed public allegations at issue in ongoing investigations by, at least, DOJ and the FEC. GX 407-G. With respect to the posts on August 22, 2018, Ms. Hoffinger emphasized the official nature of the public communications by inquiring about the irrelevant "effect" on Cohen of having "the President of the United States tweeting this," and used Cohen to connect the posts to Cohen's guilty plea on August 21. Tr. 3617-18; GXs 407-H, 407-I. While that timing is undisputed, so too should be the authority of the President of the United States to comment upon and criticize the conduct of federal prosecutors and regulators exercising Article II authority that he delegated to them.

In other words, like the other official-acts evidence that DANY used, President Trump's Twitter posts fall well within the core authority of the Nation's Chief Executive. "Investigative and prosecutorial decisionmaking is 'the special province of the Executive Branch,' and the Constitution vests the entirety of the executive power in the President, Art. II, § 1." *Trump*, 2024 WL 3237603, at *15 (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)). In *Heckler*, the Court sourced the President's authority over prosecutorial decisionmaking to the Take Care Clause. *See* 470 U.S. at 832. Thus, the Vesting Clause and the Take Care Clause served as independent sources of "core" authority for these official acts, and President Trump is entitled to absolute immunity with respect to this evidence.

Finally, even if—counter-factually—the Tweets are divorced from President Trump's authority to comment on the federal inquiries that were being undertaken in his Executive Branch at the time, "most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities." *Trump*, 2024 WL 3237603, at *18. Attendant to the "bully pulpit" Presidential power is an "expect[ation] to comment on those matters of public concern that may not directly implicate the activities of the Federal Government . . . ." *Id.*

In *Jones*, President Clinton was alleged to have authorized White House personnel and a private attorney, during his Presidency, to state publicly that sexual assault allegations by Paula Jones were "not true" and a "cheap political trick" that was "really just another effort to rewrite the results of the election." *Jones*, 974 F. Supp. at 717-18 (cleaned up). The Supreme Court believed those public comments "arguably may involve conduct within the outer perimeter of the President's official responsibilities . . . ." 520 U.S. at 686. Given that logic, it cannot be said that

President Trump's posts were "palpably beyond" that "outer perimeter." *Trump*, 2024 WL 3237603, at *13 (cleaned up).[12]

The only evidence DANY would have had to rebut the "at least" presumptive outer-perimeter immunity for the social media posts is lay-witness opinions from two witnesses with grave credibility problems, Cohen and Daniels. Those implausible opinions address President Trump's motivations in making the posts, which is a "highly intrusive" inquiry that the Supreme Court has foreclosed. *Trump*, 2024 WL 3237603, at *14 (cleaned up). More broadly, permitting prosecutors to use a President's public statements on matters of public concern in criminal proceedings would chill the President's willingness and ability to communicate with the public. That would result in an impermissible "intrusion on the authority and functions of the Executive Branch" and the "enfeebling of the Presidency." *Id.* at *16, *24.

D. President Trump's Official Acts In Response To FEC Inquiries

DANY also relied on two types of official-acts evidence relating to President Trump's 2018 response to investigations by the FEC.

First, DANY presented a February 2018 text message from Cohen indicating that President Trump had "approved" Cohen addressing the FEC complaint, both formally and through a public statement. GX 260; *see also* GX 202 (Cohen's statement). DANY also offered a text message to Cohen from Sekulow (an attorney for President Trump), which Cohen testified reflected a

[12] Prior to the Supreme Court's ruling in *Trump*, Judge Kaplan rejected President Trump's Presidential immunity defense to allegedly defamatory Tweets. *See Carroll v. Trump*, 680 F. Supp. 3d 491, 505 (S.D.N.Y. 2023). *Trump* abrogates the reasoning in *Carroll* for several reasons, including that (1) Judge Kaplan did not define the "outer perimeter" of Presidential power as that which is "palpably beyond his authority," *Trump*, 2024 WL 3237603, at *13; (2) Judge Kaplan did not apply the "presumption of immunity" to outer-perimeter acts, as required by *Trump*, *id.* at 16; and (3) Judge Kaplan impermissibly took into account the plaintiff's allegations of President Trump's motive in making posting the challenged Tweets—an exercise forbidden by *Trump*, *id.* at *14.

statement of gratitude by President Trump regarding Cohen's "statement . . . on the FEC." Tr. 3573. These communications involved President Trump using a third-party (Cohen) to make "public communications" that "are likely to fall comfortably within the outer perimeter of his official responsibilities." *Trump*, 2024 WL 3237603, at *18. Once again: if President Clinton's use of a private attorney to make public statements denying the allegations by Paula Jones was "arguably" within the "outer perimeter of the President's official responsibilities," 520 U.S. at 686, then President Trump's use of a private attorney (Sekulow) to coordinate a public statement by another private attorney (Cohen) cannot have been "palpably beyond" President Trump's outer-perimeter authority, *Trump*, 2024 WL 3237603, at *13.

Second, Cohen testified that President Trump "told" him that the FEC inquiry would be "taken care of" by then-Attorney General Jeff Sessions, and that Cohen conveyed that information to Pecker. Tr. 3576-77. Assuming this conversation happened, which we do not concede, Cohen's testimony included information regarding President Trump's "conclusive and preclusive authority" to "decide which crimes to investigate and prosecute, including with respect to allegations of election crime." *Trump*, 2024 WL 3237603, at *14 (cleaned up).

> The President may discuss potential investigations and prosecutions with his Attorney General and other Justice Department officials to carry out his constitutional duty to "take Care that the Laws be faithfully executed." Art. II, § 3. And the Attorney General, as head of the Justice Department, acts as the President's "chief law enforcement officer" who "provides vital assistance to [him] in the performance of [his] constitutional duty to preserve, protect, and defend the Constitution."

Id. (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985)). "As Madison explained, '[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.'" *Seila Law*, 591 U.S. at 213 (quoting 1 Annals of Cong. 463 (1789)).

As in *Trump*, DANY's suggestion that President Trump spoke to Attorney General Sessions "for an improper purpose do[es] not divest the President of exclusive authority over the investigative and prosecutorial functions of the Justice Department and its officials." *Trump*, 2024 WL 3237603, at *15. And, as in *Trump*, President Trump is "absolutely immune" from DANY's efforts to use this evidence against him. *Id.*

E. Official-Acts Evidence Relating To Investigations By Congress And Prosecutors

DANY presented official-acts evidence relating to President Trump's public responses to investigations by Congress and federal prosecutors, and his deliberations relating to the pardon power.

Cohen sought to justify his perjury before Congress by reference to President Trump's public position in response to the investigations by Congress and Special Counsel Mueller that "there was no Russia-Russia-Russia." Tr. 3550. President Trump's public statements in response to the congressional and Special Counsel investigations were part of his outer-perimeter authority to address the American people. Moreover, Presidential power includes the authority to engage in the "hurly-burly, the give-and-take of the political process between the legislative and the executive." *Trump v. Mazars USA, LLP*, 591 U.S. 848, 859 (2020) (cleaned up). For both of these reasons, evidence relating to President Trump's responses to these investigations are "at least" entitled to "presumptive immunity." *Trump*, 2024 WL 3237603, at *12.

DANY also elicited testimony from Cohen suggesting that he was seeking the "power of the President" in 2017 to protect him in connection with the congressional investigations. Tr. 3549. Cohen was more explicit with respect to 2018 communications with Costello, which he described as a means of "back channel communication to the President." Tr. 3594. Specifically, Cohen told the jury that a June 13, 2018 email, GX 207, referred to "potential pre-pardons" that

Cohen and Costello discussed after President Trump allegedly referenced the concept. "The President's authority to pardon," established in Article II, § 2, cl. 4, is one of the "core" constitutional powers "invested exclusively in [the President] him by the Constitution." *Trump*, 2024 WL 3237603, at *8-9.

F. President Trump's Official Disclosures On OGE Form 278e

President Trump's submission of the Office of Government Ethics (OGE) Form 278e in 2018 reflected an official act for which he is entitled to immunity. *See* GX 81.

Following a dialogue with OGE, President Trump signed the Form in May 2018 and accurately listed his relevant position as "President of the United States of America." GX 81 at 1. President Trump caused the form to be submitted to OGE, which was part of the Executive Branch that President Trump was running when he signed the document.[13] The Form disclosed information regarding President Trump's financial activities in 2017—also while he was President.

According to OGE, one of the purposes of the Form is "to ensure confidence in the integrity of the Federal Government by demonstrating that they are able to carry out their duties without compromising the public trust." 5 C.F.R. § 2634.104(a). Thus, President Trump's submission of the Form was part of the "Presidential conduct" that involved "speaking to . . . the American people," which the *Trump* Court recognized "certainly can qualify as official . . . ." 2024 WL 3237603, at *13. President Trump's submission of the Form was certainly not "palpably beyond" that authority. *Id.* (cleaned up).

Nor could DANY meet its burden of rebutting any presumption that attaches to the immunity. President Trump was required to make the disclosures on the Form in his official

[13] *See* U.S. Office of Government Ethics, Our History, https://www.oge.gov/web/OGE.nsf/about_our-history.

capacity as President. In addition, the Form reflects an "Agency Ethics Official's Opinion" that President Trump was "in compliance with applicable laws and regulations." GX 81 at 1. By using this document in a criminal prosecution, DANY invited the type of "second-guessing" of President Trump's official acts that "would threaten the independence [and] effectiveness of the Executive." 2024 WL 3237603, at *20 n.3 (cleaned up).

II. Use Of Official-Acts Evidence In Grand Jury Proceedings Requires Dismissal Of The Indictment

DANY violated the Presidential immunity doctrine by using similar official-acts evidence in the grand jury proceedings that gave rise to the politically motivated charges in this case. Because an Indictment so tainted cannot stand, the charges must be dismissed.

DANY elicited extensive official-acts testimony from [redacted] during grand jury proceedings. GJ Tr. 698-711. The prosecutors also presented [redacted], *see* GXs 407-F – 407-I, and similar testimony from [redacted]. GJX 48; GJ Tr. 915, 922-24, 939-40. [redacted] provided testimony to the grand jury that was [redacted] GJ Tr. 950-51. [redacted] testified about [redacted]. GJ Tr. 1089. Finally, DANY abused Presidential immunity in the grand jury in a way they did not at trial by presenting extensive testimony from [redacted] regarding [redacted]. GJ Tr. 731-64.

The official-acts evidence that DANY presented to the grand jury contravened the holding in *Trump* because Presidents "cannot be indicted based on conduct for which they are immune from prosecution." 2024 WL 3237603, at *19. The Presidential immunity doctrine recognized in *Trump* pertains to *all* "criminal proceedings," including grand jury proceedings when a prosecutor "seeks to charge" a former President using evidence of official acts. *Id.* at *12. Indeed, DANY

previously acknowledged to the Supreme Court in *Vance*, in connection with an investigation targeting President Trump, that there is a "prohibition on state investigation of *official* presidential conduct." Ex. 7 at 10 (emphasis in original); *see also, e.g.*, *United States v. McLeod*, 385 F.2d 734, 751-52 (5th Cir. 1967) ("Both the Supremacy Clause and the general principles of our federal system of government dictate that a state grand jury may not investigate the operation of a federal agency. . . . [T]he investigation . . . is an interference with the proper governmental function of the United States . . . [and] an invasion of the sovereign powers of the United States of America." (cleaned up)).

DANY's concession in *Vance* is consistent with the First Department's application of New York's Speech and Debate Clause in *People v. Ohrenstein*, 153 A.D.2d 342 (1st Dep't 1989). In *Ohrenstein*, the First Department denied Article 78 relief to the government relating to the dismissal of charges based on allegations of "theft, fraud and filing of a false instrument" against New York Senate employees, where "there was evidence presented to the Grand Jury" relating to activities that "clearly f[e]ll within the ambit of legislative acts that are covered by the Speech or Debate Clause." *Id.* at 347, 356. The court reasoned that an "indictment cannot be legally sufficient if it is based on Grand Jury testimony which may require inquiry into legislative acts or the motivation for legislative acts." *Id.* at 356 (citing *United States v. Brewster*, 408 U.S. 501, 512 (1972)). "Although the general rule is to view the Grand Jury evidence in the light most favorable to the People, that rule does not apply where the constitutional rights protected by the Speech or Debate Clause are affected." *Id.* at 356-57. In that setting, "[t]he obligation is on the prosecutor to show that no privileged legislative act would be implicated." *Id.* at 357. On remand following review by the Court of Appeals, *see* 77 N.Y.2d 38 (1990), the trial judge dismissed additional charges based on the finding that two of the remaining defendants were "prejudiced by the

erroneous theory" presented to the grand jury. *See People v. Ohrenstein*, 151 Misc. 2d 512, 519-20 (Sup. Ct. N.Y. Cty. 1991) (reasoning that "the court cannot find with confidence that the People's erroneous theory had no bearing on the grand jury's decision to vote these counts").

The decisions in *Ohrenstein* are consistent with the Supreme Court's reasoning in *Trump*. Allowing presentation of official-acts evidence in grand jury proceedings creates a "[v]ulnerability to the burden of a trial." *Trump*, 2024 WL 3237603, at *22 (cleaned up). That vulnerability is constitutionally unacceptable, as it "would dampen the ardor of all but the most resolute" occupants of the Oval Office. *Id.* (cleaned up). "The Constitution does not tolerate such impediments to the effective functioning of government." *Id.* (cleaned up). The grand jury proceedings in this case created just such an impediment, and the charges must be dismissed.

III. Use Of Official-Acts Evidence Requires Vacatur Of The Jury's Verdicts

The trial in this case was, to put it mildly, similarly tainted. In light of the federal constitutional doctrine articulated in *Trump* and DANY's use of official-acts evidence at trial, the jury's verdicts cannot stand. The Supreme Court's decision does not allow for an "overwhelming evidence" or "harmless error" exception to the profound institutional interests at stake. Indeed, *Trump* contemplates a pretrial interlocutory appeal of an adverse Presidential immunity determination precisely because even the prospect of such a trial is constitutionally unacceptable. It necessarily follows that the results of a trial conducted in breach of these holdings is invalid. The verdicts reflect a threat to the principles articulated by the Supreme Court and the concerns that animate the Supremacy Clause. In any event, because of the "peculiar constitutional concerns" presented, the jury's verdicts could not withstand constitutional harmless error analysis under New York law even if it were to apply.

A. Presidential Immunity Errors Are Never Harmless

The jury's verdicts must be vacated because the use of official-acts evidence at trial violated the Presidential immunity doctrine.

The Court and the jury lacked authority to "adjudicate" this case because DANY framed the trial proof in a manner that "examine[d] . . . Presidential actions." *Trump*, 2024 WL 3237603, at *9. The prosecution of a former President, such as President Trump, presents "peculiar constitutional concerns" that requires enhanced protections for "the institution of the Presidency." *Id.* at *20.

> [I]f a former President's official acts are routinely subjected to scrutiny in criminal prosecutions, the independence of the Executive Branch may be significantly undermined. The Framers' design of the Presidency did not envision such counterproductive burdens on the vigor and energy of the Executive.

Id. at *11 (cleaned up). In this setting, the "tools" that are typically used to protect a defendant's rights at trial, such as "evidentiary rulings" and "jury instructions," "are unlikely to protect adequately the President's constitutional prerogatives." *Id.* at *20 (cleaned up).

To protect against these burdens on the Presidency, states may not even subject former Presidents to "the burdens of broad-reaching discovery," much less "'the costs of trial,'" through the use of allegations or evidence relating to official acts. *Trump*, 2024 WL 3237603, at *14 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982)). Irrespective of the quality of other evidence, it is the "the possibility of an extended proceeding alone" that animates Presidential immunity. *Id.* "Inquiries of this kind can be peculiarly disruptive of effective government." *Harlow*, 457 U.S. at 817-18.

The *Trump* Court specifically rejected the argument that "as-applied challenges in the course of the trial suffice to protect Article II interests," and found no comfort in the government's suggestion that Presidential immunity challenges could be "deferred until after trial." *Trump*, 2024

WL 3237603, at *21. Instead, the Supreme Court cited *Mitchell v. Forsyth*, where the Court reasoned that "qualified immunity is in part an entitlement *not to be forced to litigate* the consequences of official conduct," 472 U.S. 511, 527 (1985) (emphasis added). *See id.* at *21. This federal constitutional reasoning forecloses harmless-error analysis under New York law in a manner similar to the treatment of "structural errors" and "mode of proceedings errors." *See People v. Mairena*, 34 N.Y.3d 473, 482 (2019); *People v. Mack*, 27 N.Y.3d 534, 540 (2016) ("Mode of proceedings errors are immune not only from the rules governing preservation and waiver but also from harmless error analysis."); *see also, e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993) (reasoning that "structural defects in the constitution of the trial mechanism . . . defy analysis by harmless-error standards" because those errors "infect the entire trial process" (cleaned up)).

Here, DANY wrongfully and unconstitutionally forced President Trump to litigate official-acts evidence at trial. They did so proudly and unapologetically, in a manner that speaks to the political motivations driving the elected local official responsible for this unjust prosecution on behalf of President Biden. For example, referring to contested official-acts evidence now plainly subject to Presidential immunity under *Trump*, DANY promised the First Department that it planned to offer such proof as evidence of President Trump's supposed [redacted] NYSCEF Doc. No. 13 ¶ 50, *Trump v. Merchan*, Case No. 2024-02413 (1st Dep't Apr. 17, 2024). That is exactly what happened at this trial, in violation of *Trump*. The result is an affront to, among other things, core constitutional interests central to the functioning of the federal government. Accordingly, the jury's verdicts must be vacated.

B. The Harmless-Error Doctrine Cannot Save The Trial Result

The Supreme Court's constitutional analysis in *Trump* forecloses harmless-error analysis. In any event, in light of the exceedingly weak evidence that DANY presented at trial and the since-recognized extreme risks of unfair prejudice resulting from the use of official-acts evidence, it cannot be said that "there is no reasonable possibility that the error might have contributed to defendant's conviction." *People v. Mairena*, 34 N.Y.3d 473, 485 (2019).

1. DANY's Evidence Was Weak

Cohen's testimony was the only connection between President Trump and the charged violations of Penal Law § 175.10. Cohen's multiple felonies, including for fraud crimes and perjury, cannot be overlooked in this analysis. *See, e.g.*, *People v. Simmons*, 75 N.Y.2d 738, 739 (1989) ("[T]he prosecution's case was less than overwhelming. It rested on the testimony of the complainant whose credibility was impugned by his extensive criminal history."). Based on Cohen's plea allocution and fall 2023 testimony against President Trump in another proceeding, a federal judge concluded that Cohen had committed perjury yet again prior to the trial in this case. *See United States v. Cohen*, 2024 WL 1193604, at *5 (S.D.N.Y. Mar. 20, 2024) (reasoning that Cohen's "October 2023 testimony . . . was either perjurious or confirms that he committed perjury before this Court").

DANY relied on Cohen's false claims, alone, to connect President Trump to Cohen's alleged conversations in 2017 with Allen Weisselberg and Weisselberg's purported notes, GX 35. *See* Tr. 3490. DANY conceded that they made no effort to present information from Weisselberg to the jury. *See* Tr. 3246-47. Given all of the resources District Attorney Bragg put into this case, the only reasonable inference to draw from that decision is that Weisselberg's recollection is not consistent with Cohen's.

Moreover, Cohen's testimony regarding the supposed meeting with President Trump and Weisselberg was tenuous at best. Cohen claimed that Weisselberg "turned around" during the meeting to relay information from President Trump and thus effectively conceded that he was not a direct participant in the conversation. Tr. 3491. As another example, Cohen falsely claimed to have discussed the purported scheme with President Trump in the Oval Office on February 8, 2017, including details regarding payments he said were due for January and February of that year. Tr. 3512-13. Days later, however, he asked McConney: "Please remind me of the monthly amount?" GX 1 at 3.

Ms. Hoffinger repeatedly asked Cohen to describe the substance of telephone conversations with President Trump in 2016 and 2017, at least seven years before the trial. Given the numerous reasons that Cohen had to be in contact with President Trump during that time frame, toll records relating to those calls did not corroborate the false and salacious details that Cohen attributed to them during his recent and ongoing political crusade. This reality came to pass during the trial when the defense demonstrated that Cohen lied, emphatically, about having discussed the details of the scheme with President Trump during a call to Keith Schiller on October 24, 2016, when in fact he spoke to Schiller about harassing phone calls from a teenager. *E.g.*, Tr. 3896-97. Through this false testimony, Cohen himself demonstrated that DANY's desperate attempts to corroborate his fictious account using phone records was little more than a prosecutorial parlor trick that is deserving of no weight in any harmless-error analysis.

DANY also tried unsuccessfully to corroborate and rehabilitate their serial-perjurer star witness through a purported recording that Cohen claimed to have made of President Trump on September 6, 2016, in blatant violation of Cohen's ethical obligations. *See* GXs 246 (audio), 248 (transcript). Cohen lied to the jury several times about the substance and circumstances of the call.

For example, Cohen claimed that the recording ended because he "received an incoming call," and Ms. Hoffinger tried to suggest that such a call was reflected on Cohen's cellphone records. Tr. 3343-44. However, the phone records demonstrated that (1) Cohen did not answer the call identified by Ms. Hoffinger because it went straight to voicemail, *see* Tr. 3145-47; and (2) the call isolated by Ms. Hoffinger in the phone records went to a different physical cellphone device, with a different IMEI number, than the device that Cohen claimed to have used to make the recording, *see* Tr. 3939-40, 4578-79.

When the September 2016 recording cut off, President Trump was in the process of asking Cohen to "check" on details that were not captured on the audio file. *See* GX 248. On cross-examination, Cohen tried to explain that away by claiming falsely—and contrary to the attributions in DANY's own transcript, GX 248—that "I used the word . . . check" because "[w]e needed to do it by check." Tr. 3939. Finally, even if all of the problems with the recording could be ignored—which they cannot—DANY's theory of the substance of the discussion did not corroborate Cohen's testimony regarding the business records at issue. DANY argued that the recording related to Karen McDougal. It had nothing to do with Cohen's $130,000 payment to Daniels, and there is no factual connection between the recording and the $420,000 that the Trump Organization paid Cohen in 2017.

DANY's case was equally flawed, if not more so, with respect to the Election Law § 17-152 conspiracy that they relied upon to escalate the unfounded and time-barred business records misdemeanors to non-existent felonies. These evidentiary weaknesses were exacerbated by the fact that DANY hid the ball regarding the theory they put to the jury until they submitted their proposed jury instructions, and by the Court's failure to require the jury to make a unanimous finding with respect to DANY's theories of "unlawful activity" objects for the Election Law § 17-

152 conspiracy predicate: the Federal Election Campaign Act ("FECA"), tax crimes, and underlying business-records violations.[14]

As to FECA, notwithstanding after-the-fact rationalizations by a variety of actors faced with ulterior motives, there was no admissible evidence that any alleged participant acted with *willful intent* to make an illegal campaign contribution. *See* Tr. 4844-45 (jury instruction regarding willfulness). Pecker said just the opposite during the trial, and he submitted a sworn declaration to the FEC to that effect at the time of these events. Tr. 1445-48.[15]

DANY's tax theory also required criminal intent. Tr. 4847. There was no such evidence. Regarding the "grossed up" theory, Cohen testified: "I didn't know. And, to be honest, I didn't really even think about it." Tr. 3490. Similarly, McConney testified: "I don't know exactly what it meant." Tr. 2299. In fact, McConney testified that "nobody" but Weisselberg "would know" that Weisselberg meant by that. Tr. 2397. Cohen and McConney went on to speculate, after the fact, about the notion in the notes. But there was no evidence that any of these men harbored criminal intent at the time of the agreement in 2017.

[14] Although the Court observed that unanimity on this issue is "not ordinarily required" when the charge at issue is a conspiracy, unanimity was critical as a constitutional safeguard in this case where DANY used the Election Law conspiracy to elevate the misdemeanor business-record charges to felonies with corresponding increases in the penalties associated with those charges. *See* Tr. 4402-04.

[15] On July 9, 2024, the campaign-finance expert whose potential testimony the Court improperly restricted at trial explained during testimony before the House Judiciary Committee why it was "incorrect as a matter of law" to characterize Cohen's payment to Daniels as a campaign contribution. *Hearing on the Weaponization of the Federal Government Before the H. Comm. on the Judiciary*, 118th Cong. 7 (2024) (statement of Bradley A. Smith, Chairman, Institute for Free Speech), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/Smith%20Testimony.pdf. Smith, a former FEC commissioner, also explained how DANY "abused" the campaign finance aspects of the trial, and he concluded that the resulting decisions "place in danger the entire enforcement scheme designed by Congress when it passed the FECA." *Id.* at 13.

Finally, DANY's embedded business-records theory was speculative and unsupported. There was no evidence whatsoever that anyone but Michael Cohen knew about the contents of the records he submitted to First Republic Bank in October 2016. Thus, there was no evidence to support the conclusion that the agreement at issue in the Election Law conspiracy predicate included an objective to use Cohen's business records as "unlawful means." Pecker testified that AMI's records were not false, and there was no evidence that he acted with the required intent to defraud. Tr. 1386, 4846 (jury instructions). Finally, as to the Form 1099s that the Trump Organization issued to Cohen, there was no evidence of a falsehood. *See* GX 93. The Form 1099s reflected "Nonemployee compensation" to Cohen and did not distinguish between income and reimbursement; it was incumbent upon Cohen to draw that distinction in his own tax filings. Tr. 2406-07. DANY intentionally avoided asking McConney any questions about the veracity of the representations in the documents, and instead invited counter-factual speculation from the jury that was not supported by the record. *See* Tr. 2364-65.

2. The Official-Acts Evidence Was Critical To DANY's Trial Presentation

Any harmless-error analysis would also have to account for the fact that the unconstitutional official-acts evidence was crucial to DANY's case-in-chief.

DANY sought to bolster Cohen and address the glaring holes in their case through the official-acts evidence. Perhaps most problematic was DANY's reliance on Hicks's testimony regarding 2018 conversations with President Trump to argue that President Trump was aware of Cohen's payment to Daniels at the time it was made. But that is not all. DANY presented Westerhout's testimony regarding the detail-oriented manner in which President Trump ran the country to argue falsely that details relating to their bogus charges could not have escaped him. DANY relied on President Trump's official-acts Tweets to the public in 2018 as purported

"consciousness of guilt" evidence to try to convince the jury that President Trump was seeking to coerce silence from star witnesses who were not credible. DANY relied on the OGE Form 278e to try to corroborate Cohen's reimbursement-related testimony.

The prosecutor's own summation illustrates how important the unconstitutional official-acts evidence was to DANY's case. *Hardy*, 4 N.Y.3d at 199. Mr. Steinglass referred to Hicks and Westerhout as examples of witnesses that provided "damaging," "utterly devastating" testimony that operated—in DANY's warped view—as "critical pieces of the puzzle." Tr. 4598. Mr. Steinglass specifically referred to Hicks, twice, and in one instance re-read a portion of her official-acts testimony to the jury. Tr. 4747, 4806. Mr. Steinglass also called attention to President Trump's "own Tweets" as important corroboration for Cohen's false narrative, Tr. 4621, and argued that President Trump used the posts to communicate directly with Cohen, Tr. 4756. The summation included specific discussion of several of the official-acts Tweets, as well as President Trump's OGE Form 278e. Tr. 4766, 4790.

3. As A Matter Of Law, The Errors Had A Causal Effect On The Jury

Constitutional harmless error analysis requires consideration of "the causal effect the error may nevertheless have had on the jury." *Hamlin*, 71 N.Y.2d at 756. The *Trump* Court identified specific and unacceptable risks arising from the extreme prejudicial impact that official-acts evidence would have on jurors. Specifically, "[a]llowing prosecutors to ask or suggest that the jury probe official acts for which the President is immune would thus raise a unique risk that the jurors' deliberations will be prejudiced by their views of the President's policies and performance while in office." *Trump*, 2024 WL 3237603, at *20. As was evident from jury selection, "Presidential acts frequently deal with matters likely to arouse the most intense feelings." *Id.* (cleaned up). The unique risks of prejudice arising from the presentation of official-acts evidence

make it even clearer that the jury's verdicts could not withstand constitutional harmless error analysis.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Indictment and vacate the jury's verdicts based on violations of the Presidential immunity doctrine and the Supremacy Clause.

Dated: July 10, 2024
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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.

Ind. No. 71543-23

PRESIDENT DONALD J. TRUMP'S MOTION TO DISMISS PURSUANT TO CPL §§ 210.20(1)(h) AND 210.40(1)

TABLE OF CONTENTS

INTRODUCTION 1
BACKGROUND 6
I. DANY's Unconstitutional Targeting Of President Trump 6
II. Unlawful Investigative Leaks 9
A. Press Reports Of Leaked Information 9
B. Mark Pomerantz's Leaks 10
III. DANY's Improper Prejudice To The Jury Pool 13
A. DA Bragg's Improper Extrajudicial Statements 13
B. Prejudicial Publicity Arising From DANY's Improper Targeting Of Allen Weisselberg 14
C. Prejudicial Publicity Caused By DANY's Star Witnesses 14
IV. DANY's Trial Misconduct 17
A. False Testimony By Stormy Daniels 17
B. Perjury By Michael Cohen 17
C. DANY's Misrepresentations Regarding Allen Weisselberg's Severance Agreement 18
V. DANY's Misrepresentations In Removal Proceedings 19
VI. Conflicts And Appearances Of Impropriety 21
A. The Court's Daughter And Authentic Campaigns Inc. 21
B. The Unconstitutional Continuation Of The Gag Order 24
VII. Post-Trial Litigation 24
VIII. President Trump's Overwhelming Victory In The 2024 Presidential Election 25
APPLICABLE LAW 25
I. CPL § 210.20(1)(h) 25
II. CPL § 210.40 25
III. Presidential Immunity 26
A. *Trump v. United States* 26
B. The 1973 OLC Opinion 27
C. The 2000 OLC Opinion 28
D. The 2024 OLC Opinion 31
IV. The Presidential Transition Act Of 1963 32
V. The Supremacy Clause 33
DISCUSSION 35
I. This Case Must Be Dismissed Pursuant To CPL § 210.20(1)(h) 35

A. Presidential Immunity Requires Dismissal 35
B. The President-Elect Is Entitled To Categorical Immunity Under The Presidential Transition Act 41
C. The Supremacy Clause Requires Dismissal 43
D. Balancing Of Valid Interests Further Supports Dismissal 49
E. The Court Cannot Defer These Proceedings Until President Trump Completes His Second Term 51
II. This Case Must Be Dismissed Pursuant To CPL § 210.40(1) 54
A. The Seriousness Of The Charges Does Not Override Presidential Immunity 54
B. No Harm Resulted From DANY's Allegations 56
C. DANY's Evidence Was Weak 58
D. President Trump's Extraordinary Service To This City And The Nation 59
E. Prosecutorial And Law Enforcement Misconduct 59
F. No Sentence Can Be Timely Imposed 63
G. Dismissal Would Improve Public Confidence 63
H. Dismissal Would Benefit The Public Welfare 66
I. There Are No Victims 67
III. No Additional Proceedings May Take Place Other Than Dismissal Pursuant To This Motion 68
CONCLUSION 69

INTRODUCTION

President Donald J. Trump respectfully submits this motion to dismiss the Indictment and vacate the jury's verdicts pursuant to CPL §§ 210.20(1)(h) and 210.40(1). The Presidential immunity doctrine, the Presidential Transition Act, and the Supremacy Clause all require that result, and they require it immediately.

Yesterday, in issuing a 10-year pardon to Hunter Biden that covers any and all crimes whether charged or uncharged, President Biden asserted that his son was "selectively, and unfairly, prosecuted," and "treated differently." Ex. 81.[1] President Biden argued that "raw politics has infected this process and it led to a miscarriage of justice." *Id.* These comments amounted to an extraordinary condemnation of President Biden's own DOJ. This is the same DOJ that coordinated and oversaw the politically-motivated, election-interference witch hunts targeting President Trump by disgraced Special Counsel Jack Smith, the other biased prosecutors in Smith's Special Counsel's Office ("SCO"), and others. This is the same DOJ that sent Matthew Colangelo to DA Bragg to help unfairly target President Trump in this empty and lawless case.

Since DA Bragg took office, he has engaged in "precisely the type of political theater" that President Biden condemned. *Bragg v. Jordan*, 669 F. Supp. 3d 257, 271 (S.D.N.Y. 2023). This case is based on a contrived, defective, and unprecedented legal theory relating to 2017 entries in documents that were maintained hundreds of miles away from the White House where President Trump was running the country. There are no "aggravating factors" here, other than those arising from DANY's misconduct. Ex. 81. Thus, this case should never have been brought, particularly during a period when DA Bragg's failure to protect this City from pervasive violent crime frightens, threatens, and harms New Yorkers on a daily basis. And this case would never have

[1] All exhibits cited herein are attached to the December 2, 2024 Affirmation of Emil Bove.

been brought were it not for President Trump's political views, the transformative national movement established under his leadership, and the political threat that he poses to entrenched, corrupt politicians in Washington, D.C. and beyond.

Wrongly continuing proceedings in this failed lawfare case disrupts President Trump's transition efforts and his preparations to wield the full Article II executive power authorized by the Constitution pursuant to the overwhelming national mandate granted to him by the American people on November 5, 2024. Under *Trump v. United States*, 603 U.S. 593 (2024) and related caselaw, DANY's disruptions to the institution of the Presidency violate the Presidential immunity doctrine because they threaten the functioning of the federal government. Local elected officials such as DA Bragg have no valid basis to cause such disruptions, which also violate the Supremacy Clause. Consequently, the federal Constitution is an absolute "legal impediment" to further proceedings, CPL § 210.20(1)(h), and the case must be immediately dismissed.

Immediate dismissal is also required in the interests of justice pursuant to CPL § 210.40(1). DANY's wrongful prosecution threatens "enduring consequences upon the balanced power structure of our Republic" and the type of "factional strife" that President Biden decried in yesterday's blanket pardon announcement. *Trump*, 603 U.S. at 606, 640.[2] "The Constitution does not tolerate such impediments to the effective functioning of government." *Id.* at 636-37. Even SCO has been forced to concede, by DOJ's Office of Legal Counsel ("OLC"), that President Trump's status as President-elect mandates dismissal of the unjust prosecutions pending against him. *See* Ex. 61. "[T]he Constitution's prohibition on federal indictment and prosecution of a sitting President" is "categorical." *Id.* at 1. Although DANY has posited that they may seek to

[2] Unless otherwise indicated, all citations to legal authorities omit internal quotations and internal citations.

stay these proceedings during President Trump's second term, OLC concluded that the "categorical prohibition on the federal indictment of a sitting President . . . *even if the case were held in abeyance* . . . applies to this situation . . . ." *Id.* at 6 (emphasis added). Thus, DANY's ridiculous suggestion that they could simply resume proceedings after President Trump leaves Office, more than a decade after they commenced their investigation in 2018, is not an option.

Consistent with a course of unethical conduct dating back to Smith's November 2022 appointment, SCO intentionally and improperly failed to memorialize OLC's reasoning, or to have OLC memorialize their reasoning, regarding these historic, unprecedented matters. *See* Ex. 80. Nevertheless, there is nothing about this prosecution—driven by a local elected prosecutor whose actions threaten to interfere with the federal government's operations in violation of express prohibitions by the U.S. Supreme Court and the terms of the Presidential Transition Act—that serves as a persuasive basis to distinguish OLC's views requiring dismissal of Smith's lawfare and the need for dismissal here.

DANY conceded as much in *Trump v. Vance*, which concerned early aspects of the investigation that gave rise to this case. There, DANY acknowledged that "[w]hen a State attempts to regulate a federal official's exercise of federal powers, its actions necessarily conflict with supreme federal authority, and the Supremacy Clause resolves the conflict in favor of the federal government." Ex. 68 at 16. DANY indicated in *Vance* that they were "mindful" that, "as a state actor," they "*cannot prosecute a president while in office*." Ex. 67 at 54 (emphasis added). DANY also conceded that where a criminal prosecution presents a "real burden" on the President—and there can be no dispute that is true here—"courts are empowered" to "shut . . . a litigation down." *Id.* at 63. That is precisely what must happen now. These arguments by DANY in *Vance*—which

were joined by Chris Conroy, a member of the current prosecution team—remain substantively correct and completely binding under judicial estoppel principles.

Many other considerations mandate dismissal in the interests of justice. DANY's politically motivated targeting was not limited to President Trump. Conroy participated in the blatantly unconstitutional and properly dismissed DANY prosecution of Paul Manafort, and DANY tried to use this Court to pursue the ongoing crusade against Steve Bannon. From the outset of the investigation, DANY engaged in a prejudicial and highly improper pattern of leaking sensitive information regarding secret grand jury proceedings and confidential investigative steps. This continued with DANY's recruitment of Special Assistant District Attorney Mark Pomerantz, whose book contained information so sensitive that DANY told a federal court the disclosures subjected Pomerantz to criminal exposure. This misconduct led Pomerantz to subsequently invoke the Fifth Amendment. It speaks volumes about the repugnancy of DANY's behavior that Pomerantz refused to answer even the following question: "Did you knowingly break any laws when investigating President Trump?" Ex. 23.

DA Bragg ran for office based on his promise to continue targeting President Trump. DA Bragg's persistent efforts to make good on that promise while conditions in the City deteriorated, coupled with his improper extrajudicial statements after the charges were filed, created enormous appearances of impropriety in DANY's front office. DA Bragg's line prosecutors carried out a similar pattern of misconduct that included: (1) misrepresentations to a federal court in connection with 2023 removal proceedings; (2) unconscionable incarceration of Trump Organization CFO Allen Weisselberg for alleged perjury, while at the same time refusing to even investigate perjury during the same trial by their star witness, Michael Cohen; (3) in addition to that non-prosecution benefit, additional indicia of an improper relationship with Cohen, which led to the discipline of a

DANY investigator and required Your Honor to order DANY to instruct Cohen to terminate his false, greed-driven public attacks on President Trump; (4) misrepresenting to the Court that Weisselberg was unavailable to testify based on his severance agreement with the Trump Organization, when in fact DANY never tried to bring him to court because his anticipated testimony contradicted Cohen's false account; (5) brazenly violating the Court's admonishments during the testimony of Stormy Daniels; and (6) eliciting perjury from Cohen at the trial.

Nor can it be overlooked, insofar as the interests of justice under CPL § 210.40(1) are concerned, that this Court has insisted on presiding over these proceedings despite substantial appearances of impropriety and conflicts of interest. These circumstances include the Court's improper financial contributions to President Trump's political opponents, in violation of judicial ethics rules. Your Honor's daughter publicly expressed bias toward President Trump and publicly recounted a conversation with Your Honor in which the Court expressed similar views that were consistent with those financial contributions. Your Honor's daughter has a long-term personal, professional, and very lucrative financial relationship with Vice President Harris, which included a senior position on Harris's failed 2020 Presidential campaign. Your Honor's daughter is now a part owner and senior executive at Authentic Campaigns, which has publicly mocked President Trump in marketing efforts and provided services to the 2024 Harris Campaign this summer while Harris was unsuccessfully campaigning against President Trump. Authentic has received tens of millions of dollars from President Trump's political opponents, and those Authentic clients have solicited similarly huge sums of money based on Your Honor's handling of this case.

After the trial was completed, during a period when there was no risk whatsoever to the integrity of the remaining proceedings, the Court continued to violate President Trump's First Amendment rights and interfered with his ability to communicate with voters via a gag order that

still prohibits President Trump from addressing these matters of public concern on threat of incarceration. These circumstances, among others, are now the subject of a congressional investigation. *See* Exs. 52-53. On September 27, 2024, the House Judiciary Committee notified counsel for Mike Nellis, a partner of Your Honor's daughter at Authentic, of "noncompliance" with a congressional subpoena and "the prospect that [Nellis] has made false statements to the Committee." Ex. 82 at 1; *see also id.* at 3 (noting that "[o]ne element of this [Committee's] oversight is the potential for bias in trial-level local courts").

As President Biden put it yesterday, "Enough is enough." Ex. 81. This case, which should never have been brought, must now be dismissed. Should the Court disagree and plan to issue a decision on the pending CPL § 330.30 motion, or even schedule a sentencing, President Trump respectfully requests notice of those determinations and a two-week stay to provide a reasonable opportunity to pursue federal injunctive relief.

BACKGROUND

I. DANY's Unconstitutional Targeting Of President Trump

DANY began their unconstitutional crusade against President Trump in August 2018, while he was serving his first term in Office and protected by Presidential immunity. According to the House Judiciary Committee, DANY:

> weaponized the criminal justice system, scouring every aspect of President Trump's personal life and business affairs, going back decades, in the hopes of finding some legal basis—however far-fetched, novel, or convoluted—to bring charges against him. When one legal theory would not pan out, instead of discontinuing its politically motivated investigation, the DANY simply pivoted to a new theory, constantly searching for a crime—any crime—to prosecute President Trump.

Ex. 1 at 1. The entire case was "politically motivated, unethically and likely unlawfully focused solely on one person, and opened the door for future prosecutions of a former president—or current candidate—that would be widely perceived as politically motivated." Ex. 2 at 1.

Former Special Assistant District Attorney Mark Pomerantz and his colleagues dubbed the focus of the charges in the Indictment the "zombie case" because of how many times DANY abandoned the theory, only to revive it when other inquiries died off. *See* M. Pomerantz, *People vs. Donald Trump: An Inside Account* 200 (2023) ("*Pomerantz Inside Account*"). Carey Dunne, counsel to then-DA Cy Vance, recruited Pomerantz to DANY to focus exclusively on the "investigation of Donald Trump." *Id.* at 4. In Pomerantz's "inside account," published after he resigned from DANY, Pomerantz disclosed the unconstitutional bias that drove DANY's tunnel vision on President Trump. Pomerantz believed President Trump was "different." *Id.* at 141, 176. President Trump had been elected by the American people, he would have a "continuing presence" in our nation's politics, and his "behavior" apparently made Pomerantz "angry, sad, and even disgusted." *Id.* at 176. So Pomerantz was "delighted" to help DANY, for free, because he felt that President Trump was a "good target for prosecution" on whatever charges DANY could concoct. *Id.* at 6, 12.

The fact that a senior DANY prosecutor believed President Trump should be subject to "different"—and far more hostile—treatment under the law is reflected in almost every development in this sad chapter of DANY's history. After DA Bragg announced his run for District Attorney in June 2019, he made improper targeting of President Trump a key part of his campaign. DA Bragg attacked President Trump "'for political advantage every chance he [got].'" Ex. 3. He emphasized that he had sued President Trump and his Presidential administration "more than a hundred times." *Id.* DA Bragg promised that he had "more experience" with President Trump "than most people in the world" and would hold President Trump "accountable." Exs. 3, 4. In March 2022, more than one year before the lawless Indictment was filed, DA Bragg's wife boasted about her husband's progress toward his campaign promise by reposting on social media

that there was, "[f]inally, a bit of good news in the Manhattan DA criminal case against Donald Trump" because DA Bragg had "nailed" President Trump "on felonies." Exs. 5, 6.

In April 2022, the media confirmed that President Biden was actively encouraging the prosecution of his chief political rival, President Trump. Biden had "confided to his inner circle that he believed former President Donald J. Trump was a threat to democracy and should be prosecuted . . . ." Ex. 7. The article stated that President Biden "has said privately that he wanted [Attorney General] Garland to act less like a ponderous judge and more like a prosecutor who is willing to take decisive action . . . ." *Id.*

On November 9, 2022, after President Trump strongly intimated that he would again seek the Presidency, President Biden issued a renewed call for lawfare against President Trump at a press conference: "[W]e just have to demonstrate that he will not take power . . . if he does run. I'm making sure he, under legitimate efforts of our Constitution, does not become the next President again." Ex. 8. On November 15, 2022, President Trump formally announced his candidacy for a second term as President. Ex. 9. Three days later, Biden's Justice Department appointed Jack Smith to oversee their unlawful, and since dismissed, lawfare against President Trump. Ex. 10.

Less than three weeks after Smith was appointed, DA Bragg created a completely new position at DANY and announced that he would fill it with Matthew Colangelo, a "senior official at the U.S. Department of Justice," to "focus on [DANY's] cases, policies, and strategies in housing and tenant protection and labor and worker protection, as well as the Office's most sensitive and high-profile white-collar investigations." Ex. 11. The claim was patently false. Following President Biden's public pressure on Attorney General Garland, Biden's DOJ sent Colangelo to DA Bragg for the singular purpose of targeting President Trump in a new, local

forum. For example, we are unaware of a single DANY action relating to "housing and tenant protection and labor and worker protection" that involved Colangelo. Other than this case, there is only one other matter reported on Westlaw or Lexis in which Colangelo entered an appearance for DANY. *See People v. Alvarez*, 217 A.D.3d 483 (1st Dep't 2023). Similarly, apart from this matter, the only other press release on DANY's website that mentions Colangelo is a September 2024 press release that relates to DA Bragg's renewed case against Harvey Weinstein. Ex. 12. DOJ sent Colangelo to DANY for one reason and one reason alone—to target President Trump and find any path, no matter how unlawful and unconstitutional, to prosecute him.

II. Unlawful Investigative Leaks

Throughout the pre-charge phase of DANY's coordinated lawfare with the Biden Administration, DANY leaked prejudicial information in violation of grand jury secrecy laws and ethical obligations. DANY's violations are amply demonstrated by a review of media reporting and *Pomerantz Inside Account*.

A. Press Reports Of Leaked Information

Between at least 2021 and 2023, media outlets repeatedly reported sensitive confidential information that could only have come from anonymous sources at DANY. For example:

- In May 2021, the *Washington Post* and *Associated Press* reported that DANY had convened a special grand jury to investigate President Trump. The *Associated Press* story was attributed to a "person familiar with the matter [who] was not authorized to speak publicly and did so on condition of anonymity." Ex. 13.

- On November 24, 2021, the *New York Times* ran an article, "Trump Investigation Enters Crucial Phase as Prosecutor's Term Nears End." The article referenced grand jury subpoenas for records, disputes over document production and sealed litigation on that topic, and a recent DANY interview of a Deutsche Bank employee. The *Times* reported that the developments, as described by "people with knowledge of the matter," showed that the Manhattan prosecutors had shifted away from investigating President Trump's taxes. Rather, they were refocusing their three-year investigation on President Trump's statements about the value of his assets. Ex. 14. This article prompted him to consider whether there was a "leak." *Pomerantz Inside Account* at 178-79.

- By February 2022, as DA Bragg reached a conclusion against bringing charges, Pomerantz and others at DANY knew that the *New York Times* was preparing to publish the story that the grand jury was on "pause." *Pomerantz Inside Account* at 240. By his own account, Pomerantz threatened DA Bragg that the *Times* would learn of his and Carey Dunne's resignations "very quickly" and suggested they may also learn that DA Cy Vance had previously directed the team to push forward with charges. *Id.* at 244-45. The *Times* ran the story on February 24, 2022, reporting that, according to "people with knowledge of the matter," DA Bragg's serious doubts about the case had caused Pomerantz and Dunne to leave. Ex. 15.

- 11 months later, in January 2023, NPR reported that DANY was once again presenting evidence to a grand jury. Citing a "person familiar with the investigation," NPR wrote that DANY was presenting evidence that President Trump committed crimes in connection with payments made to Stormy Daniels. Ex. 16.

- In March 2023, the *New York Times* reported that DANY signaled to President Trump's lawyers that he could face criminal charges. According to sources "with knowledge of the matter," DANY offered President Trump the option to testify. The *Times* described the development as "the strongest indication yet that prosecutors are nearing an indictment of the former president." Ex. 17.

- In the days leading to President Trump's March 2023 indictment, *Politico* reported that, "according to a person familiar with the proceedings," the Manhattan grand jury examining this case was not expected to hear evidence for several weeks, pushing any indictment to late April. Ex. 18. *Business Insider* similarly reported that a "source familiar with the case" said the grand jury would not revisit the investigation until the week of April 24, at the earliest. The article noted, however, that the source indicated that it was "entirely possible" that the grand jury had already voted. Ex. 19.

B. Mark Pomerantz's Leaks

In December 2021, more than three years after the investigation had commenced, Pomerantz was appalled and perturbed to learn that certain DANY attorneys had the audacity to question whether it was appropriate to continue to pursue President Trump. One such DANY lawyer found the prosecution theories to be "way out there." *Pomerantz Inside Account* at 192. Another attorney believed the case suffered from "many fatal flaws." *Id.* Pomerantz grew frustrated with this "relentlessly negative" group of dissenters who opposed his political, deranged efforts. *Id.* at 191.

In March 2022, Pomerantz resigned from DANY, claiming that DA Bragg had decided not to proceed with charges. *See* Ex. 20. Pomerantz's leaked resignation letter had "several misleading and inconsistent statements" regarding his work on the investigation. Ex. 1 at 28. The letter focused entirely on charging theories DANY never pursued, and made no reference to the false allegations regarding "hush money" payments that are at issue in this case. *See* Ex. 20. According to "[p]eople who know Bragg," he felt "deeply stung" by Pomerantz's criticism, and he issued an "unusual public statement" declaring that DANY's targeting of President Trump was "far from over." Ex. 21. Only after President Trump announced his candidacy in November 2022, however, did DA Bragg and DANY return to the "zombie" case. *See* Ex. 1 at 30.

Less than two months before DA Bragg authorized the unprecedented and unlawful charges against President Trump, Pomerantz improperly leaked an extraordinary amount of additional confidential and protected details regarding DANY's investigation in *Pomerantz Inside Account*. Pomerantz's leaks were so egregious and prejudicial that DANY argued to a federal court in April 2023 that the book contained information "that should not have been published and that expose[d] Mr. Pomerantz to criminal liability under the city charter." Ex. 22 at 19.[3] In May

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[3] At an April 19, 2023 hearing, DANY elaborated as follows:

> [A]t the time the book was published, the proceeding that we were trying to protect was confidential, and we had a legal obligation to maintain the grand jury's secrecy. We tried to navigate that as best we could by sending the letter. At the time we sent the letter, which was within a week of the announcement that the book would be published and a month before the book was published, we cc'd the letter to the department of investigation, which is the city department with civil and criminal jurisdiction to investigate the breaches of confidentiality that we identified as plausibly going to occur. That's the most we could say before we had read the book.
>
> The city charter provisions I'm referring to 2604(d)(6) and 2606(c). That latter provision makes it a misdemeanor to violate 2604(d)(6), which says a former employee may not disclose confidential information obtained as an employee.

2024, Pomerantz repeatedly invoked the Fifth Amendment in response to deposition questions from the House Judiciary Committee, including, "Did you knowingly break any laws when investigating President Trump?" Ex. 23. The book included the following comments by Pomerantz:

- "The facts surrounding the payments 'did not amount to much in legal terms. Paying hush money is not a crime under New York State law, even if the payment was made to help an electoral candidate.'"
- "'[C]reating false business records is only a misdemeanor under New York law.'"
- "'[T]here appeared to be no [felony] state crime in play.'"
- "'[T]o charge Trump with something other than a misdemeanor, DANY would have to argue that the intent to commit or conceal a federal crime had converted the falsification of the records into a felony. No appellate court in New York had ever upheld (or rejected) this interpretation of the law."
- "The statutory language (under which Trump was charged) is 'ambiguous.'"
- "'[T]here was a big risk that felony charges would be dismissed before a jury could even consider them.'"
- "'[T]he Trump investigation should have been handled by the U.S. Department of Justice, rather than by the Manhattan district attorney's office.'"
- "'[F]ederal prosecutors would not have to torture or massage [statutory] language to charge Trump with a violation,' as DANY would have to do."
- "Federal prosecutors previously looked into the Clifford 'hush money payment' and did not move forward with the prosecution."
- "'There is a statute of limitations issue with the DANY case against Trump.'"
- "Numerous DANY prosecutors were skeptical about the prosecution of Trump and were referred to internally at DANY as 'conscientious objectors.'"

Mr. Pomerantz would be exposed to misdemeanor liability if he answered questions about the work that he did in the office that is not otherwise available to the public.

Ex. 22 at 19-20.

- "The DANY prosecution team discussed 'Michael Cohen's credibility' as being one of 'the difficulties in the case.'"
- "At one point, Bragg 'commented that he "could not see a world" in which [DANY] would indict Trump and call Michael Cohen as a prosecution witness.'"

Bragg v. Jordan, 669 F. Supp. 3d 257, 262-63 (S.D.N.Y. 2023) (quoting *Pomerantz Inside Account*).

III. DANY's Improper Prejudice To The Jury Pool

The pre-charge leaks were bad enough, but DA Bragg, DANY, and DANY's star witnesses also carried out an extremely inappropriate and prejudicial publicity blitz after the charges were filed that made it impossible for President Trump to get a fair trial in New York County. A pre-trial media survey and public polling demonstrated that, based on this case and publicity regarding other lawfare against President Trump, there was no chance that President Trump could get a fair trial in Manhattan. *See* Exs. 24, 25. And he did not.

A. DA Bragg's Improper Extrajudicial Statements

At DA Bragg's press conference announcing the charges on April 4, 2023, he made a gratuitous and prejudicial reference to matters involving "sex crimes," which had no relevance to this case but foreshadowed the improper and unethical approach that DANY took during the direct examination of Stormy Daniels at the trial.[4] During a December 2023 radio interview, despite the Court's acknowledgement that extrajudicial comments by DANY or their witnesses could influence the jury pool, *see* Ex. 26 at 39-40, Ex. 27 at 12-13, DA Bragg made statements indicating that DANY had "rebrand[ed]" this case to align with Jack Smith's unconstitutional and since-dismissed prosecution in the District of Columbia. Exs. 28, 29. Bragg stated that the new theory

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[4] CNBC Television, *Manhattan DA Alvin Bragg Holds Press Conference Following Trump's Arraignment – 4/4/2023*, YOUTUBE, at 6:06 (Apr. 4, 2023), https://www.youtube.com/watch?v=C2XoDZjOMs8.

was "not money for sex," and DANY would instead echo Smith's ill-fated and unsupported theory that the case was "about conspiring to corrupt a presidential election and then lying in New York business records to cover it up." Ex. 28.

B. Prejudicial Publicity Arising From DANY's Improper Targeting Of Allen Weisselberg

Beginning in at least February 2024, DANY pressured former Trump Organization CFO Allen Weisselberg to plead guilty to a two-count information charging him with first-degree perjury, a class D felony, and to accept a five-month term of imprisonment. DANY's new charges against Weisselberg related to his testimony in *People ex rel. James v. Trump*, No. 452564/2022, the New York Attorney General's witch hunt against President Trump, his family, and his overwhelmingly successful business.

In order to maximize prejudicial coverage of their unfair targeting, DANY leaked information regarding Weisselberg's anticipated guilty plea to the media in February 2024. *See, e.g.*, Ex. 30. Following Weisselberg's plea on March 4, 2024, DANY caused the sentencing to be scheduled for April 10, 2024. Media reporting concerning Weisselberg's plea and scheduled sentencing resulted in further improper and prejudicial publicity just prior to the then-scheduled March 25, 2024 start of jury selection in this case, which the Court had to adjourn to convene a purported hearing—improperly resolved based largely on DANY's *ex parte* sealed submission—to address DANY's discovery violations. *See, e.g.*, Ex. 31.

C. Prejudicial Publicity Caused By DANY's Star Witnesses

Following DANY's April 2023 announcement of their charges against President Trump, DANY allowed Michael Cohen to seek financial benefits based on his status in the case. Cohen released more than 160 podcasts discussing President Trump, including a public declaration that

he was "NOT INTIMIDATED & READY to Strike Back."[5] *See also* Ex. 32. Other Cohen podcast titles included, "Ex-FBI Agent Tells Michael Cohen Why Trump Is SCREWED"; "Former Top DOJ Prosecutor Says TRUMP IS SCREWED, Reveals ALL to Cohen"; and "Prosecutor who investigated Trump hits him with CRUSHING BLOWS, Michael Cohen POUNCES."[6]

In a February 15, 2024 interview on CNN, Cohen claimed to be speaking on the basis of non-public evidence in the People's possession: "I believe—based upon the information that I know, and based upon not just the documentary evidence, but the corroborating testimony from so many people — I believe that he will be found guilty on all charges."[7]

During a March 2, 2024 podcast, Cohen made false and defamatory references to President Trump as a "monarch," "dictator," the "Führer" (referring to Adolf Hitler), and the "Supreme Leader" (invoking the title held by leaders of Iran and North Korea). Cohen also lied that President Trump would use "his SEAL Team Six" to "incarcerate" "Supreme Court judges," "politicians," "members of the media," and "bring these billionaires to him and do exactly what [Saudia Arabian Crown Prince] Mohammed bin Salman did. He hung these motherfuckers up by their neck until they . . . signed over their wealth to him. And Trump will do the same thing."[8] Cohen spewed

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[5] MeidasTouch, *Livestream of Political Beatdown with Michael Cohen and Ben Meiselas*, YOUTUBE (Nov. 16, 2023), https://www.youtube.com/watch?v=m8u-8xUcDDg&t=3427s.

[6] MeidasTouch, *Mea Culpa with Michael Cohen*, YOUTUBE, https://www.youtube.com/playlist?list=PL36GQAccexbzLm-eb2KEe6PPkjRkl4lWY.

[7] *Hear Michael Cohen's predictions about Trump criminal case*, CNN, at 1:42 (Feb. 15, 2024), https://www.cnn.com/videos/politics/2024/02/15/michael-cohen-trump-criminal-trial-predictions-ebof-sot-vpx.cnn.

[8] MeidasTouch, *Cohen and Popok TEAM UP to Deliver NIGHTMARE Legal News to Trump and GOP | Mea Culpa*, YOUTUBE, at 44:12, 40:33, & 44:24 (Mar. 2, 2024), https://www.youtube.com/watch?v=1n86jaLVyKg&list=PL36GQAccexbzLm-eb2KEe6PPkjRkl4lWY&index=5.

similarly prejudicial and false claims to his more than 600,000 X followers prior to and during the trial.

Not to be outdone, Stormy Daniels sought to monetize her role as a witness through a short-lived podcast and a documentary that was released in an effort to maximize views and prejudicial publicity. During the evening of March 7, 2024, the media reported that Daniels was releasing a "documentary," entitled "Stormy," on NBCUniversal. *See, e.g.*, Ex. 33. Peacock released a 2 minute 12 second trailer the same evening, which included Daniels describing herself as "out of fucks" and an "idiot who can't keep her mouth shut."[9] She claimed in the trailer that "shit got real" when President Trump got the Republican nomination in 2016, and read highly prejudicial threats not connected to President Trump, such as a random person allegedly stating, "you just signed your death warrant." A male associate claimed that unspecified "people," with no connection to President Trump, tried to bring "guns" and "knives" into Daniels's events. The trailer ended with an effort to bolster Daniels's anticipated testimony through the claim that she "won't give up" because she is "telling the truth."

On March 8, 2024, Daniels screened her documentary at the South by Southwest conference in Austin, Texas. She used the platform to declare, "f*ck Trump." Ex. 34. On March 12, 2024, DANY disclosed for the first time that Daniels had already made $125,000 in connection with the documentary and a "right of first refusal for the scripted rights to dramatization of her book." The documentary premiered in Brooklyn, New York, on March 18, and was released on Peacock the same day. *See* Ex. 35. The full documentary contained additional highly prejudicial and false claims, including Daniels's claim that she had sought to extort money from President

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[9] Peacock, *Stormy: Official Trailer*, YOUTUBE, at 0:06, 0:24, 0:43, & 1:47 (Mar. 7, 2024), https://www.youtube.com/watch?v=_tE7h_TJkxg.

Trump because she was "fucking terrified," "people had been suspiciously killed for political reasons," and "there would be a paper trail and a money trail linking me to Donald Trump so that he would not have me killed." *Id.*

IV. DANY's Trial Misconduct

DANY committed misconduct during President Trump's trial that is relevant to the Court's analysis of the CPL § 210.40 factors.

A. False Testimony By Stormy Daniels

Susan Hoffinger repeatedly and wrongly elicited false testimony from Stormy Daniels intended to suggest that Daniels's made-up encounter was non-consensual. The Court sustained objections and struck certain aspects of the testimony, but Hoffinger persisted despite the Court's admonishments. Ex. 36, Tr. 2592, 2611, 2612-15, 2618, 2620-21, 2630, 2633, 2647, 2650-51, 2653.

In response to President Trump's mistrial motion, the Court acknowledged—in an understatement—that "there were some things that would probably have been better left unsaid" and "that there are some areas that would have been better if the People did not go into them." Ex. 36, Tr. 2677. The Court also explained that Hoffinger had elicited other objectionable testimony, and that "at one point the Court *sua sponte* objected." *Id.*, Tr. 2678; *see also id.*, Tr. 3077 ("I wished those questions hadn't been asked, and I wished those answers hadn't been given.").

B. Perjury By Michael Cohen

In December 2023, federal prosecutors argued publicly that Cohen "appears to have lied under oath in a court proceeding" in *James*. Ex. 37. In March 2024, a federal court agreed, concluding that the record "gives rise to two possibilities: one, Cohen committed perjury when he pleaded guilty before Judge Pauley or, two, Cohen committed perjury in his October 2023

testimony [in *James*]." *United States v. Cohen*, 724 F. Supp. 3d 251, 257 (S.D.N.Y. 2024). During the same period in which DANY was coercing Weisselberg to plead guilty to perjury relating to his testimony in *James*, the prosecutors ignored the federal court's finding and refused to even investigate Cohen. The reason for the differing approaches is apparent. DANY needed more lies from Cohen to advance their lawfare against President Trump, and they wanted to discredit and detain Weisselberg to ensure he could not hurt their case.

At trial, Hoffinger structured Cohen's direct examination based on leading questions tethered to purported evidence without substantive content, such as cherry-picked phone records. More than happy to play along, Cohen committed perjury yet again by lying about a 1 minute 36 second phone call on October 24, 2016. *See* Ex. 36, Tr. 3423-24 (direct examination regarding Cohen's purported discussion with President Trump regarding payment to Daniels); *but see id.*, Tr. 3880-3900 (cross-examination revealing his discussion with Keith Schiller regarding harassing calls from a teenager). To our knowledge, Cohen has received only hugs, handshakes, and pats on the back from DANY. His perjury goes unpunished.

C. DANY's Misrepresentations Regarding Allen Weisselberg's Severance Agreement

After DANY unfairly incarcerated Weisselberg prior to the trial, Chris Conroy falsely claimed to the Court that Weisselberg's severance agreement with the Trump Organization was admissible to "explain, from our perspective, why he's not here." Ex. 36, Tr. 3243; *see also* Ex. 38 (severance agreement). According to Conroy, "this Agreement offers a real explanation for why [Weisselberg] is not going to be here in this trial." Ex. 36, Tr. 3245; *see also id.*, Tr. 3248. In fact, the severance agreement expressly contemplated that Weisselberg would testify in response to a subpoena. Ex. 38. DANY simply never issued one to him because they did not like what he was going to say. Ex. 36, Tr. 3246, 3248. They instead chose the morally bankrupt course

of having a 76-year-old man with ailing health jailed for five months while their star witness, Cohen, walked free.

V. DANY's Misrepresentations In Removal Proceedings

Shortly after DANY initiated the case, President Trump filed a First Removal Notice, pursuant to 28 U.S.C. § 1442(a)(1), in the Southern District of New York. Ex. 39. President Trump argued that removal was appropriate because DANY's Indictment related to acts "under color" of the Presidency. *Id.* at 7-8. The First Removal Notice also identified federal defenses based on immunity and FECA preemption and argued that the district court should exercise protective jurisdiction because the prosecution was politically motivated. *Id.* at 5-8.

In connection with DANY's remand motion, DANY argued falsely that there was "no connection" between their allegations and President Trump's official acts, and "no clear support" for the immunity defense. Ex. 40 at 1, 18. They contended that "[n]othing about this conduct touches, relates to, has a nexus or causal connection between, is associated with, or has any other connection to any official responsibility or authority of the President." Ex. 41 at 5. DANY took the same broad position at the June 27, 2023 hearing on their remand motion: "There's no argument that anybody here was doing anything in carrying out their job as a government actor." Ex. 42 at 78. As demonstrated in the pending CPL § 330.30 motion, DANY acted as if those words were never uttered during the subsequent trial by offering substantial testimony and other evidence relating to President Trump's official acts. *See* Ex. 43 at 26-41. DANY then emphasized the official-acts evidence during summations as "devastating" and called the jury's attention to President Trump's actions as "President of the United States." *Id.* at 17-18.

In response to President Trump's removal-related preemption defense, DANY argued that President Trump had presented an "erroneously narrow characterization" of the charges because

DANY planned to rely on other "another crime" predicates besides NYEL § 17-152 to establish felony violations of Penal Law § 175.10. Ex. 40 at 22. DANY assured the district court that "the charges here do not relate to the specific disclosures mandated by FECA." Ex. 41 at 12. They added that Penal Law § 175.10 and FECA "simply do not cover the same domains." Ex. 40 at 25. DANY also suggested that the preemption defense would "depend on whether and to what degree the People rely on Election Law § 17-152 at trial," "how the state court instructs the jury," and "whether the jury returns special verdicts or interrogatory responses that could resolve any ambiguity over the basis for its verdict." Ex. 41 at 14-15.

The district court relied on DANY's false representations regarding not presenting evidence of President Trump's official acts, and not using New York law as a backdoor to improper state regulation of a federal election. *See New York v. Trump*, 683 F. Supp. 3d 334, 346-50 (S.D.N.Y. 2023). This Court followed the district court's preemption analysis based on DANY's misrepresentations. *See* Ex. 44 at 15-16. The Court relied on DANY's misrepresentations again by precluding President Trump from calling an expert witness to explain to the jury the FECA legal issues that DANY ultimately made central to their case, notwithstanding their representations to the district court. *See* Ex. 45 at 1-3; Ex. 36, Tr. 3983-86.

In fact, it became clear at trial that President Trump's characterization of the charges in connection with the First Removal Notice had not been "erroneously narrow," and the preemption defense was not "speculative." Contrary to their representations during the removal proceedings, DANY also argued to the Court that Your Honor would need to "rewrite the law" in order to require unanimous findings regarding "unlawful means" under NYEL § 17-152. Ex. 36, Tr. 4404. Also contrary to their removal-related representations, DANY relied on NYEL § 17-152 as the only felony predicate for the Penal Law § 175.10 charges. Ex. 46 at 3-4. In proposed jury

instructions submitted long after the trial started, DANY demonstrated that their charges did, in fact, "relate to the specific disclosures mandated by FECA." *Id.* at 4-6; Ex. 41 at 12. The prosecutors requested, and the Court provided, instructions regarding FECA violations relating to limitations on individual and corporate contributions to federal candidates. Ex. 46 at 4-6; Ex. 36, Tr. 4844-46. Finally, although DANY had suggested to the district court that "special verdicts or interrogatory responses . . . could resolve any ambiguity" relating to preemption, less than a year later at trial DANY strenuously and successfully opposed President Trump's request that Your Honor provide interrogatories to the jury so that the basis for the verdict would be clear. Ex. 41 at 14.

VI. Conflicts And Appearances Of Impropriety

A. The Court's Daughter And Authentic Campaigns Inc.

Your Honor's daughter was a senior member of Vice President Harris's failed 2020 Presidential campaign, and she made social media posts mocking President Trump when he left the White House in 2021. Ex. 47 ¶¶ 2, 55. In a 2019 podcast, Your Honor's daughter discussed a conversation that she had with Your Honor that involved criticism of President Trump's use of Twitter, now "X," during his first term in Office—an issue that is central to the pending CPL § 330.30 motion. *Id.* ¶ 4.

In 2020, while President Trump was in Office, Your Honor made improper political contributions to "Biden for President," the "Progressive Turnout Project," and "Stop Republicans"—a group that described its purpose as "resisting the Republican Party and Donald Trump's radical right-wing legacy." Ex. 48. New York ethics authorities issued a caution based on those contributions, which violated New York's Rules Governing Judicial Conduct. *See id.*

Based on public disclosures relating to the 2024 Presidential election, clients of Authentic—where Your Honor's daughter is a senior executive and partner—actively advocated

against President Trump and solicited political contributions based on DANY's prosecution while Your Honor presided over it. *E.g.*, Ex. 47 ¶¶ 8-26. Authentic clients, including those soliciting political contributions based on developments in these proceedings, disbursed more than $18 million to Authentic since this case began. Ex. 49 at 29. In October 2023, during this case, Authentic posted an image of Harris to its Instagram account with the caption: "Happy Birthday to the MVP of MVPs. @KamalaHarris! Here's a little throwback to when she stopped by our DC office to celebrate the launch of her presidential campaign in 2019. How far we've come." Ex. 47 ¶ 38 (emphasis added).

This summer, after Vice President Harris emerged as President Trump's presumptive opponent in the 2024 Presidential election, Harris immediately framed her candidacy with a specific false reference to this case as a contest of "the prosecutor vs. the felon." *See, e.g.*, Ex. 50. Subsequent to President Trump's renewed recusal motion relating to these issues, an FEC filing by Harris's campaign demonstrated that Harris was a direct client of Authentic during the election that she recently lost. *See* Ex. 51; *see also* Ex. 82 at 6-7.

On August 1, 2024, the House Judiciary Committee sent a demand for information to Your Honor's daughter and Authentic, noting that the Court's denials of President Trump's recusal motions "implicate serious federal interests" because "Congress has a specific and manifestly important interest in preventing politically motivated prosecutions of current and former presidents, especially in venues in which real or perceived biases exist." Ex. 52 at 3. The Judiciary Committee noted that "[e]xperts have raised substantial concerns" regarding the Court "refusing to recuse . . . from President Trump's case despite your work on behalf of President Trump's political adversaries and the financial benefit that your firm, Authentic Campaigns Inc., could receive from the prosecution and conviction." *Id.* at 1. The Judiciary Committee also pointed out

that two Authentic clients, Congressman Adam Schiff and the Senate Majority PAC, had "raised at least $93 million in campaign donations while referencing the indictments in their solicitation emails." *Id.* at 2.

In an August 28, 2024 notice and subpoena to Mike Nellis, a partner of Your Honor's daughter at Authentic, the House Judiciary Committee noted that Authentic had, tellingly, refused to comply with the Committee's requests for information and documents. *See* Ex. 53 at 1; *see also id.* at 4 ("[I]n light of Authentic Campaigns' failure to comply with our earlier voluntary requests, please find attached a subpoena compelling the production of the requested documents."). The letter pointed out that Authentic had made "shifting representation[s]" in response to the congressional inquiries. The Judiciary Committee also noted:

> During Ms. Merchan's employment with the [2020] Harris campaign, Authentic Campaigns received over $7 million in compensation for its services. You also worked for then-presidential candidate Harris and it appears you continue to do so. Authentic Campaigns conducted work for the 2020 Biden-Harris campaign and, according to public records, was paid just over $2 million in a one-month period for its work.

Id. at 2. On September 27, 2024, the Committee expressed concerns to Nellis's counsel regarding "noncompliance" with the subpoena and "false statements to the Committee." Ex. 82.

While Your Honor's daughter and Authentic have transparently limited their social media presence, Nellis has amplified the type of bias any reasonable observer would expect from the foregoing evidence. Around the same time as the Harris campaign's disbursement to Authentic, Mike Nellis created a group called "White Dudes for Harris," which reportedly raised millions of dollars for Harris's losing campaign. Nellis recently received a "Shorty" award, titled "Strategist of the Year," for his support of that losing effort. Ex. 54. In his acceptance speech, as well as in a related post on X, Nellis called for "acts of resistance" against President Trump and urged his follows to "stay in the fight." *See id.* Similarly, on the day before Thanksgiving, Nellis posted

that "[w]e need to stretch the limits of what's possible," be "more aggressive" and "ruthless." Ex. 55.

B. The Unconstitutional Continuation Of The Gag Order

Since the end of the trial, the Court has insisted on a gag order that is unprecedented and as unsupported as DANY's legal theory in this case. *See* Ex. 56. The Court has acknowledged, as it must, that "witness testimony has concluded, a verdict has been rendered, and the jury discharged." *See id.* at 4. Nevertheless, the Court has prohibited President Trump from making public statements addressing his valid concerns regarding conflicts and appearances of impropriety regarding Colangelo's role in this lawfare and the financial, professional, and personal benefits Your Honor's daughter has obtained based on the Court's rulings in this case.

VII. Post-Trial Litigation

On July 1, 2024, the U.S. Supreme Court issued the Presidential immunity decision in *Trump v. United States*, 603 U.S. 593 (2024), which DANY had refused to wait for and violated during the trial. On July 10, 2024, President Trump filed a motion to dismiss and for a new trial pursuant to CPL § 330.30. *See* Ex. 43.

Having preserved his procedural rights in this Court following the completion of briefing on July 31, 2024, President Trump filed a Second Removal Notice based on *Trump* and other intervening Supreme Court decisions in the Southern District of New York on August 29, 2024. Ex. 57. The district court issued a summary remand order on September 3, 2024. President Trump appealed that ruling on the same day, and filed his opening brief in the Second Circuit on October 14, 2024. DANY has requested until January 13, 2025 to file their responsive submission.

VIII. President Trump's Overwhelming Victory In The 2024 Presidential Election

On November 5, 2024, the American people gave President Trump a powerful national mandate to Make America Great Again, and to address the harms perpetrated by the Biden-Harris Administration, including their unsuccessful lawfare using DANY, Smith, and others. President Trump won 312 Electoral College votes compared to Harris's 226, and he beat Harris in the popular vote by approximately 2.5 million. Ex. 58. President Trump is now fully engaged in the transition process. *See, e.g.*, Ex. 59. Congress will certify President Trump's victory under the Electoral Count Act on January 6, 2025. *See* 3 U.S.C. § 15. President Trump will be inaugurated on January 20, 2025. *See* Ex. 60.

APPLICABLE LAW

I. CPL § 210.20(1)(h)

"CPL 210.20's catchall provision, CPL 210.20(1)(h), empowers a court to dismiss an indictment when '[t]here exists some other jurisdictional or legal impediment to conviction of the defendant for the offense charged.'" *People v. Alonso*, 16 N.Y.3d 581, 585 (2011) (quoting CPL § 210.20(1)(h)). Constitutional violations, such as due process violations under *Brady*, are "a 'legal impediment to conviction' within the meaning of CPL § 210.20(1)(h)." *Id.* at 586.

II. CPL § 210.40

"CPL § 210.40 is a successor to section 671 of the Code of Criminal Procedure, which in turn has been said to be merely a substitute for the ancient right of the Attorney General to discontinue a prosecution." *People v. Clayton*, 41 A.D.2d 204, 206 (2d Dep't 1973). Section 210.40 "broaden[ed]" its predecessor "by granting to the defendant the power to apply for relief, as well as to the prosecutor and the court; and it refines by further describing the terms under which relief may be granted." *Id.* at 206-07. "More recently, the statute has been employed to reach

cases in which the court found for a variety of reasons that the ends of justice would be served by the termination of the prosecution." *Id.* at 206. Thus, dismissal is appropriate where "some compelling factor, consideration or circumstance clearly demonstrat[es] that conviction or prosecution of the defendant upon such indictment or count would constitute or result in injustice." CPL § 210.40(1).

III. Presidential Immunity

The Presidential immunity doctrine recently discussed by the U.S. Supreme Court in *Trump v. United States*, and in OLC opinions dating back to 1973, forecloses further proceedings in this case and requires dismissal.

A. *Trump v. United States*

In *Trump v. United States*, the Supreme Court noted that DOJ "'has long recognized' that 'the separation of powers precludes the criminal prosecution of a sitting President.'" 603 U.S. 593, 616 n.2 (2024) (quoting government's brief). With respect to sitting Presidents, the proposition is categorical. Neither the Supreme Court nor DOJ distinguished between prosecutions based on a President's official or unofficial acts. Although *Trump* focused on immunity for former Presidents, the Supreme Court described several considerations that are relevant to this motion.

Presidential immunity is necessary to "protect . . . the institution of the Presidency" and to "ensure good government." *Trump*, 603 U.S. at 610, 632. The President "occupies a unique position in the constitutional scheme," and is "the only person who alone composes a branch of government." *Id.* at 610.

> [T]he President is a branch of government, and the Constitution vests in him sweeping powers and duties. Accounting for that reality—and ensuring that the President may exercise those powers forcefully, as the Framers anticipated he would—does not place him

> above the law; it preserves the basic structure of the Constitution from which that law derives.

Id. at 639-40. The Framers believed an "energetic, vigorous, [and] decisive" President was "essential to the protection of the community against foreign attacks, the steady administration of the laws, the protection of property, and the security of liberty." *Id.* at 610.

The purpose of Presidential immunity is "to ensure that the President can undertake his constitutionally designated functions effectively, free from undue pressures or distortions." *Trump*, 603 U.S. at 615. Preventing such pressures and intrusions on the President is necessary to avoid a "feeble executive," which "implies a feeble execution of the government" that is ill-suited to serve the American people. *Id.* at 610. "Potential criminal liability, and the peculiar public opprobrium that attaches to criminal proceedings, are plainly . . . likely to distort Presidential decisionmaking . . . ." *Id.* at 613. Criminal exposure "undoubtedly poses a far greater threat of intrusion on the authority and functions of the Executive Branch than simply seeking evidence in his possession." *Id.*

Finally, where Presidential immunity applies, "courts cannot examine," or even "adjudicate," a prosecutor's allegations against a President. *Trump*, 603 U.S. at 609. As a result, Presidential immunity violations are subject to interlocutory appellate review. *See id.* at 635 ("If the President is instead immune from prosecution, a district court's denial of immunity would be appealable before trial.").

B. The 1973 OLC Opinion

In 1973, OLC concluded that "by virtue of his unique position under the Constitution the President cannot be the object of criminal proceedings while he is in office." Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, OLC, *Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office* ("1973 OLC

Op.") at 33 (Sept. 24, 1973). Thus, as in *Trump*, the 1973 OLC Opinion reflects a categorial view that a sitting President may not be subjected to any part of a criminal prosecution while in Office. In reaching that conclusion, OLC relied on two considerations: (1) the President's constitutional control over federal criminal prosecutions, and (2) "the effect of a criminal prosecution on the President's office." *Id.* at 34.

While the first consideration does not apply to DANY's state-law case, the second demonstrates why dismissal is necessary. For example, OLC observed that "[a] necessity to defend a criminal trial and to attend court in connection with it . . . would interfere with the President's unique official duties, most of which cannot be performed by anyone else." 1973 OLC Op. at 28.

> A further factor relevant here is the President's role as guardian and executor of the four-year popular mandate expressed in the most recent balloting for the Presidency. Under our developed constitutional order, the presidential election is the only national election, and there is no effective substitute for it. . . . Because only the President can receive and continuously discharge the popular mandate expressed quadrennially in the presidential election, an interruption would be politically and constitutionally a traumatic event. The decision to terminate this mandate, therefore, is more fittingly handled by the Congress [through impeachment] than by a jury . . . .

Id. at 32.

C. The 2000 OLC Opinion

In 2000, OLC reaffirmed a "*categorial* rule against indictment or criminal prosecution" of a sitting President. Memorandum from Randolph D. Moss, Assistant Attorney General, OLC, *A Sitting President's Amenability to Indictment and Criminal Prosecution* ("2000 OLC Op."), 2000 WL 33711291, at *25 (Oct. 16, 2000) (emphasis added); *see also id.* at *28 ("[T]he Constitution requires recognition of a presidential immunity from indictment and criminal prosecution while the President is in office."). Following a detailed discussion of the 1973 OLC Opinion and the

Solicitor General's brief in *In re Proceedings of the Grand Jury Impaneled December 5, 1972*: No. 73-965 (D. Md. 1973), OLC summarized DOJ's position as of 1973 as follows:

> Because of the unique duties and demands of the Presidency, the Department concluded, a President cannot be called upon to answer the demands of another branch of the government in the same manner as can all other individuals. The [1973] OLC memorandum in particular concluded that the ordinary workings of the criminal process would impose burdens upon a sitting President that would directly and substantially impede the executive branch from performing its constitutionally assigned functions, and the accusation or adjudication of the criminal culpability of the nation's chief executive by either a grand jury returning an indictment or a petit jury returning a verdict would have a dramatically destabilizing effect upon the ability of a coordinate branch of government to function.

2000 OLC Op. at *12. "As a consequence of the personal attention that a defendant must, as a practical matter, give in defending against a criminal proceeding, the [1973] memorandum concluded that there were particular reasons rooted in separation of powers concerns that supported the recognition of an immunity for the President while in office." *Id.* at *7.

OLC also opined that post-1973 Supreme Court decisions were "largely consistent with the Department's 1973 determinations." 2000 OLC Op. at *13 (citing *United States v. Nixon*, 418 U.S. 683 (1974), *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), and *Clinton v. Jones*, 520 U.S. 681 (1997)). In *United States v. Nixon*, which involved a subpoena to President Nixon pursuant to Rule 17 of the Federal Rules of Criminal Procedure, the Supreme Court recognized a "presumptive privilege for Presidential communications" that was "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." 418 U.S. at 708. OLC observed that *Nixon* "employed a balancing test to preserve the opposing interests of the executive and judicial branches with respect to the President's claim of privilege over confidential communications." 2000 OLC Op. at *19.

In *Nixon v. Fitzgerald*, the Supreme Court held that then-former President Nixon was "entitled to absolute immunity from damages liability predicated on his official acts." 457 U.S. at

749. The Supreme Court's "dominant concern" in *Fitzgerald* was "diversion of the President's attention during the decisionmaking process caused by needless worry as to the possibility of damages actions stemming from any particular official decision." *Clinton*, 520 U.S. at 694 n.19. OLC observed that the *Fitzgerald* holding was also a product of balancing, and that the "proper [balancing] inquiry focuses on the extent to which a challenged act prevents the Executive Branch from accomplishing its constitutionally assigned functions." 2000 OLC Op. at *18-19.

In *Clinton*, the Supreme Court "declined to extend the immunity recognized in *Fitzgerald* to civil suits challenging the legality of a President's unofficial conduct." 2000 OLC Op. at *16. OLC explained that the *Clinton* holding "does not change our conclusion in 1973 and again today that a sitting President cannot constitutionally be indicted or tried." *Id.* at *13; *see also id.* at *18 ("[N]otwithstanding *Clinton*'s conclusion that *civil* litigation regarding the President's unofficial conduct would not unduly interfere with his ability to perform his constitutionally assigned functions, we believe that *Clinton* and the other cases do not undermine our earlier conclusion that the burdens of *criminal* litigation would be so intrusive as to violate the separation of powers."). The "statements" in *Clinton* regarding burdens of civil litigation on the President are "palpably inapposite to criminal cases." *Id.* at *23; *see also id.* at *22 ("The greater seriousness of criminal as compared to civil charges has deep roots not only in the Constitution but also in its common law antecedents.").

Following the discussion of *Nixon*, *Fitzgerald*, and *Clinton*, OLC reaffirmed "the 1973 conclusions that indicting and prosecuting a sitting President would prevent the executive from accomplishing its constitutional functions and that this impact cannot be justified by an overriding need to promote countervailing and legitimate government objectives." 2000 OLC Op. at *19. OLC cited "[t]hree types of burdens" in support of the immunity position:

> (a) the actual imposition of a criminal sentence of incarceration, which would make it physically impossible for the President to carry out his duties; (b) the public stigma and opprobrium occasioned by the initiation of criminal proceedings, which could compromise the President's ability to fulfill his constitutionally contemplated leadership role with respect to foreign and domestic affairs; and (c) the mental and physical burdens of assisting in the preparation of a defense for the various stages of the criminal proceedings, which might severely hamper the President's performance of his official duties.

Id. As to the first burden, OLC found it "clear" that "a sitting President may not constitutionally be imprisoned." *Id.* at *21. Regarding the burden of stigma and public opprobrium, OLC explained that "the severity of the burden imposed upon the President by the stigma arising both from the initiation of a criminal prosecution and also from the need to respond to such charges through the judicial process would seriously interfere with his ability to carry out his constitutionally assigned functions." *Id.* at *22. With respect to mental and physical burdens on the President, OLC explained that "criminal litigation uniquely requires the President's *personal* time and energy, and will inevitably entail a considerable if not overwhelming degree of mental preoccupation." *Id.* at *25 (emphasis in original).

As in 1973, OLC reiterated concerns about local bias driving unconstitutional burdens on the nationally elected President. *See* 2000 OLC Op. at *27. Whereas impeachment proceedings are led by "duly elected and politically accountable officials," "the most important decisions in the process of criminal prosecution would lie in the hands of unaccountable grand and petit jurors, deliberating in secret, perhaps influenced by regional or other concerns not shared by the general polity, guided by a prosecutor who is only indirectly accountable to the public." *Id.*

D. The 2024 OLC Opinion

On November 25, 2024, SCO moved to dismiss the prosecution in *United States v. Trump*, No. 23 Cr. 257 (D.D.C.), and to dismiss the appeal of their already-dismissed case in *United States v. Trump*, No. 23 Cr. 80101 (S.D. Fla.). *See* Exs. 61, 62. SCO informed the federal courts that it

"consulted" OLC, and that "OLC concluded that its 2000 Opinion's 'categorical' prohibition on the federal indictment of a sitting President—even if the case were held in abeyance—applies to this situation, where a federal indictment was returned before the defendant takes office." Ex. 61 at 1, 6. "Accordingly, the Department's position is that the Constitution requires that this case be dismissed before the defendant is inaugurated." *Id.* at 6. Both courts granted the motions and dismissed the charges against President Trump.

In a footnote, the SCO asserted without explanation that "OLC's analysis addressed only the federal cases pending against the defendant." Ex. 61 at 6 n.1. When counsel requested more information regarding OLC's opinion, SCO responded via email that OLC had conveyed information "orally, not in writing." Ex. 80. This intentional and unconstitutional decision to avoid creating a paper trail of OLC's extraordinarily important reasoning and conclusions—all of which was exculpatory and therefore discoverable under *Brady*—is additional evidence of SCO's misguided approach to their improper work.[10]

IV. The Presidential Transition Act Of 1963

The Presidential Transition Act of 1963 was passed "to promote the orderly transfer of the executive power in connection with the expiration of the term of office of a President and the inauguration of a new President." 3 U.S.C. § 102 note, § 2. "Any disruption" of the transition "could produce results detrimental to the safety and well-being of the United States and its people." *Id.* Thus, Congress has ordered "all officers of the Government" to "take appropriate lawful steps

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[10] Many transparency organizations have called for greater transparency of OLC decision making. *See e.g.*, Melissa Wasser, Fact Sheet: Office of Legal Counsel Transparency, Project on Government Oversight (Nov. 3, 2021), https://www.pogo.org/fact-sheets/fact-sheet-office-of-legal-counsel-transparency; *see also* Xiangnong (George) Wang, Long-Withheld Office of Legal Counsel Records Reveal Agency's Postwar Influence, Knight First Amendment Institute at Columbia University (Jul. 14, 2021), https://knightcolumbia.org/blog/long-withheld-office-of-legal-counsel-records-reveal-agencys-postwar-influence.

to avoid or minimize disruptions that might be occasioned by the transfer of the executive power." *Id.*

V. The Supremacy Clause

The Constitution recognizes that the "distinct and independent character of the government of the United States" must be protected from "interference" by states. *In re Tarble*, 80 U.S. 397, 406 (1871). The "supremacy of the authority of the United States" resolves "any conflict [that] arises between the two governments." *Id.* States "have no power" to "retard, impede, burden, or in any manner control" the President or other federal authorities. *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819); *see also Hancock v. Train*, 426 U.S. 167, 178 (1976) (describing the *McCulloch* holding as a "seminal principle of our law"); *Farmers' & Mechanics' Savings Bank v. Minnesota*, 232 U.S. 516, 521 (1914) (reasoning that "[t]he supremacy of the Federal Constitution and the laws made in pursuance thereof, and the entire independence of the general government from any control by the respective states, were the fundamental grounds of the decision" in *McCulloch*). "[S]tate attachments, state prejudices, state jealousies, and state interests, might some times obstruct, or control . . . the regular administration of justice." *Martin v. Hunter's Lessee*, 14 U.S. 304, 347 (1816). Where that occurs, "the Supremacy Clause requires courts to follow federal, not state, law." *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 30 (1996); *see also Mayo v. United States*, 319 U.S. 441, 445 (1943) ("[T]he activities of the Federal Government are free from regulation by any state.").

Even "harassing subpoenas could, under certain circumstances, threaten the independence or effectiveness of the Executive." *Trump v. Vance*, 591 U.S. 786, 805 (2020); *Willingham v. Morgan*, 395 U.S. 402, 405 (1969) (reasoning that, "[o]bviously, the [first] removal provision was an attempt to protect federal officers from interference by hostile state courts," and "periods of

national stress spawned similar enactments"). "If a sitting President is intensely unpopular in a particular district—and that is a common condition—targeting the President may be an alluring and effective electoral strategy. But it is a strategy that would undermine our constitutional structure." *Vance*, 591 U.S. at 839 (Alito, J., dissenting).

To protect against these concerns, "the Constitution guarantees the entire independence of the General Government from any control by the respective States." *Trump v. Anderson*, 601 U.S. 100, 111 (2024). As relevant here, "[t]he Supremacy Clause prohibits state judges and prosecutors from interfering with a President's official duties." *Vance*, 591 U.S. at 806. The Supreme Court has applied the Supremacy Clause in that fashion to federal employees since the 1800s. *See Johnson v. Maryland*, 254 U.S. 51, 56-57 (1920) ("[E]ven the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States."); *Ohio v. Thomas*, 173 U.S. 276, 283 (1899) ("The government is but claiming that its own officers, when discharging duties under federal authority pursuant to and by virtue of valid federal laws, are not subject to arrest or other liability under the laws of the state in which their duties are performed."); *Cunningham v. Neagle*, 135 U.S. 1, 75 (1890) ("[I]f the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if, in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the state of California."); *Tennessee v. Davis*, 100 U.S. 257, 258 (1879) (reasoning that federal officials cannot be "arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess . . . .").

DISCUSSION

As a result of the 2024 Presidential election and these timely motions,[11] two separate provisions of the CPL require dismissal and vacatur of the jury's verdicts. Under CPL § 210.20(1)(h), President Trump's status as President-elect and the soon-to-be sitting President is a "legal impediment" to further criminal proceedings based on the Presidential immunity doctrine and the Supremacy Clause. Under CPL § 210.40(1), the Presidential immunity doctrine and the Supremacy Clause, as well as a host of other considerations demonstrating the blatantly improper nature of DA Bragg's politically motivated prosecution and the unfairness of these proceedings, require dismissal in the interests of justice.

I. This Case Must Be Dismissed Pursuant To CPL § 210.20(1)(h)

A. Presidential Immunity Requires Dismissal

Following President Trump's overwhelming victory in the 2024 Presidential election, Presidential immunity is an unavoidable "legal impediment" to further proceedings in this case. CPL § 210.20(1)(h). Therefore, the Indictment must be dismissed, and the jury's verdicts must be vacated.

The sitting President may not be subject to any phase of a criminal proceeding as a defendant. "The essence of [Presidential] immunity is its possessor's entitlement not to have to answer for his conduct in court." *Trump*, 603 U.S. at 630. The President may not be required to operate "under a pall of potential prosecution," or subject to "the possibility of an extended

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[11] President Trump's election victory unquestionably constitutes "good cause" under CPL § 255.20(3). Moreover, motions to dismiss pursuant to CPL § 210.40 are not subject to the timing restrictions of CPL § 255.20. *People v. Clifford*, 82 Misc. 3d 1068, 1074 (Sup. Ct. N.Y. Cnty. 2024) (finding CPL § 210.40 motion timely where "this court previously granted the application of each of the defendants for leave to file the instant motions" and DANY routinely relies on the statute "months or even years after the 45-day period has expired"). "An injustice is an injustice—no matter when during an action a motion is made to cure that injustice." *Id.* at 1086.

[criminal] proceeding." *Id.* at 613, 636. "[C]riminal prohibitions cannot apply" at all, and courts "cannot review" or "adjudicate" a prosecutor's claims against a President. *Id.* at 609, 636. That is because "[t]he executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power." *Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 610 (1838). Thus, "a court may not 'be required to proceed against the president as against an ordinary individual.'" *Trump*, 603 U.S. at 612 (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (1807)); *see also Cheney v. U.S. District Court*, 542 U.S. 367, 382 (2004). "The objections to such a course are so strong and so obvious, that all must acknowledge them." *Burr*, 25 F. Cas. at 192.

The dispositive consideration requiring dismissal is that this criminal case creates unconstitutional and unacceptable diversions and distractions from President Trump's efforts to lead the Nation. A pending prosecution creates a "danger" that is "akin to, indeed greater than, what led [the *Fitzgerald* Court] to recognize absolute Presidential immunity from civil damages liability—that the President would be chilled from taking the bold and unhesitating action required of an independent Executive." *Trump*, 603 U.S. at 613. Situations where "the President's energies are diverted by proceedings that might render him unduly cautious in the discharge of his official duties," result in "unique risks to the effective functioning of government." *Id.* at 611; *see also Fitzgerald*, 457 U.S. at 753 (reasoning that "distract[ing] a President from his public duties" would be "to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve"). "The Constitution does not tolerate such impediments . . . ." *Trump*, 603 U.S. at 636-37.

The categorical rule against criminal proceedings targeting a sitting President is so firmly rooted that it required little discussion in *Trump*. *See* 603 U.S. at 616 n.2. SCO affirmatively conceded the point. In the D.C. Circuit, SCO argued:

> That the Department of Justice and others . . . have concluded that prosecuting a *sitting* President would constitute an "'unavoidably political' task" reflects the view that prosecution would seriously interfere with a President's ability "to carry out his constitutional functions," and thus would be tantamount to removal from office.

Ex. 63 at 23 n.2 (quoting 2000 OLC Op. at *7, *19) (emphasis in original). Before the Supreme Court, SCO conceded that "the separation of powers precludes the criminal prosecution of a *sitting* President," regardless of whether the case is based on "personal or official" acts. Ex. 64 at 9 (emphasis in original). "Such a prosecution . . . would impermissibly interfere with the proper functioning of the Executive Branch." *Id.*

Late last month, SCO confirmed DOJ's view that the "Constitution's prohibition on federal indictment and prosecution of a sitting President" is "categorical," and that Smith's politically-motivated prosecutions of President Trump had to be dismissed "before [President Trump] is inaugurated." Ex. 61 at 1. Consistent with *Trump*, SCO acknowledged that "the President must not be unduly encumbered in fulfilling his weighty responsibilities . . . ." *Id.* at 2-3. Although SCO improperly failed to memorialize their 2024 communications with OLC, they acknowledged that DOJ had "determined that OLC's prior opinions" in 1973 and 2000 "apply to this situation," *i.e.*, pending criminal proceedings against the President-elect. *Id.* at 1.

OLC's prior conclusions regarding "a categorical rule against indictment or criminal prosecution" of sitting Presidents are compelling. 2000 OLC Op. at *25; *see also id.* at *21 (noting that the opinion applies regardless of whether a prosecution was "for official or unofficial [alleged]

wrongdoing").[12] "[T]he practical demands on the individual who occupies the Office of the President, particularly in the modern era, are enormous." *Id.* at *20. "Given the potentially momentous political consequences for the Nation at stake, there is a fundamental, structural incompatibility between the ordinary application of the criminal process and the Office of the President." *Id.* at *28. "[T]he President is the symbolic head of the Nation. To wound him by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs." 1973 OLC Op. at 30.

Each of the three burdens analyzed by OLC—potential incarceration, stigma, and diversions of attention—demonstrates why categorical immunity is necessary for the sitting President. *See* 2000 OLC Op. at *19. First, it is "clear that a sitting President may not constitutionally be imprisoned," which is a prospect that, among other things, would "give insufficient weight to the people's considered choice as to whom they wish to serve as their chief executive." *Id.* at *21; *see also* 1973 OLC Op. at 28 (reasoning that "only the Congress by the formal process of impeachment, and not a court by any process should be accorded the power to interrupt the Presidency"). Second, the stigma associated with an ongoing criminal prosecution—particularly where, as here, the proceedings are politically motivated and wholly lacking in integrity—is constitutionally unacceptable. "[T]hese burdens threaten the President's ability to act as the Nation's leader in both the domestic and foreign spheres." 2000 OLC Op. at *22; *see*

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[12] State courts regularly treat relevant OLC opinions as highly persuasive to the resolutions of issues presented, and this Court should too. *See, e.g.*, *Mathews v. Becerra*, 455 P.3d 277, 290 (Cal. 2019); *Pueblo v. Sanchez Valle*, 192 D.P.R. 594, 753 n.36 (P.R. 2015) (Rodriguez, J. dissenting); *In re Challenge of Cont. Award Solicitation No. 13-X-22694 Lottery Growth Mgmt. Servs.*, 436 N.J. Super. 350, 370 n.3 (N.J. Super. Ct. App. Div. 2014); *State v. Radcliff*, 978 N.E.2d 1275, 1287 (Ohio Ct. App. 2012); *see also Molloy v. Virgin Islands*, 77 V.I. 408, 419 (V.I. 2022); *In re Abrams*, 689 A.2d 6, 16 (D.C. 1997).

also 1973 OLC Op. at 30 ("The spectacle of an indicted President still trying to serve as Chief Executive boggles the imagination.").

Third, "criminal litigation uniquely requires the President's *personal* time and energy, and will inevitably entail a considerable if not overwhelming degree of mental preoccupation." 2000 OLC Op. at *25 (emphasis in original). This burden is "overwhelming." *Id.* "[T]he need to respond to such charges through the judicial process would seriously interfere with [the President's] ability to carry out his constitutionally assigned functions." *Id.* at *22; *see also* 1973 OLC Op. at 28 ("[T]he duties of the Presidency . . . have become so onerous that a President may not be able fully to discharge the powers and duties of his office if he had to defend a criminal prosecution."). "[T]he ordinary workings of the criminal process would impose burdens upon a sitting President that would directly and substantially impede the executive branch from performing its constitutionally assigned functions." 2000 OLC Op. at *12. In short, "the Presidency would be derailed . . . ." 1973 OLC Op. at 29.

Collectively, these burdens would "interfere with the President's unique official duties, most of which cannot be performed by anyone else." 1973 OLC Op. at 28. Interference arising from continued criminal proceedings would be "politically and constitutionally a traumatic event," *id.* at 32, with a "dramatically destabilizing effect" on the Presidency, 2000 OLC Op. at *12. These circumstances present a complete and total impediment to further proceedings in this case under CPL § 210.20(1)(h).

As OLC noted in 2000, the Supreme Court's decision in *Clinton v. Jones* is not to the contrary. *See* 2000 OLC Op. at *22-23. The *Clinton* Court found that the sitting President is not immune from federal civil litigation relating to pre-Presidential unofficial acts. *See* 520 U.S. at 701. The holding is "palpably inapposite to criminal cases." 2000 OLC Op. at *23. The "stigma

and suspicion" associated with criminal proceedings, even unjust ones such as these, "cannot fairly be analogized to that caused by initiation of a private civil action." *Id.* at *22. "Indictment alone risks . . . undermining the President's leadership and efficacy both here and abroad" by "severely damaging the President's standing and credibility in the national and international communities." *Id.* The Supreme Court has reasoned similarly in a manner that binds this Court. "Potential criminal liability, and the peculiar public opprobrium that attaches to criminal proceedings, are plainly more likely to distort Presidential decisionmaking than the potential payment of civil damages." *Trump*, 603 U.S. at 613. Thus, the "danger" to the "institution of the Presidency" is much "greater" in criminal cases than in civil matters such as the one at issue in *Clinton*. *Id.* at 613, 632.[13]

Finally, while categorical immunity shields President Trump from criminal proceedings as a result of the national mandate arising from the recent election, the Supreme Court has found that "alternative remedies and deterrents establish[] that absolute immunity will not place the President 'above the law.'" *Fitzgerald*, 457 U.S. at 758. "There remains the constitutional remedy of impeachment," though it is inconceivable that Congress would initiate that type of proceeding based on the dated, biased allegations presented by DANY here. *Id.* at 757; *see also Trump*, 603

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[13] The reasoning in *Trump* regarding burdens on the Presidency arising from criminal prosecutions makes clear that the First Department's earlier divided opinion in *Zervos v. Trump*—a state-law civil case—has no bearing on the issues presented in this motion. 171 A.D.3d 110 (1st Dep't 2019). The Second Circuit's post-*Zervos* comity analysis also renders the *Zervos* decision inapposite. *See Trump v. Vance*, 941 F.3d 631, 637 (2d Cir. 2019), *aff'd on other grounds*, 591 U.S. 786 (2020). This case is about much more than the "mere exercise of [civil] jurisdiction." *Zervos*, 171 A.D.3d at 128. The pending criminal proceedings impose an unconstitutional burden on President Trump's Article II authority and his efforts to lead the Country. Moreover, it is of no moment that "Congress has not passed any law immunizing the President." *Id.* at 126. "[A] specific textual basis has not been considered a prerequisite to the recognition of immunity." *Trump*, 603 U.S. at 637. The "federal law limiting a state court from entertaining" this case is the Constitution and, as discussed below, the Presidential Transition Act. *Zervos*, 171 A.D.3d at 126.

U.S. at 641 ("[W]e cannot afford to fixate exclusively, or even primarily, on present exigencies."). "The President is subjected to constant scrutiny by the press" and "[v]igilant oversight by Congress." *Fitzgerald*, 457 U.S. at 757. "Other incentives . . . include . . . the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature." *Id.* Therefore, "ensuring that the President may exercise [his sweeping] powers forcefully, as the Framers anticipated he would—does not place him above the law; it preserves the basic structure of the Constitution from which that law derives." *Trump*, 603 U.S. at 640.

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In sum, "[t]he justifying purposes" of Presidential immunity "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." *Trump*, 603 U.S. at 615. Continued criminal proceedings pose a constitutionally unacceptable risk of diversion from those functions. Enforcing the full scope of Presidential immunity, by dismissing this case immediately, is necessary "to ensure good government" and to avoid "enduring consequences upon the balanced power structure of our Republic." *Id.* at 606, 610. The unacceptable alternative is an "Executive Branch that cannibalizes itself, with each successive President free to prosecute his predecessors, yet unable to boldly and fearlessly carry out his duties for fear that he may be next." *Id.* at 640. Accordingly, the Court must dismiss the Indictment and vacate the jury's verdicts.

B. The President-Elect Is Entitled To Categorical Immunity Under The Presidential Transition Act

To be clear, immediate dismissal, prior to the inauguration, is necessary. The Presidential Transition Act strongly supports OLC's 2024 opinion that Smith's lawfare against President

Trump had to be dismissed prior to the inauguration, *see* Ex. 61 at 1, and the Act demonstrates that immediate dismissal of this case is also required.

The Presidential Transition Act applies to President Trump as "President-elect," the "successful candidate[] for the office of the President." 3 U.S.C. § 102 note, § 3(c). The Act's legislative history makes clear that there is no material distinction between the President-elect and the post-inauguration sitting President for these purposes:

> [O]nce a man is President-elect, he is not the Democratic President-elect; he is not the Republican President-elect; he is the President-elect of the people of the United States of America. In that interim time he 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).

"[T]he orderly transfer of the executive power is one of the most important public objectives in a democratic society. The transition period insures that the candidate will be able to perform effectively the important functions of his or her new office as expeditiously as possible." Memorandum from Randolph D. Moss, Assistant Attorney General, OLC, *Definition of "Candidate" Under 18 U.S.C. §207(j)(7)*, 2000 WL 33716979, at *4 (Nov. 6, 2000). The transition process is "an integral part of the presidential administration," in the "national interest," and part of President Trump's "public function," as he prepares to govern. Memorandum from Randolph D. Moss, Assistant Attorney General, 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 (Jan. 17, 2001). This process includes evaluation of sensitive national security issues and associated grave risks. For example, the Presidential Transition Act requires the outgoing administration to provide "a detailed classified, compartmented summary . . . of specific operational threats to national security; major military or covert operations; and pending decisions

on possible uses of military force" so that President Trump and his team may begin to evaluate those issues "as soon as possible after the date of the general elections." 3 U.S.C. § 102 note, § 3(a)(8)(A)(v). "One of the top priorities of any presidential administration is to protect the country from foreign and domestic threats. While a challenge at all times, the country is especially vulnerable during the time of presidential transitions . . . ." Ex. 65.

DANY's insistence on continuing with these unlawful, failed proceedings intensifies the risk associated with that vulnerability. President Trump has already commenced this complex, sensitive, and intensely time-consuming process, which is a "monumental undertaking." Ex. 66. These proceedings are interfering with that process and must therefore be terminated immediately.

C. The Supremacy Clause Requires Dismissal

The Supremacy Clause adds additional urgency to the need for immediate dismissal because DANY has created the nightmare scenario where a local, biased prosecutor is seeking to interfere with the outcome of the national election by encumbering the people's choice of a leader with unacceptable burdens and distractions.

"[T]he sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court as if the line of division was traced by landmarks and monuments visible to the eye." *Covell v. Heyman*, 111 U.S. 176, 183 (1884). The Supremacy Clause prevents "the operations of the general government" from being "arrested at the will of one of its members." *Davis*, 100 U.S. 263. There is no "element of weakness" in the Constitution such that states may "paralyze the operations of the government" through their misguided actions. *Id.*

"It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own

operations from their own influence." *McCulloch*, 17 U.S. at 427. Consequently, states' "power over governance . . . does not extend to *federal* officeholders and candidates." *Anderson*, 601 U.S. at 111 (emphasis in original); *see also id.* ("[N]ot even the respondents contend that the Constitution authorizes States to somehow remove *sitting* federal officeholders who may be violating Section 3." (emphasis in original)). States "lack even the lesser powers to issue writs of mandamus against federal officials or to grant habeas corpus relief to persons in federal custody." *Id.*

In *Clinton*, the Supreme Court anticipated that a President facing litigation in a "state forum" would "presumably rely on federalism and comity concerns," as well as "the interest in protecting federal officials from possible local prejudice." *Id.* at 691. In *Vance*, DOJ argued persuasively that this language "suggest[s] . . . [that] state proceedings can pose a greater threat to the presidency" than the federal civil case in *Clinton*. Ex. 67 at 30. After all, "[c]omity is a two-way street," which is "reinforced by the demands of federalism." *Trump v. Vance*, 941 F.3d 631, 637-38 (2d Cir. 2019), *aff'd on other grounds*, 591 U.S. 786 (2020). "The demands of federalism are diminished . . . and the importance of preventing friction is reduced, when state and federal actors are already engaged in litigation"—particularly where "the federal actor is the President of the United States, who under Article II of the Constitution serves as the nation's chief executive, the head of a branch of the federal government." *Id.* at 637-38; *see also People v. Kin Kan*, 78 N.Y.2d 54, 59-60 (1991) (reasoning that "the interpretation of a Federal constitutional question by the lower Federal courts may serve as useful and persuasive authority").

Attorney General Stanberry addressed the Supremacy Clause problem presented here during argument in *Mississippi v. Johnson*, 71 U.S. 475, 487 (1866). Stanberry pointed out that even the threat of contempt proceedings and related penalties would "ma[k]e the President

incapable of performing his duties" and, in effect, result in "remov[al]" of the President from Office by a local elected prosecutor, outside the constitutionally mandated impeachment process. *Id.*

> There is no one left to perform all the duties which for the safety of this people as a nation are reposed in the President. To correct a particular evil, to guard a particular individual or a particular State against the acts of the President, there is no way, according to the gentlemen, but to depose that President by a proceeding like this, and, for the correction of this lesser evil, to produce that enormous evil which affects not merely the State of Mississippi, but every other State of the Union and every individual.
>
> Is this the way to treat the head of the government?

Id. at 488. The answer, obviously, is no.

DANY knows this to be true, even though DA Bragg and his prosecutors have thus far been unwilling to say so for political reasons. In DANY's November 19, 2024 submission to the Court, they claimed to have considered these issues "carefully." Ex. 60 at 1. Apparently not so carefully, however, that they reviewed their binding concessions in related proceedings in *Trump v. Vance*. There, DANY acknowledged "the central role of the President in the functioning of our national government and the need to avoid interfering with the President's ability to carry out those important duties." Ex. 67 at 54. Indeed, DANY told the U.S. Supreme Court that they were "mindful" that, "as a state actor," they "*cannot prosecute a president while in office*." *Id.* (emphasis added).

DANY explained in *Vance* that they reached this conclusion because the "separation of powers analysis" discussed in cases like *Fitzgerald* and *Trump* is "very analogous" to the operation of the Supremacy Clause in the context of a local prosecution. Ex. 67 at 92-93. DANY conceded that "[w]hen a State attempts to regulate a federal official's exercise of federal powers, its actions necessarily conflict with supreme federal authority, and the Supremacy Clause resolves the conflict in favor of the federal government." Ex. 68 at 16. DANY wrote that a criminal "prosecution is

uniquely stigmatizing," and that the Supremacy Clause "preclud[es] States from directly interfering with a President's *official* acts." *Id.* at 9, 28 (emphasis in original). DANY admitted that where a criminal prosecution presents a "real burden" on the President, "courts are empowered" to "shut an investigation down" and "shut . . . a litigation down." Ex. 67 at 63.

DANY was absolutely correct in *Vance*. Conroy, still a member of the prosecution team today, signed many of DANY's briefs in *Vance*. *See, e.g.*, Ex. 68 at 53. DANY confirmed that the allegations in this case were part of the investigation at issue in *Vance* by referencing the "hush money" payments involving Cohen. *See id.* at 3 ("One of the issues raised [in the investigation] related to 'hush money' payments made on behalf of petitioner to two women with whom petitioner allegedly had extra-marital affairs."). Thus, judicial estoppel prevents DANY from escaping these positions just because DA Bragg now thinks a different strategy better suits his reelection hopes. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him"); *see also id.* at 749-50 (reasoning that the "purpose" of the doctrine is "to protect the integrity of the judicial process" by "prohibiting parties from deliberately changing positions according to the exigencies of the moment"). The Court must shut this case down now.

Furthermore, far from reflecting a spirit of generosity or reasonableness toward President Trump, DANY made these concessions in *Vance* because they are required by even cursory consideration of the subject. "The President is a representative of the people" because he is "elected by all the people." *Myers v. United States*, 272 U.S. 52, 123 (1926). The Commander in Chief is "more representative" of the nation than elected state prosecutors, such as DA Bragg,

"whose constituencies are local and not country wide." *Id.*; *see also Clinton*, 520 U.S. at 711 (Breyer, J., concurring) (reasoning that the President's "conduct embodies an authority bestowed by the entire American electorate").

Burdening the Presidency with a biased prosecution by a local prosecutor would be not only unconstitutional, but also unbearably undemocratic to the people of this country who chose President Trump as their leader. As OLC put it:

> The Framers considered who should possess the extraordinary power of deciding whether to initiate a proceeding that could remove the President—one of only two constitutional officers elected by the people as a whole—and placed that responsibility in the elected officials of Congress. It would be inconsistent with that carefully considered judgment to permit an unelected grand jury and prosecutor effectively to "remove" a President by bringing criminal charges against him while he remains in office.

2000 OLC Op. at *27. "[T]he most important decisions in the process of criminal prosecution would lie in the hands of unaccountable grand and petit jurors, deliberating in secret, perhaps influenced by regional or other concerns not shared by the general polity, guided by a prosecutor who is only indirectly accountable to the public." *Id.* "[P]ermitting such criminal process against a sitting President would affect the underlying dynamics of our governmental system in profound and necessarily unpredictable ways, by shifting an awesome power to unelected persons lacking an explicit constitutional role vis-a-vis the President." *Id.* at *28.

In *Vance*, DOJ had similar concerns about a local prosecution harming the operations of the federal government based on political bias. "No one State may properly burden the President of the whole United States." Ex. 69 at 13. "A state judiciary . . . is not coordinate or coequal to the Presidency." *Id.* at 14. "Local prosecutors have structural incentives to respond to the interests of their own electorates, and lack structural incentives to account for the compelling constitutional interests of the Presidency." *Id.* at 7. "Local prosecutors are necessarily going to put more emphasis on local interests than national ones. It simply reflects the manner in which they rise to

office through elections by local, relatively homogenous political communities." Ex. 67 at 33.[14] In DOJ's view, "the President might well need more protection in state court than he gets in federal court precisely because of the risk of local prejudice." *Id.* at 40. Thus, DOJ argued that "under both Article II and the Supremacy Clause, the President's immunity from state judicial process must be even broader." Ex. 69 at 5; *see also id.* at 11 ("The President's immunity from state judicial process must provide greater protection than his immunity from federal judicial process.").

While the *Vance* Court did not extend Presidential immunity to the DANY grand jury subpoena at issue in that case, the Court "recognize[d], as does the district attorney, that harassing subpoenas could, under certain circumstances, threaten the independence or effectiveness of the Executive." 591 U.S. at 805. As explained in the Background section, *supra*, and in Part II, *infra*, this case now presents those "certain circumstances" due to clear indications of bias and hostility. The *Vance* decision also turned on other distinguishable facts, which included a false suggestion by DANY that President Trump was not the target of their investigation, and "200 years of precedent" involving Presidential responses to subpoenas. *See id.* at 803; *id.* at 838 & n.9 (Alito, J., dissenting). In light of those precedents, the *Vance* Court found "nothing inherently stigmatizing" about DANY's subpoena. *Id.* at 803. The same cannot be said here, where there is no precedent supporting continuing a criminal prosecution of a sitting President, and the types of "threat[s]" posed by such a prosecution give rise to an unconstitutional "threat of intrusion on the authority and functions of the Executive Branch." *Trump*, 603 U.S. at 613. Accordingly, the

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[14] *Accord* Ex. 69 at 6 ("The structural features of state criminal justice systems heighten those dangers [of intrusion on the Presidency]. Local prosecutors, who represent local electorates, have strong incentives to respond to the interests of their own communities, but no comparable incentives to consider the effects of their subpoenas on the Nation as a whole. And unlike federal prosecutors, local prosecutors are not subject to the centralized supervision of the Attorney General.").

Supremacy Clause and related concerns of comity and federalism also support the need for immediate dismissal and vacatur of the jury's verdicts.

D. Balancing Of Valid Interests Further Supports Dismissal

DANY has suggested, consistent with the OLC's analysis in 2000, that "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.'" Ex. 60 at 2 (quoting *Vance*, 591 U.S. at 810). In *Vance*, however, DANY's interest in collecting evidence from a sitting President was supported by longstanding precedent dating back to the Supreme Court's decision in *Burr*. *See* 591 U.S. at 810-11. There is no authority for what DANY hopes to do here—continue with a prosecution of a sitting President.

Critically, the relevant balancing does not turn on the specific procedural posture of this case. "[A] categorical rule against indictment or criminal prosecution is most consistent with the constitutional structure, rather than a doctrinal test that would require the court to assess whether a particular criminal proceeding is likely to impose serious burdens upon the President." 2000 OLC Op. at *25. The question is simply whether "burdens imposed by indictment and criminal prosecution on the President's ability to perform his constitutionally assigned functions" are outweighed by ongoing criminal proceedings against a sitting President. *Id.* OLC has already answered that question in the negative. OLC concluded that the above-described "impact" and impermissible burdens on the Presidency "*cannot be justified* by an overriding need to promote countervailing and legitimate government objectives." *Id.* at *19 (emphasis added). Considering "the overwhelming cost and substantial interference with the functioning of an entire branch of government," OLC specifically rejected balancing arguments concerning "(1) avoiding the bar of

a statute of limitations; (2) avoiding the weakening of the prosecution's case due to the passage of time; and (3) upholding the rule of law." *Id.* at *26.

Lapse of a statute of limitations is "not . . . of significant constitutional weight when compared with the burdens such an indictment would impose on the Office of the President." 2000 OLC Op. at *26. "[T]he potential for prejudice caused by delay fails to provide an overriding need sufficient to overcome the justification for temporary immunity from criminal prosecution." *Id.* As noted above, due to the impeachment process and a host of other alternatives for pursuing actual misconduct by a sitting President, which did not happen here, concerns about "maintaining the 'rule of law'" do not outweigh the harms to the institution of the Presidency arising from the prosecution of a sitting President. *Id.* at *27.

DANY's reference to the "'rapt attention'" language in *United States v. Gilliam* is deeply misplaced. *See* Ex. 60 at 2 (quoting *Gilliam*, 994 F.2d 97, 101 (2d Cir. 1993)). While we have no doubt that DA Bragg and the other prosecutors are proud of themselves for the "rapt attention" their improper actions drew from their media allies and the public, they already had their chance to use this lawfare for the purpose of influencing the Presidential election. *Id.* (quoting *Gilliam*, 994 F.2d 97, 101 (2d Cir. 1993)). And they failed to help the Biden-Harris Administration as they had hoped to do. The Manhattan jurors in this case did not act pursuant to the "full legal and moral authority of the society," or express the "conscience of the entire community." *Gilliam*, 994 F.2d at 101. They evaluated weak, perjury-stained evidence relating to unprecedented, preempted legal theories during a trial that amounted to an improper referendum on the 2016 election, which was conducted in a borough where the vast majority of voters think President Trump's opponent should have won. On November 5, 2024, voters nationwide superseded their conclusions. DANY's interest in stubbornly continuing their efforts to incarcerate President Trump, and their disregard

of binding precedent regarding the harmful impacts on the federal government resulting from that course of action, do not outweigh the serious costs associated with continuing these proceedings.

E. The Court Cannot Defer These Proceedings Until President Trump Completes His Second Term

DANY has also wrongly suggested that it may be appropriate to "defer[] . . . all remaining criminal proceedings until after the end of Defendant's upcoming presidential term." Ex. 60 at 2. Under the Presidential immunity doctrine, the Sixth and Eighth Amendments, and the CPL, deferral is not an option.

With respect to Presidential immunity, it would be egregious and unlawful for this Court to hold the prospect of a 2029 sentencing over President Trump's head while he continues his service to this Country.

> 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*. . . . The Framers' design of the Presidency did not envision such counterproductive burdens on the vigor and energy of the Executive.

Trump, 603 U.S. at 613-14 (emphasis added). President Trump would be required to operate "under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry" at a future sentencing. *Id.* at 618. This would "seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government." *Id.*; *see also People v. Harper*, 137 Misc. 2d 357, 364-65 (Crim. Ct. N.Y. Cnty. 1987) (reasoning that "imposition of sentence after an unreasonable delay offends the principle of the separation of powers" because "the sentencing court would be unilaterally extending, to a gross extent, the period of social control which the State could exercise over the defendant").

SCO has effectively confirmed that deferral is constitutionally impermissible. "OLC concluded that its 2000 Opinion's 'categorical' prohibition on the federal indictment of a sitting

President—even if the case were held in abeyance—applies to this situation . . . ." Ex. 61 at 6; *see also id.* at 5 ("[T]he Constitution would thus prohibit an indictment even if all subsequent proceedings were postponed until after the President left office."). OLC previously concluded that even maintaining charges against a sitting President secretly, under seal, would permit a "prosecutor and grand jury" to "take an *unacceptable gamble* with fundamental constitutional values." 2000 OLC Op. at *28 n.38 (emphasis added). "[A]n indictment hanging over the President while he remains in office would damage the institution of the Presidency virtually *to the same extent as an actual conviction*." 1973 OLC Op. at 29 (emphasis added).

OLC has also explained that it would be impermissible for the criminal process, including "appealing an adverse verdict," to "drag out for months"—much less years. 1973 OLC Op. at 31. OLC recognized that their conclusion could lead to "certain drawbacks," including a "*complete hiatus* in criminal liability." *Id.* at 32 (emphasis added). However, "[i]n this difficult area all courses of action have costs," and these concerns are "[in]sufficient." *Id.* "Given the realities of modern politics and mass media, and the delicacy of the political relationships which surround the Presidency both foreign and domestic," staying the proceedings would have "a Russian roulette aspect" in which the Nation would be "hoping in the meantime that the power to govern could survive." *Id.* at 31.

Recognizing that DANY and this Court have no authority to play Russian roulette with the Executive Branch would not, as DANY has claimed, "'forever thwart[] the public's interest in enforcing its criminal laws.'" Ex. 60 at 2 (quoting 2000 OLC Op. at *26 n.32). In the passage quoted by DANY, OLC addressed the Supreme Court's holding in *United States v. Nixon*. OLC merely suggested that the Executive Privilege could not "justify[] the withholding of evidence relevant to the criminal prosecution of *other persons* . . . ." 2000 OLC Op. at *26 n.32 (emphasis

added). DANY has not charged any "other persons"—not Cohen, not David Pecker, not AMI—with the charges they brought against President Trump. Particularly in light of that reality, dismissal here would not "thwart" New York's "interest in enforcing its criminal laws." New York has no valid interest in enforcing those laws in a manner that interferes with the Presidency.

The impermissible deferral suggested by DANY would give rise to additional constitutional concerns because these proceedings are far from over. The federal-officer removal appeal in the Second Circuit must be resolved. *See infra* Part III. Even if this Court retains jurisdiction following that appeal, President Trump is entitled to interlocutory appeals concerning any adverse decisions on the Presidential immunity issues in this motion and the pending CPL § 330.30 motion. *See Trump*, 603 U.S. at 635. These additional delays would violate President Trump's Sixth Amendment speedy trial right, which includes any sentencing. *See, e.g.*, *United States v. Bryce*, 287 F.3d 249, 256 (2d Cir. 2002) ("Courts . . . acknowledge that the Sixth Amendment guarantee to a speedy trial applies to sentencing."). Imposing a delay in this case that is wholly disproportionate to the actual sentencing exposure would also violate the Eighth Amendment. *See Harper*, 137 Misc. 2d at 364.

New York also "has a strong policy against unreasonable delays in criminal causes and it has been enforced to the full." *People v. Fay*, 10 N.Y.2d 374, 379 (1961). "Sentence must be pronounced without unreasonable delay." CPL § 380.30(1). "[A] failure to do so results in a loss of jurisdiction over the defendant." *People v. Drake*, 61 N.Y.2d 359, 364 (1984). "[D]elay inevitably results in prejudice to the defendant." *Id.* at 365. "When sentence is unreasonably delayed, both the defendant and the community are arbitrarily deprived of the promptness, certainty and finality which the law seeks to guarantee." *Harper*, 137 Misc.2d at 363. For example, delayed sentencing results in "[l]ack of a judgment," which "prevents an appeal" in

which President Trump would demonstrate the numerous additional legal errors that have occurred in pretrial proceedings and at trial. *Fay*, 10 N.Y.2d at 379.

Thus, as OLC has explained, under the Constitution and the CPL, sentencing cannot be "indefinitely deferred or postponed." *Hogan v. Bohan*, 305 N.Y. 110, 112 (1953). The only permissible outcome is immediate dismissal.

II. This Case Must Be Dismissed Pursuant To CPL § 210.40(1)

Dismissal is also required in the interests of justice pursuant to CPL § 210.40(1). The driving "compelling factor" requiring dismissal is Presidential immunity and the Supremacy Clause, as discussed above in Part I. *See id.*; *see also* CPL § 210.40(1)(j) (requiring consideration of "any other relevant fact indicating that a judgment of conviction would serve no useful purpose"). The remaining factors set forth in § 210.40(1) provide additional support for that necessary outcome.

A. The Seriousness Of The Charges Does Not Override Presidential Immunity

The unprecedented nature of the charges and the circumstances of DANY's allegations support dismissal in the interests of justice. *See* CPL § 210.40(1)(a).

As Pomerantz put it, "[t]he facts surrounding the payments 'did not amount to much in legal terms. Paying hush money is not a crime under New York State law, even if the payment was made to help an electoral candidate.'" *Bragg*, 669 F. Supp. 3d at 262 (quoting *Pomerantz Inside Account*). DANY's allegations date back to at least 2016, and in some instances decades. The charges are arguably time barred, and they most certainly would be but-for the COVID-19 pandemic. *See id.* ("'There is a statute of limitations issue with the DANY case against Trump.'" (quoting *Pomerantz Inside Account*)). DANY stretched the misdemeanor business-records

charges to felonies by relying on New York Election Law § 17-152, which is "old," "arcane," and "rarely used." Ex. 70.

The underlying records entries "do not rise to the level of the majority of the crimes adjudicated in Supreme Court, New York County, namely homicide, sexual assault, drug sale, robbery, burglary, and other violent and nonviolent serious felony offenses." *People v. Clifford*, 82 Misc. 3d 1068, 1077 (Sup. Ct. N.Y. Cnty. 2024). DANY "routinely—nearly daily—move[s] to dismiss significantly more serious counts or entire indictments in the interests of justice simply to negate the consequences of New York's predicate felon sentencing statutes or to avoid immigration consequences." *Id.*; *see also People v. Rafferty*, 174 A.D.3d 1328, 1329 (4th Dep't 2019) (affirming CPL § 210.40 dismissal of business records charges). As another example, in *People v. Martinez*, the Second Department affirmed a CPL § 210.40 dismissal of business-records charges involving evidence tampering and creation of false records relating to a nursing home resident's injuries and related care. *See People v. Martinez*, 304 A.D.2d 675, 676 (2d Dep't 2003); *see also* 2001 WL 34684016 (prosecutor-appellant's brief); Ex. 79 ("The [*Martinez*] indictment said that business records were falsified, doctored forms were filed with a state agency and physical evidence was tampered with. The records were filed in Albany in photocopies that did not show the alterations, the indictment said. If convicted, each nurse could be sentenced to up to four years in prison."). Those allegations are a far cry from DANY's evidence in this matter.

DANY's failure to charge anyone else in connection with this so-called scheme belies any substantial claim that the allegations involved serious misconduct. *People v. Coomey*, 144 A.D.3d 1583, 1584 (4th Dep't 2016) (affirming CPL § 210.40 dismissal of business records charges where "defendant was unfairly targeted for criminal prosecution based on evidence of wrongdoing on the part of some of defendant's coworkers who were not prosecuted").

So too does the fact that the federal government declined to pursue charges or enforcement action against President Trump. Notwithstanding Cohen's professed interest in cooperation, federal prosecutors "concluded" their investigation of "who, besides Michael Cohen, was involved in and may be criminally liable for the two campaign finance violations to which Cohen pled guilty" without charging President Trump. Ex. 71 at 1 n.1. The FEC held its inquiry into the so-called "hush money" payments "in abeyance" while DOJ reached that conclusion. *See* Ex. 72 at 3 n.8. Subsequently, underscoring the lack of seriousness of DANY's allegations, two FEC commissioners concluded that targeting President Trump in connection with the matter "was not the best use of agency resources." *Id.* at 2. Those commissioners also noted that the allegations were "already statute-of-limitations imperiled." *Id.* at 3. Accordingly, DANY's allegations are not so serious that they overcome the pertinent Presidential immunity and Supremacy Clause considerations.

B. No Harm Resulted From DANY's Allegations

The "extent of harm caused" by the charges, which was non-existent, supports dismissal. *See* CPL § 210.40(1)(b).

There is no evidence that the entries at issue in the Trump Organization's business records were relied upon for any purpose, much less that those entries caused harm to anyone. At trial, DANY falsely suggested that IRS Form 1099s prepared by the Trump Organization and the Trust somehow contained false information. Ex. 36, Tr. 2365, 4409; *see also* Ex. 73 (GX 93). The Forms were not false. The Forms disclosed "Nonemployee compensation" to Cohen, and the Forms did not require "break[ing] down payments for legal services versus expenses incurred by a lawyer during the provision of those services." Ex. 36, Tr. 2406.

In any event, there is no evidence that the Trump Organization or the Donald J. Trump Revocable Trust used the information in the business records or the Form 1099s to harm tax authorities by reducing their tax burdens. That is why DANY resorted to the trivial and convoluted theory that there was some kind of agreement to pay *too much* to the tax authorities. *See, e.g.*, Ex. 46 at 6-7. DANY's legal theory is very much disputed, but the fact that such an arrangement would not result in any cognizable form of harm cannot be seriously contested. DANY also repeatedly and successfully resisted defense inquiry concerning Cohen's tax treatment of the payments. Exs. 74 at 16-18, 75 at 10. Thus, there is no evidence that Cohen caused harm, other than through his lies, his perjury during the *James* trial, and his perjury before this Court.

Neither the business records at issue nor the underlying payments by Cohen and AMI withheld information from voters. The claims by Dino Sajudin were false, and no one is misled when the media declines to publish lies. *E.g.*, Ex. 36, Tr. 1359. Daniels's false claims were made public long before the 2016 election, including in 2006 and again in 2011. *See, e.g.*, *id.*, Tr. 1858-59, 1877, 1895, 1898-99. Allegations relating to Karen McDougal were also public prior to the election. *See, e.g.*, *id.*, Tr. 1400, 1929-30; *see also* Ex. 73 (Nov. 4, 2016 *Wall Street Journal* article regarding allegations relating to McDougal and by Daniels).

Finally, in addition to the fact that the allegations relating to Daniels and McDougal were made public prior to the election, Cohen's October 2016 payment to Daniels would not have been reportable prior to the election under FEC regulations. Former FEC Chairman Bradley Smith—the campaign-finance expert the Court precluded—explained to Congress that "assuming the payment to Daniels was required to be reported as a campaign expenditure, it would not have been reported until *after* the election. . . . So any 'conspiracy,' if that is what it was, to prevent public disclosure of the payment 'until after the election' makes no sense." Ex. 76 at 5 (emphasis added).

"[A]ny theory that the Trump campaign [violated] N.Y. Election Law 17-152 by violating FECA reporting requirements in order to 'delay [public disclosure] until after the election' simply makes no sense and, in fact, the reporting schedule makes the prosecution argument look foolish." *Id.* at 5; *see also id.* at 13 ("[T]he campaign finance aspects of the trial in New York were abused by the prosecutors . . . ."). If there was any harm done here, it was to the FEC's enforcement program. *Id.* ("The decisions of the prosecutors and Judge Merchan place in danger the entire enforcement scheme designed by Congress when it passed the FECA."). For all these reasons, CPL § 210.40(1)(b) supports immediate dismissal.

C. DANY's Evidence Was Weak

The exceedingly weak nature of DANY's evidence supports President Trump's motion. CPL § 210.40(1)(c).

As demonstrated in President Trump's CPL § 330.30 motion, DANY's case turned on the perjured testimony of a witness, Cohen, who has been convicted of multiple felonies—including for fraud crimes and perjury. *See* Ex. 43 at 46-50; *see also, e.g.*, *People v. Simmons*, 75 N.Y.2d 738, 739 (1989) ("[T]he prosecution's case was less than overwhelming. It rested on the testimony of the complainant whose credibility was impugned by his extensive criminal history."). Cohen committed perjury in *James*, *see Cohen*, 724 F. Supp. 3d at 257, and before this Court. "The DANY prosecution team discussed 'Michael Cohen's credibility' as being one of 'the difficulties in the case.'" *Bragg*, 669 F. Supp. 3d at 263 (quoting *Pomerantz Inside Account*).

In an unconstitutional effort to bolster Cohen's implausible account, DANY resorted to myriad violations of the Presidential immunity doctrine during the trial by offering evidence of President Trump's official acts during his first term in Office. The prosecutors wrongly emphasized this inadmissible evidence to the jury as "damaging," "devastating," and "utterly

devastating." Ex. 36, Tr. 4598, 4747. These unconstitutional actions provide an independent basis for dismissal, as explained in the pending CPL § 330.30 motion. However, DANY's use of official-acts evidence at trial also shows why the interests of justice call for vacatur of the jury's unsupported verdicts and immediate dismissal. That is because such evidence is uniquely and unacceptably prejudicial:

> Presidential acts frequently deal with matters likely to arouse the most intense feelings. Allowing prosecutors to ask or suggest that the jury probe official acts for which the President is immune would thus raise a unique risk that the jurors' deliberations will be prejudiced by their views of the President's policies and performance while in office.

Trump, 603 U.S. at 631. Accordingly, DANY's weak case and the manner in which they sought to bolster it at trial also favors CPL § 210.40(1) dismissal.

D. President Trump's Extraordinary Service To This City And The Nation

President Trump's civic and financial contributions to this City and the Nation are too numerous to count. These factors strongly support dismissal under CPL § 210.40(1)(d). *See, e.g.*, *Clifford*, 82 Misc. 3d at 1081 (finding CPL § 210.40(1)(d) supports post-sentencing dismissal where defendant "has no prior criminal history"); *People v. Wooten*, 2019 WL 167063, at *2 (Sup. Ct. Kings Cnty. Jan. 11, 2019) (finding CPL § 210.40(1)(d) supports dismissal notwithstanding that "the complainant was paralyzed in the shooting").

E. Prosecutorial And Law Enforcement Misconduct

"[E]xceptionally serious misconduct" during the investigation and trial also supports dismissal. CPL § 210.40(1)(e).

There is "a distinct political overtone to this investigation, which is quite chilling and disconcerting." *People v. McAlarney*, 2021 WL 4931886, at *2 (Crim. Ct. Richmond Cnty. Oct. 21, 2021); *see also Morrison v. Olson*, 487 U.S. 654, 713 (1988) (Scalia, J., dissenting) ("Nothing is so politically effective as the ability to charge that one's opponent and his associates are . . .

'crooks.' And nothing so effectively gives an appearance of validity to such charges as a[n] . . . investigation and, even better, prosecution"). This prosecution was pursued, shamefully, based on President Trump's politics and his decision to seek a second term in Office. *See Coomey*, 144 A.D.3d at 1584 (affirming CPL § 210.40 dismissal of business records charges where "defendant would not have been prosecuted if her employer had been successful in procuring termination of her employment at an arbitration proceeding that occurred more than one year prior to commencement of the criminal proceeding"). DOJ previously expressed concern that the "risk of harassment" presented by DANY's investigation targeting President Trump was "particularly serious." Ex. 69 at 16. DOJ was correct.

The "most dangerous power of the prosecutor" is that "he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted." Robert H. Jackson, Atty Gen., DOJ, Address at the Second Annual Conference of United States Attorneys: The Federal Prosecutor at 4 (Apr. 1, 1940). That danger was fully realized in this case. Since 2018, DANY focused on bringing charges against President Trump regardless of the evidence. DANY recruited Pomerantz to help in that targeting process. Pomerantz gladly accepted because President Trump "disgusted" him, and he believed President Trump required "different"—unconstitutional—treatment by prosecutors. *Pomerantz Inside Account* at 176-77.

While DA Bragg was campaigning, he repeatedly attacked President Trump "for political advantage." Ex. 3. As a result of DA Bragg's campaign promises and other improper public statements, as well as those of his wife, "the damage was done." *People v. McCarter*, 77 Misc. 3d 825, 837 (N.Y. Sup. Ct. 2022); *see also* Ex. 69 at 18 ("A state prosecutor in a community where the President is unpopular thus would have significant incentives to win votes by investigating the President."). The comments regarding President Trump "kept alive the impression that [DA

Bragg] was willing to respond to campaign-related pressures," and led to "media noise" that "created the appearance of impropriety . . . ." *McCarter*, 77 Misc. 3d at 837. This supported a public perception that this case was "bought and paid for with campaign contributions and political capital." *Id.*

"[W]hat impression could [President Trump]"—and the public—"have had of the fairness of a prosecution instituted by one with the personal and financial attachments of this prosecutor?" *People v. Zimmer*, 51 N.Y.2d 390, 395 (1980). After DA Bragg took office, he coordinated with the Biden-Harris Administration to bring in Colangelo to continue with the desperate and improper targeting effort. In doing so, DA Bragg was "an elected prosecutor in New York County with constituents, some of whom wish[ed] to see Bragg wield the force of law against the former President and a current candidate for the Republican presidential nomination." *Bragg*, 669 F. Supp. 3d at 276. DA Bragg once again failed to appropriately "carry out his heavy responsibility" to "achieve a just result." *Zimmer*, 51 N.Y.2d at 393-94. He, and his prosecutors, "los[t] sight of the fact that a defendant, as an integral member of the body politic, is entitled to a full measure of fairness." *Id.* at 393.

That failure to proceed in a manner consistent with basic fairness manifested itself repeatedly during the investigation. A DANY investigator who assisted Pomerantz, Jeremy Rosenberg, was reportedly disciplined for biased and improper communications with Cohen. Ex. 77; *see also* Ex. 36, Tr. 2047-51. DANY also violated grand jury secrecy rules and ethical obligations by leaking sensitive information. Several of the articles at issue could only have come from these prosecutors. *See, e.g.*, Ex. 13 (citing a "person familiar with the matter [who] was not authorized to speak publicly and did so on condition of anonymity"); Ex. 15 (describing internal non-public deliberations at DANY based on information from "people with knowledge of the

matter"). Pomerantz's subsequent leaks in *Pomerantz Inside Account* were so serious that DANY considered them to be criminal and he subsequently invoked the Fifth Amendment regarding this issue. *See* Ex. 22 at 19; *see also Bragg*, 669 F. Supp. 3d at 275 ("On the record at the hearing on the motion for emergency relief, Bragg's counsel admitted that Pomerantz's book did not preserve the confidences of the District Attorney's Office."). When DA Bragg initiated federal litigation in a frivolous effort to prevent Congress from asking the questions that led Pomerantz to invoke, the court pointed out that Bragg was "engaging in precisely the type of political theater he claims to fear." *Bragg*, 669 F. Supp. 3d at 271.

After the charges were filed publicly, DA Bragg made improper extrajudicial statements that were inconsistent with the Court's admonishments at the May 4, 2023 status conference. Ex. 28. DANY created additional prejudicial pretrial publicity by coercing a perjury plea from Weisselberg relating to *James*, while ignoring Cohen's perjury at the same trial. DANY permitted Cohen and Daniels to publicly market their status as witnesses in a manner what was wildly prejudicial to President Trump. So much so, in fact, that the Court had to order DANY to instruct Cohen to stop. Ex. 36, Tr. 3253-54.

By the time of the trial, the prosecutors were willing to say and do anything to obtain a conviction. They ignored Presidential immunity, and convinced the Court to rush ahead despite obviously relevant Supreme Court proceedings in *Trump v. United States*. DANY's hubris on that topic, and their stubborn insistence on offering official-acts evidence in grand jury proceedings and at trial, resulted in damage to the "institution of the Presidency." *Trump*, 603 U.S. at 632; *see also id.* at 643 (Thomas, J., concurring) ("Few things would threaten our constitutional order more than criminally prosecuting a former President for his official acts."). DANY's insistence on offering official-acts evidence at the trial also violated prior representations they made during the

federal removal proceedings. DANY violated additional removal-related representations, which they used to deny President Trump appropriate access to a federal forum, by (1) requiring the jury to consider complex campaign-finance issues in a manner that FECA expressly prohibits, and (2) refusing to take any reasonable steps to mitigate these legal errors by, for example, providing special interrogatories to the jury and requiring fully unanimous verdicts. In addition, Conroy misrepresented to the Court that Weisselberg was unavailable to testify because of a severance agreement, when in fact he was unavailable because DANY had imprisoned him based on manufactured perjury charges. Hoffinger wrongly used Daniels to falsely suggest to the jury that her encounter was not consensual, which, as the Court put it, "would probably have been better left unsaid." Ex. 36, Tr. 2677. Hoffinger elicited perjury from Cohen regarding the October 24, 2016 phone call. Ex. 36, Tr. 3423-24, 3880-3900. These were desperate efforts by prosecutors trying to win at any cost. Therefore, like the other factors, CPL § 210.40(1)(e) supports dismissal in the interests of justice.

F. No Sentence Can Be Timely Imposed

As explained above in Part I.E, the "effect of imposing upon [President Trump] a sentence," CPL § 210.40(1)(f), would be to violate the Presidential immunity doctrine, the Supremacy Clause, the Sixth Amendment, the Eighth Amendment, and CPL § 380.30(1). Therefore, § 210.40(1)(f) strongly supports dismissal.

G. Dismissal Would Improve Public Confidence

Dismissing this case, rather than interfering with the Presidency in violation of the Constitution, would improve "the confidence of the public in the criminal justice system." CPL § 210.40(1)(g).

Pre-trial polling substantiated significant concerns about the system's ability to render a just result. 77% of New York County respondents expressed a negative opinion of President Trump, 60% of respondents indicated that they were biased against President Trump, and 61% of the same respondents already believed that President Trump was guilty of a crime. Ex. 25 at Q13, Q17, Q27. During jury selection on April 15 and 16, 2024, more than half of the 192 potential jurors asked to be removed on the basis of a threshold question regarding impartiality. *See, e.g.*, Ex. 36, Tr. 123-31, 412-20 ("First, I'm going to ask those of you who believe you cannot be fair and impartial to raise your hand. . . ."). DANY strategically chose to structure their trial presentation as a second chance for Manhattanites to vote on the 2016 election, knowing that many potential jurors had already voted against President Trump twice, in 2016 and 2020. *See* Ex. 25 at Q3-Q5. This was a politically-motivated abuse of power intended to benefit the Biden-Harris Administration and the prosecutors' careerist objectives, but not the people of the City.

In light of the evidence of bias and misconduct, "rather than undermining the public's confidence in the criminal justice system, a dismissal is more likely to bolster it . . . ." *People v. McAlarney*, 2021 WL 4931886, at *4 (Crim. Ct. Richmond Cnty. Oct. 21, 2021); *see also Clifford*, 82 Misc. 3d at 1087 ("This court believes that the public will be relieved to know that our judiciary carefully considers the arguments of the parties that come before the court and that the courts will dismiss charges when they constitute an injustice."); *People v. Sandow*, 68 Misc. 3d 685, 695 (City Ct. Dutchess Cnty. 2019) ("The confidence of the public in the criminal justice system will be strengthened if the members of the community can be assured that the rules . . . are enforced uniformly, and that certain speech, no matter how annoying, will not be punishable by imprisonment because it is speech that offends or criticizes government officials—for this is the antithesis of constitutional guarantees.").

This conclusion is supported by DANY's assertion regarding "rapt attention" to the trial. Ex. 60 at 2. "[I]n well-publicized cases involving high officers, it is virtually impossible to insure a fair trial," and "[i]t might be impossible to impanel a neutral jury." 1973 OLC Memo. at 25. It would not be "fair" to the institutional jury process "to give it responsibility for unavoidably political judgment in the esoteric realm of the Nation's top Executive." *Id.* at 31. There are also serious, unfixable "problems of fairness, and of acceptability of the verdict." *Id.* "Given the passions and exposure that surround the most important office in the world, the American Presidency," "the country in general" cannot "have faith in the impartiality and sound judgment of twelve jurors selected by chance out of a population of more than 200 million." *Id.*

Lastly, we recognize, without conceding, Your Honor's conclusion that the Court has not faced a disqualifying conflict during these proceedings. Nevertheless, the "confidence of the public" factor under CPL § 210.40(1)(g) presents a different question, and it is one for which the evidence cited in prior recusal motions adds force to President Trump's dismissal argument. Your Honor violated applicable ethics rules by providing financial support to President Trump's opponents. Your Honor's daughter has publicly criticized President Trump, including with specific respect to issues such as use of Twitter that are significant to the pending CPL § 330.30 litigation. She also has a long history of working for Vice President Harris's failed Presidential campaigns, implicating the personal financial entanglements that type of relationship creates. She is part owner of a company, Authentic, that has made tens of millions of dollars by providing services to President Trump's adversaries, and those adversaries have successfully solicited huge amounts of donations based on Your Honor's handling of this case. Within weeks of Harris announcing her candidacy for President, the Harris Campaign disclosed a direct payment to Authentic, demonstrating that Your Honor's daughter continued to use Authentic to provide

services to Vice President Harris during this litigation and despite President Trump's recusal arguments. *See* Ex. 51. During the same period, Nellis, a partner of Your Honor's daughter at Authentic, raised large sums of money for the Harris Campaign. As Harris and her surrogates attacked President Trump regarding DANY's allegations and the results of the trial, the Court insisted on an unprecedented post-trial gag order that prevented him from meaningfully responding during the campaign. More recently, Nellis urged his followers to "fight" the election results in an "aggressive" and "ruthless" fashion. Ex. 55. As a result of these issues, Authentic, Your Honor's daughter, and Nellis are part of a congressional investigation with which they have refused to cooperate. Exs. 52, 53.

It would be a Herculean—and, we respectfully submit, impossible—task to remain impartial under these circumstances. Dismissing this case, rather than continuing on a course of action that the U.S. Supreme Court, DOJ, and even DANY (in *Vance*) conceded would harm the national interest, would improve the public's confidence in the justice system under CPL § 210.40(1)(g).

H. Dismissal Would Benefit The Public Welfare

Dismissing this case would benefit the "safety [and] welfare of the community." CPL § 210.40(1)(h).

Other than to ensure that President Trump will be able to devote all of his energy to protecting the Nation, "[d]ismissal here has no effect on public safety." *People v. Wooten*, 2019 WL 167063, at *2 (Sup. Ct. Kings Cnty. Jan. 11, 2019). When DANY was seeking President Trump's records through subpoenas to third parties during President Trump's first term in office, DANY argued to the Supreme Court that "there is no real *public* interest at stake here at all . . . ." Ex. 78 at 1. However, "[t]here . . . 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*, 603 U.S. at 611; *see also Cheney*, 542 U.S. at 382 (describing the "paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties"). Removing obstacles to an orderly transition of Executive power, through immediate dismissal, also benefits the public welfare. *See* 3 U.S.C. 102 note, § 2 ("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.").

Finally, dismissal would benefit the public welfare by giving DA Bragg and the numerous prosecutors assigned to this case a renewed opportunity to put an end to deteriorating conditions in the City and to protect its residents from violent crime. *See* Ex. 1 at 8 (noting "Bragg's disregard for rising crime in New York City" and "his decision to not prosecute such heinous crimes").

I. There Are No Victims

Consistent with the fact that there is no evidence of harm from the business-records entries at issue, there are no victims with cognizable interests in this motion. *See* CPL § 210.40(1)(i).

The "community at large" is not a victim for purposes of CPL § 210.40(1)(h). *See Clifford*, 82 Misc. 3d at 1091 (finding that the interests of the "community at large" are adequately addressed under other CPL § 210.40 factors and, "[a]s there is no 'victim' in this matter, the court finds that this factor does not weigh in favor of or against dismissal"). More importantly, the allegations by Daniels and relating to McDougal were disclosed prior to the election, so the public suffered no harm.

McDougal did not even want to publicize her story. *See, e.g.*, Ex. 36, Tr. 1090, 1110, 1365-67. She negotiated with AMI for a $150,000 payment and several significant publishing opportunities that made her more marketable. *See* Ex. 36, Tr. 1129, 1132, 1379-81. When she

asked that AMI return the lifetime rights to her story, Pecker accommodated her. Ex. 36, Tr. 1239, 1250-51.

Daniels is not a victim here. At best, she entered into a contract with Cohen that resulted in a bargained-for exchange. More accurately, as her attorney put it, she sought to extort President Trump and his campaign by exerting "leverage" relating to a "date in certain," *i.e.*, the 2016 election. Ex. 73; *id.* (Davidson attributing the following comment to Daniels: "Because if he loses this election, and he's going to lose, . . . all fucking leverage this case is worth zero. And if that happens, I'm going to sue you because you lost this opportunity."); *see also id.* ("We know we're full of shit in the media. We know that she was never threatened in Las Vegas. We know all these things.").

Therefore, there is no cognizable "victim" interest undercutting the weight of the interests of justice, as reflected in the foregoing discussion, under CPL § 210.40(1)(i). Accordingly, dismissal is required based on all of the considerations set forth in CPL § 210.40(1).

III. No Additional Proceedings May Take Place Other Than Dismissal Pursuant To This Motion

For the reasons set forth in Parts I and II, the Court should dismiss this case immediately. President Trump has not yet presented those specific arguments in federal court, including in the federal-officer removal appeal commenced prior to the election. *See People v. Trump*, 24-2299-cv (2d Cir. 2024). However, the Presidential immunity arguments set forth in the pending CPL § 330.30 motion are very much a part of that appeal. It should be unnecessary to address those additional constitutional violations by DANY, and federalism and comity considerations require that the Court refrain from doing so prior to the resolution of this motion and the Second Circuit appeal. To proceed otherwise would reflect an improper lack of respect to the federal Court of Appeals and to the Executive Branch that President Trump was elected to lead by the American

people. That course would also "defeat the very purpose of permitting an appeal," and leave President Trump "holding an empty bag." *Forty Six Hundred LLC v. Cadence Educ., LLC*, 15 F.4th 70, 79 (1st Cir. 2021). The result would be "illogical" in any case, *id.*, but even more so in this one involving "question[s] of lasting significance," *Trump*, 603 U.S. at 641.

In no event may the Court proceed to sentencing. In addition to Presidential immunity and the Supremacy Clause, federal law prohibits the court from entering a "judgment of conviction" until the appeal is resolved. 28 U.S.C. § 1455(b)(3). "Sentencing is the entry of judgment in a criminal cause." *Fay*, 10 N.Y.2d at 379 (1961); *see also* CPL § 1.20(15) (judgment is complete when "sentence [is] imposed"). Therefore, the Court lacks authority to take that step prior to the resolution of the federal-officer removal appeal. Should the Court disagree and plan to issue a decision on the CPL § 330.30 motion, or schedule a sentencing, President Trump respectfully requests notice of those decisions and a two-week stay to provide a reasonable opportunity to pursue federal injunctive relief.

CONCLUSION

For the foregoing reasons, the Court should immediately dismiss the Indictment and vacate the jury's verdicts.

Dated: December 2, 2024
New York, N.Y.

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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** Defendant's Motion to Dismiss the Indictment and Vacate the Jury's Verdict Pursuant to C.P.L. § 330.30(1) Indictment No. 71543-23

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

PART I: BACKGROUND AND PROCEDURAL HISTORY

Trial commenced on the instant matter on April 15, 2024, and continued through May 29, 2024, when the jury received the case to begin deliberations. The following day, on May 30, 2024, the jury returned a verdict of guilty on 34 counts of Falsifying Business Records in the First Degree. That same day, this Court set a deadline of June 13, 2024, for the filing of post-trial motions and adjourned to July 11, 2024, for the imposition of sentence. The June 13, 2024, deadline passed without Defendant filing motions.

On July 1, 2024, the Supreme Court of the United States, rendered a landmark decision in *Trump v. United States*, 603 US 593 [2024]. Defendant filed a pre-motion letter dated that same day seeking leave of this Court to file the instant motion pursuant to Criminal Procedure Law ("CPL") § 330.30(1). Defendant argued in his letter that the jury's verdict must be set aside pursuant to *Trump* because "DANY should not have been permitted to offer evidence at trial of President Trump's official acts." Defendant's Letter dated July 1, 2024.

Defendant first broached the topic of Presidential immunity on December 22, 2022, in a motion for summary judgment he filed in an unrelated case brought against him for defamation. *Carroll v. Trump*, 680 F.Supp.3d 491, 498 [SD NY 2023]. In that motion, Defendant argued that the suit should be dismissed because a "President is 'entitled to absolute immunity from damages liability predicated on his official acts,'" and that the alleged defamatory statements introduced at that trial fell within the outer perimeter of his official duties as President. *Id.* at ECF No. 109 citing *Nixon v. Fitzgerald*, 457 US 731 [1982].

Defendant was arraigned on the instant matter several months later, on April 4, 2023. Approximately one month later, on May 4, 2023, Defendant filed a Notice of Removal in the Southern District of New York. *New York v. Trump*, 683 F.Supp.3d 334 [SD NY 2023]. In the Notice of Removal, he argued that "this case involves important federal questions" because the indictment contains charges related to conduct that Defendant "committed while he was President of the United States that was within 'the color of his office.'" *Id.* at ECF No. 1. The motion was denied by Judge Hellerstein on July 19, 2023, who found that the Defendant "failed to show that the conduct charged by the Indictment is for or relating to any act performed by or for the President under color of the official acts of a President." *Id.* at 351.

On June 13, 2023, Defendant was indicted in the United States District Court for the Southern District of Florida on charges related to his alleged handling of classified documents. *United States of America v. Trump, et al.*, S.D. Fla, 23 CR 80101, (AMC) (hereinafter the "*Florida Documents Matter*"). On August 3, 2023, the Defendant was indicted in Washington, D.C. for allegedly interfering with the 2020 Presidential election. *United States v. Trump*, US Dist Ct, D.D.C 23 CR 257, (TSC) (hereinafter "*January 6th Matter*").

On September 29, 2023, Defendant filed an omnibus motion in the instant matter in which he did not raise any issues with respect to Presidential immunity or the Supremacy Clause. *See* Defendant's Omnibus Motion *generally*. Five days later, on October 5, 2023, Defendant moved to dismiss the *January 6th Matter* on the grounds of Presidential immunity. *January 6 Matter* at ECF No. 74. On February 22, 2024, Defendant moved to dismiss the criminal indictment in the *Florida Documents Matter* on the grounds of Presidential immunity, arguing that the "charges stem directly from official acts by President Trump while in office." *See Florida Documents Matter* at ECF No. 324. That same day, Defendant filed motions *in limine* in the instant matter wherein he sought, among other things, to: preclude the People from arguing that "President Trump sought to improperly influence the 2016 election;" preclude the testimony of Dino Sajudin, Karen McDougal and Stephanie Clifford; preclude the People "from suborning Michael Cohen's perjury;" and preclude the People from "introducing the nearly 100 statements they seek to attribute to President Trump." Defendant's Motions *in limine* at pg. 40. Notably, Defendant did not raise the defense of Presidential immunity even though he had already done so in the Notice of Removal he filed with the Southern District of New York, the *Florida Documents Matter* and the *January 6th Matter.*[1] In fact, Defendant again

[1] Counsel in the instant matter also represented Defendant in the *Florida Documents Matter* and the *January 6th Matter*, both of which have been dismissed.

failed to argue Presidential immunity in his Reply to the People's motions *in limine* which he filed a week later, on February 29, 2024.

On March 7, 2024, 18 days before the then scheduled trial date of March 25, 2024, Defendant for the first time in the instant matter moved to preclude various pieces of evidence on the grounds of Presidential immunity. By Decision and Order dated April 3, 2024, this Court denied the motion as untimely pursuant to CPL § 255.20(3), holding that Defendant "had myriad opportunities to raise the claim of Presidential immunity well before March 7, 2024" but failed to do so. *See* this Court's Decision and Order dated 4/3/24 at pgs. 5-6.[2]

As noted above, Defendant filed the instant CPL § 330.30(1) motion after the Supreme Court rendered its July 1, 2024, decision but after this Court's June 13, 2024, deadline for the filing of post-verdict motions. Nonetheless, this Court granted leave, set a briefing schedule and adjourned sentencing in order to carefully analyze the Defendant's arguments in the context of *Trump* and to determine whether that Decision has any bearing on the case at bar.[3]

The following constitutes the Decision and Order of this Court.

PART II: *TRUMP V. UNITED STATES*, 603 US 593 [2024]

On August 1, 2023, a federal grand jury indicted Donald J. Trump for conduct that allegedly occurred during his Presidency following the 2020 Presidential election. *Trump* at 602. Trump moved to dismiss the indictment on the grounds of Presidential immunity. *Id.* at 603. The Federal District Court for the D.C. Circuit denied the motion. *Id.* at 604. Defendant appealed and the D.C. Circuit Court of Appeals affirmed. *Id.* The Supreme Court of the United States granted *certiorari* "to answer the following question: '[w]hether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office.'" *Id.* at 605. The Supreme Court identified *Trump* as "the first criminal prosecution in our Nation's history of a former President for actions taken during his Presidency"[4] and then elaborated on the issue before it: "We are called upon to consider whether and under what circumstances such a prosecution may proceed." *Id.*

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[2] In a letter motion filed with this Court on April 16, 2024, Defendant again raised the argument of evidence preclusion premised on Presidential immunity. The motion incorporated Defendant's March 7, 2024, Presidential immunity motion.

[3] During the pendency of the instant motion, Defendant filed a separate motion to dismiss pursuant to CPL §§ 210.20(1)(h) and 210.40(1). That motion has not yet been decided.

[4] As noted in the Procedural History, *supra*, the instant matter was arraigned on April 4, 2023, months before Defendant was indicted in the *January 6th Matter*.

The Supreme Court concluded 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. At least with respect to the President's exercise of his core constitutional powers, this immunity must be absolute." *Id.* at 606. The *Trump* Court identified some of the duties within his core constitutional powers as commanding the Armed Forces, granting reprieves and pardons, appointing public ministers and foreign relations such as "making treaties, appointing ambassadors, recognizing foreign governments, meeting foreign leaders, overseeing international diplomacy and intelligence gathering, [...] terrorism, trade and immigration." *Id.* at 607. As the President's duties within his core constitutional powers are of "unrivaled gravity and breadth," a President must be permitted to make decisions of the utmost import without fear of prosecution. *Id.* Thus, "Congress cannot act on, and courts cannot examine, the President's actions on subjects within his 'conclusive and preclusive' constitutional authority." *Id.* at 609.

The *Trump* Court however, recognized that "not all of the President's official acts fall within his conclusive and preclusive authority." *Id.* The President sometimes acts in a "zone of twilight" and the reasons that justify absolute immunity do not apply to those acts. *Id.* Before analyzing and deciding which acts fall within this "zone of twilight," where the President's authority is shared with Congress, the *Trump* Court "recognize[d] that only a limited number of our prior decisions guide determination of the President's immunity in this context. That is because proceedings directly involving a President have been uncommon in our Nation and 'decisions of the Court in this area' have accordingly 'been rare' and 'episodic.'" *Id.* at 610 citing *Dames & Moore v. Regan*, 453 US 654 661 [1981]. Lacking precedent on point, the *Trump* Court, "[t]o resolve the matter [looked] primarily to the Framers' design of the Presidency within the separation of powers, [its] precedent on Presidential immunity in the civil context, and [...] criminal cases where a President resisted prosecutorial demands for documents." *Id.* Notably absent of course, was any precedent where a President was criminally charged for actions taken while in office – the specific issue the *Trump* Court was tasked with resolving. *Id.* at 639 ("No court has ever been faced with the question of a President's immunity from prosecution. All that our Nation's practice establishes on the subject is silence.")

In its analysis of Presidential immunity in the civil context, the *Trump* Court cited and relied in large part, upon *Fitzgerald*, 457 US 731, which held that a President must be absolutely immune from "damages liability for acts within the 'outer perimeter' of his official duties." *Fitzgerald* at 756. Conversely, when considering the issue of document demands upon the President in the criminal context, the *Trump* Court relied upon *United States v. Nixon*, 418 US 683 [1974], which held that when

a subpoena is issued to a president to produce certain evidence, there can be no claim of absolute privilege "given the 'constitutional duty of the Judicial Branch to do justice in criminal prosecutions.'" *Trump* at 612. But the *Trump* Court recognized that "[c]riminally prosecuting a President for official conduct undoubtedly poses a far greater threat of intrusion on the authority and functions of the Executive Branch than simply seeking evidence in his possession, as in *Burr* and *Nixon*." *Id.* at 613. The *Trump* Court was careful to acknowledge that "[t]he President, charged with enforcing federal criminal laws, is not above them." *Id.* at 614. "Taking into account these competing considerations, we conclude that the separation of powers principles explicated in our precedent necessitate at least a *presumptive* immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility." *Id.*

The *Trump* Court instructed that the first step in analyzing whether a former President is entitled to immunity is to "distinguish his official from unofficial actions" and the first step in doing that is to assess the "President's authority to take that action." *Id.* at 617. The *Trump* Court recognized however, that "no court has thus far considered how to draw that distinction," and the task "can be difficult." *Id.* "Critical threshold issues in this case are how to differentiate between a President's official and unofficial actions, and how to do so with respect to the indictment's extensive and detailed allegation covering a broad range of conduct. We offer guidance on those issues below." *Id.* The *Trump* Court stopped short of resolving, at least completely, the issue before it and notably refrained from deciding what level of immunity was sufficient for official actions lying within the outer perimeter of a President's authority. "At the current stage of proceedings in this case, however, we need not and do not decide whether that immunity must be absolute, or instead whether a presumptive immunity is sufficient." *Id.* at 606. In doing so, the *Trump* Court observed that "[d]espite the unprecedented nature of this case, and the very significant constitutional questions that it raises, the lower courts have rendered their decisions on a highly expedited basis. Because those courts categorically rejected *any* form of Presidential immunity, they did not analyze the conduct alleged in the indictment to decide which of it should be categorized as official and which unofficial. Neither party has briefed that issue before us." *Id.* at 616. As a result, the *Trump* Court remanded the case to the Federal District Court "to determine in the first instance-with the benefit of briefing we lack-whether Trump's conduct in this area qualifies as official or unofficial." *Id.* at 628.

Notwithstanding the determination to remand as to all other claims, the *Trump* Court did find Trump "absolutely immune from prosecution for *the alleged conduct* involving his discussions with

Justice Department officials."[5] *Id.* at 621 (emphasis added). In attempting to assuage the concerns expressed by the dissent, Chief Justice Roberts succinctly clarified the majority's holding. "As for the dissent, they strike a tone of chilling doom that is wholly disproportionate to what the Court actually does today – conclude that immunity extends to official discussions between the President and his Attorney General, and then remand to the lower courts to determine 'in the first instance' whether and to what extent Trump's remaining alleged conduct is entitled to immunity;" the *Trump* Court expressly indicating that its holding is no broader than that. *Id.* at 637.

Because the *Trump* Court remanded to the Federal District Court, for it to conduct its own evaluation, the Court provided some guidance for distinguishing "official" from "unofficial" acts and the context within which that analysis should be performed. As framed by Chief Justice Roberts, there "accordingly 'exists the greatest public interest' in providing the President with 'the maximum ability to deal fearlessly and impartially with' the duties of his office." *Id.* at 611 *citing Fitzgerald* at 752, quoting *Ferri v. Ackerman*, 444 US 193, 203 [1979]. And further, the *Trump* Court emphasized the need to safeguard "the independence and effective functioning of the Executive Branch, and to enable the President to carry out his constitutional duties without undue caution." *Id.* at 614. But also, "[t]he President enjoys no immunity for his unofficial acts, and not everything the President does is official. The President is not above the law." *Id.* at 642. Thus, while a finding of official conduct of a President acting within the core constitutional authority imparts absolute immunity, presumptive immunity from prosecution for an official act in the outer perimeter is overcome if "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,'" as long as this analysis precludes inquiry into the President's motives. *Id.* at 614, 618.

That the ruling offered some guidance but ultimately remanded to the District Court for a more thorough exploration of the relevant facts, speaks to the narrowness of its holding. *Trump* involves a unique set of facts, applied to a rarely explored area of the law without precedent directly on point in our Nation's history. That holding was guided by the bedrock principle, as first set forth by the Supreme Court in the limited precedent in this area, to wit *Fitzgerald* and *Clinton*, that a sitting

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[5] The *Trump* Court was able to rule on the applicability of the Presidential immunity doctrine as to charges related to a President's discussions with his Attorney General because it had a sufficient record on that issue. However, the case was remanded for the lower court to develop a similarly robust record for possible review of the other claims on appeal. Remand was necessary in *Trump*, but the Supreme Court did not hold that lower courts *must* conduct such hearings in every instance. Thus, Defendant's claim that the absence of a formal hearing constitutes a mode of proceedings error is unsupported.

President must "make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system" without undue fear of criminal repercussions. *Id.* at 611. In extending its ruling to prohibit the use of official conduct evidence in charges premised upon unofficial conduct, the *Trump* Court highlighted its concern that if "official conduct for which the President is immune [is] scrutinized to help secure his conviction, even on charges that purport to be based only on his unofficial conduct, the 'intended effect' of immunity would be defeated." *Id.* at 631 *citing to Fitzgerald* at 756.

The *Trump* Court's decision was principally concerned with a President's ability to make decisions *and* to make those decisions for the public good. Based upon that concern, which Chief Justice Roberts refers to in various ways throughout the *Trump* decision, it is readily apparent that *Trump* addressed a very specific issue: "When may a former President be prosecuted for official acts taken during his Presidency?" *Id.* at 641. That is not the issue currently before this Court. The criminal charges here stem from the private acts of the Defendant made prior to taking the Office of the President – leaving only the question as to whether the *evidence* used to support the instant charges meet the official acts criteria as set forth by the *Trump* Court.

In the case at bar, the trial Court is thoroughly familiar with the legal and factual issues before it – having presided over every stage of the proceedings. And unlike *Trump*, both parties here have argued and now briefed the issues exhaustively. The record before this Court is complete and there is no need for further fact-finding or briefing.

The President of the United States has a duty to the citizenry that is paramount to each and every decision they make. "There accordingly 'exists the greatest public interest' in providing the President with the 'maximum ability to deal fearlessly and impartially with' the duties of his office." *Id.* at 611. This is to ensure the President can take "bold and unhesitating action" free from fear of unwarranted reprisal. *Id.* at 613. But a "President is not above the law." *Id.* at 642.

It is through this lens and pursuant to the guidance provided by the Supreme Court that this Court considers Defendant's CPL § 330.30(1) motion.

PART III: ARGUMENTS OF THE PARTIES

Defendant moves to dismiss the indictment and vacate the jury verdict on the grounds that the People introduced evidence in the grand jury and at trial relating to Defendant's official acts as President, in violation of the Presidential immunity doctrine as pronounced by the Supreme Court

in *Trump*, and the Supremacy Clause.[6] Defendant further argues that the alleged violation is not subject to harmless error analysis and even if it were, the harm caused is irreparable. Defendant's Motion at pgs. 20, 41, 43.

Specifically, Defendant argues that certain "official-acts evidence" admitted at trial "concerned actions taken pursuant to 'core' Executive power for which 'absolute' immunity applies." *Id.* at pg. 2. Defendant further argues that should this Court find that Defendant is not entitled to absolute immunity, then "it is equally clear" that he is entitled to presumptive immunity because the evidence admitted at trial "fit[s] comfortably within" the outer perimeter of the President's authority and the People have failed to rebut this claim with evidence unrelated to motive as required by the *Trump* Court's Decision. *Id.* at pgs. 27, 29.

Defendant identifies the following evidence as improperly received at trial: private communications with Hope Hicks ("Ms. Hicks") as White House Communications Director; Office of Government Ethics Form 278e ("OGE Form 278e"); the observations of Madeleine Westerhout ("Ms. Westerhout"), Director of Oval Office Operations, regarding Defendant's "preferences and practices" in the Oval Office; the testimony of Michael Cohen ("Mr. Cohen") regarding his communications with Defendant and others about the presidential pardon power, testimony regarding a "pressure campaign," and testimony about his conversations with David Pecker ("Mr. Pecker") about a related Federal Election Commission (hereinafter "FEC") inquiry; and "five sets of posts from 2018 on President Trump's official White House Twitter account."[7] *Id.* at pg 14.

The People argue that Defendant failed to preserve the majority of his objections. The People further argue that should the Court consider the merits of the motion, despite the procedural bar, the evidence Defendant identifies is wholly unrelated to any official acts as President and thus, not entitled to any form of immunity whether it be in the grand jury or at trial. In the alternative, the People argue that the evidence at issue relates only to the outer perimeter of the President's authority which is entitled only to presumptive immunity, which the government has successfully rebutted

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[6] Defendant previously raised a Supremacy Clause argument before Judge Hellerstein who, in his July 19, 2023, decision denying removal, held that Supremacy Clause "immunity requires the defendant to show both that he was performing 'an act which he was authorized to do by the law of the United States' and that, in performing that authorized act, 'he did no more than what was necessary and proper for him to do.'" *New York v. Trump*, 683 F.Supp.3d 334, [SD NY 2023]. Defendant failed to raise this argument in a timely post-judgment motion. Moreover, the issue of Supremacy was not implicated in *Trump* and therefore, that decision does not provide Defendant a new avenue for consideration by this Court of his current Supremacy Clause claim. In any event, this Court adopts Judge Hellerstein's reasoning and finding.

[7] This evidence is discussed in greater detail in the Discussion section below.

without inquiring into the President's motives in adherence with *Trump*. Finally, the People argue that if any of the evidence in dispute was admitted in violation of either immunity prohibition, the error was harmless in light of the overwhelming evidence of guilt.

PART IV: CPL § 330.30(1)

"After rendition of a verdict of guilty and before sentence," a court may set aside a verdict if there is a ground in the record that, if raised on appeal, "would require a reversal or modification of the judgment as a matter of law by an appellate court." CPL § 330.30(1), Defendant's Motion at pg. 18; People's Response at pg. 8. A trial court's inquiry pursuant to § 330.30(1) is generally limited to a determination of whether the trial evidence was "legally sufficient to establish the defendant's guilt of an offense of which he was convicted." *People v. Carter*, 63 NY2d 530, 536 [1984]. A trial court must determine only "whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial in order to uphold the verdict." *People v. Bleakly*, 69 NY2d 490 [1987].

The only claim of error that can serve as a basis to set aside a verdict is one that was properly preserved for appellate review. *People v. Everson*, 100 NY2d 609 [2003]. Therefore, in the context of a CPL § 330.30(1) motion, an "argument may not be addressed unless it has been properly preserved for review during the trial." *People v. Hines*, 97 NY2d 56 [2001] citing to *People v. Carter*, 63 NY2d 530 [1984]. As reasoned in *People v. Hawkins*, 11 NY3d 484 [2008], "[s]ound reasons underlie this preservation argument. As we stated in *Gray*, a specific motion brings the claim to the trial court's attention, alerting all parties, in a timely fashion to any alleged deficiency in the evidence, thereby advancing both the truth-seeking purpose of the trial and the goal of swift and final determination of guilt or nonguilt of the defendant." *Hawkins*, 11 NY3d at 492, referencing *People v. Gray*, 86 NY2d 10 [1995]. To "preserve a claim of error in the admission of evidence or a charge to the jury, a defendant must make his or her position known to the court." *Gray*, 86 NY2d at 19.

PART V: DISCUSSION

Section A. Preservation

The threshold issue this Court must consider then, is whether the claims of Presidential immunity were properly preserved for this Court's review.

The People argue that Defendant failed to preserve any claim of Presidential immunity as to the evidence in dispute other than the testimony of Ms. Hicks and OGE Form 278e. People's

Response at pgs. 6, 9-12. While Defendant claims that he preserved objections as to all evidence in his pre-trial filings and at trial, he also argues that the Court should overlook any failure to properly preserve in the "interest of justice" or for "good cause." Defendant's Reply at pg. 2. However, "good cause" and "interest of justice" are not legally viable standards for a CPL §330.30(1) review in the absence of proper preservation. *People v. Carter*, 63 NY2d 530 [1984] (Trial judges have no power to vacate a conviction on interest of justice grounds), *People v. Sudol*, 89 AD3d 499 [1st Dept 2011] (Trial court lacks Appellate Division jurisdiction and may only grant a motion where alleged error was preserved by proper objection at trial.)

Defendant also argues that *Trump* constitutes an intervening decision and therefore, provides an exception to the preservation requirement. Defendant's Reply at pgs. 1-2, 6. This Court disagrees. The New York Court of Appeals in *People v. Cabrera* emphasized that preservation is crucial except in the most limited of circumstances as it "gives the parties an essential opportunity to prove relevant factual and legal issues, thereby ensuring that the record before this Court reflects a full airing of the points that bear upon an ultimate merits determination." 41 NY3d 35, 43 [2023]. It further held that "preservation is essential where the failure to raise a claim in the court of first instance means that the appellate record is inadequate to fairly assess the merits, *even if governing law was altered by an intervening Supreme Court decision.*" *Id.* at 45 (emphasis added). The *Cabrera* court highlighted several New York Court of Appeals decisions that reiterated the need for preservation despite an intervening Supreme Court decision. For example, the Court of Appeals held in *People v. Martin*, 50 NY2d 1029 [1980], that the intervening Supreme Court decision in *Payton v. New York*, 445 US 573 [1980], which changed the law in New York regarding warrantless arrests inside the home, did not excuse a failure to preserve in the lower courts. The intervening decision in *Trump* equally does not excuse a failure by Defendant to adequately preserve his objections to the evidence he now claims was erroneously admitted.

Defendant also claims that the admission of what he has characterized as official acts evidence constitutes a "mode of proceedings" error which does not require preservation. Mode of proceedings errors occupy a very narrow set of claims. *People v. Patterson*, 39 NY2d 288 [1976]. To qualify, the error must "go to the essential validity of the process and [be] so fundamental that the entire trial is irreparably tainted." *People v. Kelly* 5 NY3d 116, 119-120 [2005]. "[M]ost errors of constitutional dimension" must be preserved in the trial court. *People v. Hanley,* 20 NY3d 601, 604-605. Examples of mode of proceedings errors include "changing of the burden of proof, consent to less than a 12-member jury in a criminal case, and deviation from State constitutionally mandated

requirements for an indictment." *Gray*, 86 N.Y.2d at 21-22. And more recently, the Court of Appeals held that notwithstanding the Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 US 1 [2022], which "effected a substantial change in Second Amendment jurisprudence," and "raises significant questions about whether, in light of *Bruen*, lack of licensure is an essential element of New York's criminal possession of a weapon offense and must therefore be charged to the jury in all cases," it did not qualify as a mode of proceedings error. *People v. David*, 41 NY3d 90, 97 [2023]. The alleged errors here do not satisfy the narrow mode of proceedings exception.

As briefly summarized above, Defendant failed to seek a pre-trial ruling on the issue of Presidential immunity until March 7, 2024, less than three weeks before the scheduled start of trial.[8] Although Defendant argues that the Supreme Court's grant of *certiorari* on the issue of Presidential immunity on February 28, 2024, established the timeliness of his filing, that is not the case, as was thoroughly explained in this Court's Decision of April 3, 2024, which tracked the history of litigation in the instant matter and paralleled it with Defendant's immunity-based filings in his federal matters. That analysis established what can only be explained as Defendant's affirmative decision to not file a timely immunity-based motion here.

On April 15, 2024, the first day of jury selection, Defendant informed this Court of his intent to file another motion for preclusion of evidence on the grounds of Presidential immunity. Tr. 53-55. The following day, Defendant formally filed a pre-motion letter which incorporated by reference his March 7, 2024, submission.[9] In the April 16, 2024, letter, Defendant sought a pre-trial ruling on the grounds of Presidential immunity as to two specific areas of potential evidence, OGE Form 278e and certain social media posts later identified as People's Exhibits 407G through 407I. Defendant also made a sweeping reference to other categories of potential evidence, including "witness testimony regarding [Defendant's] official acts during time in Office, such as anticipated testimony from former White House staff regarding their communications with President Trump during his first term." On April 18, 2024, the People responded by letter arguing the Court should "adhere to

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[8] The trial date was later adjourned to April 15, 2024, due to a discovery dispute.

[9] In his March 7, 2024, submission, Defendant sought an adjournment of the trial until a decision was rendered in *Trump*, or in the alternative, preclusion of any official acts evidence based on Presidential immunity. In that submission, he referenced three Twitter postings by Defendant from 2018, three public statements Defendant made in 2018 (none of which were introduced at trial), the U.S. Office of Government Ethics form submitted in 2018, testimony from Ms. Hicks regarding communications she had with Defendant between January 2017 and March 2018 and again from March 2020 to January 2021, and conversations between Mr. Cohen and Defendant in February 2017 and 2018 "Twitter posts" testified to by Mr. Cohen in the grand jury. Defendant's March 7, 2024 Motion pgs. 3-4.

its previous ruling" that Defendant's motion for pre-trial consideration was untimely and that the Court should instead rule on objections as they are made at trial. On April 19, 2024, this Court reiterated its previous ruling that the motion for a pre-trial ruling was untimely. Notwithstanding, this Court made clear that Defendant was not without recourse. To be clear, this Court did not preclude Defendant from objecting and seeking preclusion of proffered evidence he believed to be in violation of the Presidential immunity doctrine. Decision on the merits of such objections was merely deferred until an actual objection was voiced at trial. "[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 (emphasis added).

In accordance with this Court's ruling, Defendant preserved his claim with respect to the testimony of Ms. Hicks as to "statements by Defendant while he was President of the United States" by making a timely objection prior to her testimony. Indeed, on May 3, 2024, immediately after the People called Ms. Hicks to the stand and before the start of her direct examination, the following colloquy took place:

> "MR. BOVE: May I approach?
>
> THE COURT: Sure.
>
> MR. BOVE: Thank you. Judge, I am sorry. We want to put on the record our objection on Presidential immunity grounds. I expect there will be testimony from Ms. Hicks related to statements by President Trump while he was President of the United States. Unless you tell me it is necessary, I prefer not to lodge the objections question by question. We object to the subject of her testimony based on the authorities we submitted, and our position being that the testimony is evidence of official acts being presented at a criminal trial against the President, and it should be precluded.
>
> MR. COLANGELO: I don't anticipate we will be showing any exhibits that fall within that category. We intend to elicit testimony, and we have briefed at length the argument that the rule of inadmissibility that Mr. Bove just described does not exist and is not a rule. The inadmissibility rule was not a rule that was ever recognized. Several cases that we have cited has held the exact opposite in the analogous context of consular immunity. As we cited in other papers holding that evidence of otherwise immune conduct is nonetheless admissible in a trial regarding criminal conduct for non-immune acts. So, the testimony we intend to elicit involves statements by the Defendant, and there is no doctrine that would allow excluding it.

THE COURT: I believe I ruled on this as well. So the objection is noted. I don't think you need to object as to each question.

MR. BOVE: Thank you, Judge." Tr. 2120-2122.

Therefore, this Court agrees that the objection was properly preserved as to the testimony of Ms. Hicks pertaining to official acts. Defendant identifies the official acts evidence as "President Trump's private conversations with the White House Communications Director," and separates those conversations into four specific communications. Defendant's Motion at pgs. 2-3, 9-11. Although Defendant now appears to expand his objection to include "[a]ll of Hicks's testimony concerning events in 2018,"[10] there is no reference in the testimony to any alleged official acts other than the four he has identified. In fact, of the 98 pages of transcript memorializing Ms. Hicks's testimony, only 11 pages pertain to the four instances identified by Defendant. Those four objections are preserved and will be addressed individually in the discussion section below.

Defendant objected at trial and properly preserved his Presidential immunity claim with respect to Form OGE 278e. Tr. 2369-2370, People's Exhibit 81.

Defendant failed to object to the testimony of Ms. Westerhout on the grounds of Presidential immunity at any time during the course of the trial and thus, his current claim as to her testimony is unpreserved.

Likewise, Defendant failed to preserve the majority of his Presidential immunity claims with respect to Mr. Cohen's testimony. The subject matter of all of Defendant's claims in the instant motion relate to a so-called "pressure campaign," statements relating to an FEC investigation, and lastly, statements related to Mr. Cohen's testimony before Congress and the Special Counsel's investigation into alleged Russian interference in the 2016 presidential election. Defendant's Motion at pgs. 12-16, 33-40. According to the People, the pressure campaign referred to measures taken by Defendant while President and others, to "dissuade Cohen from cooperating with investigations into the payments to McDougal and Stormy Daniels." People's Response at p. 4. The People sought to introduce evidence of a pressure campaign for three purposes: to demonstrate Defendant's consciousness of guilt, to rebut Defendant's claim that certain witnesses, including Mr. Cohen, were benefitting from their testimony, and to explain to the jury why certain witnesses, including Mr. Cohen, at various times denied certain allegations which they later recanted and acknowledged as true. Tr. 41-58. Defendant sought a pre-trial ruling to exclude evidence of the pressure campaign on

[10] Defendant's Motion at pg. 26.

the grounds that such evidence violated the Presidential immunity doctrine, as well as on relevance and other evidentiary grounds. While this Court declined to rule on Defendant's motion on his Presidential immunity claims as untimely, this Court agreed with Defendant on the other evidentiary grounds and in its Decision and Order on Defendant's Motions *in limine*, dated March 18, 2024, excluded testimony about the alleged pressure campaign unless and until such time as Defendant opened the door to such testimony.

Opening statements commenced on April 22, 2024. In his opening statement, Defendant raised the very subject this Court had earlier cautioned would likely open the door to testimony about the alleged pressure campaign. As a result, on April 30, 2024, before introducing certain evidence, the People renewed their request for permission to elicit testimony about the pressure campaign. Tr. 1652. The Court entertained extensive argument whether Defendant had in fact opened the door to such testimony and if so, the purpose for which it could be introduced. Tr. 1652-1662. Defense counsel ultimately agreed that the testimony could properly be elicited to advance the People's theory of the alleged pressure campaign, but maintained his objection that it should not come in to prove consciousness of guilt. "So, with respect to the other proffered reasons for some of this testimony to counter financial benefits to Mr. Cohen and Ms. Daniels and to explain why they changed their story, that makes sense. And I think they are going to talk about that on direct, but consciousness of guilt is of a different order, in our view." Tr. 1660. As a result, this Court modified its previous ruling to the extent that the testimony would be permitted for the limited purpose of rebutting the challenges to Mr. Cohen's, and others', credibility, but could not be introduced as evidence of consciousness of guilt. Tr. 1661-1662. Defendant thereafter objected to the introduction of People's Exhibits 407F through 407I, immediately prior to their introduction.[11] Tr. 3167-3168. Thus, Defendant's claim as to these exhibits was properly preserved. However, at no time immediately prior to, or during, Mr. Cohen's testimony did Defendant voice any further objections to official acts evidence on Presidential immunity grounds. Thus, the remaining claims are not preserved.

The record is clear that Defendant did not make any Presidential immunity-based objections at trial other than those identified above, and Defendant concedes as much. However, Defendant

[11] During the lengthy colloquy addressing the purported pressure campaign on April 30, 2024, defense counsel made a passing reference to Defendant's April 16, 2024, filing which included Presidential immunity claims as to People's Exhibits 407F through 407I. On May 10, 2024, Exhibits 407F through 407I were offered into evidence. In lieu of making a speaking objection or requesting a sidebar, the objection voiced by Defendant was "Your Honor, the same objection as discussed last week." Giving broad deference to Defendant and every benefit of the doubt, this Court will recognize an objection Defendant made on Presidential immunity grounds, ten days prior on April 30, 2024, as to exhibits 407F through 407I.

claims that he preserved his Presidential immunity claims in pre-trial submissions and was thus not required to object to each piece of evidence when it was offered. This argument not only ignores this Court's clear pre-trial ruling directing him to do precisely that which he now claims he was not required to do, but is contrary to the law. CPL § 470.15(4)(a) is clear that a ruling or instruction of the court must be duly protested by the defendant. *See Gray*, 86 NY2d at 19 ("[I]n order to preserve a claim of error in the admission of evidence or a charge to the jury, a defendant must make his or her position known to the court."). If Defendant genuinely believes that his pre-trial filings satisfy his preservation requirement, it begs the question why he nonetheless voiced a clear objection prior to the testimony of Ms. Hicks? Equally confounding is Defendant's explanation for objecting to the admission of OGE Form 278e as a mere effort "to make clear that [Defendant] maintained the immunity objection as to *documentary* official acts." Defendant's Reply at pg. 5 (emphasis added). This argument is unavailing. In essence, Defendant's argument is that preservation is achieved by voicing a single objection to testimonial evidence he seeks to preclude, presumably the one made prior to the testimony of Ms. Hicks, and a corresponding single objection to documentary evidence, the OGE Form 278e. This is simply not the law. A general motion to preclude "witness testimony" prior to trial, which this Court did not rule on, does not satisfy the obligation of counsel to make timely objections. Again, under Defendant's theory, a defendant need only register a single general objection to testimonial evidence – such as hearsay, for example - at the start of trial and another objection to hearsay contained in documents, to preserve any and all hearsay objections for the entirety of a six-week trial. This argument not only ignores settled law, it also ignores the practical rationale for the preservation requirement in the first place.

With respect to Ms. Westerhout, Defendant did not object to her testimony on Presidential immunity grounds either in pre-trial submissions or at trial. Defendant argues that he preserved an objection in his pre-trial filings, apparently referring to a broadly worded general objection to the introduction of official acts evidence contained in his March 7, 2024, pre-trial motion. That objection lacked any specificity and referred generally to the testimony of witnesses. It is not for a trial court to independently identify, without guidance from counsel, the evidence a party finds objectionable. Lastly, Defendant claims he did not object to Ms. Westerhout's testimony, as he had done prior to the testimony of Ms. Hicks, to "avoid antagonizing the court or testing its patience." Defendant's Reply at pg. 5. However, an examination of the trial record demonstrates that this Court did not curtail counsel or limit his right to object. In fact, the record demonstrates that counsel objected approximately 170 times during the course of the trial.

Because Defendant failed to timely object to Ms. Westerhout's testimony about Defendant's "work habits," "preferences," "relationships and contacts," and "social media" practices at the White House,[12] the motion to set aside the verdict on those grounds is denied as unpreserved. Because Defendant failed to timely object to Mr. Cohen's testimony other than that relating to People's 407F through 407I, the motion to set aside the verdict on those grounds is denied as unpreserved.

Despite Defendant's failure to preserve the objections he raises in the instant motion, other than those pertaining to Ms. Hicks and Exhibits 407F through 407I, this Court will nonetheless consider his motion on the merits, in its entirety.

Section B: Official and Unofficial Acts

Unlike *Trump*, this court need not decide whether the crimes of which Defendant was convicted constitute official acts because Defendant concedes that they were decidedly unofficial. The much narrower issue presented here is whether a discrete subset of evidence admitted at trial constituted official acts deserving of some level of immunity, whether it be absolute or presumptive. To evaluate each of those claims, it is important to understand the context of the unofficial acts for which Defendant stands convicted.

The evidence adduced at trial established that a meeting between Defendant, Mr. Pecker, Chairman of American Media, Inc. ("AMI"),[13] and Mr. Cohen, took place in 2015 in Trump Tower. At that meeting, the three participants conspired to influence the 2016 presidential election. The scheme required that Mr. Pecker publish positive stories about Defendant to promote his presidential candidacy. Mr. Pecker would also prevent publication of negative stories about Defendant by acquiring the stories and not publishing them. Mr. Pecker would also, among other things, publish negative stories about rival presidential candidates. The jury heard evidence that various stories were published by AMI in accordance with this agreement. The jury also heard about two stories that were obtained to prevent their publication. The stories were purchased subject to non-disclosure agreements ("NDAs") to prevent the public from hearing the allegations contained therein. One NDA was executed between AMI and Karen McDougal ("Ms. McDougal"), a woman who claimed to have had an affair with Defendant prior to his campaign for the presidency. A second NDA was executed between Mr. Cohen, on behalf of Defendant, and Stormy Daniels ("Ms.

[12] Defendant's Motion at pgs. 31-33.

[13] American Media is a publishing company that publishes celebrity and health and fitness magazines, including The National Enquirer, the Globe, Life & Style, In Touch, Closer, Us Weekly, Shape and Muscle, and Fitness and Flex. Tr. 914.

Daniels") a/k/a Stephanie Clifford, an adult film actress who alleged to have had an intimate encounter with Defendant in 2006.

With respect to Ms. McDougal, the funds to pay the NDA were provided by AMI. With respect to Ms. Daniels, the funds to effectuate the NDA were provided by Mr. Cohen on behalf of Defendant. The testimony further established that Defendant reimbursed Mr. Cohen for those payments with checks he signed and authorized in 2017 when he was President. Those checks and the financial documents related to the checks, falsely reflected the payments as retainer fees for Mr. Cohen in his capacity as private counsel to Defendant and not as reimbursement for Mr. Cohen's payment to Ms. Daniels.

Turning now to the evidence at issue, this Court must first determine whether certain evidence admitted through Ms. Hicks, Ms. Westerhout and Mr. Cohen as well as postings by Defendant on social media, and financial disclosure form OGE Form 278e for 2017 reflected official acts subject to absolute immunity.

In *Trump*, the majority identified only one instance of official conduct entitled to absolute immunity and remanded the matter for the District Court to conduct the remainder of the analysis as to all other conduct at issue.[14] The Court provided guidance to the District Court to assist in differentiating between official and unofficial acts, noting, in part, that "[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* at 2322 quoting *Forrester v. White*, 484 US 219, 229 [1988].

As noted by Justice Coney-Barrett in her concurrence in part, in the absence of precedent directly on point, the use of a hypothetical is a highly useful legal tool and one would be hard-pressed to devise a hypothetical more on point to guide the analysis between official and unofficial conduct than the case at bar: is a President's in-office conduct to conceal payments to an adult film actress to keep information from the public eye relating to an encounter that occurred prior to his Presidency official or unofficial?

While Judge Hellerstein in the Southern District of New York did not conduct the type of full-throated analysis proscribed by *Trump* because the Notice of Removal he considered was filed well before Trump was decided, he nonetheless did analyze some of the conduct at issue here. In rejecting Defendant's Supremacy claim *in the instant matter*, Judge Hellerstein concluded that "[r]eimbursing Cohen for advancing hush money to Stephanie Clifford cannot be considered the

[14] *Trump* held that Defendant is accorded absolute immunity with respect to the specific conduct alleged in that indictment involving his discussions with Justice Department officials. *Trump* at p. 15.

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 FSupp3d at 347.

It is therefore logical and reasonable to conclude that if the act of falsifying records to cover up the payments so that the public would not be made aware is decidedly an unofficial act, so too should the communications to further that same cover-up be unofficial.

Testimony of Hope Hicks

Ms. Hicks was Director of Communications for the Trump Organization beginning in October 2014. In January 2015, she transitioned to the position of Press Secretary for Defendant's campaign in his run for President. Tr. 2126-2127, 2136. She testified at trial about certain allegations that became public during the final days of the campaign that cast Defendant in a negative light. She further testified about the manner and extent to which she participated in Defendant's response to the allegations. Ms. Hicks worked in the White House from January 20, 2017, until April 2018, and returned in March 2020 until January 2021. Her first position was Director of Strategic Communications. In that role she "worked closely with – with the communications team and the press team on message development and organizing events to help showcase Mr. Trump's accomplishments, the agenda of the Administration. I worked closely with Mr. Trump on media opportunities for him." Tr. 2208. In August 2017, Ms. Hicks assumed the position of Communications Director. Tr. 2207-2208. In that role, she "oversaw the team," "coordinating all of the communication efforts for the Administration from the White House throughout all of the agencies, and making sure that each of [sic] principals of the agencies and the agencies themselves were prioritizing Mr. Trump's agenda, and that we were all working together to maximize the impact of any positive messages that we were trying to get out and share with the American people" and "capitalize on any opportunities to showcase Mr. Trump and his work, the President in a good light." Tr. 2210.

Defendant argues that in her roles at the White House, any communications between Ms. Hicks and Defendant must receive absolute immunity pursuant to the Take Care and Vesting Clauses, as Defendant's ability to speak freely to Ms. Hicks was a core function of the Executive. According to Defendant, because Ms. Hicks wielded executive power on his behalf, authority that exists pursuant to Article II of the Constitution, any communications he had with her are subject to absolute immunity, or at the very least, presumptive immunity. The People argue that the

communications Defendant had with Ms. Hicks, which are the subject of this motion, constitute unofficial acts not entitled to any level of immunity and submit that even if the Court were to find that the communications fall within the outer perimeter of Defendant's authority, subject to presumptive immunity, that presumption has been rebutted by ample evidence unrelated to motive as required under *Trump*.

Defendant identifies four communications. Defendant's Motion at pgs. 9-11.[15] They are as follows:

Hicks 1: Ms. Hicks testified she was aware that on March 20, 2018, Ms. McDougal sued AMI over the NDA she entered into with AMI. People's Exhibit 319 is a text message between Ms. Hicks and Ms. Westerhout, then Executive Assistant to Defendant as President. The text was sent on March 20, 2018, the same day the lawsuit was filed. In the text, Ms. Westerhout asks Ms. Hicks, "Hey. The President wants to know if you called David Pecker again?" That was the extent of Ms. Hicks's testimony about that text. Tr. 2210-2213.

Hicks 2: Ms. Hicks testified that shortly after the McDougal lawsuit was filed, Ms. McDougal was interviewed on CNN by Anderson Cooper. Ms. Hicks testified that following that interview, she spoke with Defendant "about the news coverage of the interview, how it was playing out." Ms. Hicks did not testify as to any actual statements Defendant made to her. Tr. 2214-2215. There was no further testimony from Ms. Hicks regarding this interaction with Defendant.

Hicks 3: Ms. Hicks testified about a January 2018 inquiry by the Wall Street Journal ("WSJ") regarding a story it planned to publish about the alleged sexual encounter between Defendant and Ms. Daniels and the NDA which was executed in 2016 in the days leading up to the election. Tr. 2215-22. In her testimony, Ms. Hicks stated that she discussed the story with Defendant and "how to respond to the story, how he would like a team to respond to the story." Tr. 2217. She further testified about the following statements attributed to a White House official in that WSJ article: "[t]hese are old, recycled reports, which were published and strongly denied prior to the election" the official "declined to respond to questions about an agreement with Ms. Clifford." Tr. 2218, People's Exhibit 181. Ms. Hicks testified she was not the official, but that she had "discuss[ed] this statement" with Defendant before it was issued.[16] Tr. 2218-2219.

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[15] The four communications were not introduced in chronological order. They will be addressed here in the order in which they came into evidence at trial.

[16] Ms. Hicks testified that she was not certain, but that the official referenced was likely the Deputy Press Secretary. Tr. 2218.

Hicks 4: Ms. Hicks testified about a February 2018 conversation she had with Defendant about a statement attributed to Mr. Cohen in a New York Times ("NYT") article the day before. Tr. 2219. In the article, Mr. Cohen is reported as stating, among other things, that he made a payment to Ms. Daniels without Defendant's knowledge. Ms. Hicks further testified that Defendant told her:

> "[h]e spoke to Michael, and that Michael had paid this woman to protect him [Defendant] from a false allegation, um, and that – you know, Michael felt like it was his job to protect him, and that's what he was doing. And he did it out of the kindness of his own heart. He never told anybody about it. You know. And he was continuing to try to protect him up until the point where he felt he had to state what was true." Tr. 2219-2220.

She further testified that Defendant told her:

> "that he thought it was a generous, um, you know, thing to do, and he was appreciative of the loyalty," and that Defendant "wanted to know how it was playing, and just my thoughts and opinion about this story versus having the story – a different kind of story before the campaign had Michael not made that payment," and that Defendant's "opinion was it was better to be dealing with it now, and that it would have been bad to have that story come out before the election." Tr. 2220-2221.

Defendant's argument that any communication he had with Ms. Hicks is subject to absolute immunity by virtue of the position she held in the White House is mistaken. "It is the nature of the function performed, not the identity of the actor who perform[s] it, that inform[s] our immunity analysis." *Trump* at 2322 quoting *Forrester v. White*, 484 US 219, 229 [1988]. Indeed, the President himself may speak in his unofficial capacity as a candidate or party leader, and certainly he can do so in his private capacity as well. Any argument that private conduct transforms into official conduct by communicating about the same to an individual with a particular title is without merit. Analysis of the trial record demonstrates that Hicks 1 through 4 reflect communications - or mere topics of communications - which manifestly pertain to unofficial or private conduct and are inextricably intertwined with private discussions and events which began before Defendant's Presidency.

All four instances relate to pre-inauguration intimate interactions between Defendant and two different women, and the ongoing effort to conceal those interactions post-inauguration. Defendant's attempts to sweep these communications under the protections afforded by the Take Care and Vesting Clauses is unpersuasive and Defendant has not referenced any Constitutional authority upon which he was acting for any of the four communications with Ms. Hicks.

The personal nature of Hicks 1 through 4 is made even clearer when viewed alongside testimony introduced through Mr. Pecker. To begin, Mr. Pecker's testimony reflected that his relationship with Defendant was a personal one and remained so after the inauguration. Mr. Pecker served no government function at any time, official or otherwise. Further, Mr. Pecker's testimony tracked the same subject matter as that referenced in Hicks 1 through 4, yet Defendant did not and could not make a single immunity-based objection to it prior to, during, or after trial. Tr. 1228-1231 (communications between Defendant-President and Mr. Pecker regarding Mr. Pecker's pre-election assistance with the "McDougal matter"); Tr. 1236-1238, 1239 (communications between Defendant-President and Mr. Pecker regarding Ms. McDougal's interview with Anderson Cooper); Tr. 1238-1239 (phone call between Mr. Pecker and Ms. Hicks relating to extending Ms. McDougal's employment contract with AMI so "she would not go out and give any further interviews or talk to the press or say negative comments about American Media or about [President] Trump."). In fact, Hicks 1 through 4 perfectly track the unobjected to conversations previously testified to by Mr. Pecker.

A finding that Hicks 1 through 4 constitute unofficial conduct is consistent with the holding and policy concerns expressed by the Court in *Trump*. Conversations and meetings with a White House Communications Director about personal matters involving an alleged affair and a sexual encounter that occurred prior to taking the Office of the President of the United States are undoubtedly not the "greatest public interest[s]" the Supreme Court contemplated when it wrestled with protecting a President's ability to "deal fearlessly and impartially with the duties of his office." *Trump* at 611, citing *Fitzgerald*, 457 US at 750 quoting *Ackerman*, 444 US at 203.

Defendant's argument that these communications fall at least within the outer perimeter of his authority also fails. The testimony was most certainly palpably beyond any actual authority Defendant possessed in his capacity as President.[17] However, even if this Court were to find that the communications do fall within the outer perimeter of his Presidential authority, it would also find that other, non-privileged trial testimony provided ample non-motive related context and support to rebut a presumption of privilege and that Defendant was acting in his personal capacity and not

[17] Contrary to Defendant's interpretation, the Supreme Court in *Clinton* did not hold that a President's communications with his private attorney, thereafter, shared with the public, are within the outer perimeter of his authority. The Court definitively stated that that issue was not before it. *Clinton v. Jones*, 520 US 681, 686 [1997].

pursuant to his authority as President. Nor does the introduction of that evidence pose any danger of intrusion on the authority and function of the Executive Branch.

Testimony of Madeleine Westerhout

Ms. Westerhout testified that she had been employed by the Republican National Committee for three and one-half years until January 2017 when she joined the transition team for Defendant as President-elect. She then worked as Special Assistant to the President and later as Executive Assistant to the President. Tr. 2984. Her function was to assist Defendant in various ways, primarily by facilitating communications with other parties – both personal and professional. Tr. 2984-2996. In the transition year, she engaged often with Rhona Graff, who had been Defendant's Executive Assistant at the Trump Organization, in part, to ensure Ms. Westerhout had access to Defendant's personal contact list. She further testified about Defendant's work habits and preferences, including how and in what form he communicated on social media.

Defendant argues that the introduction of Madeleine Westerhout's testimony relating to "presidential practices" including "work habits," "preferences," "relationships and contacts," and "social media practices" violated the Presidential immunity doctrine. Defendant's Motion at pgs. 11-12, 31-32.

As previously noted, objection to Ms. Westerhout's testimony was unpreserved and thus unreviewable. Nonetheless, as an alternative holding, this Court finds that the argument also fails on the merits because her testimony reflected unofficial conduct in its entirety.[18]

It bears noting that before Ms. Westerhout testified, it was Defendant who first elicited testimony about Defendant's work habits and practices from Ms. Hicks on cross-examination as excerpted below:

> Defense Counsel: And that office that you described the Oval Office and the area around it, that was a very hectic space in 2017, right?
> Ms. Hicks: Yes.
> Defense Counsel: And it sounds like for a period of time when you had that job, you could see from where you were sitting the resolute desk?
> Ms. Hicks: Yes.
> Defense Counsel: That's where the President sat?
> Ms. Hicks: Yes.
> Defense Counsel: When he was acting as President, right?

[18] In fact, defense counsel stated he had "no objection" to the People's request to introduce a contact list provided to Ms. Westerhout by Trump Organization employee Rhona Graff at the White House. A line of questioning Defendant now claims was inadmissible. Tr. 3001.

Ms. Hicks: That's right.
Defense Counsel: So you got a sense of how chaotic that environment was day to day, right?
Ms. Hicks: Uh-huh. That particular area wasn't necessarily chaotic in a bad way. I just want to clarify. It was very busy. There was a lot going on. There were certainly parts of the experience that were chaotic, but he was constantly moving.
Defense Counsel: People were working very hard to make it not chaotic and keep it orderly?
Ms. Hicks: Yes.
Defense Counsel: But, the fact is, there were many meetings and a lot going on, right?
Ms. Hicks: Yes.
Defense Counsel: And from where you sat, you could see that the President was frequently multitasking, right?
Ms. Hicks: Yes.
Defense Counsel: And people were interrupting what he was doing, right?
Ms. Hicks: Yes.
Defense Counsel: Different priorities would get called out to his attention and he would pivot?
Ms. Hicks: That's right.

Tr. 2239-2240.

Ms. Westerhout's testimony on direct examination, and further explored on cross-examination, paralleled the cross-examination of Ms. Hicks regarding Defendant's work habits and presidential practices. Defense Counsel repeated the strategy when he cross-examined Ms. Westerhout. Through his cross-examination of Ms. Westerhout and Ms. Hicks (as well as Rhona Graff)[19], counsel created a record from which he later argued that Defendant was not fully cognizant of the nature of the checks he signed, which formed the basis for 11 of the 34 counts he was convicted of, because he was busy multi-tasking as President of the United States. Tr. 4484-4487. In fact, counsel's cross-examination of Ms. Westerhout delved much further into Defendant's "work habits" than did her testimony on direct examination:

Defense Counsel: And so, would you see him signing things without reviewing them?
Ms. Westerhout: Yes.
Defense Counsel: And would you see him signing checks without reviewing them?
Ms. Westerhout: Yes.
Defense Counsel: And you would see him signing checks while he was on the phone; right?
Ms. Westerhout: Yes.
Defense Counsel: Would you see him sometimes signing checks when he was meeting with people?
Ms. Westerhout: Yes.
Defense Counsel: And there were different types of people that he was meeting with; right?
Ms. Westerhout: Yes.

[19] Defendant also pursued this line of questioning regarding Defendant's practice of multi-tasking while signing checks in his cross-examination of Rhona Graff, Executive Assistant to Defendant at the Trump Organization. Tr. 1523-1524.

Defense Counsel: Sometimes he was meeting with the top foreign leaders in the world; right?
Ms. Westerhout: Yes, uh-huh.
Defense Counsel: And other times he was meeting with you?
Ms. Westerhout: Yeah, uh-huh.
Defense Counsel: And so, he wouldn't be signing the checks when he was meeting with the top people in the world?
Ms. Westerhout: Yes.
Defense Counsel: But maybe when he was meeting with you, talking about something else, he would also be signing documents?
Ms. Westerhout: Yes, talking about the schedule or anything that had been going on.
Defense Counsel: The Chief of Staff that he would be meeting with?
Ms. Westerhout: Yes.
Defense Counsel: And other people, he would be doing that?
Ms. Westerhout: That's right.
Defense Counsel: He was a person who multitasked; right?
Ms. Westerhout: Definitely.
(Tr. 3114-3115).

Indeed, counsel established through his cross-examination of Ms. Westerhout, that her coordination with Trump Organization employee Rhona Graff to obtain Defendant's contact list was decidedly a personal and not a professional function.

Defense Counsel: And you were asked by the Prosecutor if you were – if you coordinated with the Trump Organization during that first year by asking questions of the Trump Organization employees; right?
Ms. Westerhout: Yes.
Defense Counsel: The person that you coordinated with most was Rhona Graff; right?
Ms. Westerhout: Yes.
Defense Counsel: And this did not have to do with the Trump Organization business; did it?
Ms. Westerhout: No.
Defense Counsel: It had to do with his personal affairs; right?
Ms. Westerhout: Yes, uh-huh.
Defense Counsel: For example, you needed his contact list; right?
Ms. Westerhout: Yes, uh-huh.
[...]
Defense Counsel: So that first year you spent a lot of time talking with Rhona Graff; right?
Ms. Westerhout: Yes.
Defense Counsel: But you did not spend time talking with the Trump Organization employees to coordinate business of the Trump Organization; right?
Ms. Westerhout: No, uh- uh.
Defense Counsel: It was just personal aspects for President Trump; right?
Ms. Westerhout: That's correct.
(Tr. 3036- 3037).

This is not to say that Ms. Westerhout could never engage in communications subject to Presidential immunity. However, just as was the case with Ms. Hicks, Ms. Westerhout's mere role as Executive Assistant does not *per se* cloak her communications and observations of the President with absolute immunity. Indeed, defense counsel identified certain portions of her testimony as pertaining to private matters. Ms. Westerhout's testimony about her observations that Defendant preferred to work in a dining area rather than at the Resolute Desk, or that he preferred to use a *Sharpie* marker over a ball point pen does not create an unacceptable risk of "undue pressures or distortions" to a President's work. *Trump* at 615. Nor does a reference to the fact that Defendant carried papers when he boarded Air Force One or Marine One – or that he multi-tasked when he met with his Chief of Staff – elevate her observations to the level of a National Security concern.

Defendant alleges that the People "forced" Ms. Westerhout, through an "invasive" direct examination, to reveal details about how the Defendant operated the Executive Branch, for example, "[Defendant] liked speaking with people in person or on the phone," he "liked to read," "[h]e liked hard copy documents," and he took "[a] lot" of calls each day from as early as 6:00 am until "late into the night." Simply stated, Ms. Westerhout's testimony about these observations do not concern the "core Commander In Chief power [...] for which 'absolute' immunity applies." Defendant's Motion at pg. 32.

As Ms. Westerhout's testimony did not reference any official conduct, no level of immunity applies. As an alternative finding, even if the testimony did pertain to conduct falling within the outer perimeter of his Presidential authority subject to presumptive immunity, this Court finds that the People have once again rebutted that presumption without invoking the motive for the conduct.

Office of Government Ethics Form 278e

Defendant argues that the introduction into evidence of the OGE Form 278e submitted in 2018 (People's Exhibit 81) violated the Presidential immunity doctrine because completion of the form constitutes an official act. OGE Form 278e is an Annual Financial Disclosure Report required to be submitted to the Office of Government Ethics.

Trump Organization Senior Vice President and Controller Jeff McConney, testified that Form 278e is a "Conflict of Interest Form that the Government requires certain individuals to file annually, semi-annually" and that the Defendant filed the form since "when he declared his candidacy in 2015" through January 2017 when Defendant was no longer working at the Trump Organization. Mr. McConney testified that he worked on that form on behalf of Defendant before

he became President for "each year [Defendant] was a candidate or a Federal official." Tr. 2366-2368.

Defendant concedes that the President is not the only person required to complete OGE Form 278e as it is a Conflict of Interest Form for high-level federal officials. Defendant's Motion at pg. 40 citing 5 C.F.R. § 2634.104(a). Thus, simply because Defendant signed the form when in office does not dictate that such function falls within the outer perimeter of his authority. While Defendant's statement that he "was required to make the disclosures on the Form in his official capacity as President" may be true, the disclosures were not made pursuant to his conclusive and preclusive authority. Rather, he did so because the President is one of the federal employees required to complete the Form in the same way that he was required to complete the Form when he was merely a Presidential candidate. As *Trump* made clear, even communications between the President and Vice President must be analyzed to determine whether they constitute official acts protected by the Presidential immunity doctrine. A financial disclosure form that is required to be prepared and filed by other federal government employees cannot be subject to Presidential immunity. Further, no decision-making authority is implicated by the filing of the document other than the decision whether to comply with the requirement, and to complete the form truthfully, the same decisions all other mandated federal employees must make with respect to Form 278e.

As OGE Form 278e does not require communications from Defendant that are within his exclusive and preclusive Article II authority, or within the outer perimeter of his authority, the statements by Defendant on that form are not deemed official conduct and thus, receive no immunity.

Testimony of Michael Cohen

Mr. Cohen testified that he was employed as Executive Vice President and Special Counsel to Defendant at the Trump Organization from 2007 to January 2017. He participated in the Trump Tower meeting with Defendant and Mr. Pecker in 2015 and thereafter, engaged in conduct in furtherance of the agreement made at that meeting. The conduct included communicating with Mr. Pecker and other employees of AMI, and other individuals who possessed information deemed harmful to Defendant's campaign. This was all carried out at the direction of Defendant. Mr. Cohen testified that, among other things, he executed an NDA with Ms. Daniels on behalf of Defendant to prevent her account from becoming public in the weeks prior to the November 2016 election. He further testified that he paid Ms. Daniels through her attorney, to effectuate the terms of the NDA

and that he did so on behalf of Defendant. Mr. Cohen further testified that he left the Trump Organization to become Personal Attorney to the President following Defendant's inauguration, and at no time did he have a position in the White House or anywhere else in government. Tr. 3475, 3494-3495. Mr. Cohen testified that he did not receive any salary or retainer in his position as Defendant's Personal Attorney. Tr. 3499-3501. Rather, Mr. Cohen benefited financially from his role because it created other financial opportunities for him. Tr. 3500. Mr. Cohen testified that Defendant reimbursed him with checks in 2017 for the payment he made to Ms. Daniels. The checks falsely purported to represent payments on a non-existent retainer agreement and the reimbursement was structured that way to conceal the payment Mr. Cohen made to Ms. Daniels, to prevent her allegations from becoming public and to influence the 2016 Presidential election.

Notwithstanding these efforts to conceal the true nature of the payments, testimony from various witnesses established that the allegations by Ms. McDougal about an affair and Ms. Daniels about a sexual encounter, became public after Defendant was sworn in as President of the United States. Initially, Mr. Cohen claimed over the course of many months, that Defendant knew nothing about the NDA or the payments to Ms. Daniels. Later however, he recanted, informing others, including various federal and state prosecutors, that Defendant was indeed aware of and in fact, authorized the payment to Ms. Daniels and that he later reimbursed Mr. Cohen in the manner described above.

Mr. Cohen testified that his representations, and at times prior sworn testimony, changed in the months following disclosure of the NDA and the related reimbursement checks. The People gave prior notice, and introduced evidence of, a "pressure campaign" Defendant mounted to compel Mr. Cohen to remain silent as to the agreement and Defendant's complicity in the efforts to influence the 2016 election. This Court initially precluded testimony about the pressure campaign in its entirety, but later qualified that should Defendant "open the door," the Court would permit its introduction for the limited purpose of rehabilitating Mr. Cohen's credibility to explain why Mr. Cohen had initially denied that Defendant knew about the scheme but later recanted and affirmed that Defendant was indeed complicit. On April 30, 2024, the People argued that the door had been opened by Defendant in his opening statement and that the evidence should be allowed in as per the Court's earlier ruling and caution. This Court agreed the door had been opened and permitted the evidence to be introduced to rebut Defendant's attacks on Mr. Cohen's credibility. The evidence of

a pressure campaign came in the form of testimony from Mr. Cohen, e-mails from and to Robert Costello,[20] an attorney, and other evidence including Twitter posts by Defendant.

Defendant argues that the following communications introduced through Mr. Cohen constitute evidence of official-acts subject to absolute immunity:

Cohen 1: Mr. Cohen's testimony regarding his prior testimony before the House Permanent Select Committee on Intelligence on Russian interference in the 2016 election. At trial, Mr. Cohen testified that he "was staying on Mr. Trump's message that there was no Russia-Russia-Russia and again, in coordination with the Joint Defense Team, that's what was preferred," to explain why he was untruthful to Congress. Defendant argues that Mr. Cohen's trial testimony, that he "felt" he "needed" what the People described as "the power of the President" to "protect" him in connection with his testimony before Congress, violated the Presidential immunity doctrine. Defendant's Motion at pgs. 12-13.

Cohen 2: An e-mail sent on June 13, 2018, by Robert Costello to Mr. Cohen stating, in part, "What you do next is for you to decide, but if that choice requires any discussion with my friend's client, you have the opportunity to convey that this evening, but only if you so decide." Mr. Cohen testified on direct examination that he interpreted that e-mail as a reference to "potential pre-pardons, I believe." People's Exhibit 207, Tr. 3603, Defendant's Motion at pg. 13. Mr. Cohen testified further on cross-examination that "I spoke to my attorney about it because we had seen on television President Trump talking about, potentially, pre-pardoning everybody and putting an end to this, what I deemed to be a nightmare," Tr. 3835-3836, Defendant's Motion at pg. 13.

Cohen 3a-b: Defendant argues that the following exhibits and testimony were introduced through Mr. Cohen in violation of the Presidential immunity doctrine:

- Cohen 3a: A February 6, 2018, text from Mr. Cohen to a NYT reporter that Defendant "just approved me responding to [the FEC] complaint and statement. Please start writing and I will call you soon;"[21] Mr. Cohen's February 13, 2018, public response to the FEC complaint in which Mr. Cohen stated that he used his own funds to pay Ms. Daniels and that "[n]either the Trump Organization nor the Trump campaign was a party to the transaction with

[20] As discussed in greater detail below, in April 2018, following the execution of search warrants on his office and home, Mr. Cohen sought legal representation. Robert Costello was one of the attorneys he initially consulted. Mr. Costello represented to Mr. Cohen that he had a close relationship with Rudy Giuliani, a lawyer with close ties to Defendant. Mr. Costello represented that these relationships would be beneficial to Mr. Cohen because they would provide a back channel for communicating with Defendant to ensure that Mr. Cohen would be protected. Tr. 3593-3595.

[21] People's Exhibit 260, Defendant's Motion at pg. 13.

[Daniels];"[22] a February 19, 2018, text from Jay Sekulow, private counsel to Defendant, to Mr. Cohen that Mr. Sekulow's "[c]lient says thanks for what you do;"[23] Mr. Cohen's trial testimony that he interpreted the text message to mean Defendant appreciated "the statement that [Cohen] was putting out to the press on the FEC;"[24] and testimony from Mr. Cohen that he "was instructed...by Mr. Trump, to keep in touch with Jay Sekulow because he [Sekulow] was in contact with Mr. Trump."[25]

- Cohen 3b: Mr. Cohen's testimony that he told Mr. Pecker, "the [FEC] matter is going to be taken care of and the person, of course, who is going to be able to do it is Jeff Sessions," and that Defendant "told" Mr. Cohen that Attorney General Sessions would address the matter.[26]

Cohen 4: E-mail communications with Robert Costello on April 21, 2018, relating to Defendant's posts on Twitter earlier that day. People's Exhibit 205, Defendant's Motion at pgs. 14-15. The subject line of the e-mail read "Giuliani" and the heading read "Attorney Client Communication Privileged." Defendant specifically references the last line of the e-mail wherein Mr. Costello wrote, "P.S. Some very positive comments about you from the White House." Mr. Cohen testified that the e-mail from Mr. Costello "let me know that I was still important to the team and stay the course, that the President had my back." Defendant alleges that the communications in the e-mail were from Defendant and thus, constitute official acts. Tr. 3598-3600.

None of the above-referenced communications constitute official acts.

With respect to Cohen 1, the Court finds that this testimony did not in any way introduce evidence of an official act by Defendant. Mr. Cohen testified at trial about testimony he gave under oath to Congress relating to an ongoing investigation, the subject matter of which were allegations of Russian interference in the 2016 election and a Trump Moscow real estate project. Tr. 3550. As Mr. Cohen had admittedly testified untruthfully before Congress, and the false prior testimony was used to attack his credibility, the People were permitted to attempt to rehabilitate him by explaining why he testified untruthfully. The reference to "no Russia Russia Russia" did not reference official conduct of Defendant, but merely Mr. Cohen's explanation that he had perjuriously minimized the frequency and duration of his contacts with Defendant about the Trump real estate project to curry favor with Defendant at a time when Mr. Cohen felt he needed Defendant's support. The trial

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[22] People's Exhibit 202, Defendant's Motion at pg. 13.
[23] People's Exhibit 217, Defendant's Motion at pg. 13.
[24] Tr. 3573, Defendant's Motion at pg. 14.
[25] Tr. 3571, Defendant's Motion at pgs. 13-14.
[26] Tr. 3577, Defendant's Motion at pg. 14.

evidence was clear, Mr. Cohen lied under oath to a federal body. The challenged testimony was relevant for the jury to hear that Mr. Cohen's motivation for lying to Congress was to remain consistent with the Defendant with whom he had been in lock-step for decades. Significantly, the subject of Cohen 1 relates to matters that occurred prior to Defendant becoming President and do not involve communications with the President.

Cohen 2 and Cohen 4 relate to communications between Mr. Cohen and Mr. Costello. Mr. Cohen testified that when he became the subject of certain investigations, he sought legal representation and Mr. Costello was one of the attorneys he consulted during his search. Mr. Cohen testified that it was of paramount importance that he retain an attorney who would represent his interests. The communications with Mr. Costello paint the picture of an attorney who was attempting to convince Mr. Cohen that his connections to the President made him the best choice for the job of legal counsel to Mr. Cohen. Mr. Cohen ultimately was not convinced. The communications in Cohen 2 and 4 reflect Mr. Costello's approach. Mr. Cohen's testimony that he believed Mr. Costello was referring to potential "pre-pardons" did not purport to be a communication from Defendant and thus, did not implicate any Presidential immunity doctrine. In fact, the record demonstrates that Defendant agrees.

On April 15, 2024, the prosecution and the defense argued at length about certain communications. The parties differed with regard to whether the communications were probative of the pressure campaign. Defendant argued for preclusion of the testimony to prevent witnesses, such as Mr. Cohen, from inculpating the Defendant. Defendant's position at that time, was "there is zero evidence that anything that Mr. Costello said to Mr. Cohen came from President Trump." Tr. 52. Counsel further argued "there is no connection between the communication from Mr. Costello to Mr. Cohen and anything President Trump said or did [...]." Tr. 52. The substantive testimony from Mr. Cohen regarding "pardons" which Defendant now argues violated Presidential immunity, was in fact elicited not by the People, but by defense counsel on cross-examination. In fact, defense counsel explored the subject of presidential pardons at length to attack Mr. Cohen's credibility. Defendant's arguments on this point in the instant motion are wholly inconsistent with the position he took at trial:

> Defense Counsel: So, I want to talk now about your testimony to Congress about whether you ever requested a pardon, okay?
> Mr. Cohen: Yes, sir.
> Defense Counsel: On that February 27, 2019, House Committee Hearing you gave a statement under oath that you never asked for, nor would you ever accept a pardon from President Trump, correct?

Mr. Cohen: Correct.
Defense Counsel: And that was false, correct?
Mr. Cohen: No sir.
Defense Counsel: Why was that not false?
Mr. Cohen: I never asked for it. I spoke to my attorney about it because we had seen on television President Trump talking about, potentially, pre-pardoning everybody and putting an end to this, what I deemed to be a nightmare. So I reached out to my attorney to ask him whether or not this is legitimate.
Defense Counsel: So, when you were asked – when you provided testimony – and, again, same thing happened on that occasion, you had to prepare remarks that you provided the committee and then you read into the record, right?
Mr. Cohen: Yes, sir.
Defense Counsel: And both of those prepared remarks in writing and also when you said, and I have never asked for, nor would I accept a pardon from President Trump, correct?
Mr. Cohen: Correct.
Defense Counsel: Now, that was on February 27th. Do you remember about ten days later you were deposed in the House Oversight Committee?
Mr. Cohen: Yes, sir.
Defense Counsel: And do you remember being asked the same question about accepting a pardon and you saying that you directed your lawyer to explore the possibility because you were a hundred percent open to accepting it?
Mr. Cohen: Yes, sir.
Defense Counsel: And the lawyer – there were a couple of lawyers that you were talking about, right? One was Mr. Ryan, who worked – who was your lawyer who worked with a law firm called McDermott, Will and Emery?
Mr. Cohen: Yes.
Defense Counsel: And you spoke with a lawyer named Robert Costello about that same issue, about exploring the possibility of a pardon, correct?
Mr. Cohen: I spoke to Mr. Costello about that as well.
Defense Counsel: And in that deposition so, not the sworn testimony on February 27th, but in that deposition, you said that, you directed your lawyers to explore the possibility of a pardon because the possibility was constantly being dangled in your face, right?
Mr. Cohen: Correct.

Defense counsel's cross-examination of Mr. Cohen on the subject of Presidential pardons continued for some time. Tr. 3838-3843. For counsel to ignore his extensive cross-examination on this subject, following what was a passing reference to "pre-pardons" generally on direct examination, mischaracterizes the actual record.

Cohen 3a and 3b relate to communications about investigations by the FEC into conduct by Mr. Cohen and Defendant during the 2016 Presidential campaign. The communications relate to Defendant as candidate for President, not to Defendant as President and reference no official act. Notably, all the participants in these conversations were decidedly related to Defendant in his personal capacity, Mr. Cohen and Mr. Sekulow as prior and then private counsel, and Mr. Pecker, a

personal friend. Similarly, Mr. Cohen's attempt to funnel a journalist a story relating to the payments he made to Ms. Daniels, was intended to shine a more favorable light on Mr. Cohen and Defendant - his co-conspirator. That e-mail had nothing to do with official acts by Defendant as President and everything to do with him as candidate.

This Court agrees and is persuaded that the testimony referenced in Cohen 3a and 3b does not implicate Defendant's conclusive and preclusive authority. The People argue, "[a]s relevant here, the FEC has "exclusive jurisdiction with respect to the civil enforcement" of FECA, 52 U.SC. § 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)." People's Response at pg. 30. Further, "[b]ecause 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 [...] directs the Attorney General to initiate a prosecution or investigation [...]." People's Response at p. 31, n 6.

As previously noted, the objections to Mr. Cohen's testimony were unpreserved and thus unreviewable. Nonetheless, as an alternative holding, this Court finds that the argument also fails on the merits because his testimony reflected unofficial conduct and no level of immunity applies. Even if the testimony did pertain to conduct falling within the outer perimeter of his Presidential authority subject to presumptive immunity, this Court finds that the People have once again rebutted that presumption without invoking the motive for the conduct.

Defendant's Twitter Posts

Turning to Defendant's claim that certain Tweets he caused to be posted constitute official acts, in dispute are People's 407F, 407G, 407H, and 407I. The Tweets cover a range of topics, including but not limited to: disparaging remarks about a New York Times reporter; explaining what a NDA is; and presumably, advice whether one should retain Mr. Cohen as an attorney.

As previously stated, this Court finds that Defendant has properly preserved his arguments as to this evidence. However, after applying the standards set forth in *Trump*, this Court finds that none of the four posts constitute official acts.

Defendant argues that the social media posts reflect the President's extraordinary power to speak to his fellow citizens and that viewing the context of the Tweets further supports that position. Defendant's Motion at pg. 33. The Twitter account, Defendant contends, was one of the White House's main vehicles for conducting official business. *Id.* In support of this position, Defendant argues that "the official-acts conclusion is further supported by the fact that President Trump relied

on a White House employee to help him operate the account." Defendant's Motion at pg. 34. Defendant further argues that the prosecution "relied on false opinions from Cohen and Daniels to try to suggest that these Tweets were directed at them, individually, rather than what they objectively were: communications with the American people regarding matters of public concern bearing on President Trump's credibility as the Commander in Chief." *Id.* Defendant claims that 407I simply reflects Defendant's comments on, and criticism of, federal prosecutors and regulators and that, pursuant to *Trump*, such posts are covered by the Presidential immunity umbrella because "investigative and prosecutorial decision making is 'the special province of the Executive Branch,' and the Constitution vests the entirety of the executive power in the President." Defendant's Motion at pg. 36.

The People contend that the Tweets "consist solely of 'unofficial acts' for which 'there is no immunity.'" People's Response at pg. 13 citing *Trump* at 651. They further argue that the "challenged Tweets bear no resemblance to the kinds of public comments that the Supreme Court indicated would qualify as official presidential conduct." *Id.* at 15. The People also argue that, even if the Tweets are deemed "official conduct," the presumptive immunity that attaches is easily rebutted, as there is no danger that introducing the posts into evidence, presents any "intrusion on the authority and functions of the executive branch." *Id.* at 16.[27]

"The justifying purpose of the immunity recognized in *Fitzgerald* and the one we recognize today are not that the President must be immune because he is President...they are to ensure that the President can undertake his constitutional functions free from undue pressure or distortions." *Trump* at 615. The Tweets do not constitute the type of conduct the *Trump* Court intended to protect when it discussed a President's ability to communicate with the public. To find otherwise would effectively mean that every statement ever uttered (or posted on social media) by a sitting President, whether personal or official, in his or her own interests or that of the Country, would be protected by absolute immunity. Were that the case, the *Trump* Court would not have felt it necessary to provide guidance to assist the Federal District Court in properly analyzing and determining which Presidential acts are official and which are not. For example, when discussing Defendant's alleged attempts to undermine the January 6 certification proceeding, the *Trump* Court noted that there may

[27] The People also argue that this evidence "consists of a public record of an official act" and is thus admissible even if it is deemed official acts. People's Response pg. 13. This Court is not persuaded that this is an accurate reading of *Trump* as to evidence of a public record and thus, declines to apply this reasoning to the Tweets at issue.

be "contexts in which the President, notwithstanding the prominence of his position, speaks in an unofficial capacity – perhaps as a candidate for office or party leader." *Trump* at 629. This point was further emphasized by Chief Justice Roberts when he unequivocally wrote that "not everything the President does is official." *Id.* at 642. The analysis and guidance are pragmatic.

Undoubtedly, there are Tweets and other communications that a President makes that qualify as official communications with the public regarding matters of public concern. In the modern world, social media is but one of many forms of communication that a President can employ to convey messages of the utmost import, such as to comfort a hurting nation after a tragedy. The Tweets in question, however, do not fit that mold. As such, none of the disputed Tweets, whether preserved or not, constitute official acts subject to absolute immunity, nor do they fall within the outer perimeter so as to raise a presumption of immunity.

When the *Trump* Court discussed Defendant's Tweets, and in particular his speech on January 6, 2021, the Court reasoned that a President possesses an "extraordinary power to speak to his fellow citizens and on their behalf." *Trump* at 629. The *Trump* Court illustrated that this extraordinary power, could be exercised to advance the public interest, such as when the nation needs to be comforted in the wake of a national tragedy. *Id.* People's 407F reflects Defendant's comments about "The New York Times and a third rate reporter named Maggie Haberman, known as a Crooked H Flunkie [...]going out of their way to destroy Michael Cohen and his relationship with me in the hope that he will 'flip.' [...] Sorry, I don't see Michael doing that [...]." Viewing People's 407F in the context of *Trump,* it leaves little doubt that such a communication does not approach the illustrations provided by the *Trump* Court. People's 407F does not advance a policy concern or other public interest. As such, it is not an official act and it is not protected by any level of immunity. Even if this Court were to find that it falls within the outer perimeter subject to presumptive immunity, it would find that the People have rebutted that immunity without relying on the motive behind the conduct.

This Court finds that People's 407G is also entirely personal in nature. The subject is a personal retainer with an attorney about a personal matter and an NDA. The post asserts that it was a "private agreement" between two individuals, entered into before Defendant took Office. This is precisely the type of personal speech the *Trump* Court contemplated when it held that "although Presidential immunity is required for official actions to ensure that the President's decision making is not distorted by the threat of future litigation stemming from those actions, that concern does not

support immunity for unofficial conduct." *Trump* at 615. This Court finds Defendant's argument that the *Trump* Court intended to protect this type of speech unavailing.

This Court also finds that the Tweet in People's 407H does not constitute an official act nor is it the type of communication the *Trump* Court contemplated when it referenced President Theodore Roosevelt's famous "bully pulpit" as a means to "persuade Americans, in ways that the President believes would advance the public interest." *Id.* at 629 ("Indeed, a long-recognized aspect of Presidential power is using the office's 'bully pulpit' to persuade Americans, including by speaking forcefully or critically, in ways that the President believes would advance the public interest."). People's 407H, in this Court's view, merely contains Defendant's thoughts on the services of his former private attorney.

Regarding the final Tweet, People's 407I, Defendant argues that this Tweet is afforded the protections of Presidential immunity as it is part of the "core authority of the Nation's Chief Executive" to "comment upon and criticize the conduct of federal prosecutors and regulators" which he derives from Article II authority. Defendant's Motion at pgs. 35, 36. This is because the content of this Tweet, and its context, referred to Mr. Cohen, his former personal attorney, as a person willing to "make up stories" and "break," as opposed to Paul Manafort, Defendant's campaign chairman, who was not. Just as the title of Communications Director does not bestow absolute immunity to any and all communications with Ms. Hicks, neither does mere reference to the Justice Department convert a Tweet to an official act. This Court is not convinced by Defendant's argument. While the *Trump* Court has made clear that the President must be protected, and therefore receive absolute immunity, when conducting official business such as when directing the Office of the Attorney General, the Defendant's Tweet in People's 407I contains nothing of the sort. Nor is this Court persuaded, for the reasons stated in the preceding paragraphs, that this Tweet made in Defendant's personal capacity, constitutes an official act. This Twitter post and the communication contained therein does not constitute a core official act nor does it fall within the outer perimeter of his official duties.

PART VI: HARMLESS ERROR

The People argue that if this Court concludes that "any evidence of official presidential acts [were] improperly admitted at trial," Defendant's request to "set aside the verdict should be rejected on harmless-error grounds." People's Response at pg. 38. In response, Defendant argues that harmless error does not apply here because "federal constitutional reasoning forecloses harmless-

error analysis under New York law in a manner similar to the treatment of 'structural errors' and 'mode of proceedings errors.'" Defendant's Motion at pg. 44.

Even if this Court did find that the disputed evidence constitutes official acts under the auspices of the *Trump* decision, which it does not, Defendant's motion is still denied as introduction of the disputed evidence constitutes harmless error and no mode of proceedings error has taken place.

The Court of Appeals has held that "'[t]he paramount purpose of all rules of evidence is to ensure that the jury will hear all pertinent, reliable and probative evidence which bears on the disputed issues.'" *People v. Robinson*, 17 NY3d 868 [2011] *citing to People v. Miller*, 39 NY2d 543, 551 [1976]. If the error at issue violates a defendant's constitutional rights, the constitutional test for harmless error applies. *People v. Goldstein*, 6 NY3d 119 [2005]. That is, the burden is on the People to show that any error was harmless beyond a reasonable doubt. *Id.* citing *Chapman v. California*, 386 US 18, 24 [1967] and *People v. Crimmins*, 36 NY2d 230 [1975]. Non-constitutional harmless errors do not involve constitutional provisions. As such, there is a less exacting standard of review. In such instances, the error is deemed harmless if there is overwhelming evidence of a defendant's guilt and there is no significant probability that the error affected the outcome of the trial. *People v. Mairena*, 34 NY3d 473 [2019]; *People v. Vargas*, 154 AD3d 971 [2d Dept 2017]. "Our State test with respect to non-constitutional error is not so exacting as the Supreme Court test for constitutional error." *Crimmins*, 36 NY2d at 241. "We observe that in either instance, of course, unless the proof of the defendant's guilt, without reference to the error, is overwhelming, there is no occasion for consideration of any doctrine of harmless error." *Id.* Whether "overwhelming proof of guilt" exists cannot be determined with mathematical precision. *Id.* The vast majority of New York courts, including the court in *Crimmins*, consider two discrete factors when determining whether an error was harmless: (1) the quantum and nature of the evidence against the defendant if the error is excised and (2) the causal effect the error may nevertheless have had on the jury. *People v. Clyde*, 18 NY3d 145 [2011] *citing to People v. Hamlin*, 71 NY2d 750 [1988].

As discussed in Part V(a) supra, mode of proceedings errors occupy a very narrow set of claims and "go to the essential validity of the process and are so fundamental that the entire trial is irreparably tainted." *Kelly* 5 NY3d 116, 119-120, *People v. Cabrera*, 41 N.Y.3d 35 [2023]. These types of errors are not easily defined. *People v. Mack*, 27 NY3d 534 [2016]. Since such errors require "reversal without regard to the prejudice, or lack thereof, to the defendant, the Court of Appeals has

been hesitant to expand this doctrine. *Id.* at 540. "The designation of a mode of proceedings error is therefore 'reserved for the most fundamental flaws." *Id.* at 541.

Defendant's primary argument on this point is that "Presidential Immunity errors were not and are never 'harmless.'" Defendant's Reply at pg. 18. This argument is premised on the claim that errors involving Presidential immunity constitute mode of proceedings errors. Defendant argues that the official acts evidence at the heart of his motion fall under the rubric of Presidential immunity and are therefore "structural errors" of the "type of danger that would lead Presidents to be chilled from taking the bold and unhesitating action required of an independent Executive." *Id.* at pgs. 19-20. Defendant points to the Supreme Court's warning that "official acts evidence raises a unique risk that the jurors' deliberations will be prejudiced by their views of the President's policies and performance while in office." *Id.*

The People dispute the "importance or constitutional nature of official acts immunity" and submit that the conduct alleged here is not unique. People's Response at pg. 36. They further argue that many "evidentiary privileges derive from important public policy concerns…[y]et the Court of Appeals has applied harmless error analysis even to extremely important evidentiary privileges."[28] *Id.* Finally, the People argue that even if the disputed evidence was introduced in error at trial, the remaining evidence supports a finding of guilt.[29] People's Response at pg. 39.

As an initial matter, this Court does not agree that the alleged error here qualifies as a mode of proceedings error such that it is not subject to harmless error analysis. Mode of proceedings errors typically involve situations that strike at the heart of a trial, such as a court failing to advise counsel "with meaningful notice of [a] substantive jury note." *People v. Morrison*, 32 NY3d 951 [2018]. In addition to the examples provided in Part V(A) *supra*, other examples of the high procedural bar can include a trial judge's inappropriate commentary before a jury regarding a defendant's decision not to testify (*People v.* McLucas, 15 NY2d 167 [1965]) and the conviction for a crime that does not exist within the Penal Law (*People v.* Martinez, 81 NY2d 810 [1993]. In each of those instances, the Court of Appeals found that the errors were so fundamental to "the organization of the court or the mode

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[28] In a footnote, the People cite examples such as *People v. Rivera*, 25 NY3d 256 [2015] where harmless error analysis was applied to the physician-patient privilege and *People v. Carmona*, 82 NY2d 603 [1993] where it was applied to the cleric-congregant privilege. People's Response at pg. 36 n8.

[29] As the People tacitly acknowledge in Footnote 9 of their Response, the trial record in this matter is dense. Nonetheless, this Court will be succinct when referencing the selected testimony and exhibits in this portion of its Decision.

of proceedings proscribed by law," that the failure to preserve their objection was of no import. *Patterson*, 39 N.Y.2d at 295.

This Court finds that even if the disputed evidence was admitted in error, such error was harmless. "Not every error committed in the course of a criminal prosecution will necessarily lead to a reversal or modification of a judgment of conviction, and that, subject to certain exceptions, an error will be disregarded if it is determined to have been harmless." The Powers of the New York Court of Appeals, NYCTAPP §21:13, *Crimmins* 36 NY2d at 239. "Even when constitutional errors, as other errors, have occurred in a case, they do not require reversal when a reviewing court can conclude with confidence that they were harmless beyond a reasonable doubt." *Smith*, 97 NY2d at 330.

In addition to presiding over every stage of these proceedings, this Court has carefully scrutinized the trial record, including all evidence such as: invoices, general ledger entries, recorded phone conversations, text messages, e-mails, Mr. Weisselberg's handwritten notes, and video footage. This also includes testimony from Mr. Cohen[30], Ms. Daniels, Mr. McConney, Keith Davidson, Mr. Pecker, and Gary Farro to name but a fraction of the evidence the jury heard and considered, separate and apart from that evidence and select testimony which Defendant challenges on Presidential immunity grounds. Also included was evidence in the form of Defendant's own words from his many published books. This Court concludes that if error occurred regarding the introduction of the challenged evidence, which it does not, and such error were excised, such error was harmless in light of the overwhelming evidence of guilt. *Crimmins* at 230.

PART VII: USE OF OFFICIAL ACTS IN GRAND JURY

Defendant argues that the use of alleged official acts evidence in the grand jury tainted the proceedings and requires dismissal of the indictment. Defendant's Motion at pg. 41. The official acts referenced by Defendant essentially mirror the trial evidence he has challenged. See Part V above. The only evidence presented in the grand jury, that was not introduced at trial, is the testimony of the witness identified as Trump Counselor.[31]

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[30] This Court, having had the unique opportunity to hear Mr. Cohen's testimony and to observe his demeanor on direct and cross examination and to form an opinion as to his credibility, does in fact credit his testimony.

[31] As this witness testified in the grand jury and not at trial, they will be referred to as Trump Counselor throughout this Decision.

The People's response in opposition is similar to their arguments discussed *supra*. Specifically, that Defendant did not preserve this claim and even if he had, the argument would fail on the merits. They further argue that any error committed in the grand jury is harmless. People's Response at pgs. 61-63. In response to the People's preservation argument, Defendant once again argues that the *Trump* Court addressed an issue of first impression and therefore, *Trump* "constitutes 'good cause' for the timing of the motion." Defendant's Reply at pg. 2.

In Part V, this Court analyzed the respective arguments of the parties as they apply to the evidence introduced at trial. Here, this Court analyzes the arguments in the context of the grand jury presentation and sees no reason to depart from the conclusion reached *supra*. In Part V(A), this Court ruled that where Defendant failed to make a timely and proper objection to the introduction of evidence at trial, he has failed to adequately preserve his objections to such evidence for purposes of CPL § 330.30(1) review. The same is true in the context of grand jury testimony.

Here, Defendant never lodged an objection to the sufficiency of the grand jury proceedings or the propriety of Trump Counselor's testimony on the grounds of Presidential immunity. Notably, Defendant, in his Reply to the People's Opposition, does not, and it seems cannot, point to any instance where such an objection was made. In Defendant's Reply, he again references "good cause" for the timing of his motion and his failure to preserve his arguments. Defendant's Reply at pg. 2. As this Court reasoned when addressing preservation in Part V(A) *supra*, "good cause" and "interest of justice" are not legally viable standards for a CPL § 330.30(1) review in the absence of preservation. *Carter*, 63 NY2d 530.

In the alternative, were this Court to find that Defendant did properly preserve his objections as to the purported official acts evidence presented to the grand jury, Defendant's claim is nonetheless denied on the merits. It is not necessary for this Court to repeat its detailed analysis in Section V *supra*. The testimony of Trump Counselor did not pertain to official acts as contemplated by *Trump*. Instead, this Court will only address Defendant's arguments with respect to Trump Counselor as well as Mr. Pecker's testimony relating to Attorney General Jeff Sessions.[32]

Trump Counselor testified regarding their role and duties during Defendant's time as President. They further testified that they had "formal and informal" meetings with Defendant. Regarding the instant matter, they testified to having general discussions about Ms. Daniels when news about the payments resurfaced in 2018. This testimony ranged from media appearances the

[32] The Court's analysis of the testimony of Mr. Pecker is made in light of the *Trump* Court's ruling that a President has the absolute discretion to "decide which crimes to investigate and prosecute." *Trump* at 621.

witness made, to comments about the news, discussing NDAs with Defendant, to discussing the various media appearances made by Ms. Daniels' attorney at the time, Michael Avenatti. As analyzed above, the discussions between Defendant and Trump Counselor are nothing more than conversations about personal matters. Notably, this witness testified in the grand jury, that their conversations with Defendant about Ms. Daniels, were not related to official conduct and dealt more with Defendant's then private attorney. Indeed, Trump Counselor questioned why they would be asked questions about Defendant's payments to Ms. Daniels when they had nothing to do with the White House or the campaign.

With respect to Mr. Pecker, he testified in the grand jury, in sum and substance, what Mr. Cohen told him: that the United States Attorney General reports to the President. A fact that is public knowledge and involves no official acts such as the Executive Branch deciding which crimes to investigate and prosecute.

Finally, this Court cannot agree with Defendant's interpretation of *People v. Ohrenstein*, 153 AD2d 342 [1st Dept 1989] that an "indictment cannot be legally sufficient if it is based on grand jury testimony which may require inquiry into legislative acts or the motivation for legislative acts." Defendant's Motion at pg. 42. Specifically, Defendant argues that the trial court in *Ohrenstein* "dismissed additional charges based on the finding that two of the remaining defendants were 'prejudiced by the erroneous theory' presented to the grand jury." *Id.* Defendant's reading of *Ohrenstein* presumes that because *Trump* held that a former President cannot be indicted for conduct for which they are immune from prosecution, then the indictment here must be dismissed. This argument is premised on a finding that the evidence in dispute, i.e. that which was presented to the grand jury, constitutes official acts for which Defendant is entitled to immunity. This Court has not made such a finding. As such, Defendant's motion in this respect is denied.

PART VIII: CONCLUSION

This Court finds that Defendant preserved his claims only as to the testimony of Hope Hicks, OGE Form 278e, and Twitter postings identified as People's Exhibits 407F through 407I. All other claims are denied as unpreserved; and

This Court further finds that the evidence related to the preserved claims relate entirely to unofficial conduct and thus, receive no immunity protections; and

As to the claims that were unpreserved, this Court finds in the alternative, that when considered on the merits, they too are denied because they relate entirely to unofficial conduct entitled to no immunity protections; and

Further, even if this Court were to deem all of the contested evidence, both preserved and unpreserved, as official conduct falling within the outer perimeter of Defendant's Presidential authority, it would still find that the People's use of these acts as evidence of the decidedly personal acts of falsifying business records poses no danger of intrusion on the authority and function of the Executive Branch, a conclusion amply supported by non-motive-related evidence; and

Lastly, this Court concludes that if error occurred regarding the introduction of the challenged evidence, such error was harmless in light of the overwhelming evidence of guilt.

Defendant's motion to dismiss the indictment and vacate the jury verdict pursuant to CPL § 330.30(1) is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 16, 2024
New York, New York

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

HON. J. MERCHAN

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** Defendant's Motion to Dismiss the Indictment and Vacate the Jury's Verdict Pursuant to CPL §§ 210.20(1)(h) and 210.40(1) Indictment No. 71543-23

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

PART I: BACKGROUND AND PROCEDURAL HISTORY

On May 30, 2024, a New York County jury returned a verdict finding Defendant guilty after trial, on 34 counts of Falsifying Business Records in the First Degree. That same day, this Court set a deadline of June 13, 2024, for the filing of post-trial motions. The deadline passed without the filing of any motions.

The Court set the matter down for the imposition of sentence to July 11, 2024. However, that date was adjourned to September 18, 2024, as a direct result of the United States Supreme Court's decision in the matter of *Trump v. United States*, 603 US 593 [2024]. On August 14, 2024, Defendant requested an adjournment of sentencing until after the 2024 Presidential election. The People did not oppose Defendant's request. As a result, on September 6, 2024, this Court adjourned sentencing, if necessary, to November 26, 2024.

On November 10, 2024, following the 2024 Presidential election, Defendant requested a "stay [of] the existing scheduled dates [...], 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." On November 22, 2024, this Court granted Defendant leave to file a motion pursuant to Criminal Procedure Law § 210.40(1) (Motion to Dismiss Indictment in Furtherance of Justice – otherwise known as a "Clayton Motion") and set a motion schedule. Defendant filed the

instant motion on December 2, 2024. The People filed their Response on December 9, 2024, and Defendant filed his Reply on December 13, 2024.[1]

The following constitutes the Decision and Order of this Court.

PART II: ARGUMENTS OF THE PARTIES

Defendant argues that "[t]he Presidential immunity doctrine, the Presidential Transition Act, and the Supremacy Clause all require" dismissal "immediately." Defendant's Motion at pg. 1. In support, Defendant points not only to his status as President-elect, but also to alleged "unlawful" conduct by the prosecution, rulings of this Court allegedly in violation of Defendant's rights, and claimed evidentiary infirmities at trial, which either present a legal impediment to conviction or together, require dismissal in the interests of justice. The allegations of "unlawful" conduct against the New York County District Attorney ("DANY") include claims that DANY engaged in "politically motivated targeting" of Defendant; unlawfully "leaked" information about the investigation; tainted the jury pool by making improper public statements; engaged in repeated misrepresentations to this and other courts before, during, and after trial; and suborned perjury from prosecution witnesses, Michael Cohen and Stormy Daniels. Defendant also accuses this Court of impermissibly presiding over this matter despite the existence of an alleged conflict of interest, and of imposing an "unlawful gag order," a reference to this Court's Order Governing Extrajudicial Statements.[2]

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[1] On December 16, 2024, the Court issued its Decision and Order denying Defendant's separate Motion to Vacate and Dismiss pursuant to CPL § 330.30(1).

[2] This Court recognizes that the lawyering by both the prosecution and the Defense has been exceptional and spirited throughout the entirety of this case. It is clear that the People have prosecuted this matter to the best of their abilities and the Defense has represented their client zealously. There have however, been instances when in written submissions, counsel has come dangerously close to crossing the line of zealous representation and the professional advocacy one would expect from members of the bar and officers of the court and this Court has at times, made counsel aware of its observations and concerns. Now however, counsel has resorted to language, indeed rhetoric, that has no place in legal pleadings. For example, countless times in their Motion to Dismiss, counsel accuses the prosecution and this Court of engaging in "unlawful" and "unconstitutional" conduct. *See* Defendant's Motion at pgs. 1, 6-9, 11, 43, 51. These same terms are also peppered throughout Defendant's Reply. Those words, by definition, mean "criminally punishable." (Black's Law Dictionary 748-749 [Third Pocket Edition]). Viewed in full context and mindful of the parties to this action, such arguments, in the broader picture, have the potential to create a chilling effect on the Third Branch of government. Indeed, Chief Justice Roberts in his 2024 Year End Report on the Federal Judiciary, felt compelled "to address four areas of illegitimate activity that, in my view, do threaten the independence of judges on which the rule of law depends: (1) violence, (2) intimidation, (3) disinformation, and (4) threats to defy lawfully entered judgments." J.G.

The People oppose Defendant's motion arguing that "President-elect immunity does not exist," and that the "vast majority of defendant's claims involve objections that this Court and others have repeatedly rejected." People's Response at pg. 1. The People submit alternative remedies, short of a dismissal, which they argue still respect the doctrine of Presidential immunity from criminal process while at the same time respecting the verdict rendered by the New York County jury. The alternative proposals include adjourning sentencing until after Defendant completes his term of office or the application of the "Alabama Rule" which would effectively permanently abate proceedings without dismissal or the imposition of sentence.

PART III: THE JURY VERDICT

As indicated above, the Defendant has been found guilty on 34 felony counts. The significance of the fact that the verdict was handed down by a unanimous jury of 12 of Defendant's peers, after trial, cannot possibly be overstated. Indeed, the sanctity of a jury verdict and the deference that must be accorded to it, is a bedrock principle in our Nation's jurisprudence. "The right to have a jury make the ultimate determination of guilty has an impressive pedigree. Blackstone described 'trial by jury' as requiring that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors." *United States v. Gaudin*, 515 US 506 [1995], citing to 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (emphasis added). Even an examination of *how* a jury reached its verdict must be approached with caution as only extraordinary

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Roberts, Jr., 2024 Year End Report on the Federal Judiciary at pg. 5. "Public officials, too, regrettably have engaged in recent attempts to intimidate judges – for example, suggesting political bias in the judge's adverse rulings without a credible basis for such allegations. [...]. Attempts to intimidate judges for their rulings in cases are inappropriate and should be vigorously opposed." *Id.* at pg. 7. "Judicial independence is worth preserving. As my late colleague Justice Ruth Bader Ginsburg wrote, an independent judiciary is 'essential to the rule of law in any land' yet it 'is vulnerable to assault; it can be shattered if the society law exists to serve does not take care to assure it's preservation.'" *Id.* at pg. 8 citing R.B. Ginsberg, Remarks on Judicial Independence, Conference of American Judges Association, 2006. "Of course, the courts are no more infallible than any other branch. In hindsight, some judicial decisions [are] wrong, sometimes egregiously wrong." *Id.* at pg. 5.

Wrong – not "unlawful" or deliberately violative of a litigant's constitutional rights - and our Rule of Law provides a system of appellate review for higher courts to consider a litigant's claim of error below. This Court is in complete agreement with Chief Justice Roberts' views on this subject. Dangerous rhetoric is not a welcome form of argument and will have no impact on how the Court renders this or any other Decision.

circumstances warrant second guessing the deliberative process. *See People v. Testa*, 61 NY2d 1008 [1984].

In fact, it is standard practice in criminal courts in this state to instruct jurors at the start of every trial, and to remind them before commencing deliberations, that "[y]ou and you alone are the judges of the facts, and you and you alone are responsible for deciding whether the defendant is guilty or not guilty." CJI2d[NY] Role of the Court and Jury. The practical and policy concerns implicated by these instructions are legion. *People v. Oldham*, 58 Misc 3d 807 [Sup Ct, New York County 2018]. As such, arriving at a unanimous verdict after applying their "collective intelligence and experience" reviewing and analyzing evidence is "regarded as a hallmark of our judicial system." *People v. Brown*, 48 NY2d 388 [1979]. Thus, it is understandably rare, for a trial court to overturn a unanimous jury verdict.

PART IV: PRESIDENTIAL IMMUNITY FROM CRIMINAL PROSECUTION

Defendant makes clear that the "driving 'compelling factor'" requiring vacatur of the jury's verdict and dismissal of the indictment is "Presidential immunity and the Supremacy Clause." Defendant's Motion at pg. 54. Thus, the primary issue before this Court is: whether a President-elect must be afforded the same immunity protections from a state prosecution as a sitting President? This issue, as far as this Court can discern, is without precedent. Although the parties agree on very little, they both appear to recognize the paucity of available precedent to assist this Court in evaluating Presidential immunity in the instant context. Though the parties arrive at starkly different conclusions, they both rely on the same small universe of legal authority to support their respective arguments. This guidance can be found primarily in *Trump v. United States*, 603 US 593 [2024]; *United States v. Nixon*, 418 US 683 [1974]; *Nixon v. Fitzgerald*, 457 US 731 [1982]; *Clinton v. Jones*, 520 US 681 [1997]; *Trump v. Vance*, 591 US 786 [2020]; The Presidential Transition Act of 1963; 1973 Office of Legal Counsel ("OLC") Memorandum *Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office;* and 2000 OLC Memorandum *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 2000 WL 33711291 [Oct. 16, 2000]. The clear concerns confronted by the aforementioned sources, which are detailed in the 2000 OLC Memorandum, and referenced by the parties, are:

1. The actual imposition of a criminal sentence of incarceration;
2. The public stigma occasioned by the initiation of criminal proceedings; and
3. The mental and physical demands of assisting with the preparation of a defense for the various stages of a criminal proceeding.

As noted by the Special Counsel's Office in their recent memorandum of dismissal, the 1973 and 2000 OLC memos addressed only federal cases involving Presidents. *See Government's Motion to Dismiss, United States v. Trump*, US Dist Ct, DDC, Chutkan, J. No. 23-cr-257, ECF No. 281 ("As with the 1973 and 2000 OLC Opinions, OLC's analysis addressed only the federal cases pending against the defendant."). A fair reading of the scant legal precedent in this area of the law supports that the decisions rendered by the Supreme Court over the prior decades were also focused on addressing federal cases brought against Presidents, with *Vance* being the one exception.[3] However, it is logical to infer that the three concerns expressed in the 2000 OLC memorandum can overlap with criminal prosecutions that occur in state court. The first consideration set forth in the 2000 OLC memo, incarceration as a criminal sentence, carries the same restrictions as that of a federal sentence, i.e. deprivation of liberty. Second, the "public stigma" of a criminal proceeding will likely occur in both, federal and state courts. Lastly, the "mental and physical burdens" that would befall a defendant assisting in his defense against criminal charges would be largely the same in federal and state proceedings. They both require such exercises as witness preparation, analysis of discovery material and evidence, and overall trial strategy. Furthermore, the balancing of competing public interests, i.e. that of protecting the powers and functions of the Executive Branch, upholding the Rule of Law, and honoring the sanctity of a jury verdict permeate criminal proceedings not only in federal court, but in state court as well. *Government's Motion to Dismiss, United States v. Trump*, No. 23-cr-257, ECF No. 281; People's Response at pg. 6; Defendant's Motion at pg. 49. Therefore, this Court applies that same balancing of competing public interests to the instant state proceeding in its analysis of Defendant's Motion.

PART V: PRESIDENT-ELECT IMMUNITY FROM CRIMINAL PROSECUTION

Applying the guidance of the aforementioned sources, this Court finds that Presidential immunity from criminal process for a sitting president does not extend to a President-elect. To begin, the Constitution dictates that only a President, after taking the oath of office, has the authority of the Chief Executive, a President-elect does not. Accordingly, a President-elect is not permitted to

[3] Though *Vance* directly involved the matter before this Court, the Supreme Court's Decision came long before trial commenced. The issue in *Vance* dealt squarely with "a subpoena issued to the President by a local grand jury operating under the supervision of a state court." *Vance* at 799. As such, although the doctrine of Presidential immunity is discussed within the dicta of that decision, there is nothing directly on point for the issue currently before this Court.

avail himself of the protections afforded to the individual occupying that Office.[4] This finding is consistent with *US v. Williams*, wherein the D.C. Circuit Court of Appeals held that the Presidential Transition Act of 1963, 3 U.S.C. 102, does not "confer 'official' status on a President-elect." 7 F Supp 2d 40, 51 [DC Circ. 1998]. The D.C. Circuit Court further held that the "Act provides money and office space to the President-elect's transition team but does not—and cannot—deem any of the President-elect's actions 'official' before he or she complies with the Oath and Affirmation Clause." *Id.*

Turning to the three concerns identified above, beginning with the second, the case at bar is well past the initiation stage and whatever threat of public stigma from criminal prosecution that might have existed has long passed. Indeed, one of Defendant's most frequent arguments is that this Court should defer to the will of the citizenry who recently re-elected him to the Office of the Executive, notwithstanding an actual guilty verdict in this case. Thus, whatever stigma that might have existed, will most certainly not interfere with Defendant's ability to carry out his duties – both as President-elect and as the sitting President.

The third concern addresses the mental and physical demands of defending against a criminal proceeding. To be clear, neither the United States Supreme Court, nor the Office of Legal Counsel in either their 1973 or 2000 Memoranda, were concerned solely with the time demands of mounting a defense upon a sitting President. *See Clinton*, 520 US at 703 ("The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution."); *Vance,* 591 US at 801 (Rejection of Defendant's contention that "diversion occasioned by a state criminal subpoena imposes an equally intolerable burden on a President's ability to perform his Article II functions."); 1973 OLC Memorandum at 29 ("[C]riminal proceedings against a President in office should not go beyond a point where they could result in so serious a physical interference with the President's performance of his official duties that it would amount to an incapacitation;" 2000 OLC Memorandum at 24 (Referencing the distinction between the demands on a sitting President's time for a civil trial, versus a criminal trial, which may be mitigated by "skillful trial management."). In fact, a sitting President is subject to impeachment proceedings, civil litigation, and service of criminal

[4] Undoubtedly, the transition period between election and the taking of the Presidential oath is one filled with enormous responsibility. Yet, even Defendant in his motion refers to Presidential immunity as one relating specifically to a *sitting* President no fewer than 33 times.

process – including subpoenas – all of which impose time demands. *See Nixon*, 418 US 683; *Fitzgerald*, 457 US 731; *Clinton*, 520 US 681; *Vance*, 591 US 786.

The greater concern noted by these same sources is whether the burden impedes on a sitting President's ability to perform his constitutional duties. Defendant analogizes that the same concern applies equally to a President-elect, arguing that the demands on his time to appear at any sentencing would be so significant as to impede his ability to prepare for his constitutional duties during the transition period. This Court is not persuaded. Having addressed and resolved all matters brought before this Court and the verdict now more than half a year behind us, all that remains outstanding in this case is the issuance of this Decision and the imposition of sentence. Scheduling sentence is a function that remains exclusively within the purview of the trial judge and can be easily set down for a date and time certain to minimize disruption and inconvenience, provided that applicable statutory obligations are met.[5] Defendant argues that Special Prosecutor Jack Smith's decision to dismiss the Defendant's federal indictments is evidence of a mandate that all criminal cases pending against the President-elect must cease immediately. The vastly different procedural posture of the instant case renders any comparison to the Special Counsel's indictments unpersuasive.

Further, while Defendant now claims this Court cannot and must not sentence Defendant, the record is clear that Defendant not only consented to, but in fact requested the very adjournment that led us down the path we are on. As the parties are aware, it was on Defendant's application, without opposition from the People, that sentence was adjourned until *after* the Presidential election. Any claim Defendant may have that circumstances have changed as a result of Defendant's victory in the Presidential election, while convenient, is disingenuous. Defendant has always pronounced, since the inception of this case, confidence and indeed the expectation, that he would prevail in the 2024 Election - confidence that has proven well-founded. That he would become the "President-elect" and be required to assume all the responsibilities that come with the transition were entirely anticipated. Thus, it was fair for this Court to trust that his request to adjourn sentencing until after the election carried with it the implied consent that he would face sentence during the window between the election and the taking of the oath of office. The Supreme Court's decision in *Trump* has delayed sentence - not precluded it.[6]

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[5] CPL Article 380 sets forth, among other requirements, that sentencing must be pronounced without unreasonable delay and afford time for the preparation of a pre-sentence report – which was completed months ago.

[6] The first concern relating to incarceration is addressed in Part IX below.

PART VI: MOTION TO DISMISS INDICTMENT PURSUANT TO CPL § 210.20(1)(H)

Defendant presents this Court with the novel theory of President-elect immunity as it applies to CPL § 210.20(1)(h), arguing that such immunity presents a "legal impediment to conviction." For the reasons stated above, this Court remains unpersuaded that President-elect immunity is the law and thus, neither that doctrine, nor the Supremacy Clause or Presidential Transition Act present a legal impediment to imposition of sentence. Alternatively, Defendant seeks, in essence, a form of retroactive immunity. Both of these theories are briefly addressed below.

Essentially, what Defendant asks this Court to do is to create, or at least recognize, two types of Presidential immunity, then select one as grounds to dismiss the instant matter. First, Defendant seeks application of "President-elect immunity," which presumably implicates all actions of a President-elect before taking the oath of office. Thus, he argues that since no sitting President can be the subject of any stage of a criminal proceeding, so too should a President-elect be afforded the same protections. Defendant's Motion at pg. 35. Second, as the People characterize in their Response, Defendant seeks an action by the Court akin to a "retroactive" form of Presidential immunity, thus giving a defendant the ability to nullify verdicts lawfully rendered prior to a defendant being elected President by virtue of being elected President. It would be an abuse of discretion for this Court to create, or recognize, either of these two new forms of Presidential immunity in the absence of legal authority. The Defendant has presented no valid argument to convince this Court otherwise. Binding precedent does not provide that an individual, upon becoming President, can retroactively dismiss or vacate prior criminal acts nor does it grant blanket Presidential-elect immunity. This Court is therefore forbidden from recognizing either form of immunity.

PART VII: THE CLAYTON MOTION

In addition to his claim that Presidential immunity and the Supremacy Clause demand dismissal as a matter of law, he separately argues that President-elect immunity and the Supremacy Clause are factors this Court must consider in connection with his motion to dismiss pursuant to CPL § 210.40(1) in furtherance of justice under this Court's discretionary authority.

CPL § 210.40(1), also known as a Clayton Motion, sets forth ten factors a court should consider individually and collectively when exercising its discretion whether to grant a motion to dismiss in the interests of justice. *See People v. Clayton*, 41 AD2d 204 [2d Dept 1973]. Those factors are:

(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.

Dismissals in the interests of justice should be issued sparingly and granted in the "'rare' and 'unusual' case where it 'cries out for fundamental justice beyond the confines of conventional considerations' (citations omitted)." *People v. Pittman*, 228 AD2d 225, 226 [1st Dept 1996]. Such motions should be granted only where there is "some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment … would constitute or result in injustice." *People v. Rahmen*, 302 AD2d 408, 409 [2d Dept 2003]. When considering such motion, a court must refrain from usurping the role of the jury. *Id.; People v. Hudson*, 217 AD2d 53 [2d Dept 1995].

A motion filed pursuant to CPL § 210.40(1) must normally be made within forty-five days of arraignment. CPL § 255.10(1). Notwithstanding that limitation, Defendant requested leave to file this motion following the 2024 Presidential election. As Defendant's status as President-elect presented a factor for consideration that did not exist within 45 days of his arraignment, this Court granted that request. Defendant presents additional factors which he claims, when applied to the ten enumerated categories individually, or collectively, support the "necessary outcome." Defendant's Motion at pg. 54. To be clear, Defendant's claims, other than those related to Presidential immunity from criminal process relate either to evidentiary issues or prosecutorial conduct which occurred prior to indictment, before trial or during trial, and should have been addressed in a properly and timely filed Clayton motion. Nonetheless, this Court will address the claims on their merits as Defendant argues that Presidential immunity and the Presidential Transition Act individually, or taken together with the traditional Clayton factors, warrant a dismissal in the interest of justice.

PART VIII: APPLICATION OF THE CLAYTON FACTORS

This Court will now apply Defendant's claims to the Clayton factors.

(a) The seriousness and circumstances of the offense, and
(b) The extent of harm caused by the offense

Defendant argues that the 34 counts of Falsifying Business Records in the First Degree in this case pale in comparison to the seriousness of the majority of street crimes prosecuted in New York County, and that, coupled with the decisions of other agencies to not pursue charges against Defendant, provides context for this Court to consider factors (a) and (b).

That violent crimes are, or are not, prosecuted in this same courthouse does not negate the seriousness and circumstances of the instant case. Seriousness and harm are not measured solely by the level of violence inflicted or the extent of financial harm. Seriousness can be gauged by considering the significance of the act under the unique circumstances of the case, as well as by the harm to society as a whole. *Cf People v. Norman*, 6 Misc 3d 317 [Sup Ct Kings Cty 2004] ("[N]ature of the crimes charged militate against, rather than in favor of, dismissal" rejecting motion under factors (a), (b), (d), (f), (g) and (h) in prosecution against New York State Assemblyman for 76 counts of offering false instrument for filing as the harm was in the "impairment of public trust."). Here, 12 jurors unanimously found Defendant guilty of 34 counts of falsifying business records with the intent to defraud, which included an intent to commit or conceal a conspiracy to promote a presidential election by unlawful means. It was the premediated and continuous deception by the leader of the free world that is the gravamen of this offense. To vacate this verdict on the grounds that the charges are insufficiently serious given the position Defendant once held, and is about to assume again, would constitute a disproportionate result and cause immeasurable damage to the citizenry's confidence in the Rule of Law.

(c) The evidence of guilt

Defendant claims that the evidence at trial was "weak," and argues that DANY relied on perjured testimony and evidence introduced in violation of the Presidential immunity doctrine. As to the latter, this Court recently issued its Decision and Order finding that no official acts evidence was admitted at trial. Thus, that argument is meritless. As to the allegation that Michael Cohen provided unreliable perjured testimony, this Court presided over the entire trial and sat mere feet from all the witnesses who testified. In doing so, this Court had an opportunity to listen to their testimony and to observe their demeanor and therefore to form an opinion as to their credibility, and having done so, it does not agree with Defendant's characterization of Mr. Cohen's testimony.

Moreover, a total of 22 witnesses testified at trial, and over 500 exhibits admitted, all of which supported the jury's verdict. This claim does not weigh in Defendant's favor.

(d) The history, character and condition of the defendant

Defendant argues that his "contributions to this City and the Nation are too numerous to count," and concludes his argument under this section by referencing two NY Supreme Court cases which are entirely distinguishable.[7] Defendant's Motion at pg. 59. This Court agrees that Defendant served his country as President and will do so again in a matter of weeks. However, that service is but one of the considerations to weigh under this factor.

Despite Defendant's unrelenting and unsubstantiated attacks against the integrity and legitimacy of this process, individual prosecutors, witnesses and the Rule of Law, this Court has refrained from commenting thereon unless required to do so as when ruling on motions for contempt of court. However, Defendant, by virtue of the instant motion, directly asks this Court to consider his character as a basis to vacate the jury verdict, and this Court must do so in accordance with the requirements of CPL section 210.40(1)(d).

Defendant's disdain for the Third Branch of government, whether state or federal, in New York or elsewhere, is a matter of public record. Indeed, Defendant 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. *See* People's Response at Section IV. C. In the case at bar, despite repeated admonitions, this Court was left with no choice but to find the Defendant guilty of 10 counts of Contempt for his repeated violations of this Court's Order Restricting Extrajudicial Statements ("Statements Order"), findings which by definition mean that Defendant willingly ignored the lawful mandates of this Court. An Order which Defendant continues to attack as "unlawful" and "unconstitutional," despite the fact that it has been challenged and upheld by the Appellate Division First Department and the New York Court of Appeals, no less than eight times. Indeed, as Defendant must surely know, the same Order was left undisturbed by the United States Supreme Court on December 9, 2024. *Good Lawgic, LLC, et al, v. Merchan*, 604 US 24A328 [2024]. Yet Defendant continues to undermine its legitimacy, in posts to his millions of followers. Indeed,

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[7] Defendant's reference to *People v. Clifford* in support of dismissal due to lack of a criminal history is misleading; that case addressed Clayton motions submitted as to four defendants, three of whom had no criminal records, with relief granted only as to one. 82 Misc 3d 1068 [Sup Ct, New York County 2024]. The second case involves facts wholly incomparable to the instant matter. *People v. Wooten*, 62 Misc3d 1207(A) [Sup Ct, Kings County, 2019].

this is not the only instance in which Defendant has been held in contempt or sanctioned by a Court.[8] Defendant's character and history vis-a-vis the Rule of Law and the Third Branch of government must be analyzed under this factor in direct relation to the result he seeks, and in that vein, it does not weigh in his favor.

(e) Any exceptionally serious misconduct of law enforcement personnel

Defendant next alleges several instances of trial misconduct, including: false testimony elicited by DANY from Stormy Daniels and Michael Cohen; alleged misrepresentations by DANY for the unavailability of potential witness Allen Weisselberg; an "unconstitutional crusade" against Defendant; "unlawful investigative leaks"; and alleged misrepresentations by DANY in the Removal proceedings.[9]

Defendant's arguments that the People committed egregious misconduct by eliciting certain testimony from Mr. Cohen and Ms. Daniels is unsupported, and his arguments mischaracterize the record. This Court entertained countless arguments before and during trial regarding the permissible parameters of the testimony of these witnesses and rulings were made in every instance. If those rulings were violated, objections were voiced and when appropriate, questions and/or answers were stricken from the record. Where necessary, curative or limiting instructions were given to the jury. Notably, the jury credited the testimony of Mr. Cohen and Ms. Daniels and returned a verdict consistent with that finding.

Further, this Court does not share Defendant's characterization of the colloquy surrounding the availability of Mr. Weisselberg. The People unsuccessfully argued for the admission of Mr. Weisselberg's severance agreement as proof of his unavailability to the People, while counsel for Defendant argued that he "wouldn't be surprised if there ends up being foundation for a missing witness instruction about the uncalled witnesses being equally unavailable to both sides." Tr. 3241-3242. Equating an unpersuasive argument with misconduct is a leap this Court will not make. Thus, neither of these claims weigh in Defendant's favor.

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[8] For example, Defendant has been held in contempt by courts within this jurisdiction and sanctioned by others. *People of the State of New York v. The Trump Organization, Inc.*, No. 451G85/2020 [Sup Ct, New York County 2022]; *Trump v. Clinton*, 653 F Supp 3d 1198 [S.D. Fla. 2023] ("Frivolous lawsuits should not be used as a vehicle for fundraising or fodder for rallies or social media. Mr. Trump is using the courts as a stage set for political theater and grievance. This behavior interferes with the ability of the judiciary to perform its constitutional duty).

[9] While several of these claims are clearly designated by Defendant in support of factor 210.40(1)(e), others were raised in earlier portions of Defendant's motion without reference to a specific Clayton factor. Notwithstanding that omission, the Court will consider those claims as most appropriately falling under subsection (e).

As for the alleged misrepresentations by DANY in connection with the Removal proceedings, this Court is not aware of such misrepresentations. Thus far, Defendant's efforts to remove the case to federal jurisdiction have been rejected. What remains is Defendant's appeal of Judge Hellerstein's denial of his motion for leave to move for removal a second time.

With respect to Defendant's claim of an "unconstitutional crusade" against him and "unlawful investigative leaks," both claims have been raised previously and rejected by this Court. *See* Defendant's Omnibus Motion *generally*; Decision and Order on Defendant's Omnibus Motion Dated February 15, 2024; Decision and Order on People's Motions in *Limine* Dated March 18, 2024. The claims are equally unpersuasive now. While significant portions of Defendant's motion reference a book by a former DANY Assistant District Attorney to bolster these claims, this Court is not swayed. That a former prosecutor wrote a book which is critical of the decisions of District Attorney Alvin Bragg, does not render those decisions unethical, unlawful, or evidence of misconduct.

(f) The purpose and effect of imposing upon the defendant an authorized sentence

Defendant argues that the effect of imposing an authorized sentence violates "the Presidential immunity doctrine, the Supremacy Clause, the Sixth Amendment, the Eighth Amendment and CPL 380.30(1)," and thus, this factor strongly supports dismissal in the interests of justice. Defendant's Motion at pg. 63. In support of that claim, Defendant refers this Court to his earlier argument in his Motion to Dismiss Part I.E in which he contests the legality of deferring proceedings until he completes his Presidential term. This Court rejects Defendant's claim that proceeding with sentencing is precluded as a matter of law. Analysis of this claim pursuant to this Court's *discretionary authority* is consistent with and addressed below under factor (j).

(g) The impact of a dismissal upon the confidence of the public in the criminal justice system

Defendant argues that a dismissal will "improve public confidence" in the criminal justice system because anything short of a full dismissal will interfere with the Presidency. This Court's perspective is different. To begin, he claims the New York County jury pool was tainted and that he was unable to select an impartial jury.[10] Defendant raised this same issue previously in a motion for a further adjournment based on alleged prejudicial pretrial publicity. That motion was denied on April 12, 2024. Further, this Court presided over the *voir dire*, and nothing raised during the course of the jury selection process, gives this Court pause regarding the jury pool. And while Defendant

[10] Referenced within this category are Defendant's arguments regarding DA Bragg's extrajudicial statements during the pendency of this case, publicity arising from the prosecution of Trump Organization Chief Financial Officer Allen Weisselberg, and public statements by witnesses Michael Cohen and Stormy Daniels.

repeatedly refers to that stage in the process when "more than half" of the potential jurors purportedly self-identified as unable to be impartial as proof of an unfair system, this Court construes that very event entirely differently. First, it is standard practice for this Court to ask prospective jurors at the start of every trial, to self-identify if based solely upon what they've heard about the case up to that point they have reason to believe that they cannot be fair and impartial, or if they cannot serve for any other reason. Thus, while not particularly significant, we do not know how many prospective jurors self-excused because they doubted their ability to be fair, and how many self-excused for some other reason, such as travel plans, childcare responsibilities or a scheduled medical procedure. More importantly, a jury panel where half of its members self-identify as not confident in their ability to serve, for whatever reason, is not entirely uncommon, and their departure left us with those members of the panel who believed they could serve. It was these remaining jurors that the parties were given ample opportunity to examine for the existence of bias, partiality, or hostility. Notably, the attorneys did not question the prospective jurors until after the seated jurors had answered an exhaustive questionnaire – which was prepared with the participation of both defense counsel and the prosecution.

What Defendant is asking this Court to do is to assume that the jurors who self-identified were truthful, while those who remained were not. That conclusion is illogical and entirely unsupported. Further, the record is devoid of any instances during *voir dire*, which lasted four days, of defendant asking jurors whether they had been exposed to any extrajudicial statements by DA Bragg, Mr. Cohen or Ms. Daniels. This would appear to contradict Defendant's stated concern. The aforementioned questionnaire, inquired of prospective jurors as to their media and social media exposure, and the parties were permitted to ask follow-up questions. Defendant's conclusory claims that the jurors were tainted by public access to certain content has no support in the record and thus, cannot be considered under this factor to weigh in his favor.

Notwithstanding that Defendant's claims about the jury pool are unsubstantiated, it is important that this Court address the recent letter submissions of both parties dated December 3, 5 and 9, 2024, regarding Defendant's allegations of juror misconduct. As this Court previously stated in its letter of December 16, 2024, claims of such nature go to the very heart of the criminal process. As such, this Court is prepared to consider any claims of juror misconduct, if and when, Defendant properly files a motion that "must contain sworn allegations[.]" *See* CPL section 330.30(2); Court's Letter Order Dated December 16, 2024. Until then, Defendant's claims are merely unsupported allegations – nothing more. Importantly, no such submission has been made.

Finally, Defendant alleges, again, that public confidence is fatally impaired by this Court's alleged "disqualifying conflict." Defendant's Motion at pg. 65. And while Defendant "recognize(s), without conceding," the prior rulings of this Court rejecting such a claim, he pursues it once again. What Defendant does not acknowledge is that he has made three applications to the Appellate Division challenging this Court's rejection of Defendant's motions for recusal, which have all been rejected. Further, Defendant is reminded that very early in these proceedings, this Court sought an opinion from the Advisory Committee on Judicial Ethics, regarding the very issues contained in Defendant's subsequent motions for recusal and which he now raises again. The Committee rendered an opinion on May 4, 2023, finding that "the judge's impartiality cannot reasonably be questioned based on the judge's relative's business and/or political activities" and further advising that there was no requirement that this Court recuse from the proceedings. *See* Opinion of the Advisory Committee on Judicial Ethics, Op. 23-54 [May 4, 2023]. Despite the Opinion, of which Defendant has been aware for over one year, and the repeated Decisions of the Appellate Division, Defendant continues to mount the same baseless attacks in each succeeding motion, albeit with increasing ire. The frequency of the claims and escalating rhetoric in each subsequent motion – does not render the claims true or valid. They are not and it is irresponsible and deeply concerning for counsel to insist on advancing these claims.

To be clear, this is not the only example of Defendant pursuing a claim with increasing indignation while simultaneously failing to acknowledge that this Court's rulings on those subjects have been repeatedly upheld. By way of illustration, Defendant's motion papers refer to the "Unconstitutional Continuation of The Gag Order" as an example of this Court's alleged conflicted status. As noted *supra*, as recently as December 9, 2024, the United States Supreme Court denied an application for a stay regarding that Order in *Good Lawgic, LLC, et al v. Merchan*, a denial following repeated rejections of this claim in lower courts. *See* Part VIII (d). It is therefore bewildering to this Court that Defendant continues to file such papers.

(h) the impact of a dismissal on the safety or welfare of the community

Here, Defendant argues that the welfare of the community is at stake as a dismissal "remov[es] obstacles to an orderly transition of Executive power." Despite the alarming nature of the claim, Defendant provides no basis for it. Defendant's Motion at pg. 67. Consideration of this factor is also addressed under factor (j).

(i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion

This factor provides no relevant consideration which weighs either in favor of, or against Defendant.

(j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose

Here, it is appropriate to address Defendant's argument that his status as President-elect, and the enormity of the responsibilities that accompany the transition, together with all of the other factors, weigh heavily in favor of dismissal in the interests of justice. To be clear, none of the concerns raised by the Supreme Court or the OLC, and referenced in Defendant's motion, are relevant to the instant case. However, recognizing the magnitude of the unique scenario before us, the Court has scrutinized the positions of the respective parties. In so doing, this Court recognizes the importance of considering and balancing the seemingly competing factors before it: ensuring that the Executive Branch is free to fully dispense the duties of the President and safeguard the interests of the Nation, unencumbered by pending criminal proceedings; to ensure that the Supreme Court's ruling and the citizenry's expectation be honored that all are equal and no one is above the law; and the importance of protecting the sanctity of a jury verdict. This Court is simply not persuaded that the first factor outweighs the others at this stage of the proceeding, either on its own or in conjunction with the other Clayton factors.

Defendant's position is that nothing short of an outright and complete dismissal of the jury verdict will suffice to properly address his claims. This Court has painstakingly considered the respective arguments of the parties and finds that setting aside the jury verdict is not the best or only way to reconcile the competing interests. To dismiss the indictment and set aside the jury verdict would not serve the concerns set forth by the Supreme Court in its handful of cases addressing Presidential immunity nor would it serve the Rule of Law. On the contrary, such decision would undermine the Rule of Law in immeasurable ways. Just as this Court finds that President-elect immunity is not an actual precept and one which this Court has no authority to create, so too does this Court find that Defendant's status as President-elect does not require the drastic and "rare" application of its authority to grant the Clayton motion in furtherance of justice.

PART IX: SENTENCING

Finding no legal impediment to sentencing and recognizing that Presidential immunity will likely attach once Defendant takes his Oath of Office, it is incumbent upon this Court to set this matter down for the imposition of sentence prior to January 20, 2025. It is this Court's firm belief that only by bringing finality to this matter will all three interests be served. A jury heard evidence for nearly seven weeks and pronounced its verdict; Defendant and the People were given every opportunity to address intervening decisions, to exhaust every possible motion in support of and in opposition to, their respective positions in what is an unprecedented, and likely never to be repeated legal scenario. This Court must sentence Defendant within a reasonable time following verdict; and Defendant must be permitted 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.

This Court has considered and now rejects the People's suggestion that it adopt the "Alabama Rule" which would preserve the jury verdict while terminating the proceedings as such a remedy would deny Defendant the pathway he needs to exhaust his appellate rights.

The Court has also considered the People's alternative proposal of holding sentence in abeyance until such time as Defendant completes his term of Office and finds it less desirable than imposing sentence prior to January 20, 2025. The reasons are obvious. However, if the Court is unable to impose sentence before Defendant takes his oath of office, then this may become the only viable option.

While this Court as a matter of law must not make any determination on sentencing prior to giving the parties and Defendant an opportunity to be heard, it seems proper at this juncture to make known the Court's inclination to not impose any sentence of incarceration, a sentence authorized by the conviction but one the People concede they no longer view as a practicable recommendation. As such, in balancing the aforementioned considerations in conjunction with the underlying concerns of the Presidential immunity doctrine, a sentence of an unconditional discharge appears to be the most viable solution to ensure finality and allow Defendant to pursue his appellate options. Further, to assuage the Defendant's concerns regarding the mental and physical demands during this transition period as well as the considerations set forth in the 2000 OLC Memorandum, this Court will permit Defendant to exercise his right to appear virtually for this proceeding, if he so chooses. *People v. Reyes*, 72 Misc 3d 1133 [Sup Ct New York County 2011].

PART X: CONCLUSION

THEREFORE, this Court finds that neither the vacatur of the jury's verdicts nor dismissal of the indictment are required by the Presidential immunity doctrine, the Presidential Transition Act or the Supremacy Clause; and

THIS COURT FURTHER FINDS that Defendant's arguments, whether independent of one another, or considered together, in support of his motions pursuant to CPL § 210.40(1) factors (a) through (j) are unpersuasive as no compelling factor, consideration or circumstance submitted demonstrate that imposition of sentence would result in an injustice; and

THIS COURT FURTHER FINDS that there is no legal impediment to imposition of sentence under CPL § 210.20(1)(h); and it is

HEREBY ORDERED that Defendant's motion to dismiss the indictment and vacate the jury verdict pursuant to CPL § 210.20(10)(h) and § 210.40(1) is denied; and it is further

ORDERED, that Defendant appear for sentencing following conviction on January 10, 2025, at 9:30 in the morning, at the Courthouse located at 100 Centre Street in New York County; and it is further

ORDERED, that Defendant may choose to appear at his sentencing in person or virtually. Counsel is directed to inform this Court of Defendant's preference no later than January 5, 2025.

The foregoing constitutes the Decision and Order of the Court.

Dated: January 3, 2025
New York, New York

JAN 03 2025

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

JUAN M. MERCHAN

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.	Ind. No. 71543-23

PRESIDENT TRUMP'S NOTICE OF AUTOMATIC STAY OF CRIMINAL PROCEEDINGS OR, IN THE ALTERNATIVE, MOTION FOR IMMEDIATE STAY

President Donald J. Trump hereby provides notice to the Court and DANY that he will initiate appellate proceedings on January 6, 2025[1] to challenge both (1) this Court's December 16, 2024 ruling wrongly denying President Trump's Post-Trial Presidential Immunity Motion, which arose from, among other established law and jurisprudence, President Trump's claim of Presidential immunity based on evidentiary use of official acts; and (2) this Court's January 3, 2025 ruling wrongly denying President Trump's Motion to Dismiss Pursuant to CPL §§ 210.20(1)(h) and 210.40(1), which was based on, without limitation, President Trump's claim of sitting-President immunity, as extended into the transitional period while President Trump is President-elect. As discussed herein, the commencement of appellate proceedings—which should result in a dismissal of this politically-motivated prosecution that was flawed from the very beginning, centered around the wrongful actions and false claims of a disgraced, disbarred serial-liar former attorney, violated President Trump's due process rights, and had no merit—seeking interlocutory review of these claims of Presidential immunity immediately results in an automatic stay of proceedings in this Court under *Trump v. United States*, 603 U.S. 593 (2024), and related case law, as conceded by the Manhattan DA in past filings. *See, e.g.*, Nov. 19, 2024 DANY Ltr. at 2. Due to the fact that further criminal proceedings are automatically stayed by operation of federal constitutional law, the Court will lack authority to proceed with sentencing, must therefore immediately vacate the sentencing hearing scheduled for January 10, 2025, and suspend all proceedings in the case until the conclusion of President Trump's appeal on Presidential immunity.

In the alternative, even if the filing of President Trump's appeal does not automatically stay these proceedings—which it does—the Court should grant an immediate stay of all pending

[1] President Trump will file an Article 78 proceeding as well as a direct appeal in the Appellate Division, First Department, seeking review of the Court's two recent incorrect rulings on Presidential immunity.

proceedings, including the sentencing scheduled for January 10, 2025, pending the outcome of appellate review, for the same reasons set forth herein.

LEGAL ANALYSIS

I. The U.S. Supreme Court's Decision in *Trump v. United States* Mandates a Stay of Further Trial-Court Proceedings Pending President Trump's Immunity Appeal.

Before the U.S. Supreme Court decided *Trump v. United States*, 603 U.S. 593 (2024), the only court to consider whether the filing of an appeal on Presidential immunity mandates a stay of the underlying criminal proceedings pending appeal—the U.S. District Court for the District of Columbia—held that "Defendant's appeal [on Presidential immunity grounds] ***automatically stays*** any further proceedings that would move this case towards trial or impose additional burdens of litigation on Defendant." *United States v. Trump*, 706 F. Supp. 3d 91, 93 (D.D.C. 2023) (emphasis added). This holding was correct, as DANY has effectively conceded in this very case. *See* Nov. 19, 2024 DANY Ltr. at 2 ("[A]s a practical matter, Defendant's stated plan to pursue immediate dismissal and file interlocutory appeals will likely lead to a stay of proceedings in any event."). The U.S. Supreme Court's subsequent decision in *Trump* reaffirms that such a stay pending interlocutory review is mandatory and automatic, arising directly from the constitutional doctrine of Presidential immunity.

A. *Trump* Mandates That President Trump May Pursue an Interlocutory Appeal on Presidential Immunity Supported by an Automatic Stay.

In recognizing Presidential immunity from criminal prosecution for official acts, the Supreme Court emphasized that "[t]he essence of immunity 'is its possessor's entitlement not to have to answer for his conduct' in court." *Trump*, 603 U.S. at 630 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985)). Because "the President is . . . immune from prosecution, a district court's denial of immunity" is "*appealable before trial*." *Id.* at 635 (emphasis added) (citing

Mitchell, 472 U.S. at 524-30). The Supreme Court repeatedly emphasized that the federal doctrine of separation of powers mandates that an *interlocutory* appeal of questions of Presidential immunity must be available. The Court interpreted *Mitchell* to stand for the proposition that "questions of immunity are *reviewable before trial* because the essence of immunity is the entitlement not to be subject to suit." *Id.* (emphasis added). The criminal process's extensive "safeguards, though important, do not alleviate the need for *pretrial review*," because "under our system of separated powers, criminal prohibitions cannot apply to certain Presidential conduct to begin with. . . . [W]hen the President acts pursuant to his exclusive constitutional powers, Congress cannot—as a structural matter—regulate such actions, and courts cannot review them." *Id.* at 636 (emphasis added). That is because "the interests that underlie Presidential immunity seek to protect not the President himself, but the institution of the Presidency." *Id.* at 632.

Accordingly, "[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," which includes interlocutory review before further trial-court proceedings on the merits. *Trump*, 603 U.S. at 636. "Even if the President were ultimately not found liable for certain official actions, the possibility of an extended proceeding alone may render him unduly cautious in the discharge of his official duties." *Id.* (cleaned up). "Vulnerability to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute." *Id.* (cleaned up). "The Constitution does not tolerate such impediments to 'the effective functioning of government,'" *id.* at 636-37(quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 751 (1982))—and thus the Constitution requires that appellate review of questions of Presidential immunity proceed to completion *before* further proceedings in the trial court. *See id.* at 635-37 (holding that questions of Presidential immunity from criminal prosecution are "appealable before trial" and, under

Mitchell, "reviewable before trial because the essence of immunity is the entitlement not to be subject to suit").

The Supreme Court's repeated citation of *Mitchell v. Forsyth* is particularly telling on this point. Like *Trump* itself, *Mitchell* mandates an automatic stay of trial-court proceedings while the immunity claim is on appeal, and it is widely cited for that very proposition. *See Mitchell*, 472 U.S. at 525-26; *see also, e.g.*, *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989) (citing *Mitchell* to conclude that an automatic stay applies in an immunity appeal); *Chuman v. Wright*, 960 F.2d 104, 104-05 (9th Cir. 1992) (same). *Mitchell* held that "the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct . . . ." 472 U.S. at 525. This requires a stay to protect officials from any burdens of litigation while the question of immunity is under review on appeal, including preventing "the general costs of subjecting officials to the risks of trial," and protecting those officials from "even such pretrial matters as discovery." *Id.* at 526 (cleaned up). Immunity, *Mitchell* held, is "an entitlement not to stand trial or face the other burdens of litigation." *Id.* "The entitlement is an *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial." *Id.* Immunity entails "an entitlement *not to be forced to litigate the consequences of official conduct*," *id.* at 527 (emphasis added), at *any* stage of criminal proceedings—which is exactly what the automatic stay implements.

B. At Minimum, Three Features of *Trump* Reinforce the Requirement of an Automatic Stay.

At minimum, three features of the U.S. Supreme Court's opinion in *Trump* mandate an automatic stay, all confirming that the interlocutory appellate rights that *Trump* recognizes as part and parcel of Presidential immunity include an automatic stay of trial-court proceedings pending

interlocutory appeals relating to the Court's rulings regarding official-acts and Presidential immunity.

1. Forcing President Trump to face sentencing and judgment while his claims of Presidential immunity are still pending on appeal would "deprive immunity of its intended effect."

As noted above, *Trump* held that "[t]he essence of [Presidential] immunity 'is its possessor's entitlement not to have to answer for his conduct" in court." *Trump*, 603 U.S. at 630 (quoting *Mitchell*, 472 U.S. at 525). Forcing a President to continue to defend a criminal case—potentially through trial or, even more dramatically here, through *sentencing and judgment*—while the appellate courts are still grappling with his claim of immunity would, in fact, force that President "to answer for his conduct in court" before his claim of immunity is finally adjudicated. *Id.* The *Trump* Court's references to "the threat of trial, *judgment*, and *imprisonment*" make clear that Presidential immunity violations cannot be ignored in favor of a rushed pre-inauguration sentencing, based on a fatally flawed record that would lead to a wrongful judgment of conviction. *Id.* at 613 (emphasis added). Thus, denying a stay pending appeal would do exactly what *Trump* repeatedly warned against—it would "depriv[e] immunity of its intended effect." *Id.* at 619.

It is of no moment that the Court has suggested an intention to impose a sentence of unconditional discharge. While it is indisputable that the fabricated charges in this meritless case should have never been brought, and at this point could not possibly justify a sentence more onerous than that, no sentence at all is appropriate based on numerous legal errors—including legal errors directly relating to Presidential immunity that President Trump will address in the forthcoming appeals. The Court's non-binding preview of its current thinking regarding a hypothetical sentencing does not mitigate these bedrock federal constitutional violations. *Cf. Trump*, 603 U.S. at 637 ("We do not ordinarily decline to decide significant constitutional

questions based on the Government's promises of good faith."); *United States v. Stevens*, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

The *Trump* Court repeatedly rejected the arguments that would have rendered Presidential immunity ineffective in this fashion. Holding that a mere allegation of unlawfulness cannot deprive a President of immunity, the Supreme Court reasoned that, if it were "[o]therwise, Presidents would be subject to trial on every allegation that an action was unlawful, depriving immunity of its intended effect." 603 U.S. at 619 (cleaned up). Likewise, regarding the government's demand to admit *evidence* of official acts at trial—which underlies one of President Trump's key enumerations of error here—the Supreme Court held "[t]hat proposal threatens to *eviscerate the immunity we have recognized*." *Id.* at 631 (emphasis added). "[T]he Government's position is untenable in light of the separation of powers principles we have outlined." *Id.* "If official conduct for which the President is immune may be scrutinized to help secure his conviction, even on charges that purport to be based only on his unofficial conduct, the 'intended effect' of immunity would be defeated." *Id.* (quoting *Fitzgerald*, 457 U.S. at 756).

Given that Presidential immunity entails immunity from the burdens of criminal litigation such as trial and sentencing, forcing the President to defend a criminal case—*especially* at a sentencing hearing ten days before he is due to become President again—while his claim is adjudicated on appeal would "eviscerate" immunity by "depriving immunity of its intended effect." *Trump*, 603 U.S. at 619, 631. The automatic stay pending appeal prevents this very injury.

2. Presidential immunity nullifies the power of trial courts to act.

Second, as the U.S. Supreme Court emphasized, the doctrine of Presidential immunity nullifies the power of trial courts to act. "Congress cannot act on, and *courts cannot examine*, the

President's actions on subjects within his 'conclusive and preclusive' constitutional authority." *Trump*, 603 U.S. at 609 (emphasis added). "Neither may the courts adjudicate a criminal prosecution that examines such Presidential actions." *Id.* Indeed, "pretrial review" by interlocutory appeal is mandated because "under our system of separated powers, criminal prohibitions cannot apply to certain Presidential conduct to begin with." *Id.* at 635-36. "[W]hen the President acts pursuant to his exclusive constitutional powers, Congress cannot—as a structural matter—regulate such actions, and *courts cannot review them*." *Id.* at 636 (emphasis added). This fact renders a stay pending appeal particularly necessary—the court should not continue to act while its very power to act in the first place is under appellate consideration.

This conclusion, moreover, is even more forceful when it comes to President Trump's claim of sitting-President immunity, which all parties agree becomes comprehensive and absolute as soon as President Trump takes office. *See generally* Memorandum from Randolph D. Moss, Assistant Attorney General, OLC, *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 2000 WL 33711291, at *29 (Oct. 16, 2000) ("[A] sitting President is constitutionally immune from indictment and criminal prosecution."). Sitting-President immunity extends into the brief transition period during which the President-elect prepares to assume the Executive Power of the United States, and the courts thus lack authority to adjudicate criminal claims against him. *See, e.g.*, 3 U.S.C. § 102 note, § 2 ("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. . . . [A]ll officers of the Government [should] conduct the affairs of the Government . . . to take appropriate lawful steps to avoid or minimize disruptions that might be occasioned by the transfer of the executive power . . . ."). That is exactly why the Special Counsel's Office dismissed, during the transition period, their politically-motivated charges brought in Florida and Washington,

D.C. against President Trump, and there is no basis for proceeding differently here by forcing a sentencing rather than allowing President Trump to pursue constitutionally mandated interlocutory appellate rights, which will result in the mandated dismissal of this case.

3. A stay allows for orderly resolution of critical issues.

Third, the U.S. Supreme Court in *Trump* instructed that issues of Presidential immunity should be resolved in a methodical, orderly fashion—not at the attempted breakneck speed of the lower courts in that case. The Supreme Court chastised the lower courts for proceeding without due care and caution: "Despite the unprecedented nature of this case, and the very significant constitutional questions that it raises, the lower courts rendered their decisions on a highly expedited basis." 603 U.S. at 616. "[T]he underlying immunity question . . . raises multiple unprecedented and momentous questions about the powers of the President and the limits of his authority under the Constitution," *id.*, and even the Supreme Court was "deciding [the case] on an expedited basis, less than five months after we granted the Government's request" to expedite the case. *Id.* at 616-17. Allowing a criminal case to proceed to sentencing, while a federal appeal is pending about whether the case should be proceeding in New York County at all, and another appeal is pending directly challenging the Court's Presidential immunity rulings, would constitute "highly expedited" treatment at its worst. *See id.* at 616. Indeed, this Court's current schedule—denying President Trump's sitting-President immunity motion on January 3, 2025, and then scheduling a sentencing hearing just seven days later, immediately before President Trump's inauguration—typifies the "highly expedited" treatment that the U.S. Supreme Court cautioned against. For example, the rushed timing in the current schedule forecloses DANY from making a sentencing submission, which has to be served no less than ten days before sentencing, CPL § 390.40(2), and violates President Trump's right to a full opportunity to prepare his own. *See* CPL

§ 390.40(1). It cannot be ignored that this rushed seven-day period between the ruling and the sentencing has been imposed in a case that dates back to 2018, and includes an enormous record of discovery and trial proceedings. In that context, there is no legal basis to rush ahead to sentencing rather than impose a stay, other than DANY's preference to get this done prior to President Trump's inauguration, and in advance of New York' so that DA Bragg can tell voters in his upcoming election that he completed the case.

Likewise, in such appeals, "whether 'the litigation may go forward in the district court is precisely what the court of appeals must decide.'" *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 741 (2023) (quoting *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997)). "[T]he district court must stay its proceedings while the interlocutory appeal . . . is ongoing." *Id.* This logic applies with even greater force to an interlocutory appeal on the far more momentous question of Presidential immunity from criminal prosecution.

Indeed, the "common practice" of entering such automatic stays "reflects common sense." *Coinbase*, 599 U.S. at 742-43. "Absent an automatic stay of district court proceedings," the U.S. Supreme Court's "decision . . . to afford a right to an interlocutory appeal would be largely nullified." *Id.* at 743. "If the district court could move forward with pre-trial and trial proceedings"—or worse, as here, criminal sentencing and judgment—while the appeal was ongoing, "then many of the asserted benefits" of Presidential immunity "would be irretrievably lost." *Id.* "[C]ontinuation of proceedings in the district court 'largely defeats the point of the appeal.'" *Id.* (quoting *Bradford-Scott*, 128 F.3d at 505). "A right to interlocutory appeal of the [immunity] issue without an automatic stay of the district court proceedings is therefore like a lock without a key, a bat without a ball, a computer without a keyboard—in other words, not especially sensible." *Id.*

C. The Automatic Stay Extends to Both Claims of Presidential Immunity That President Trump Is Currently Raising on Appeal.

The automatic stay of trial-court proceedings required by *Trump*, *Coinbase*, and other jurisprudence, extends to both claims of Presidential immunity that President Trump is currently raising on appeal: (1) Presidential immunity based on evidentiary misuse of official acts, and (2) absolute sitting-President immunity from criminal process, extended to the President-elect.

First, an interlocutory appeal is appropriate to challenge the erroneous widespread admission of *evidence* of immune official acts—including (as here) the unlawful presentation of such evidence both to the grand jury, and to the trial jury. As *Trump* explained, immunity from the evidentiary misuse of official acts is just as fundamental to the doctrine of Presidential immunity as immunity from prosecution for official acts: "If official conduct for which the President is immune may be scrutinized to help secure his conviction, even on charges that purport to be based only on his unofficial conduct, the 'intended effect' of immunity would be defeated." 603 U.S. at 631 (quoting *Fitzgerald*, 457 U.S. at 756). DANY's use of official-acts evidence to probe a President's motives "risk[s] exposing even the most obvious instances of official conduct to judicial examination on the mere allegation of improper purpose, thereby intruding on the Article II interests that immunity seeks to protect." *Id.* at 618. "Indeed, it would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government if in exercising the functions of his office, the President was under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry." *Id.* (cleaned up). "The President's immune conduct would be subject to examination by a jury on the basis of generally applicable criminal laws. Use of evidence about such conduct, even when an indictment alleges only unofficial conduct, would thereby heighten the prospect that the President's official decisionmaking will be distorted." *Id.* at 631. Because evidentiary-use

immunity implicates the same constitutional concerns as direct-prosecution immunity, *see id.*, it directly follows that the automatic stay pending appeal applies to evidentiary-use appeals as well.

Second, President Trump's claim of sitting-President immunity implicates all the same policies and concerns as official-act immunity and heightens the need for the automatic stay. All parties agree that, once President Trump assumes office, he will be absolutely immune from any criminal process, state or federal, under the doctrine of sitting-President immunity. But this Court's decision to schedule a sentencing hearing on January 10, 2025, at the apex of Presidential transition and ten days before President Trump assumes Office, necessitates that President Trump will be forced to continue to defend his criminal case while he is in Office—at the very least, on appeal from judgment, as this Court's January 3 Order repeatedly and expressly recognizes. *See, e.g.*, Jan. 3, 2025, Decision and Order, at 17 ("Defendant must be permitted 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. . . . [A] sentence of an unconditional discharge appears to be the most viable solution to ensure finality and allow Defendant to pursue his appellate options."). Moreover, DANY could also pursue an appeal of any sentencing determination they view as contrary to law. *See* CPL § 450.20(4). Thus, under the current schedule, instead of facing no further criminal proceedings while he is President, President Trump will be forced to deal with criminal proceedings for years to come, which is the opposite of what the doctrine of sitting-President immunity requires. Forcing President Trump to prosecute, or even defend, a criminal appeal during his term of Office—an appeal that could result in a remand for *another criminal trial* during President Trump's term—is itself a clear-cut violation of sitting-President immunity.

Moreover, the prospect of imposing a sentence on President Trump just before he assumes Office as the 47th President raises the specter of other possible restrictions on liberty, such as

travel, reporting requirements, registration, probationary requirements, and others—all of which would be constitutionally intolerable under the doctrine of sitting-President immunity. These constitutional errors would compound the already grave constitutional problems with this proceeding raised in our prior pleadings, including forcing a jury on the Defendant in record time and without proper process.

D. The Automatic Stay Extends to Criminal *Sentencing* as Well as Trial.

Because the right of interlocutory appeal and automatic stay prevent a trial court from proceeding to *trial* pending appeal on immunity, it follows *a fortiori* that the same rights prevent the trial court from forcing President Trump from undergoing *criminal sentencing and judgment* while his immunity appeal is pending. As *Trump* repeatedly emphasizes, Presidential immunity protects the President from the entire "suit," not just certain procedural stages of the suit. "The essence of immunity is its possessor's entitlement not to have to answer for his conduct in court." 603 U.S. at 630 (cleaned up). "Official immunity, including the President's official-act immunity, is '*immunity from suit* rather than a mere defense to liability.'" *Blassingame v. Trump*, 87 F.4th 1, 29 (D.C. Cir. 2023) (emphasis in original) (quoting *Mitchell*, 472 U.S. at 526). "It is 'an entitlement not to stand trial or face the other burdens of litigation.'" *Id.* (quoting *Mitchell*, 472 U.S. at 526). "Those concerns are particularly pronounced when the official claiming immunity from suit is the President." *Id.* Thus, the President's "immunity from suit," *id.*, extends to immunity from the imposition of criminal sentence and final judgment as well as trial, because "[t]he Framers' design of the Presidency did not envision such counterproductive burdens on the 'vigor' and 'energy' of the Executive." *Trump*, 603 U.S. at 614 (cleaned up) (quoting The Federalist No. 70, at 471-72). Thus, President Trump "must be afforded that opportunity" to litigate his claims on appeal "before the proceedings can mov[ing] ahead to the merits, including

before any merits-related discovery," *Blassingame*, 87 F.4th at 29—or, as here, before "moving ahead to" a *final judgment* on "the merits," *id.* (emphasis added). Indeed, undergoing a criminal sentencing is the most extreme example of "hav[ing] to answer for his conduct in court," *Trump*, 603 U.S. at 630 (cleaned up)—exactly what the doctrine of Presidential immunity forbids and why an automatic stay is mandated.

E. New York Appellate Law and Practice Support an Immediate Stay.

To be clear, the filing of President Trump's appeal on immunity *automatically* stays further criminal proceedings in this Court—including the imminent sentencing hearing scheduled for January 10, 2025—pending the outcome of the appeal, and it does so as a matter of federal constitutional law. *See Trump*, 706 F. Supp. 3d at 93 ("Defendant's appeal *automatically stays* any further proceedings that would move this case towards trial or impose additional burdens of litigation on Defendant") (emphasis added). As the U.S. Supreme Court's *Trump* decision makes clear, this automatic stay is an essential part of the federal doctrine of Presidential immunity itself, which arises from the very structure of the U.S. Constitution. *Trump*, 603 U.S. at 629-30, 634-38. As a matter of federal constitutional law, the doctrine of Presidential immunity binds New York courts under the Supremacy Clause. *See e.g.*, *Trump v. Vance*, 591 U.S. 786, 810 (2020) (holding that a President can raise federal challenges to a state criminal subpoena under "the Supremacy Clause," which is an "avenue [that] protects against local political machinations 'interposed as an obstacle to the effective operation of federal constitutional power'") (quoting *United States v. Belmont*, 301 U.S. 324, 332 (1937)). When the "judicial authority is invoked in aid" of the United States' authority in the "field of its powers," "State Constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an

obstacle to the effective operation of a federal constitutional power." *Belmont*, 301 U.S. at 331-32.

Vitally, there is no conflict between the Supreme Court's automatic-stay doctrine in *Trump* and New York appellate law and practice here, because President Trump is equally entitled to a stay under New York law. Section 7805 of the CPLR expressly authorizes stays of "further proceedings" in the trial court pending resolution of an Article 78 proceeding. CPLR § 7805 ("On the motion of any party or on its own initiative, *the court may stay further proceedings*, or the enforcement of any determination under review . . . ." (emphasis added)). Relying on this provision, New York appellate courts routinely grant stays of criminal proceedings while the trial court's authority to conduct further proceedings is subject to appellate review in an Article 78 proceeding. *See, e.g.*, *Kisloff v. Covington*, 73 N.Y.2d 445, 448 (1989) (noting the Appellate Division stayed the prosecution after the filing of an Article 78 petition "seeking to prohibit further prosecution"); *Dow v. Tomei*, 107 A.D.3d 986, 987 (2d Dep't 2013) (staying enforcement of order "compelling the petitioner to appear in court for resentencing"); *Gorghan v. DeAngelis*, 25 A.D.3d 872, 872-73 (3d Dep't 2006) ("Thereafter, County Court . . . summarily denied petitioner's motion which sought an order prohibiting retrial based on double jeopardy grounds and petitioner initiated this proceeding. By order of this Court, all further proceedings in County Court have been stayed pending this decision."); *McLaughlin v. Eidens*, 292 A.D.2d 712, 713 (3d Dep't 2002) ("By order of this Court, all proceedings have been stayed" pending resolution of an Article 78 proceeding challenging the trial court's authority to proceed); *Van Wie v. Kirk*, 244 A.D.2d 13, 23 (4th Dep't 1998) ("Upon filing the instant CPLR article 78 petition, petitioner obtained a stay of proceedings" preventing the criminal trial from proceeding); *Lacerva v. Dwyer*, 177 A.D.2d 747, 748 (3d Dep't 1991) ("Further proceedings were then stayed by the court to permit preparation of this CPLR

article 78 proceeding to prohibit retrial on the ground of double jeopardy. This court stayed the criminal trial pending determination of this proceeding."); *see also Rush v. Mordue*, 68 N.Y.2d 348, 352 n.1 (1986) (noting the parties stipulated to a stay in the underlying criminal case pending the outcome of the proceedings and appeal in the Court of Appeals); *James N. v. D'Amico*, 139 A.D.2d 302, 309-10 (4th Dep't1988) (Boomer, J., concurring) (arguing that stays should be issued under CPLR 7805 upon a "showing of probability of success on the merits of the [Article 78] proceeding").

Such stays of criminal proceedings include cases granting a stay to prevent the trial court from conducting a sentencing hearing pending decision on an Article 78 petition to block the sentencing from occurring—the exact procedural posture of this case. *See, e.g., Dow*, 107 A.D.3d at 986. They also include stays issued at the prosecution's request, not just the defense. *See Vance v. Roberts*, 176 A.D.3d 492, 493 (1st Dep't 2019) ("The People sought and obtained a stay of this order and commenced this article 78 proceeding."); *Hoovler v. DeRosa*, 143 A.D.3d 897, 899 (2d Dep't 2016) ("On July 6, 2016, the . . . District Attorney of Orange County commenced this proceeding pursuant to CPLR article 78 . . . to prohibit Judge DeRosa from enforcing his order dated July 1, 2016. This Court stayed enforcement of that order, as well as the trial in the criminal action, pending determination of this proceeding.").

Section 7805's authorization of stays of all "further proceedings" in criminal cases, and New York courts' common practice of granting such stays in Article 78 proceedings challenging the trial court's authority to proceed in criminal cases, implement the same policy reflected in the U.S. Supreme Court's decision in *Trump*. In fact, it would be astonishing if such a stay, which is routinely granted in garden-variety criminal cases, were denied to a President of the United States asserting claims of Presidential immunity from prosecution that "raise[s] multiple unprecedented

and momentous questions about the powers of the President and the limits of his authority under the Constitution." *Trump*, 603 U.S. at 616.

CONCLUSION

By virtue of President Trump's filing of appellate proceedings raising his claims of Presidential immunity, all proceedings in this Court are automatically stayed by operation of federal constitutional law. In the alternative, even if such a stay were discretionary, the Court should grant such a stay. The Court should vacate the sentencing hearing scheduled for January 10, 2025, and suspend all further deadlines in the case until President Trump's immunity appeals are fully and finally resolved, which should result in a dismissal of this case, which should have never been brought in the first place. Further, President Trump respectfully requests that this Court notify the parties by Monday, January 6, 2025, at 2 p.m., whether the Court intends to proceed with the sentencing hearing on January 10, 2025, which should not occur, notwithstanding President Trump's interlocutory appeal on immunity, to allow sufficient time for President Trump to seek an emergency appellate review.

Dated: January 5, 2025
New York, New York

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

In the Matter of the Application of:	Case No. 2025-00118
DONALD J. TRUMP,	
Petitioner,	**NOTICE OF PETITION**
For a Judgment Under Article 78 of the CPLR	
-against-	
THE HONORABLE JUAN M. MERCHAN, A.J.S.C., and PEOPLE OF THE STATE OF NEW YORK by ALVIN L. BRAGG, JR., MANHATTAN DISTRICT ATTORNEY,	
Respondents.	

PLEASE TAKE NOTICE that, upon the Verified Article 78 Petition brought by Order to Show Cause, dated January 6, 2025, President Donald J. Trump, as Petitioner herein, will move this Court, at a Term to be held at the Courthouse thereof, located at 27 Madison Avenue, New York, NY 10010, on the 27 day of January, 2025, at 9:30 a.m., or as soon thereafter as counsel can be heard, for an Order on the first cause of action, finding that the denials by Justice Merchan of President Trump's claims of Presidential immunity, both Presidential official-acts immunity based on the evidentiary misuse of official acts before the grand jury and at trial, and the absolute immunity of a sitting President from any criminal process, state or federal, which extends into the brief but crucial period of transition when President Trump is the President-Elect, are in excess of Supreme Court's jurisdiction under CPLR § 7803(2); and for such other and further relief as this Court may deem just and proper.

Dated: January 6, 2025
New York, New York

Respectfully submitted,

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VERIFIED ARTICLE 78 PETITION

TO THE APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK:

Petitioner President Donald J. Trump, by his attorneys, Blanche Law PLLC, alleges the following as and for his Verified Petition against The Honorable Juan M. Merchan, A.J.S.C. ("Justice Merchan") and the People of the State of New York, by Alvin L. Bragg, Jr., Manhattan District Attorney ("DANY") (collectively, "Respondents"):

PRELIMINARY STATEMENT

1. President Trump brings this Article 78 proceeding to redress the serious and continuing infringement on his Presidential immunity from criminal process that he holds as the 45th and soon-to-be 47th President of the United States of America. In this Petition, President Trump seeks review of two closely related, interlocking, and erroneous decisions by Justice Merchan denying President Trump's claims of Presidential immunity: (1) Justice Merchan's December 16, 2024 Decision and Order denying President Trump's Post-Trial Presidential Immunity Motion, which (among other things) asserted Presidential immunity based on evidentiary misuse of official acts before the grand jury and at trial, in violation of *Trump v. United States*, 603 U.S. 593 (2024) ("Presidential official-acts immunity"); and (2) Justice Merchan's January 3, 2025 Decision and Order denying President Trump's post-trial motion that asserted, among other grounds, President Trump's undisputed absolute immunity from criminal process as the sitting President, which extends into the brief, crucial transitional period under which President Trump is President-elect and is conducting the work necessary to assume the Executive power of the United States ("sitting-President immunity"). These errors violate the doctrine of Presidential immunity and completely undermine the erroneous jury verdict in this meritless, politically motivated case that violated

President Trump's fundamental due process rights and rested heavily on the testimony of disbarred, disgraced serial liar Michael Cohen.

2. Justice Merchan's erroneous decisions threaten the institution of the Presidency and run squarely against established precedent disallowing any criminal process against a President-Elect, as well as prohibiting the use of evidence of a President's official acts against him in a criminal proceeding. Under *Trump*, the Supremacy Clause of the United States Constitution, U.S. CONST. art. VI, cl. 2, and other established law and jurisprudence, *see* N.Y. CONST. art. I, § 6, Justice Merchan is without authority under the law to proceed to sentencing while President Trump exercises his federal constitutional right to challenge these rulings, and the erroneous jury verdict in the underlying criminal case must be vacated and the charges against President Trump must be dismissed with prejudice, without further delay.

JURISDICTION AND VENUE

3. This Court has jurisdiction pursuant to CPLR §§ 7804(b) and 506(b)(1).

4. Venue in this Court is proper pursuant to CPLR § 506(b)(1) because the action, in the course of which the matter sought to be enforced or restrained originated, is triable in Supreme Court, New York County.

THE PARTIES

5. President Trump is the 45th and will soon be the 47th President of the United States. President Trump is a defendant in the matter captioned *People v. Trump*, Indictment No. 71543-23, currently pending before Supreme Court, New York County, Criminal Division, and is currently the President-Elect of the United States of America. On January 20, 2025, President Trump will be sworn in again as President of the United States.

6. Respondent Justice Merchan is an Acting Justice of the Supreme Court, New York County. Justice Merchan is the Justice presiding in the matter captioned *People v. Trump*, Ind. No. 71543-23.

7. Respondent Alvin L. Bragg, Jr., Manhattan District Attorney, for the People of the State of New York, is responsible for the prosecution of the matter *People v. Trump*, Ind. No. 71543-23.

FACTUAL BACKGROUND

Procedural History

I. Pre-Trial Proceedings

8. On February 28, 2024, the United States Supreme Court granted certiorari in *Trump v. United States* to determine "[w]hether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office." 2024 WL 833184, at *1 (Feb. 28, 2024). Less than a week earlier, DANY had disclosed their intention to present evidence at trial involving official actions by President Trump while in office during his first term as President. Ex. 1 at 50.

9. Within a week of the United States Supreme Court's grant of certiorari, on March 7, 2024, President Trump moved to exclude evidence of President Trump's official acts at trial and for an adjournment to allow time for the United States Supreme Court to decide the immensely significant constitutional issue of presidential immunity, a matter of first impression. Ex. 2. President Trump, when discussing the timing of his motion, pointed to the recent grant of certiorari and the recent emphasis on federalism principles by the United States Supreme Court in *Trump v. Anderson*, 601 U.S. 100 (2024). *Id.* at 2. In his motion, President Trump specifically challenged admissibility of several pieces of proposed evidence that reflected official acts of the President shielded by Presidential immunity. These included statements issued through his official

Presidential Twitter (now known as X) account to the American people in 2018, statements to the press in official Presidential media appearances, documentary evidence reflecting official Presidential actions, and testimony of former White House employees regarding official actions taken by President Trump during his first term as President. *Id.* at 3-4.

10. Justice Merchan denied President Trump's motion on April 3, 2024, citing supposed timeliness issues. Ex. 3. He "decline[d] to consider" whether Presidential immunity precludes evidence of President Trump's official acts at trial. *Id.* at 6.

11. On April 10, 2024, President Trump filed a Verified Article 78 Petition seeking, *inter alia*, a writ of prohibition as to Justice Merchan's April 3, 2024 Decision and Order. *Trump v. Merchan*, No. 2024-02413 (1st Dep't Apr. 10, 2024). This Petition was denied on May 23, 2024. *Id.*, NYSCEF No. 21. In denying the Petition, the Court reasoned that the immunity issues "may be raised in a direct appeal" and need not be addressed pre-trial. *Id.* at 4. On July 1, 2024, this reasoning was directly refuted by the United State Supreme Court in *Trump v. United States*, 603 U.S. 593, 635 (2024) ("If the President is . . . immune from prosecution, a . . . denial of immunity would be *appealable before trial*.") (emphasis added); *see also id.* at 636 (noting the "need for pretrial review" of claims of Presidential immunity).

12. On April 15, 2024, the first day of jury selection, DANY made an offer of proof involving official acts of President Trump while in office in 2018. Ex. 4, Tr. 41-46. In response, President Trump renewed his objection to the use of such evidence, under the doctrine of Presidential immunity. Later on April 15, 2024, President Trump submitted his objections to Justice Merchan, including objections to statements issued through his official Presidential Twitter account to the American people in 2018, documentary evidence reflecting official Presidential actions, and

witness testimony regarding official actions taken by President Trump during his first term in office. Ex. 5.

13. On April 19, 2024, Justice Merchan ruled that President Trump would have to wait until trial to make such immunity objections, to be addressed as and when such objections would arise during trial proceedings. Ex. 4, Tr. 802. This ruling runs directly against the requirement of *Trump* that immunity issues must be resolved *pre-trial*. *Trump*, 603 U.S. at 635-36. Thus, Justice Merchan violated the doctrine of Presidential official-act immunity by (among other violations) requiring President Trump to sit through an entire criminal trial and object to official-acts evidence on a case-by-case basis, instead of considering the People's proffer of anticipated evidence and excluding it before trial.

II. Trial Proceedings Regarding Official-Acts Immunity

14. Throughout the course of the trial in this meritless case, President Trump renewed his objections based on Presidential immunity regarding evidence involving his official acts as President, which were repeatedly and erroneously denied by Justice Merchan. *See, e.g.*, Ex. 4, Tr. 2121-22 (witness testimony of former White House employee's official-capacity interactions with then-President Trump and the press); *id.* at 2370 (documentary evidence reflecting official presidential actions)

15. The trial elicited lengthy testimony regarding the official acts of President Trump.

16. For example, DANY elicited such testimony from former White House Communications Director Hope Hicks. Hicks joined President Trump's Administration in 2017 as his Director of Strategic Communications. Ex. 4, Tr. 2207-08. Her official duties included highlighting the President's agenda. *Id.* at 2208.

17. Hicks became the White House Communications Director in August 2017, working in close proximity to the Oval Office and speaking with President Trump "[e]very day." Ex. 4, Tr. 2208-10. Her duties included coordinating the Administration's communication efforts throughout all government agencies to ensure the President's agenda was prioritized, and to maximize the impact of positive messaging about the President and his work to the American people. *Id.* at 2210.

18. At trial, Hicks testified about her official-capacity communications with President Trump and the press concerning the January 12, 2018 *Wall Street Journal* article offered into evidence by DANY. *See* Ex. 4, Tr. 2215-16. Hicks testified that she spoke with President Trump about "how to respond to the story" and about "a team" response. *Id.* at 2217.

19. Hicks also testified about her communications with President Trump regarding a February 2018 *New York Times* article discussing Michael Cohen's payments, Ex. 4, Tr. 2219-21, and about a Karen McDougal interview on CNN in March 2018. *Id.* at 2214-15. Hicks testified, "I did speak to Mr. Trump. I was the Communications Director. This was a major interview. Yes. We just spoke about the news coverage of the interview, how it was playing out." *Id.*

20. At trial, DANY also offered evidence from Madeleine Westerhout, a Special Assistant to the President and Executive Assistant to the President in the White House, which discussed in detail President Trump's conduct of official business in the White House, including invasive testimony about President Trump's Presidential practices in communications with his Chief of Staff and other key aides, his work habits in the Oval Office and on Air Force One, and the manner in which President Trump conducted official business on behalf of the United States. Notwithstanding that this testimony exclusively discussed President Trump's *official* conduct,

Justice Merchan erroneously held that Ms. Westerhout's testimony "reflected unofficial conduct in its entirety." Ex. 6 at 22.

21. During trial, DANY offered evidence of official Presidential communications made in 2018 by President Trump's official White House Twitter account used to communicate with the American people. Ex. 7 (discussing issues of public importance surrounding witnesses and allegations involved in this case)].

22. During trial, DANY offered documentary evidence reflecting official Presidential actions, including the 2017 Office of Government Ethics (OGE) form signed by President Trump regarding compliance of the President with applicable laws and regulations. Ex. 8; Ex. 4, Tr. 2365-76.

23. During DANY's trial summation, DANY repeatedly emphasized official-acts testimony from Hicks and the statements issued by President Trump through his official White House Twitter account to the jury, as well as the inadmissible documentary evidence. *See* Ex. 4, Tr. 4598, 4621, 4747, 4756, 4766, 4790.

24. On May 30, 2024, the trial in this matter concluded and the jury was discharged.

25. On July 1, 2024, the United States Supreme Court issued its decision in *Trump v. United States*, 603 U.S. 593 (2024). The Court held that the President has absolute immunity from criminal prosecution for exercising his core constitutional powers, and at least "presumptive immunity" for other official actions within the "outer perimeter" of his official responsibilities. *Id.* at 606, 618. The Court held that the doctrine of Presidential immunity prevents the *evidentiary* use of official acts against a President at trial, because it prohibits a jury from "examin[ing] acts for which a President is immune" "even on charges that purport to be based only on his unofficial conduct." *Id.* at 630-31. The Court held that immunity issues "must be addressed at the outset of a proceeding." *Id.* at 636.

26. Following the United States Supreme Court's decision, President Trump, on July 1, 2024, sought leave to file a motion to set aside the jury verdict based upon that decision. Justice Merchan granted this request on July 2, 2024, setting a briefing schedule and delaying the sentencing date to allow consideration of the issue. Ex. 9.

27. President Trump then filed a detailed motion to vacate the jury verdict and dismiss the indictment based on extensive misuse of evidence of his official acts, both to the grand jury and at trial, which was unconstitutional under *Trump v. United States*, 603 U.S. 593 (2024). *See* Ex. 15, which is incorporated by reference herein.

28. On December 16, 2024, Justice Merchan denied President Trump's motion to dismiss based on official-acts immunity. Ex. 6.

29. Justice Merchan's Decision and Order wrongly concluded that all of the contested evidence at trial "relate[d] entirely to unofficial conduct entitled to no immunity protections." Ex. 6 at 41. As discussed more fully under Count I, below, this Decision and Order contains many errors, and President Trump challenges all such errors in this Article 78 proceeding.

30. Justice Merchan conceded that many of President Trump's claims were properly preserved, particularly in regard to the testimony of White House Communications Director Hope Hicks, President Trump's official communications with the American people via Twitter, and President Trump's official submissions as President of the OGE forms. Ex. 6 at 40. He wrongly found other claims were unpreserved, despite acknowledging objections based on Presidential immunity made by counsel both before, during, and after trial, including "approximately 170 times during the course of the trial." *Id*. at 9-15.

31. In so finding, Justice Merchan disregarded the United States Supreme Court's strict instruction 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*, 603 U.S. at 636—and instead focused improperly on the "obligation of counsel to make timely objections" during trial proceedings. Ex. 6 at 15. In addition to the fact that timely objections were in fact lodged, Presidential immunity violations are unwaivable "mode of proceedings" errors because they result in institutional harms to the structure of the federal government. *See People v. Mairena*, 34 N.Y.3d 473, 482 (2019); *People v. Mack*, 27 N.Y.3d 534, 540 (2016) ("Mode of proceedings errors are immune not only from the rules governing preservation and waiver but also from harmless error analysis."); *see also, e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993) (reasoning that "structural defects in the constitution of the trial mechanism . . . defy analysis by harmless-error standards" because those errors "infect the entire trial process" (cleaned up)).

32. Justice Merchan erroneously held that none of the evidence regarding White House Communications Director Hope Hicks' testimony, nor testimony from the other witnesses, was covered by the Presidential Immunity doctrine. Ex. 6 at 40-41.

33. In so finding, Justice Merchan gave no weight to Hope Hicks' official role in the White House, which was to ensure the President's agenda was prioritized and to maximize the impact of the President's message to the American people. Ex. 4, Tr. 2208-10. Justice Merchan declined to follow *Trump*, which specifically forbids "testimony" from a President's "advisors" for the purpose of "probing the official act" and wrongly found no issue with such "highly intrusive" inquiries into the President's motives by means of intimate communications among President Trump and his close advisors about how to respond to the American people over matters of public concern. *Trump*, 603 U.S. at 632 n.3. In particular, these communications involved public concern by the American people about public accusations against President Trump made in 2018 regarding the same issues in this case. *See* Ex. 6 at 19-20.

34. Justice Merchan committed the same error with respect to the testimony of Special Assistant to the President and Executive Assistant to the President Madeleine Westerhout, by allowing invasive "testimony" from a President's "advisors" for the purpose of "probing the official act[s]" of President Trump. *Trump*, 603 U.S. at 632 n.3. The prospect that a President's most confidential White House aides might be forced to testify against him in a criminal trial about his conduct of official business and the course of sensitive internal discussions in the White House raises a grave and manifest risk of deterring bold and unhesitating decisionmaking by the Chief Executive.

35. Justice Merchan erroneously found that none of the Twitter postings by President Trump to the American public constituted "official acts." Ex. 6 at 32; *see also* Ex. 4, Tr. 55 ("If the argument is that tweets that your client sent out while he was President cannot be used because they somehow constitute an official presidential act, it's going to be hard to convince me that something that he tweeted out to millions of people voluntarily cannot be used in court when it's not being presented as a crime. It's just being used as an act, something that he did. But we'll wait until we get that submission.").

36. In so finding, Justice Merchan reasoned that, while "[u]ndoubtedly, there are Tweets . . . that a President makes that qualify as official communications with the public regarding matters of public concern," the Tweets at issue "d[id] not fit that mold" because they were "entirely personal in nature" and did not "advance a policy concern or other public interest." Ex. 6 at 34.

37. Justice Merchan declined to follow the clear instruction in *Trump* that "most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities," and thus be immune, "[e]ven when no specific federal responsibility requires his communication." *Trump*, 603 U.S. at 627, 629. These public communications through

an official White House social-media account were indisputably official actions of the President. *See, e.g.*, *Lindke v. Freed*, 601 U.S. 187, 191 (2024) (holding that "such speech is attributable to the State only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media"). Here President Trump possessed actual authority to speak on behalf of the Executive Branch, and he purported to exercise that authority when he tweeted on matters of public concern to the American public.

38. Justice Merchan reasoned that a President's "decision making is not distorted by the threat of future litigation stemming from" the sort of Tweets at issue, notwithstanding that the Tweets were permitted by Justice Merchan to become a focal point of this very criminal action against President Trump. Ex. 6 at 34. In so reasoning, Justice Merchan disregarded *Trump's* strict instruction against use of a President's public statements on matters of public concern in criminal proceedings, as such use would chill the President's willingness and ability to communicate with the public. *Trump*, 603 U.S. at 618.

39. Justice Merchan incorrectly found that the evidence of President Trump's statements on the OGE forms, completed in his official capacity as President, were "not deemed official conduct." Ex. 6 at 26.

40. In so finding, Justice Merchan acknowledged that "the President is . . . required to complete [the] OGE Form" and conceded that "Defendant's statement that he 'was required to make the disclosures on the Form in his official capacity as President' may be true." Ex. 6 at 26.

41. Justice Merchan reasoned in error that, since other federal employees were required to complete OGE forms in their own various official capacities, the President completing the form in his official capacity did not render the communications made therein "within the outer perimeter of his authority." Ex. 6 at 26. Justice Merchan did not address the instruction of *Trump* that the

President's speaking to the American people regarding the "public concern," which is involved in the purpose behind the OGE forms, "certainly can qualify as official" conduct. *Trump*, 603 U.S. at 618, 629.

42. Justice Merchan wrongfully found that even if all the evidence constituted official acts subject to Presidential immunity, the admission of such evidence was "harmless." Ex. 6 at 38. In so finding, Justice Merchan wrongly ignored the fact that the *Trump* Court rejected the notion that "as-applied challenges in the course of the trial suffice to protect Article II interests." *Trump*, 603 U.S. at 635.

43. Justice Merchan found that evidence presented to the Grand Jury did not consist of official acts but, rather, "nothing more than conversations about personal matters." Ex. 6 at 40.

44. Justice Merchan relied on his previous findings regarding the evidence at issue, and he disregarded *Trump's* admonition that "[e]ven if the President were ultimately not found liable for certain official actions, the possibility of an extended proceeding alone may render him unduly cautious in the discharge of his official duties." *Trump*, 603 U.S. at 636 (cleaned up).

45. Justice Merchan also erred and violated the doctrine of Presidential immunity by admitting extensive testimony about President Trump's interactions with Cabinet-level officials, public statements about federal investigations, and similar matters.

46. For example, at trial, DANY presented a February 2018 text message from convicted perjurer Michael Cohen indicating that President Trump had "approved" Cohen addressing the FEC complaint, both formally and through a public statement. Ex. 11; *see also* Ex. 12. Contrary to Justice Merchan's erroneous decision admitting this statement, these communications involved President Trump using a third-party (Cohen) to make "public communications" that "are likely to

fall comfortably within the outer perimeter of his official responsibilities." *Trump*, 603 U.S. at 598.

47. In addition, Cohen testified that President Trump "told" him that the FEC inquiry would be "taken care of" by then-Attorney General Jeff Sessions, and that Cohen conveyed that information to another individual. Ex. 4, Tr. 3576-77. Even if this conversation had happened, which we do not concede, Cohen's testimony included information regarding President Trump's "exclusive authority and absolute discretion" to "decide which crimes to investigate and prosecute, including with respect to allegations of election crime." *Trump*, 603 U.S. at 620 (cleaned up). This reflects the exercise of core, unreviewable Executive power, and Justice Merchan plainly abused his discretion by admitting it. *Id.*

48. During trial, Cohen sought to justify his perjury before Congress by reference to President Trump's public position in response to the investigations by Congress and Special Counsel Mueller that "there was no Russia-Russia-Russia." Ex. 4, Tr. 3550. But President Trump's public statements in response to the Congressional and Special Counsel investigations were part of his official authority to address the American people. Moreover, Presidential power includes the authority to engage in the "hurly-burly, the give-and-take of the political process between the legislative and the executive." *Trump v. Mazars USA, LLP*, 591 U.S. 848, 859 (2020) (cleaned up). The evidence relating to President Trump's responses to these Congressional and Special Counsel investigations are "at least" entitled to "presumptive immunity." *Trump*, 603 U.S. at 614.

49. DANY also elicited testimony from Cohen suggesting that he was seeking the "power of the President" in 2017 to protect him in connection with Congressional investigations. Ex. 4, Tr. 3549. Cohen was more explicit with respect to 2018 communications with attorney Robert Costello, which he described as a means of "back channel communication to the President." *Id.*

at 3594. Specifically, Cohen told the jury that a June 13, 2018 email, GX 207, referred to "potential pre-pardons" that Cohen and Costello discussed after President Trump allegedly referenced the concept. Again, this testimony addressed the exercise of the President's Pardon Power, which is a core, unreviewable Executive power subject to absolute immunity. "The President's authority to pardon," established in Article II, § 2, cl. 4, is one of the "core" constitutional powers "invested exclusively in [the President] him by the Constitution." *Trump*, 603 U.S. at 606, 609. Justice Merchan plainly erred and abused his discretion by admitting such testimony about the exercise of core Executive power.

50. These and other fatal errors in Justice Merchan's ruling on official-acts immunity entail that Justice Merchan's ruling should be reversed, the jury verdict vacated, and the case dismissed with prejudice.

III. President Trump's Re-Election And Sitting-President Immunity

51. On November 5, 2024, President Trump was re-elected as the 47th President of the United States in a historic landslide victory.

52. Once President Trump was re-elected, he became the President-Elect of the United States for the brief but crucial period of 75 days between November 5, 2024, and January 20, 2025, as reflected in the Presidential Transition Act, 3 U.S.C. § 102 note.

53. As sitting President of the United States, President Trump is shielded by sitting-President immunity: absolute Presidential immunity from any criminal investigation or prosecution, state or federal. "In the criminal context, . . . 'the separation of powers precludes the criminal prosecution of a sitting President.'" *Trump*, 603 U.S. at 616 n.2 (2024) (quoting the Brief of the United States). "Given the potentially momentous political consequences for the Nation at stake, there is a fundamental, structural incompatibility between the ordinary application of the criminal process

and the Office of the President." Memorandum from Randolph D. Moss, Assistant Attorney General, OLC, *A Sitting President's Amenability to Indictment and Criminal Prosecution* ("2000 OLC Memo"), 2000 WL 33711291, *28.

54. DANY concedes that, once President Trump assumes office on January 20, 2025, the underlying criminal case against him cannot proceed in any fashion.

55. As Justice Story wrote, the President's Executive power includes "the power to perform [his duties], without any obstruction or impediment whatsoever. *The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office* . . . ." 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, pp. 418-19 (1st ed. 1833) (emphasis added). "[T]he indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions." 2000 OLC Memo, at *1.

56. Sitting-President immunity protects President Trump from both state and federal criminal investigations or prosecutions. The Supreme Court has held for over 200 years that "States have no power . . . to retard, impede, burden, or in any manner control the operations" of the federal government. *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819). As the Supreme Court reaffirmed in 2020, "the Constitution guarantees 'the entire independence of the General Government from any control by the respective States.'" *Trump v. Vance*, 591 U.S. 786, 800 (2020) (quoting *Farmers and Mechanics Sav. Bank of Minneapolis v. Minnesota*, 232 U.S. 516, 521 (1914)). "It follows that States also lack the power to impede the President's execution of those laws." *Id.* at 801. Under this principle, "[t]he Supremacy Clause prohibits state judges and prosecutors from interfering with a President's official duties." *Id.* at 806. Because federal prosecutors may not

charge or proceed in any way against a sitting President, it follows *a fortiori* that state prosecutors may not do so either. *See id.*

57. Accordingly, once a President assumes office, any pending criminal cases against him, whether state or federal, must be dismissed. *See, e.g., Vance*, 591 U.S. at 806.; 2000 OLC Memo, at *8. To leave a criminal indictment—or, as here, a legally erroneous conviction, sentencing, and judgment—hanging over the President of the United States while he is in office would "boggle[] the imagination" and play "Russian roulette" with America's vital interests and national security. 2000 OLC Memo, at *8.

58. Sitting-President immunity also shields the *President-elect* from criminal process during the brief but crucial period between his election and his inauguration, during which he prepares to assume Office and exercise the Executive power of the United States.

59. The federal Special Counsel's Office recently recognized this reality by completely dismissing its criminal cases against President Trump *before* he takes office on January 20, 2025.

60. In the Presidential Transition Act, 3 U.S.C. § 2 note, Congress emphasized the continuity and identity between the President's transitional duties and his official duties upon inauguration: "The national interest requires that such transitions in the office of President be accomplished so as to assure continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal Government, both domestic and foreign." 3 U.S.C. § 2 note. The President-elect's transition activities are *Presidential* activities whose burden or disruption threatens the national interest: "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." *Id.* Accordingly, under the Act, "*all officers of the Government*" are required to "so conduct the affairs of the Government for which they exercise responsibility and authority as . . . 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." *Id.* (emphasis added).

61. Citing the Presidential Transition Act, DOJ explained: "Based on a recognition that 'the orderly transfer of the executive power in connection with the expiration of the term of office of a President and the inauguration of a new President' is in the 'national interest,' Congress believed that *transition efforts are a public function* that should be financed by government funds rather than by private interests." *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 OLC Memo), 2001 WL 34058234, at *3 (emphasis added).

62. The Presidential nature of transition activities has been recognized by many, including President Kennedy and many members of Congress: "[E]xpenses incurred by the President-elect and Vice-President-elect after the election . . . are precisely the sort of expenses that Congress felt it was important to fund publicly because they viewed these activities as: 'expenses that are necessary and pertinent to the job of the Presidency and the Vice Presidency,' 109 Cong. Rec. at 19,738 (Senator Jackson); 'a public function,' *id.* at 13,346 (Rep. Rosenthal); 'an integral part of the presidential administration,' *id.* at 13,347 (Rep. Monagan); and, as President Kennedy expressed in his letter transmitting the proposed legislation that was to become the Presidential Transition Act, 'the reasonable and necessary costs of installing a new administration in office.'" 2001 OLC Memo, *4 (final quote from *Letter of Transmittal from the President of the United States to the President of the Senate and the Speaker of the House of Representatives* (May 29, 1962), *reprinted in* H.R. Rep. No. 88-301, at 9, 12 (1963)).

63. "As Congressman Charles Joelson put it during the floor debates over the enactment of the Presidential Transition Act of 1963: '[O]nce a man is President-elect, he is not the Democratic President-elect; he is not the Republican President-elect; he is the President-elect of the people of the United States of America. In that interim time he is called upon probably to make more fateful decisions than he will have to make after he is, indeed, sworn into office." Joshua P. Zoffer, *The Law of Presidential Transitions*, 129 Yale L. J. 2500, 2504 (2020) (quoting 109 Cong. Rec. 13348 (1963)).

64. Similarly, the "structure of the Constitution" and "the separation of powers" compel the conclusion that the President-elect is completely immune from criminal process. 2000 OLC Memo, at *11, *18. The separation of powers prevents the criminal prosecution of the President because it would "prevent the executive from accomplishing its constitutional functions." *Id.* at *19 (cleaned up). "Three types of burdens merit consideration" in this analysis, *id.*—all of which strongly support the immunity of the President-elect.

65. First, "the actual imposition of a criminal sentence of incarceration . . .would make it physically impossible for the President to carry out his duties." 2000 OLC Memo, at *19. This is plainly true of the President-elect as well as the President.

66. Any criminal sentence, or even the distraction of ongoing criminal proceedings—including appeals necessary to vindicate the Presidential immunity doctrine and President Trump's individual constitutional rights—threatens to disrupt the enormously burdensome task of undergoing a Presidential transition. As the General Services Administration describes, "[t]he process of a presidential transition is a monumental undertaking. In just over ten weeks between the election and the inauguration, a president-elect must prepare to take control of an executive branch that comprises over 140 agencies, hundreds of sub-components, and millions of civilian

and uniformed personnel." U.S. General Services Administration, *Presidential Transition Directory*, at https://www.gsa.gov/governmentwide-initiatives/presidential-transition-2024/ethics-and-accountability. Defending criminal litigation amid this "monumental undertaking" is wholly impracticable.

67. Crucially, the President-elect must immediately begin addressing the most sensitive areas of national security. The Presidential Transition Act provides that transition activities "shall include the preparation of a detailed classified, compartmented summary by the relevant outgoing executive branch officials of specific operational threats to national security; major military or covert operations; and pending decisions on possible uses of military force. This summary shall be provided to the apparent successful candidate for the office of President as soon as possible after the date of the general elections . . . ." 3 U.S.C. § 102 note; *see also* Henry B. Hogue, Cong. Research Serv., R46602, *Presidential Transition Act: Provisions and Funding* 8 (2024).

68. The President-elect's complete engagement and undivided attention to this process are critical for national security: "One of the top priorities of any presidential administration is to protect the country from foreign and domestic threats. While a challenge at all times, the country is especially vulnerable during the time of presidential transitions . . . ." Center for Presidential Transition, *Presidential Transitions Are a Perilous Moment for National Security* (Aug. 16, 2023), https://presidentialtransition.org/reports-publications/presidential-transitions-are-a-perilous-moment-for-national-security/. "[T]he first months of new administrations are an especially vulnerable time for the country's national security. Successful transition planning is essential for minimizing the risk." *Id.*

69. Second, "the public stigma and opprobrium occasioned by the initiation of criminal proceedings . . . could compromise the President's ability to fulfill his constitutionally

contemplated leadership role with respect to foreign and domestic affairs." 2000 OLC Memo, at *19. Indeed, "the severity of the burden imposed upon the President by the stigma arising both from the initiation of a criminal prosecution and also from the need to respond to such charges through the judicial process would seriously interfere with his ability to carry out his constitutionally assigned functions." *Id.* at *22.

70. Once again, the same reasoning applies equally to the President-elect. "[T]he distinctive and serious stigma of indictment and criminal prosecution imposes burdens fundamentally different in kind from those imposed by the initiation of a civil action, and these burdens threaten the President's ability to act as the Nation's leader in both the domestic and foreign spheres." 2000 OLC Memo, at *22.

71. During the transitional period, the President-elect must communicate with world leaders, formulate his agenda for foreign and domestic relations, select key personnel for his incoming administration, and coordinate with the outgoing Administration across all agencies of the federal government. Just as "the severity of the burden" and "the stigma arising . . . from . . . criminal prosecution" would disrupt constitutionally assigned functions of a sitting President and threaten to injure his standing and credibility with world leaders, so also it would undermine the ability of the President-elect to conduct an orderly transition. 2000 OLC Memo, at *22.

72. Third, "the mental and physical burdens of assisting in the preparation of a defense for the various stages of the criminal proceedings . . . might severely hamper the President's performance of his official duties." 2000 OLC Memo, at *19. The same principle extends to Presidential *transition* activities as well. Defending criminal litigation at all stages—*especially*, as here, defending a criminal sentencing—is uniquely taxing and burdensome to a criminal defendant. "Once criminal charges are filed, the burdens of responding to those charges are different in kind

and far greater in degree than those of responding to civil litigation." *Id.* at *22. "The constitutional provisions governing criminal prosecutions make clear the Framers' belief that an individual's mental and physical involvement and assistance in the preparation of his defense both before and during any criminal trial would be intense, no less so for the President than for any other defendant." *Id.* at *23.

73. "The Constitution contemplates the defendant's attendance at trial and, indeed, secures his right to be present by ensuring his right to confront witnesses who appear at the trial." 2000 OLC Memo, at *23. Thus, "a criminal prosecution would require the President's personal attention and attendance at specific times and places . . . . Indeed, constitutional rights and values are at stake in the defendant's ability to be present for all phases of his criminal trial." *Id.* at *24. "[C]riminal litigation uniquely requires the President's *personal* time and energy, and will inevitably entail a considerable if not overwhelming degree of mental preoccupation." *Id.* at *25 (emphasis in original).

74. These demands of time, energy, and attention are just as unconstitutionally burdensome and disruptive during the Presidential transition as during the Presidency itself. They are particularly burdensome when a President-elect faces the prospect of criminal judgment and *sentencing* during his transitional period.

75. Sitting-President immunity requires the complete dismissal of pending criminal cases against the newly elected President, not merely staying those cases until after his term in office.

76. An indictment brought against a sitting President must be immediately dismissed, not stayed until he leaves office. That is because "an indictment hanging over the President while he remains in office would damage the institution of the Presidency virtually to the same extent as an actual conviction." 2000 OLC Memo, at *8. "In addition, there would be damage to the executive

branch 'flowing from unrefuted charges.'" *Id.* Because "the modern Presidency, under whatever party, has had to assume a leadership role undreamed of in the eighteenth and early nineteenth centuries," it follows that "[t]he spectacle of an indicted President still trying to serve as Chief Executive *boggles the imagination*." *Id.* (emphasis added) (cleaned up).

77. Permitting prosecutors to leave an indictment against the sitting President pending during his term in office would play "Russian roulette" with America's vital interests and its national security: "Given the realities of modern politics and mass media, and the delicacy of the political relationships which surround the Presidency both foreign and domestic, there would be *a Russian roulette aspect to the course of indicting the President but postponing trial*, hoping in the meantime that the power to govern could survive." 2000 OLC Memo, at *8 (emphasis added).

78. In his motion to dismiss filed on December 2, 2024, President Trump asserted his sitting-President immunity and immunity as the President-Elect of the United States against the underlying criminal case. He raised the foregoing arguments, among many others, and requested vacatur of the jury verdict and complete dismissal of the case. *See* Ex. 10, which is incorporated by reference herein.

79. On January 3, 2025, Justice Merchan entered a Decision and Order erroneously denying President Trump's claim of sitting-President immunity and setting President Trump's sentencing hearing for seven days later, on January 10, 2025. Ex. 13.

80. In the January 3, 2025 Decision and Order, Justice Merchan acknowledged that a sitting President is immune from federal prosecution, and he further acknowledged that this immunity extends to state prosecution as well. Ex. 13 at 4 ("[I]t is logical to infer that the three concerns expressed in the 2000 OLC memorandum can overlap with criminal prosecutions that occur in

state court."). But he erroneously concluded that "Presidential immunity from criminal process for a sitting president does not extend to a President-elect." *Id.*

81. Justice Merchan's entire analysis is erroneous because it relies on a *case-specific* application of the three factors discussed in the 2000 OLC Memo—the disruptive nature of criminal punishment, the public stigma associated with criminal prosecution, and the mental and physical burdens of defending a criminal case—as applied to the facts of this case. *See* Ex. 13 at 6-7. The entirety of his analysis focuses on whether those three factors would present a significant obstacle to President Trump's transition efforts in the specific context of this case in its unique procedural posture. *Id.*

82. This analysis is obviously wrong and an abuse of discretion, because it dramatically understates the burden, disruption, stigma, and distraction that this case threatens to impose and is already imposing on President Trump in his transition efforts, for the reasons discussed above.

83. More fundamentally, Justice Merchan's analysis is obviously wrong and an abuse of discretion because it directly contradicts the reasoning of the very OLC Memo on which it relies. The OLC Memo emphasizes that the existence of Presidential immunity from criminal process does *not* depend, and must not depend, on the sort of case-by-case analysis that Justice Merchan indulged in his Decision and Order. Ex. 13 at 6-7. Instead, the OLC Memo rightly insists that the existence of Presidential immunity presents a *categorical* question: "Thus a categorical rule against indictment or criminal prosecution is most consistent with the constitutional structure, rather than a doctrinal test that would require the court to assess whether a particular criminal proceeding is likely to impose serious burdens upon the President." 2000 OLC Memo, at *25. Thus, a sitting President, or President-elect, does not have to subject himself in every case to an individual judge's case-by-case balancing of the burdens on the Presidency—an inquiry that itself

would likely violate principles of federalism and the separation of powers. DOJ reaffirmed this reasoning in November 2024 when dismissing the federal prosecution against President Trump, explaining that "the Constitution's prohibition on federal indictment and prosecution of a sitting President" is "categorical." Ex. 14. Justice Merchan's January 3, 2025 Decision and Order, therefore, does exactly what the OLC Memo rejects—it involves "the court . . . assess[ing] whether a particular criminal proceeding is likely to impose serious burdens upon the President[-elect]." 2000 OLC Memo, at *25. This case-by-case approach is wrong as a matter of law. Instead, for the reasons discussed above and below in Count I, the categorical approach necessitates the conclusion that a sitting President's complete immunity from criminal process extends to a President-elect as well—and for virtually the same reasons.

AS AND FOR A FIRST CAUSE OF ACTION
(For Judgment Pursuant to CPLR 7803)

This Proceeding Provides The Appropriate Vehicle To Challenge Justice Merchan's Decision And Order.

84. President Trump repeats and realleges each and every allegation in the foregoing paragraphs as it fully set forth herein.

85. CPLR § 7803(2) authorizes a petitioner to challenge in a special proceeding whether a "body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction."

86. Section 7803(2) is a codification of the common-law writ of prohibition and is available "both to restrain an unwarranted assumption of jurisdiction and to prevent a court from exceeding its authorized powers in a proceeding over which it has jurisdiction." *La Rocca v. Lane*, 37 N.Y.2d 575, 578-79 (1975); *see also Soares v. Carter*, 25 N.Y.3d 1011, 1013 (2015); *Johnson v. Sackett*, 109 A.D.3d 427, 428-29 (1st Dep't 2013).

87. "[A]buses of power may be identified by their impact upon the entire proceeding as distinguished from an error in a proceeding itself proper." *Holtzman v. Goldman*, 71 N.Y.2d 564, 569 (1988); *see also Rush v. Mordue*, 68 N.Y.2d 348, 353-354 (1986).

88. "Prohibition may lie . . . where the claim is substantial, implicates a fundamental constitutional right, and where the harm caused by the arrogation of power could not be adequately redressed through the ordinary channels of appeal." *Rush*, 68 N.Y.2d at 354; *see also Fischetti v. Scherer*, 44 A.D.3d 89, 91 (1st Dep't 2007); *La Rocca*, 37 N.Y.2d at 579.

89. For the foregoing reasons, this petition pursuant to CPLR § 7803(2) in the nature of prohibition is an appropriate means of challenging Justice Merchan's Decisions and Orders denying President Trump's two claims of Presidential immunity—both (1) Presidential official-acts immunity based on the evidentiary misuse of official acts before the grand jury and at trial, and (2) the absolute immunity of a sitting President from any criminal process, state or federal, which extends into the brief but crucial period of transition when President Trump is the President-elect.

Justice Merchan's December 16 Decision And Order Directly Contradicts *Trump v. United States*

90. On July 1, 2024, the Supreme Court laid out the President's constitutional right to immunity from criminal prosecution and the scope thereof. *Trump*, 603 U.S. at 593. The Court held that, "our constitutional structure of separated powers" and "the nature of Presidential power require[] that a former President have some immunity from criminal prosecution for official acts during his tenure in office." *Id.* at 606. The Court found that, "[a]t least with respect to the President's exercise of his core constitutional powers, this immunity must be absolute." *Id.*

91. The Court explained, "once it is determined that the President acted within the scope of his exclusive authority, his discretion in exercising such authority cannot be subject to further judicial

examination." *Trump*, 603 U.S. at 608. Similarly, criminal laws enacted by legislatures, "either a specific one targeted at the President or a generally applicable one," "may not criminalize the President's actions within his exclusive constitutional power." *Id.* at 609. Thus, "[n]either may the courts adjudicate a criminal prosecution that examines such Presidential actions." *Id.*

92. Further, "for his remaining official actions," President Trump "is also entitled to immunity." *Trump*, 603 U.S. at 606. This immunity, the Court held, is "at least a *presumptive* immunity from criminal prosecution" extending over all of a President's acts "within the outer perimeter of his official responsibility." *Id.* at 614 (emphasis in original).

93. The President "occupies a unique position in the constitutional scheme." *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). The President "alone composes a branch of government." *Mazars USA, LLP*, 591 U.S. at 868.

94. The Constitution, as designed by the Framers, seeks "'to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many.'" *Trump*, 603 U.S. at 610 (quoting *Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in judgment)). "The purpose of a vigorous and energetic Executive, they thought, was to ensure good government, for a feeble executive implies a feeble execution of the government." *Id.* (cleaned up).

95. The President, therefore, is "vested" by the Constitution with "'supervisory and policy responsibilities of utmost discretion and sensitivity'" and must make "'the most sensitive and far-reaching decisions entrusted to any official under our constitutional system.'" *Trump*, 603 U.S. at 610-11 (quoting *Fitzgerald*, 457 U.S. at 750, 752). The Court held, "[a]ppreciating the 'unique risks to the effective functioning of government' that arise when the President's energies are

diverted by proceedings that might render him 'unduly cautious in the discharge of his official duties,' we have recognized Presidential immunities and privileges 'rooted in the constitutional tradition of the separation of powers and supported by our history.'" *Id.* at 611 (quoting *Fitzgerald*, 457 U.S. at 749, 751-52 & n.32). Thus, in the civil context, the Court has recognized "absolute immunity from damages liability predicated on . . . official acts" "within the 'outer perimeter' of [a President's] official responsibility" due to the "functionally mandated incident of [the President's] unique office." *Id.* (quoting *Fitzgerald*, 457 U.S. at 749, 756).

96. Criminal prosecution, as compared to civil damages, poses "a far greater threat of intrusion on the authority and functions of the Executive." *Trump*, 603 U.S. at 613. The Court reasoned that such "danger is akin to, indeed greater than, what led us to recognize absolute Presidential immunity from civil damages liability" such that "the President would be chilled from taking the 'bold and unhesitating action' required of an independent Executive." *Id.* (quoting *Fitzgerald*, 457 U.S. at 745). The Court explained that "if a former President's official acts are routinely subjected to scrutiny in criminal prosecutions, 'the independence of the Executive Branch' may be significantly undermined." *Id.* at 613-4 (quoting *Vance*, 591 U.S. at 800).

97. In determining whether actions of the President are official or unofficial, the Court stressed that such determinations can "raise[] multiple unprecedented and momentous questions about the powers of the President and the limits of his authority under the Constitution." *Trump*, 603 U.S. at 616. It involves "applying the principles" underlying Presidential immunity and "can be difficult." *Id.* at 616-17. Such determinations involve "the breadth of the President's discretionary responsibilities" and "his innumerable functions" extending to the "outer perimeter" of the President's official responsibilities. *Id.* at 617-18 (cleaned up).

98. The Court elaborated that "some Presidential conduct—for example, speaking to and on behalf of the American people—certainly can qualify as official even when not obviously connected to a particular constitutional or statutory provision." *Id.* at 618 (citing *Trump v. Hawaii*, 585 U.S. 667, 701 (2018)). "[A] long-recognized aspect of Presidential power is using the office's 'bully pulpit' to persuade Americans, including by speaking forcefully or critically, in ways that the President believes would advance the public interest." *Id.* at 629. In fact, the President "is even expected to comment on those matters of public concern that may not directly implicate the activities of the Federal Government." *Id.* Thus, "most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities." *Id.*

99. Moreover, the Court held, when distinguishing official from unofficial conduct, "courts may not inquire into the President's motives." *Trump*, 603 U.S. at 618. "It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive . . . if . . . the President was under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry." *Id.* (cleaned up).

100. "Nor may courts deem an action unofficial merely because it allegedly violates a generally applicable law." *Trump*, 603 U.S. at 619.

101. Nor may any official acts for which the President is immune "be scrutinized to help secure his conviction, even on charges that purport to be based only on his unofficial conduct." *Trump*, 603 U.S. at 631. The Court found that "[u]se of evidence about such conduct, even when an indictment alleges only unofficial conduct, would thereby heighten the prospect that the President's official decisionmaking will be distorted." *Id.*

102. Ultimately, it is the "Government's burden to rebut the presumption of immunity." *Trump*, 603 U.S. at 624. Further, "whether the President may be held liable for particular actions . . . must be addressed *at the outset of a proceeding*." *Id.* at 636 (emphasis added).

103. As discussed further herein, Justice Merchan's Decision and Order of December 16, 2024, violates all these principles, as well as the Supremacy Clause. With respect to the latter, Justice Merchan completely misunderstood the relevant authorities. Ex. 6 at 8 n.6. He cited to discussion in *New York v. Trump*, 683 F. Supp. 3d 334 (S.D.N.Y. 2023), of a distinct argument under the Supremacy Clause under *In re Neagle*, 135 U.S. 1, 75 (1890). *Neagle*, however, requires that immunity derive from a "law of the United States." 135 U.S. at 75. But "some Presidential conduct . . . certainly can qualify as official"—and, thus, be subject to immunity—"even when not obviously connected to a particular constitutional or statutory provision." *Trump*, 603 U.S. at 618. *Neagle* also includes a proportionality element, *i.e.*, whether a federal employee's official actions entailed "no more than what was necessary and proper for him to do." 135 U.S. at 75. Under *Trump v. United States*, a President's official actions are no less immune simply because a prosecutor or a court deems the actions to be disproportionate to the matter at hand. The Supreme Court left open the possibility that prosecutors could rebut presumptive immunity for official acts within the "outer perimeter" of Presidential power, but only where prosecutors can establish that use of the official-acts evidence "would pose no dangers of intrusion on the authority and functions of the Executive Branch." *Trump*, 603 U.S. at 614-15 (cleaned up). Thus, Justice Merchan erred, badly, by relying on inapposite reasoning from an earlier removal decision in *New York v. Trump*, and ignoring the full application of the Supremacy Clause under the circumstances presented here.

104. DANY unconstitutionally relied upon official-acts evidence.

A. President Trump's Official Communications With His Advisor, Hope Hicks

105. DANY unconstitutionally elicited testimony from Hope Hicks regarding her official-capacity communications with President Trump in 2018 concerning matters of public concern. *See* Ex. 4, Tr. 2214-21.

106. Hope Hicks, who served as the White House Communications Director, worked closely with President Trump, speaking with him "every day," and was tasked with coordinating President Trump's communication efforts throughout all government agencies to ensure the President's agenda was prioritized and to maximize the impact of the President's message to the American people. Ex. 4, Tr. 2208-10.

107. *Trump* specifically forbids prosecutors from offering "testimony" from a President's "advisors" for the purpose of "probing the official act." 603 U.S. at 632 n.3. *Trump* also forbids such "highly intrusive" inquiries into the President's motives, inquiries probing intimate communications among President Trump and his close advisors, such as communications with his White House Communications Director over matters of public concern. *Id.* at 619, 632 n.3; *see also Fitzgerald*, 457 U.S. at 745, 756.

108. "[S]pecial considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 385 (2004). Holding the "pall of potential prosecution" over the sort of communications as those between President Trump and his Communications Director would result in the President being "chilled from taking the bold and unhesitating action required of an independent Executive." *Trump*, 603 U.S. at 613 (cleaned up).

109. The testimony DANY elicited concerned President Trump's internal deliberations about how to respond to the January 12, 2018 Wall Street Journal article, the February 2018 New

York Times article discussing Michael Cohen's payments, and the March 2018 CNN interview by Karen McDougal. Ex. 4, Tr. 2215-21.

110. President Trump's internal deliberations about the official White House response to these matters of public concern are absolutely immune. While interacting with Hicks, President Trump was "supervis[ing]" someone who was "wield[ing] executive power on his behalf" which "follows from the text of Article II" and is, thus, absolutely immune conduct. *Trump*, 603 U.S. at 608 (cleaned up).

111. Moreover, President Trump was communicating to the American people on matters of public concern, coordinating the official White House response to these issues. This "long-recognized aspect of Presidential power" is "expected" from the President and "fall[s] comfortably" within the "outer perimeter" of his official responsibilities as President. *Trump*, 603 U.S. at 629.

112. Justice Merchan's failure to appreciate the seriousness of the interests the Constitution required him to balance is encapsulated in the following reasoning regarding Hicks' testimony: "even if this Court were to find that the communications do fall within the outer perimeter of his Presidential authority, it would also find that other, non-privileged trial testimony provided ample non-motive related context and support to rebut a presumption of privilege and that Defendant was acting in his personal capacity and not pursuant to his authority as President." Ex. 6 at 21-22. Because President Trump's statements were plainly within the outer perimeter of his authority, "[t]he question then becomes whether that presumption of immunity is rebutted under the circumstances." *Trump*, 603 U.S. at 623. DANY bore the burden of rebutting that presumption by demonstrating that use of that evidence would "pose no dangers of intrusion on the authority and functions of the Executive Branch." *Id.* at 615 (cleaned up). Justice Merchan

completely ignored the critical issue that the U.S. Supreme Court required him to address. Further, with respect to that burden, Justice Merchan was manifestly wrong to assign relevance to evidence he believed suggested President Trump was "acting in his personal capacity and not pursuant to his authority as President." Ex. 6 at 21-22. The only question at that point in the analysis was whether the evidence threatened intrusions on the executive function, and it is most certainly the case that the prospect of local prosecutors using evidence of interactions in the White House among the President and his confidential advisers intrudes on the President's ability to communicate effectively with advisers and staff. DANY bore the burden on this issue, and they offered no evidence to the contrary. Equally important, if not more so, is the manner in which Justice Merchan's failure to even appreciate the question he was required to address illustrates the dangerousness of his opinion to the "institution of the Presidency" regarding "a question of lasting significance" that will "have profound consequences for the separation of powers and for the future of our Republic." *Trump*, 603 U.S. at 632, 641.

113. Therefore, DANY should have been barred from using evidence of President Trump's interactions with Hicks, and Justice Merchan erred in denying relief on this ground.

B. President Trump's Official Communications to the American People Via Twitter

114. Similarly, DANY unconstitutionally used official-acts evidence relating to Tweets attributed to President Trump from 2018 concerning issues of public importance surrounding witnesses and allegations in this case. Ex. 7.

115. "[C]ommunications in the form of Tweets" constitutes one method by which the President "'speak[s] to his fellow citizens and on their behalf.'" *Trump*, 603 U.S. at 629 (quoting *Hawaii*, 585 U.S. at 701).

116. The United States Supreme Court was very clear that "most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities" and thus be immune. *Trump*, 603 U.S. at 629.

117. "[E]ven when no specific federal responsibility requires his communication—to encourage [state officials] to act in a manner that promotes the President's view of the public good" can fall within the President's official duties. *Trump*, 603 U.S. at 627.

118. Moreover, DANY may not "inquire into the President's motives" when attempting to use this evidence to show that President Trump was somehow directing secret messages to witnesses in the case rather than communicating with the American people. *Trump*, 603 U.S. at 618.

119. Permitting prosecutors' use of a President's public statements on matters of public concern in criminal proceedings would chill the President's willingness and ability to communicate with the public. *See Trump*, 603 U.S. at 618.

120. President Trump's communications with the American people are immune under *Trump*.

121. Therefore, DANY should have been barred from using as evidence President Trump's official communications with the American people via Twitter, and Justice Merchan erred in denying relief on that ground.

C. President Trump's Official Disclosures On OGE Forms

122. Further, DANY unconstitutionally offered documentary evidence reflecting official presidential actions, including the OGE form signed by President Trump regarding compliance of the President with applicable laws and regulations. Ex. 8; Ex. 4, Tr. 2365-76.

123. According to OGE, one of the purposes of the form signed by President Trump is "to ensure confidence in the integrity of the Federal Government by demonstrating that they are able to carry out their duties without compromising the public trust." 5 C.F.R. § 2634.104(a).

124. President Trump, by signing and submitting this form as President, was speaking to the American public regarding the "public trust" through his official capacity as President. *See Trump*, 603 U.S. at 618, 629 (such communications "certainly can qualify as official").

125. President Trump signed and submitted this form in his official capacity as President, and the form itself reflects an "Agency Ethics Official's Opinion" that President Trump was "in compliance with applicable laws and regulations." Ex. 8 at 1. By using this documentary evidence in his criminal prosecution, DANY was "second-guessing" the President's official acts to the effect of "threaten[ing] the independence or effectiveness of the Executive." *Trump*, 603 U.S. at 632 n.3 (cleaned up).

126. The documentary evidence offered by DANY is inadmissible, and DANY should have been barred from using such evidence. Justice Merchan erred in denying relief on this ground.

The Use Of Official-Acts Evidence In Grand Jury Proceedings Requires Dismissal Of The Indictment

127. DANY presented evidence of President Trump's official acts, immune under *Trump*, to the grand jury.

128. Presidents "cannot be indicted based on conduct for which they are immune from prosecution." *Trump*, 603 U.S. at 630. This pertains to all criminal proceedings, including grand jury proceedings. *Id.* at 615.

129. "Even if the President were ultimately not found liable for certain official actions, the possibility of an extended proceeding alone may render him 'unduly cautious in the discharge of his official duties.'" *Trump*, 603 U.S. at 636 (quoting *Fitzgerald*, 457 U.S. at 752 n.32).

130. "The Constitution does not tolerate such impediments to 'the effective functioning of government.'" *Trump*, 603 U.S. at 636-37 (quoting *Fitzgerald*, 457 U.S. at 751).

131. Moreover, "[b]oth the Supremacy Clause and the general principles of our federal system of government dictate that a state grand jury may not investigate the operation of [the Executive]." *United States v. McLeod*, 385 F.2d 734, 751 (5th Cir. 1967); *id.* at 752 (noting this would present an "invasion of the sovereign powers of the United States").

132. Therefore, DANY's unconstitutional use of official-acts evidence in the grand jury proceedings requires dismissal of the Indictment.

Use Of Official-Acts Evidence Was Not Harmless And Requires Vacatur Of The Jury Verdict

133. *Trump* requires issues of immunity to be "addressed at the outset of a proceeding." 603 U.S. at 636. The results of a trial conducted in breach of this principle are invalid.

134. *Trump* specifically rejected the argument that "as-applied challenges in the course of the trial suffice to protect Article II interests," 603 U.S. at 635, and yet Justice Merchan insisted that President Trump would have to wait until trial to raise immunity objections, *see* Ex. 4, Tr. 802, and during trial, Justice Merchan repeatedly denied such objections when validly raised. *See, e.g.*, Ex. 4, Tr. 2121-22, 2370.

135. Justice Merchan and the jury lacked authority to "adjudicate" this case because the evidence offered by DANY constituted immune official acts of President Trump. *Trump*, 603 U.S. at 609.

136. The repeated violation of President Trump's constitutional right to Presidential immunity constituted fundamental error underlying the entire trial proceedings, and was not harmless. Indeed, the unconstitutional official-acts evidence was crucial to DANY's case-in-chief. Justice Merchan erred in denying relief on this ground.

President Trump's Immunity From This Prosecution Is Further Mandated By His Status As President-Elect Of The United States

137. For the reasons stated above, which are incorporated by reference herein, President Trump has absolute immunity from any state or federal criminal investigation or prosecution as sitting President of the United States. This immunity also extends to the brief but crucial transitional period between President Trump's election on November 5, 2024, and his inauguration on January 20, 2025. This doctrine of sitting-President immunity mandates the immediate dismissal, not just a stay, of any pending criminal case against President Trump, regardless of the stage of proceedings. Once President Trump was re-elected, the jury verdict in the underlying criminal case should have been immediately vacated, and the case dismissed. Justice Merchan erred in denying Presidential immunity to President Trump on this ground, and further erred by issuing an incredibly disruptive order requiring President Trump to appear for a criminal sentencing on seven-days' notice, on January 10, 2025, at the apex of the Presidential transition.

Justice Merchan's Decisions And Orders Inflict Ongoing Irreparable Injury

138. Justice Merchan's Decisions and Orders violate President Trump's constitutional right to Presidential immunity, intrude upon his constitutional duties while transitioning into his second Administration as President-Elect, and threaten to "distort" the decisionmaking and the independence of future Chief Executives. *Trump*, 603 U.S. at 613. "Few things would threaten our constitutional order more" than a criminal prosecution reliant upon "official acts." *Id.* at 643

(Thomas, J., concurring). "Fortunately, the Constitution does not permit us to chart such a dangerous course." *Id.* The irreparable injury from the Decisions and Orders is manifest.

139. "Questions about whether the President may be held liable for particular actions . . . must be addressed at the outset of a proceeding." *Trump*, 603 U.S. at 636.

140. "A showing of irreparable injury will generally be automatic from the invocation of the immunity doctrine" if criminal proceedings, such as sentencing, continue forward, "because of the irretrievable loss of immunity from suit." *McSurely v. McClellan*, 697 F.2d 309, 317 & n.13 (D.C. Cir. 1982); *see also Nam v. Permanent Mission of the Rep. of Korea to the United Nations*, 2023 WL 2456646, at *2 (S.D.N.Y. 2023) ("But in cases where a party claims immunity, courts have held that proceeding to trial during the appeal causes irreparable harm.").

141. By allowing these criminal proceedings to continue forward in violation of President Trump's constitutional right to Presidential immunity, including both Presidential official-acts immunity and absolute sitting-President immunity, Justice Merchan's Decision and Order inflicts irreparable harm upon President Trump.

WHEREFORE, Petitioner respectfully requests that this Court grant judgment in his favor as follows:

(a) On the first cause of action, finding that Respondents' continued maintenance of criminal proceedings are unlawful, unconstitutional, and in excess of the Supreme Court's jurisdiction under CPLR § 7803(2) and prohibiting any further proceedings pending appeal;

(b) Directing that the jury verdict in the underlying criminal case must be vacated and the case immediately dismissed in its entirety, with prejudice; and

(c) Granting such further and additional relief as the court deems just and proper.

Dated: New York, New York
January 6, 2025

Respectfully submitted,

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Attorneys for President Donald J. Trump

VERIFICATION

I, Todd Blanche, am a member of Blanche Law PLLC, attorneys for President Donald J. Trump, Petitioner, in the above-captioned Article 78 proceeding. I have read the foregoing Verified Petition and know the contents thereof. The same are true to my knowledge, except to matters therein stated to be alleged on information and belief and as to those matters, I believe it to be true.

Dated: New York, New York
January 6, 2025

Todd Blanche

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

In the Matter of the Application of:	)	Case No. 2025-00118
DONALD J. TRUMP,	)	
Petitioner,	)	
For a Judgment Under Article 78 of the CPLR	)	
-against-	)	
THE HONORABLE JUAN M. MERCHAN, A.J.S.C., ET AL.,	)	
Respondents.	)	

PRESIDENT DONALD J. TRUMP'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO EXPEDITE RESOLUTION OF ARTICLE 78 PETITION AND TO STAY TRIAL-COURT PROCEEDINGS PENDING REVIEW OF CLAIMS OF PRESIDENTIAL IMMUNITY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRESIDENT TRUMP'S MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY APPLICATION TO STAY TRIAL-COURT PROCEEDINGS PENDING REVIEW OF CLAIMS OF PRESIDENTIAL IMMUNITY 1

PROCEDURAL BACKGROUND 2

ARGUMENT 4

I. The U.S. Supreme Court's Decision in *Trump v. United States* Mandates a Stay of Further Trial-Court Proceedings Pending President Trump's Immunity Appeal 4

A. *Trump* Mandates That President Trump May Pursue an Interlocutory Appeal on Presidential Immunity Supported by an Automatic Stay 5

B. At Minimum, Three Features of *Trump* Reinforce the Requirement of an Automatic Stay of Further Proceedings in the Supreme Court 7

1. Forcing President Trump to face sentencing and judgment while his claims of Presidential immunity are still pending on appeal would "deprive immunity of its intended effect." 7

2. Presidential immunity nullifies the power of trial courts to act 9

3. A stay allows for orderly resolution of critical issues 10

C. The Automatic Stay Extends to Both Claims of Presidential Immunity That President Trump Is Currently Raising on Appeal 12

D. The Automatic Stay Extends to Criminal *Sentencing* as Well as Trial 14

E. New York Appellate Law and Practice Support an Immediate Stay 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Apostol v. Gallion,
870 F.2d 1335 (7th Cir. 1989) 6

Blassingame v. Trump,
87 F.4th 1 (D.C. Cir. 2023).....15

Bradford-Scott Data Corp. v. Physician Computer Network, Inc.,
128 F.3d 504 (7th Cir. 1997) 12

Chuman v. Wright,
960 F.2d 104 (9th Cir. 1992) 6

Coinbase, Inc. v. Bielski,
599 U.S. 736 (2023).....11, 12

Dow v. Tomei,
107 A.D.3d 986 (2d Dep't 2013).....17

Gorghan v. DeAngelis,
25 A.D.3d 872 (3d Dep't 2006).....17

Hoovler v. DeRosa,
143 A.D.3d 897 (2d Dep't 2016).....18

James N. v. D'Amico,
139 A.D.2d 302 (4th Dep't 1988).....17

Kisloff v. Covington,
73 N.Y.2d 445 (1989).....17

Lacerva v. Dwyer,
177 A.D.2d 747 (3d Dep't 1991).....17

McLaughlin v. Eidens,
292 A.D.2d 712 (3d Dep't 2002).....17

Memorandum from Randolph D. Moss, Assistant Attorney General,
OLC, *A Sitting President's Amenability to Indictment and Criminal Prosecution*,
2000 WL 33711291 (Oct. 16, 2000).....10

Mitchell v. Forsyth,
472 U.S. 511 (1985).....5, 6, 7, 15

Nixon v. Fitzgerald,
457 U.S. 731 (1982).....6, 9, 13

Rush v. Mordue,
68 N.Y.2d 348, 352 n.1 (1986).....17

Trump v. United States,
603 U.S. 593 (2024)..... *passim*

Trump v. Vance,
591 U.S. 786 (2020).....16

United States v. Belmont,
301 U.S. 324 (1937).....16

United States v. Stevens,
559 U.S. 460 (2010).....8

United States v. Trump,
706 F. Supp. 3d 91 (D.D.C. 2023).....4, 16

Van Wie v. Kirk,
244 A.D.2d 13 (4th Dep't 1998).....17

Vance v. Roberts,
176 A.D.3d 492 (1st Dep't 2019).....18

Statutes

3 U.S.C. § 102 note, § 2.....10

CPLR Article 78.....17, 18

CPLR § 7805..... *passim*

Rules

CPL § 210.20(1)(h).....1

CPL § 210.40(1).....1

CPL § 390.40(1).....11

CPL § 390.40(2).....11

CPL § 450.20(4).....14

PRESIDENT TRUMP'S MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY APPLICATION TO STAY TRIAL-COURT PROCEEDINGS PENDING REVIEW OF CLAIMS OF PRESIDENTIAL IMMUNITY

President Donald J. Trump respectfully requests that this Court issue an immediate stay of criminal proceedings in the Supreme Court before Respondent, the Hon. Juan M. Merchan, Acting Justice, pending the resolution of this appellate proceeding seeking review of Justice Merchan's two erroneous rulings wrongly denying President Trump's claims of Presidential immunity. On January 6, 2025, Justice Merchan erroneously denied this relief. The Constitution and CPLR § 7805 now require this Court to stand in to prevent grave injustice and harm to the institution of the Presidency and the operations of the federal government.

President Trump's Article 78 Petition—and the separate notice of appeal he has filed challenging the same orders—seeks this Court's review of (1) Justice Merchan's December 16, 2024 ruling wrongly denying President Trump's Post-Trial Presidential Immunity Motion, which asserted, among other grounds, President Trump's claim of Presidential immunity based on evidentiary use of official acts; and (2) Justice Merchan's January 3, 2025 ruling wrongly denying President Trump's Motion to Dismiss Pursuant to CPL §§ 210.20(1)(h) and 210.40(1), which was based on, without limitation, President Trump's claim of immunity from criminal process as sitting President of the United States, as extended into the transition period while President Trump is President-elect. As discussed herein, the commencement of appellate proceedings seeking interlocutory review of these claims of Presidential immunity immediately causes an automatic stay of proceedings in the Supreme Court under *Trump v. United States*, 603 U.S. 593 (2024), and related case law, as conceded by the District Attorney in past filings. *See, e.g.*, Nov. 19, 2024 DANY Ltr. at 2. This Article 78 proceeding should result in a dismissal of this politically motivated prosecution that was flawed from the very beginning, centered around the wrongful

actions and false claims of a disgraced, disbarred serial-liar former attorney, violated President Trump's due process rights, and had no merit.

Due to the fact that further criminal proceedings are automatically stayed by operation of federal and state constitutional law, Justice Merchan lacks authority to proceed with the sentencing scheduled for this Friday, and all proceedings before him must be stayed pending resolution of this appellate proceeding addressing questions of Presidential immunity. In the alternative, even if the filing of President Trump's appeal did not automatically stay proceedings before Justice Merchan—which it does—the Court should grant an immediate stay of proceedings in the Supreme Court under CPLR § 7805, including the sentencing scheduled for January 10, 2025, pending the outcome of appellate review, for the same reasons set forth herein. Thus, President Trump should be granted an immediate, automatic stay of all proceedings in Supreme Court—including the criminal sentencing hearing currently scheduled for this Friday—until his claims of Presidential immunity are resolved in this proceeding, any further appeals that arise from it, and any other related legal proceeding, which should result in a complete dismissal of this meritless case with prejudice. The Court should immediately order this stay of trial-court proceedings, and if necessary, enter an immediate temporary stay while the Court considers this stay motion.

PROCEDURAL BACKGROUND

As set forth in greater detail in our Article 78 Petition filed with this Application, which is incorporated by reference herein, President Trump is the defendant in an ill-conceived criminal case brought by New York County District Attorney Alvin Bragg ("DANY"). At trial in the matter in April 2024, over President Trump's timely objections raised both before and during trial, DANY offered, and Justice Merchan erroneously admitted, extensive evidence of President Trump's official acts while he was serving in office as President. This evidence included President Trump's

communications with the public through official White House channels on matters of significant concern, his communications with high-level official White House advisors on matters of public concern, President Trump's conduct of official activity on behalf of the people of the United States, and his submission of official forms required by law for public officials acting in an official capacity. Justice Merchan wrongly held that all such evidence of official acts was admissible, and this Court incorrectly held that any review of those evidentiary rulings must await until appeal from final judgment.

On July 1, 2024, the U.S. Supreme Court rejected both of these positions, in an opinion on federal constitutional law that is binding in New York courts. *Trump v. United States*, 603 U.S. 593 (2024). In *Trump*, the U.S. Supreme Court held (1) evidence of a President's official acts is not admissible against him at trial, even to prove non-official conduct; and (2) any determination of questions on Presidential immunity is immediately appealable and subject to interlocutory review before trial.

Following *Trump*, President Trump filed a motion to vacate the jury verdict and dismiss the case on the ground that the admission of evidence of President Trump's official acts, both to the grand jury and at trial, violated the doctrine of Presidential immunity for a President's official acts ("official-act immunity"), which was repeatedly underscored in *Trump*. On December 16, 2024, Justice Merchan denied that motion, in an erroneous decision that is under review here.

On November 5, 2024, President Trump was re-elected as President of the United States, and he will take office again as the 47th President of the United States on January 20, 2025. Shortly after his re-election, President Trump filed a separate motion to vacate the jury verdict and dismiss the case based on the longstanding doctrine that a sitting President of the United States is completely immune from all criminal process ("sitting-President immunity"), and thus it is

unconstitutional for there to be pending criminal proceedings against a sitting President. In the motion, President Trump confirmed that this form of Presidential immunity also extends to a President-elect during the brief but crucial transitional period between his election and his assumption of office.

Justice Merchan erroneously denied this motion on January 3, 2025, and then set the matter for criminal sentencing on an expedited schedule, in contravention against the Supreme Court's admonition against such haste in *Trump*, just seven days later, on January 10, 2025. On January 5, 2025, President Trump's counsel notified Justice Merchan and DANY that they intended to seek immediate appellate review of Justice Merchan's erroneous rulings on Presidential immunity, and filed a Notice of Automatic Stay before Justice Merchan. *See* Ex. 1. On January 6, 2025, Justice Merchan refused to stay the proceedings, including the sentencing scheduled for January 10, 2025.

ARGUMENT

I. The U.S. Supreme Court's Decision in *Trump v. United States* Mandates a Stay of Further Trial-Court Proceedings Pending President Trump's Immunity Appeal.

Before the U.S. Supreme Court decided *Trump v. United States*, 603 U.S. 593 (2024), the only court to consider whether the filing of an interlocutory appeal on Presidential immunity mandates a stay of the underlying criminal proceedings held that "Defendant's appeal [on Presidential immunity grounds] *automatically stays* any further proceedings that would move this case towards trial or impose additional burdens of litigation on Defendant." *United States v. Trump*, 706 F. Supp. 3d 91, 93 (D.D.C. 2023) (emphasis added). This holding was correct, as DANY has effectively conceded in this very case. *See* Nov. 19, 2024 DANY Ltr. at 2 ("[A]s a practical matter, Defendant's stated plan to pursue immediate dismissal and file interlocutory appeals will likely lead to a stay of proceedings in any event."). The U.S. Supreme Court's

subsequent decision in *Trump* reaffirms that such a stay pending interlocutory review is mandatory and automatic, arising directly from the constitutional doctrine of Presidential immunity.

A. *Trump* Mandates That President Trump May Pursue an Interlocutory Appeal on Presidential Immunity Supported by an Automatic Stay.

In recognizing Presidential immunity from criminal prosecution for official acts, the Supreme Court emphasized that "[t]he essence of immunity 'is its possessor's entitlement not to have to answer for his conduct' in court." *Trump*, 603 U.S. at 630 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985)). Because "the President is . . . immune from prosecution, a district court's denial of immunity" is "*appealable before trial*." *Id.* at 635 (emphasis added) (citing *Mitchell*, 472 U.S. at 524-30). The Supreme Court repeatedly emphasized that the federal doctrine of separation of powers mandates that an *interlocutory* appeal of questions of Presidential immunity must be available. "[Q]uestions of immunity are *reviewable before trial* because the essence of immunity is the entitlement not to be subject to suit." *Id.* (emphasis added). The criminal process's extensive "safeguards, though important, do not alleviate the need for *pretrial review*," because "under our system of separated powers, criminal prohibitions cannot apply to certain Presidential conduct to begin with. . . . [W]hen the President acts pursuant to his exclusive constitutional powers, Congress cannot—as a structural matter—regulate such actions, and courts cannot review them." *Id.* at 636 (emphasis added). That is because "the interests that underlie Presidential immunity seek to protect not the President himself, but the institution of the Presidency." *Id.* at 632.

Accordingly, "[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," which includes interlocutory appellate review before sentencing or other trial-court proceedings on the merits. *Trump*, 603 U.S. at 636. "Even if the President were ultimately not found liable for

certain official actions, the possibility of an extended proceeding alone may render him unduly cautious in the discharge of his official duties." *Id.* (cleaned up). "Vulnerability to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute." *Id.* (cleaned up). "The Constitution does not tolerate such impediments to 'the effective functioning of government,'" *id.* at 636-37 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 751 (1982))—and thus the Constitution requires that appellate review of questions of Presidential immunity proceed to completion *before* further proceedings in the trial court. *See id.* at 635-37 (holding that questions of Presidential immunity from criminal prosecution are "appealable before trial" and "reviewable before trial because the essence of immunity is the entitlement not to be subject to suit").

The Supreme Court's repeated citation of *Mitchell v. Forsyth* is particularly telling on this point. Like *Trump* itself, *Mitchell* mandates an automatic stay of trial-court proceedings while the immunity claim is on appeal, and it is widely cited for that very proposition. *See Mitchell*, 472 U.S. at 525-26; *see also, e.g.*, *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989) (citing *Mitchell* to conclude that an automatic stay applies in an immunity appeal); *Chuman v. Wright*, 960 F.2d 104, 104-05 (9th Cir. 1992) (same). *Mitchell* held that "the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct . . . ." 472 U.S. at 525. This requires a stay to protect officials from any burdens of litigation while the question of immunity is under review on appeal, including preventing "the general costs of subjecting officials to the risks of trial," and protecting those officials from "even such pretrial matters as discovery." *Id.* at 526 (cleaned up). Immunity, *Mitchell* held, is "an entitlement not to stand trial or face the other burdens of litigation." *Id.* "The entitlement is an *immunity from suit* rather than a mere defense to liability;

and . . . it is effectively lost if a case is erroneously permitted to go to trial." *Id.* Immunity entails "an entitlement *not to be forced to litigate the consequences of official conduct*," *id.* at 527 (emphasis added), at *any* stage of criminal proceedings—which is exactly what the automatic stay implements.

B. At Minimum, Three Features of *Trump* Reinforce the Requirement of an Automatic Stay of Further Proceedings in the Supreme Court.

At minimum, three features of the U.S. Supreme Court's opinion in *Trump* mandate an automatic stay of further proceedings in the Supreme Court pending review by this Court. All of these features confirm that the interlocutory appellate rights that *Trump* recognizes as part and parcel of Presidential immunity include an automatic stay of trial-court proceedings pending interlocutory appeals relating to Presidential immunity.

1. Forcing President Trump to face sentencing and judgment while his claims of Presidential immunity are still pending on appeal would "deprive immunity of its intended effect."

As noted above, *Trump* held that "[t]he essence of [Presidential] immunity 'is its possessor's entitlement not to have to answer for his conduct' in court." *Trump*, 603 U.S. at 630 (quoting *Mitchell*, 472 U.S. at 525). Forcing a President to continue to defend a criminal case—potentially through trial or, even more dramatically here, through *sentencing and judgment*—while the appellate courts are still grappling with his claim of immunity would, in fact, force that President "to answer for his conduct in court" before his claims of immunity are finally adjudicated. *Id.* The *Trump* Court's references to "the threat of trial, *judgment*, and *imprisonment*" make clear that Presidential-immunity violations cannot be ignored in favor of a rushed pre-inauguration sentencing, based on a fatally flawed record that would lead to a wrongful judgment of conviction. *Id.* at 613 (emphasis added). Thus, denying a stay of trial-court proceedings

pending appeal would do exactly what *Trump* repeatedly warned against—it would "depriv[e] immunity of its intended effect." *Id.* at 619.

It is of no moment that the Supreme Court has suggested an intention—though not a commitment—to impose a sentence of unconditional discharge. While it is indisputable that the fabricated charges in this meritless case should have never been brought, and at this point could not possibly justify a sentence more onerous than that, no sentence at all is appropriate based on numerous legal errors—including legal errors directly relating to Presidential immunity. The Supreme Court's non-binding preview of its current thinking regarding a hypothetical sentencing does not mitigate these bedrock federal constitutional violations or in any way limit President Trump's right to interlocutory review of those errors. *Cf. Trump*, 603 U.S. at 637 ("We do not ordinarily decline to decide significant constitutional questions based on the Government's promises of good faith."); *United States v. Stevens*, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."). Moreover, even a sentence of unconditional discharge comes with significant collateral consequences as a matter of law, including loss of civil rights such as the right to possess a firearm and loss of the right to vote in many states. Forcing President Trump to prepare for a criminal sentencing in a felony case while he is preparing to lead the free world as President of the United States in less than two weeks imposes an intolerable, unconstitutional burden on him that undermines vital national interests.

For this reason, the *Trump* Court repeatedly rejected the arguments that would have rendered Presidential immunity ineffective in this fashion. Holding that a mere allegation of unlawfulness cannot deprive a President of immunity, the Supreme Court reasoned that, if it were "[o]therwise, Presidents would be subject to trial on every allegation that an action was unlawful,

depriving immunity of its intended effect." 603 U.S. at 619 (cleaned up). Likewise, regarding the government's demand to admit *evidence* of official acts at trial—which underlies one of President Trump's key enumerations of error here—the Supreme Court held "[t]hat proposal threatens to *eviscerate the immunity we have recognized*." *Id.* at 631 (emphasis added). "[T]he Government's position is untenable in light of the separation of powers principles we have outlined." *Id.* "If official conduct for which the President is immune may be scrutinized to help secure his conviction, even on charges that purport to be based only on his unofficial conduct, the 'intended effect' of immunity would be defeated." *Id.* (quoting *Fitzgerald*, 457 U.S. at 756).

Given that Presidential immunity entails immunity from the burdens of criminal litigation such as trial and sentencing, forcing the President to defend a criminal case—*especially* at a sentencing hearing ten days before he is due to become President again—while his claim is adjudicated on appeal would "eviscerate" immunity by "depriving immunity of its intended effect." *Trump*, 603 U.S. at 619, 631. The automatic stay pending appeal prevents this very injury.

2. Presidential immunity nullifies the power of trial courts to act.

Second, as the U.S. Supreme Court emphasized, the doctrine of Presidential immunity nullifies the power of trial courts to act. "Congress cannot act on, and *courts cannot examine*, the President's actions on subjects within his 'conclusive and preclusive' constitutional authority." *Trump*, 603 U.S at 609 (emphasis added). "Neither may the courts adjudicate a criminal prosecution that examines such Presidential actions." *Id.* Indeed, "pretrial review" by interlocutory appeal is mandated because "under our system of separated powers, criminal prohibitions cannot apply to certain Presidential conduct to begin with." *Id.* at 635-36. "[W]hen the President acts pursuant to his exclusive constitutional powers, Congress cannot—as a structural matter—regulate such actions, and *courts cannot review them*." *Id.* at 636 (emphasis added). This

fact renders a stay pending appeal particularly necessary—the Supreme Court should not continue to act while its very power to act in the first place is under appellate consideration.

This conclusion, moreover, is even more forceful when it comes to President Trump's claim of sitting-President immunity, which all parties agree becomes comprehensive and absolute as soon as President Trump takes office. *See generally* Memorandum from Randolph D. Moss, Assistant Attorney General, OLC, *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 2000 WL 33711291, at *29 (Oct. 16, 2000) ("[A] sitting President is constitutionally immune from indictment and criminal prosecution."). Sitting-President immunity extends into the brief transition period during which the President-elect prepares to assume the Executive Power of the United States, and the courts thus lack authority to adjudicate criminal claims against him. *See, e.g.*, 3 U.S.C. § 102 note, § 2 ("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. . . . [A]ll officers of the Government [should] conduct the affairs of the Government . . . to take appropriate lawful steps to avoid or minimize disruptions that might be occasioned by the transfer of the executive power . . . ."). That is exactly why the federal Special Counsel's Office dismissed, during the transition period, their politically-motivated charges brought in Florida and Washington, D.C. against President Trump, and there is no basis for proceeding differently here by forcing a sentencing rather than allowing President Trump to pursue constitutionally mandated interlocutory appellate rights, which will result in the mandated dismissal of this case.

3. A stay allows for orderly resolution of critical issues.

Third, the U.S. Supreme Court in *Trump* instructed that issues of Presidential immunity should be resolved in a methodical, orderly fashion—not at the attempted breakneck speed of the lower courts in that case. The Supreme Court chastised the lower courts for proceeding without

due care and caution: "Despite the unprecedented nature of this case, and the very significant constitutional questions that it raises, the lower courts rendered their decisions on a highly expedited basis." 603 U.S. at 616. "[T]he underlying immunity question . . . raises multiple unprecedented and momentous questions about the powers of the President and the limits of his authority under the Constitution," *id.*, and even the Supreme Court was "deciding [the case] on an expedited basis, less than five months after we granted the Government's request" to expedite the case, *id.* at 616-17. Allowing a criminal case to proceed to sentencing, while an Article 78 Petition is pending directly challenging the Court's Presidential immunity rulings would constitute "highly expedited" treatment at its worst. *See id.* at 616.

Indeed, the Supreme Court's current schedule—denying President Trump's sitting-President immunity motion on January 3, 2025, and then scheduling a sentencing hearing just seven days later, immediately before President Trump's inauguration—typifies the "highly expedited" treatment that the U.S. Supreme Court cautioned against. For example, the rushed timing in the current schedule forecloses DANY from making a sentencing submission, which has to be submitted no less than ten days before sentencing, CPL § 390.40(2), and violates President Trump's right to a full opportunity to prepare his own. *See* CPL § 390.40(1). It cannot be ignored that this rushed seven-day period between the ruling on Presidential immunity and the sentencing has been imposed in a case that dates back to 2018 and includes an enormous record of discovery and trial proceedings. In that context, there is no legal basis to rush ahead to sentencing rather than impose a stay, other than DANY's preference to get this done prior to President Trump's inauguration so that DA Bragg can tell voters in his upcoming election that he completed the case.

Likewise, in appeals such as this one, "whether 'the litigation may go forward in the district court is precisely what the court of appeals must decide.'" *Coinbase, Inc. v. Bielski*, 599 U.S. 736,

741 (2023) (quoting *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997)). "[T]he district court must stay its proceedings while the interlocutory appeal . . . is ongoing." *Id.* This logic applies with even greater force to an interlocutory appeal on the far more momentous question of Presidential immunity from criminal prosecution.

Indeed, the "common practice" of entering such automatic stays "reflects common sense." *Coinbase*, 599 U.S. at 742-43. "Absent an automatic stay of district court proceedings," the U.S. Supreme Court's "decision . . . to afford a right to an interlocutory appeal would be largely nullified." *Id.* at 743. "If the district court could move forward with pre-trial and trial proceedings"—or worse, as here, criminal sentencing and judgment—while the appeal was ongoing, "then many of the asserted benefits" of Presidential immunity "would be irretrievably lost." *Id.* "[C]ontinuation of proceedings in the district court 'largely defeats the point of the appeal.'" *Id.* (quoting *Bradford-Scott*, 128 F.3d at 505). "A right to interlocutory appeal of the [immunity] issue without an automatic stay of the district court proceedings is therefore like a lock without a key, a bat without a ball, a computer without a keyboard—in other words, not especially sensible." *Id.*

C. The Automatic Stay Extends to Both Claims of Presidential Immunity That President Trump Is Currently Raising on Appeal.

The automatic stay of trial-court proceedings required by *Trump*, *Coinbase*, and other jurisprudence, extends to both of the claims of Presidential immunity that President Trump is currently raising on appeal: (1) Presidential immunity based on evidentiary misuse of official acts, and (2) absolute sitting-President immunity from criminal process, extended to the President-elect.

First, an interlocutory appeal is appropriate to challenge the erroneous widespread admission of *evidence* of immune official acts—including (as here) the unlawful presentation of such evidence both to the grand jury and to the trial jury. As *Trump* explained, immunity from the

evidentiary misuse of official acts is just as fundamental to the doctrine of Presidential immunity as immunity from prosecution for official acts: "If official conduct for which the President is immune may be scrutinized to help secure his conviction, even on charges that purport to be based only on his unofficial conduct, the 'intended effect' of immunity would be defeated." 603 U.S. at 631 (quoting *Fitzgerald*, 457 U.S. at 756). DANY's use of official-acts evidence to probe a President's motives "risk[s] exposing even the most obvious instances of official conduct to judicial examination on the mere allegation of improper purpose, thereby intruding on the Article II interests that immunity seeks to protect." *Id.* at 618. "Indeed, it would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government if in exercising the functions of his office, the President was under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry." *Id.* (cleaned up). "The President's immune conduct would be subject to examination by a jury on the basis of generally applicable criminal laws. Use of evidence about such conduct, even when an indictment alleges only unofficial conduct, would thereby heighten the prospect that the President's official decisionmaking will be distorted." *Id.* at 631. Because evidentiary-use immunity implicates the same constitutional concerns as direct-prosecution immunity, *see id.*, it directly follows that the automatic stay pending appeal applies to evidentiary-use appeals as well.

Second, President Trump's claim of sitting-President immunity implicates all the same policies and concerns as official-act immunity and heightens the need for the automatic stay. All parties agree that, once President Trump assumes Office, he will be absolutely immune from any criminal process, state or federal, under the doctrine of sitting-President immunity. But the Supreme Court's decision to schedule a sentencing hearing on January 10, 2025, at the apex of Presidential transition and ten days before President Trump assumes Office, necessitates that

President Trump will be forced to continue to defend his criminal case while he is in Office—at the very least, on appeal from the judgment, as the Supreme Court's January 3 Order repeatedly and expressly recognizes. *See, e.g.*, Jan. 3, 2025, Decision and Order, at 17 ("Defendant must be permitted 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. . . . [A] sentence of an unconditional discharge appears to be the most viable solution to ensure finality and allow Defendant to pursue his appellate options."). Moreover, DANY could also pursue an appeal of any sentencing determination they view as contrary to law. *See* CPL § 450.20(4). Thus, under the current schedule, instead of facing no further criminal proceedings while he is President, President Trump will be forced to deal with criminal proceedings for years to come, which is the opposite of what the doctrine of sitting-President immunity requires.

Moreover, the prospect of imposing sentence on President Trump just before he assumes Office as the 47th President raises the specter of other possible restrictions on liberty, such as travel, reporting requirements, registration, probationary requirements, and others—all of which would be constitutionally intolerable under the doctrine of sitting-President immunity. As noted above, every adjudication of a felony conviction results in significant collateral consequences for the defendant, regardless of whether a term of imprisonment is imposed. Furthermore, these constitutional errors would compound the already grave constitutional problems with this proceeding, including grave due process problems, such as forcing a jury on President Trump in record time and without proper process.

D. The Automatic Stay Extends to Criminal *Sentencing* as Well as Trial.

Because the right of interlocutory appeal and automatic stay prevent a trial court from proceeding to *trial* pending appeal on immunity, it follows *a fortiori* that the same rights prevent

the trial court from forcing President Trump from undergoing *criminal sentencing and judgment* while his immunity appeal is pending. As *Trump* repeatedly emphasizes, Presidential immunity protects the President from the entire "suit," not just certain procedural stages of the suit. "The essence of immunity is its possessor's entitlement not to have to answer for his conduct in court." 603 U.S. at 630. "Official immunity, including the President's official-act immunity, is '*immunity from suit* rather than a mere defense to liability.'" *Blassingame v. Trump*, 87 F.4th 1, 29 (D.C. Cir. 2023) (quoting *Mitchell*, 472 U.S. at 526). "It is 'an entitlement not to stand trial or face the other burdens of litigation.'" *Id.* (quoting *Mitchell*, 472 U.S. at 526). "Those concerns are particularly pronounced when the official claiming immunity from suit is the President." *Id.* Thus, the President's "immunity from suit," *id.*, extends to immunity from the imposition of criminal sentence and final judgment as well as trial, because "[t]he Framers' design of the Presidency did not envision such counterproductive burdens on the 'vigor' and 'energy' of the Executive." *Trump*, 603 U.S. at 614 (cleaned up) (quoting The Federalist No. 70, at 471-72). Thus, President Trump "must be afforded that opportunity" to litigate his claims on appeal "before the proceedings can move ahead to the merits, including before any merits-related discovery," *Blassingame*, 87 F.4th at 29—or, as here, before "moving ahead to" a *final judgment* on "the merits," *id.* (emphasis added). Indeed, undergoing a criminal sentencing is the most extreme example of "hav[ing] to answer for his conduct in court," *Trump*, 603 U.S. at 630—exactly what the doctrine of Presidential immunity forbids and why an automatic stay is mandated.

E. New York Appellate Law and Practice Support an Immediate Stay.

To be clear, the filing of President Trump's appeal on immunity *automatically* stays further criminal proceedings in the Supreme Court—including the imminent sentencing hearing scheduled for January 10, 2025—pending the outcome of the appeal, and it does so as a matter of federal

constitutional law. *See Trump*, 706 F. Supp. 3d at 93("Defendant's appeal *automatically stays* any further proceedings that would move this case towards trial or impose additional burdens of litigation on Defendant" (emphasis added)). As the U.S. Supreme Court's *Trump* decision makes clear, this automatic stay is an essential part of the federal doctrine of Presidential immunity itself, which arises from the very structure of the U.S. Constitution. *Trump*, 603 U.S. at 629-30, 634-38. As a matter of federal constitutional law, the doctrine of Presidential immunity binds New York courts under the Supremacy Clause. *See e.g.*, *Trump v. Vance*, 591 U.S. 786, 810 (2020) (holding that a President can raise federal challenges to a state criminal subpoena under "the Supremacy Clause," which is an "avenue [that] protects against local political machinations 'interposed as an obstacle to the effective operation of federal constitutional power'") (quoting *United States v. Belmont*, 301 U.S. 324, 332 (1937)). When the "judicial authority is invoked in aid" of the United States' authority in the "field of its powers," "State Constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power." *Belmont*, 301 U.S. at 331-32.

There is no conflict between the U.S. Supreme Court's automatic-stay doctrine in *Trump* and New York appellate law and practice here, because President Trump is equally entitled to a stay under New York law, and this Court should grant a stay on this ground as well. Section 7805 of the CPLR expressly authorizes stays of "further proceedings" in the trial court pending resolution of an Article 78 proceeding. CPLR § 7805 ("On the motion of any party or on its own initiative, *the court may stay further proceedings*, or the enforcement of any determination under review . . . ." (emphasis added)). Relying on this provision, New York appellate courts routinely grant stays of criminal proceedings while the trial court's authority to conduct further proceedings

is subject to appellate review in an Article 78 proceeding. *See, e.g.*, *Kisloff v. Covington*, 73 N.Y.2d 445, 448 (1989) (noting the Appellate Division stayed the prosecution after the filing of an Article 78 petition "seeking to prohibit further prosecution"); *Dow v. Tomei*, 107 A.D.3d 986, 987 (2d Dep't 2013) (staying enforcement of order "compelling the petitioner to appear in court for resentencing"); *Gorghan v. DeAngelis*, 25 A.D.3d 872, 872-73 (3d Dep't 2006) ("Thereafter, County Court . . . summarily denied petitioner's motion which sought an order prohibiting retrial based on double jeopardy grounds and petitioner initiated this proceeding. By order of this Court, all further proceedings in County Court have been stayed pending this decision."); *McLaughlin v. Eidens*, 292 A.D.2d 712, 713 (3d Dep't 2002) ("By order of this Court, all proceedings have been stayed" pending resolution of an Article 78 proceeding challenging the trial court's authority to proceed); *Van Wie v. Kirk*, 244 A.D.2d 13, 23 (4th Dep't 1998) ("Upon filing the instant CPLR article 78 petition, petitioner obtained a stay of proceedings" preventing the criminal trial from proceeding); *Lacerva v. Dwyer*, 177 A.D.2d 747, 748 (3d Dep't 1991) ("Further proceedings were then stayed by the court to permit preparation of this CPLR article 78 proceeding to prohibit retrial on the ground of double jeopardy. This court stayed the criminal trial pending determination of this proceeding."); *see also Rush v. Mordue*, 68 N.Y.2d 348, 352 n.1 (1986) (noting the parties stipulated to a stay in the underlying criminal case pending the outcome of the proceedings and appeal in the Court of Appeals); *James N. v. D'Amico*, 139 A.D.2d 302, 309-10 (4th Dep't 1988) (Boomer, J., concurring) (arguing that stays should be issued under CPLR 7805 upon a "showing of probability of success on the merits of the [Article 78] proceeding").

Such stays of criminal proceedings include cases granting a stay to prevent the trial court from conducting a sentencing hearing pending decision on an Article 78 petition to block the sentencing from occurring—the exact procedural posture of this case. *See, e.g.*, *Dow*, 107 A.D.3d

at 986. They also include stays issued at the prosecution's request, not just the defense. *See Vance v. Roberts*, 176 A.D.3d 492, 493 (1st Dep't 2019) ("The People sought and obtained a stay of this order and commenced this article 78 proceeding."); *Hoovler v. DeRosa*, 143 A.D.3d 897, 899 (2d Dep't 2016) ("On July 6, 2016, the . . . District Attorney of Orange County commenced this proceeding pursuant to CPLR article 78 . . . to prohibit Judge DeRosa from enforcing his order dated July 1, 2016. This Court stayed enforcement of that order, as well as the trial in the criminal action, pending determination of this proceeding.").

Section 7805's authorization of stays of all "further proceedings" in criminal cases, and New York courts' common practice of granting such stays in Article 78 proceedings challenging the trial court's authority to proceed in criminal cases, implement the same policy reflected in the U.S. Supreme Court's decision in *Trump*. In fact, it would be astonishing if such a stay, which is routinely granted in garden-variety criminal cases, were denied to a President of the United States asserting claims of Presidential immunity from prosecution that "raise[s] multiple unprecedented and momentous questions about the powers of the President and the limits of his authority under the Constitution." *Trump*, 603 U.S. at 616.

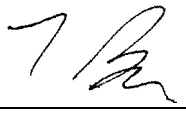
CONCLUSION

By virtue of President Trump's filing of appellate proceedings raising his claims of Presidential immunity, all proceedings in the Supreme Court are automatically stayed by operation of federal constitutional law. Justice Merchan, therefore, lacks authority to proceed with the sentencing hearing scheduled for January 10, 2025, or to conduct any further proceedings in the underlying criminal case, until this Article 78 proceeding is concluded. In the alternative, even if such a stay were discretionary, which it is not, this Court should grant such a stay under CPLR § 7805 for all the reasons discussed herein. Accordingly, this Court should immediately order a

stay of all criminal proceedings before Justice Merchan, including but not limited to the sentencing hearing currently scheduled for Friday, January 10, 2025, pending resolution of this Article 78 proceeding and any further and related appeals, which should result in a dismissal of this case with prejudice.

Dated: January 7, 2025
New York, New York

Respectfully submitted,



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Attorneys for President Donald J. Trump

OGE Form 278e (March 2014)
U.S. Office of Government Ethics; 5 C.F.R. part 2634 | Form Approved: OMB No. (3209-0001)

Report Type:	Annual
Year (Annual Report only):	2017
Date of Appointment/Termination:	January 20, 2017

UNITED STATES OFFICE OF GOVERNMENT ETHICS
Preventing Conflicts of Interest in the Executive Branch

Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278e)

Filer's Information

Last Name	First Name	MI	Position	Agency
Trump	Donald	J	President of the United States of America	

Other Federal Government Positions Held During the Preceding 12 Months:
N/A

Name of Congressional Committee Considering Nomination (Nominees only):
N/A

Filer's Certification - I certify that the statements I have made in this report are true, complete and correct to the best of my knowledge:

Signature: [signature] Date: May 15, 2018

Agency Ethics Official's Opinion – On the basis of information contained in this report, I conclude that the filer is in compliance with applicable laws and regulations (subject to any comments below)

Signature: [signature] Date: May 15, 2018

Other Review Conducted By:

Signature: Date:

U.S. Office of Government Ethics Certification (if required):

Signature: [signature] Date: 5/16/2018

Comments of Reviewing Officials:

Note 3 to Part 8: OGE has concluded that the information related to the payment made by Mr. Cohen is required to be reported and that the information provided meets the disclosure requirement for a reportable liability. 5/16

GX 202

"In late January 2018, I received a copy of a complaint filed at the Federal Election Commission (FEC) by Common Cause. The complaint alleges that I somehow violated campaign finance laws by facilitating an excess, in-kind contribution. The allegations in the complaint are factually unsupported and without legal merit, and my counsel has submitted a response to the FEC.

I am Mr. Trump's longtime special counsel and I have proudly served in that role for more than a decade. In a private transaction in 2016, I used my own personal funds to facilitate a payment of $130,000 to Ms. Stephanie Clifford. Neither the Trump Organization nor the Trump campaign was a party to the transaction with Ms. Clifford, and neither reimbursed me for the payment, either directly or indirectly. The payment to Ms. Clifford was lawful, and was not a campaign contribution or a campaign expenditure by anyone.

I do not plan to provide any further comment on the FEC matter or regarding Ms. Clifford."

"Just because something isn't true doesn't mean that it can't cause you harm or damage. I will always protect Mr. Trump."

GX 207

From: **Costello, Robert J.** [redacted]@dhclegal.com>
Date: Wed, Jun 13, 2018 at 3:21 PM
Subject: FW: Update DRAFT
To: Michael Cohen <[redacted]@gmail.com>

Michael,

Since you jumped off the phone rather abruptly, I did not get a chance to tell you that my friend has communicated to me that he is meeting with his client this evening and he added that if there was anything you wanted to convey you should tell me and my friend will bring it up for discussion this evening.

I would suggest that you give this invitation some real thought. Today's newspaper stories should not rattle you. The event announced today you thought would be announced Friday or Monday so it is merely a difference of timing. MW& E were brought in to do a discreet task and they have performed those services in an exemplary fashion. This is not a change in plan rather it is exactly what was planned. Your message or the message of MW &E should be positive and not negative in any way. What you do next is for you to decide, but if that choice requires any discussion with my friends client, you have the opportunity to convey that this evening, but only if you so decide.

I must tell you quite frankly that I am not used to listening to abuse like today's conversation. You have called me numerous times over the last month to discuss issues and I have always tried to be as helpful as I could. You told me back in April that I was part of the team and I have acted accordingly on your behalf. When I suggested that we meet and discuss a strategy following this news you

suddenly took a new approach and stated: "That's not going to happen" Stunned by this remark, I was asking you for a clarification of our legal relationship. You indicated that you would be talking to someone in a boutique firm that was not ready to get involved and when I noted that you were willing to sit down with them but not sit down with us, you had an unfortunate outburst. I relayed this situation to Jeff Citron who suggested that you probably were just having a bad moment but that it was necessary to seek a clarification of our position with you in light of your remarks.

Please remember if you want or need to communicate something, please let me know and I will see that it gets done. I hope I am wrong but it seems to both Jeff and I that perhaps we have been played here. Let me know what you want to do.

Bob

DHC

Robert J. Costello, Esq.
Davidoff Hutcher & Citron LLP
605 Third Avenue, New York, NY 10158
Firm: [redacted]7200 Direct: [redacted].3238
Fax: [redacted]1884 Email: [redacted]@dhclegal.com
Website

--
Yours,

Michael D. Cohen
[redacted]0114 (Cellular)
[redacted]@gmail.com

GX 260

Timeline (4)

#	Type	Direction	Attachments	Locations	Date	Time	Party	Description	Source	Latitude	Longitude	Address	Deleted	Tag Note	Source file information	Carved
1	Instant Messages	Outgoing			2/6/2018	2/6/2018 2:03:56 PM(UTC-5)	From: [redacted]0114 Michael Cohen (owner) To: [redacted]4978 Maggie Haberman To: [redacted]4978 Maggie Haberman	Big boss just approved me responding to complaint and statement. Please start writing and I will call you soon	Native Messages						971effd1117bd8fdce3bfdf2a4202af234e63f00_files_full.zip/private/var/mobile/Library/SMS/sms.db: 0x2DA7895 (Table: message, handle; Size: 82022400 bytes)	
2	Instant Messages	Outgoing			2/6/2018	2/6/2018 3:22:55 PM(UTC-5)	From: [redacted]0114 Michael Cohen (owner) To: [redacted]4978 Maggie Haberman To: [redacted]4978 Maggie Haberman	Embargoed until we talk with Steve Ryan. But you are the only one who will have it	Native Messages						971effd1117bd8fdce3bfdf2a4202af234e63f00_files_full.zip/private/var/mobile/Library/SMS/sms.db: 0x2DAAFE4 (Table: message, handle; Size: 82022400 bytes)	
3	Instant Messages	Outgoing			2/13/2018	2/13/2018 4:28:09 PM(UTC-5)	From: [redacted]0114 Michael Cohen (owner) To: [redacted]4978 Maggie Haberman To: [redacted]4978 Maggie Haberman	"In late January 2018, I received a copy of a complaint filed at the Federal Election Commission (FEC) by Common Cause. The complaint alleges that I somehow violated campaign finance laws by facilitating an excess, in-kind contribution. The allegations in the complaint are factually unsupported and without legal merit, and my counsel has submitted a response to the FEC. I am Mr. Trump's longtime special counsel and I have proudly served in that role for more than a decade. In a private transaction in 2016, I used my own personal funds to facilitate a payment of $130,000 to Ms. Stephanie Clifford. Neither the Trump Organization nor the Trump campaign was a party to the transaction with Ms. Clifford, and neither reimbursed me for the payment, either directly or indirectly. The payment to Ms. Clifford was lawful, and was not a campaign contribution or a campaign expenditure by anyone. I do not plan to provide any further comment on the FEC matter or regarding Ms. Clifford."	Native Messages						971effd1117bd8fdce3bfdf2a4202af234e63f00_files_full.zip/private/var/mobile/Library/SMS/sms.db: 0x2E789FF (Table: message, handle; Size: 82022400 bytes)	
4	Instant Messages	Outgoing			2/13/2018	2/13/2018 7:37:03 PM(UTC-5)	From: [redacted]0114 Michael Cohen (owner) To: [redacted]4978 Maggie Haberman To: [redacted]4978 Maggie Haberman	We are good to go on the statement. Release tomorrow at 6:40am	Native Messages						971effd1117bd8fdce3bfdf2a4202af234e63f00_files_full.zip/private/var/mobile/Library/SMS/sms.db: 0x2E7FA78 (Table: message, handle; Size: 82022400 bytes)	

GX 407F

← **Thread**

Donald J. Trump ✓
@realDonaldTrump

The New York Times and a third rate reporter named Maggie Haberman, known as a Crooked H flunkie who I don't speak to and have nothing to do with, are going out of their way to destroy Michael Cohen and his relationship with me in the hope that he will "flip." They use....

9:10 AM · Apr 21, 2018

7,762 Retweets **3,758** Quote Tweets **36.4K** Likes

Donald J. Trump ✓ @realDonaldTrump · Apr 21, 2018
Replying to @realDonaldTrump
....non-existent "sources" and a drunk/drugged up loser who hates Michael, a fine person with a wonderful family. Michael is a businessman for his own account/lawyer who I have always liked & respected. Most people will flip if the Government lets them out of trouble, even if....

6,705 7,431 29.6K

Donald J. Trump ✓ @realDonaldTrump · Apr 21, 2018
....it means lying or making up stories. Sorry, I don't see Michael doing that despite the horrible Witch Hunt and the dishonest media!

13.9K 7,377 31.9K

GX 407G


Post
Donald J. Trump
@realDonaldTrump
Mr. Cohen, an attorney, received a monthly retainer, not from the campaign and having nothing to do with the campaign, from which he entered into, through reimbursement, a private contract between two parties, known as a non-disclosure agreement, or NDA. These agreements are.....
6:46 AM · May 3, 2018
17K
11K
44K
71

← **Post**

Donald J. Trump ✓
@realDonaldTrump

...very common among celebrities and people of wealth. In this case it is in full force and effect and will be used in Arbitration for damages against Ms. Clifford (Daniels). The agreement was used to stop the false and extortionist accusations made by her about an affair,.....

6:54 AM · May 3, 2018

15K 10K 46K 35


Post
Donald J. Trump
@realDonaldTrump
...despite already having signed a detailed letter admitting that there was no affair. Prior to its violation by Ms. Clifford and her attorney, this was a private agreement. Money from the campaign, or campaign contributions, played no roll in this transaction.
7:00 AM · May 3, 2018
36K
13K
51K
49

GX 407H


Post
Donald J. Trump
@realDonaldTrump
If anyone is looking for a good lawyer, I would strongly suggest that you don't retain the services of Michael Cohen!
8:44 AM · Aug 22, 2018
57K
47K
99K
260

GX 407I

← **Post**

Donald J. Trump ✓
@realDonaldTrump

I feel very badly for Paul Manafort and his wonderful family. “Justice” took a 12 year old tax case, among other things, applied tremendous pressure on him and, unlike Michael Cohen, he refused to “break” - make up stories in order to get a “deal.” Such respect for a brave man!

9:21 AM · Aug 22, 2018

42K 19K 58K 104

introducing into evidence.

MR. STEINGLASS: Okay. The Court also reserved decision on evidence that the defendant attempted to dissuade witnesses from cooperating with law enforcement. And there were several categories of evidence that the Court referred to in its Decision.

And, again, I will direct you to pages 12 to 13 of your ruling on the People's motions in limine. The Court again stated that an offer of proof was required before the Court could make a ruling.

The first category includes the tweets and communications with Michael Cohen before and after his decision to provide information to law enforcement.

As the evidence will clarify, and as Your Honor probably knows, on April 9, 2018 the FBI raided Michael Cohen's home and place of business partly in connection with this investigation into potential FICA violations involving illegal campaign contributions to Mr. Trump. That investigation included inquiry into the Karen McDougal and Stormy Daniels' payoffs.

Within days, President Trump, then President Trump, spoke on the phone with Michael Cohen and told him, in substance, don't worry, everything is going to be fine. I am the President. I got you. Don't worry about it. You are going to be okay.

As time went on, Michael Cohen received messages from others who reached out to say in substance, the boss loves you and has your back.

Mr. Trump publicly supported Michael Cohen telegraphing to him the importance of staying on message and at the time Mr. Trump was even paying the legal fees for Michael Cohen's attorneys.

So as, by way of example, you can see on your screen, Judge, a series of tweets from then President Trump less than two weeks after Michael Cohen's apartment and business were raided.

I am not going to read the whole thing, but some of the highlighted portions, going out of their way to destroy Michael Cohen and his relationship with me in the hope that he will flip. Michael is a fine person with a wonderful family, which is why I have always liked and respect him. Most people will flip if the government let's them out of trouble. Sorry, I don't see Michael doing it.

Around the same time, Michael Cohen met with attorney Robert Costello to discuss the possibility of retaining him and Costello billed himself as having close ties to Trump's lawyer at the time, Rudy Giuliani, and Costello claimed to have opened up a back channel of communication with President Trump, which was critical to maintain.

Among the emails that establish this is People's Exhibit 205. Again, I am not going to read the entire thing. Some of the highlighted portions, I spoke with Rudy. Very, very positive. You are loved. They are in our corner. Rudy said this communication channel must be maintained. Sleep well tonight. You have friends in high places.

PS, some very positive comments about you from the White House.

(Continued on the next page.)

MR. STEINGLASS: So, in mid June of 2018, sensing that Mr. Costello's loyalties were, to say the least, divided, Michael Cohen began distancing himself from Mr. Costello.

On June 14, 2018, Costello e-mailed Michael Cohen with a link to a YouTube video and the subject line, "Giuliani on the possibility of Cohen cooperating, Mueller probe." Again, I'm not going to read the whole e-mail, but some of the highlighted portions:

"You are believing a narrative promoted by the left-wing media. Many of them are already writing that you are cooperating. This strategy has been consistent from start to put pressure on you into believing that you are alone, that everyone you knew before is distancing themselves from you, and you are being thrown under the bus. They want you to cave. They want you to fail. They do not want you to persevere and succeed."

Now, these tweets and backdoor communications are clearly designed to keep Michael Cohen from breaking with Mr. Trump, to keep him close. For a while, that strategy worked. The evidence will be very clear that, even after Mr. Trump reimbursed Michael Cohen for the unlawful campaign contribution, Michael Cohen continued to deny wrongdoing. For several months, he continued to lie on behalf of Mr. Trump.

Now, the defense wants the jury to interpret these lies as prior inconsistent statements, evidence of his general lack of credibility, evidence that he was telling the truth then when he was denying it and he's lying now when he testifies before you and before this jury, but the truth is that Michael Cohen stayed loyal for as long as he did because of the defendant's pressure campaign and we must be permitted to elicit the evidence that contextualizes why Michael Cohen would deny wrongdoing for so long.

Now, of course, we all know that the defendant's strategy ultimately failed. On August 21, 2018, Michael Cohen pled guilty to campaign finance violations and that plea was widely reported. He allocuted that he committed these FICA violations in coordination with and at the direction of Mr. Trump. The very next day--the very next day--the defendant switched gears and posted the following tweets:

"If anyone is looking for a good lawyer, I would strongly suggest that you don't retain the services of Michael Cohen."

A few moments later, comparing him to Paul Manafort. Well, he's actually comparing Paul Manafort to Michael Cohen:

"Unlike Michael Cohen, he refused to break, make

up stories in order to get a deal."

These tweets, phone calls, and e-mails should be admissible for two reasons:

First, the pressure campaign explains, as we saw, why Michael Cohen continued to lie for Mr. Trump as long as he did.

Second, immediately after Michael Cohen petitioned to plead guilty and provide information, the defendant began openly disparaging Michael Cohen and attacking his livelihood.

It's a clear effort to raise the cost of cooperation and, as the Court noted in its decision, such conduct can certainly be probative of consciousness of guilt.

There is virtually no danger of unfair prejudice here. These are the defendant's own words publicly broadcast, tweeted out for the world to see, and he should not be able to prevent the jury from hearing them now.

These are all interrelated, this pressure campaign. With the Court's permission, I'm going to tackle these all at once because it's all interrelated.

The next category involves tweets by the defendant around the time of the Grand Jury presentation in this case.

As the Court is aware, the instant case was

between the two.

Then, a couple of reactions to the tweets and then the Truths:

With respect to the tweets that the People proffer, again, to make sure that your Honor is aware, we anticipate 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. Putting that aside for a moment, they need to be looked at individually.

The initial tweet that just talks about Mr. Cohen being a good person and reflecting that he was his lawyer, it's hard -- that was a tweet not sent to Mr. Cohen. It was when President Trump was President facing a barrage of news media and criticism about what was happening in this case and responding to that. So, to say, "Well, that was also consciousness of guilt and can be admitted in this trial as consciousness of guilt," goes way too far. There is no connection. That's why it can't just be wholesale every tweet comes in or every Truth comes in. Each one has to be looked at individually.

The ones that are more recent, your Honor, the Truths, it's pretty rich that, when there's leaks from the Grand Jury a year-and-a-half ago--and I'm not accusing anybody or saying who leaked that--and then-candidate

President Trump is responding forcefully, that that's now going to be used as some sort of threatening of witnesses or consciousness of guilt. He has a right to defend himself. He has a right to defend himself not only against the witnesses themselves who are broadcasting from the rooftops just as loudly or trying to be just as loudly as President Trump's communications but also the American public. He's facing criticism from all kinds of people from the other side, the individuals he's running against--at this point, President Biden--and also from the media and from others. He's defending himself. So, it's neither here nor there as it relates to the language used, but it's being offered by the People as some sort of consciousness of guilt or pressure campaign and that opens way too many questions for the jury.

Now, as your Honor asked at the end, there are potentially cross-examination questions that we could ask of Mr. Cohen where, potentially, the door could be opened--I agree with that--but it shouldn't be that, in their case in chief, they can take a Truth or a tweet that President Trump sends to his millions and millions of followers, again, either while President or as a candidate. He's certainly not just speaking to Mr. Cohen or Ms. Clifford. Of course not. It's being broadcasted to the whole world and used against him in this case as

consciousness of guilt or as part of a pressure campaign.

I'll address the more recent ones in connection with the order to show cause, but I think the same argument applies as it relates to coming into evidence at trial.

THE COURT: Regarding your submission you intend to make, I haven't seen it.

MR. BLANCHE: It hasn't been made.

THE COURT: I know.

If the argument is that tweets that your client sent out while he was President cannot be used because they somehow constitute an official presidential act, it's going to be hard to convince me that something that he tweeted out to millions of people voluntarily cannot be used in court when it's not being presented as a crime. It's just being used as an act, something that he did. But we'll wait until we get that submission.

Just to clarify, People, are you looking to introduce this and use this on your direct case or on redirect or on rebuttal? How is it that you anticipate using this?

MR. STEINGLASS: Well, I anticipate using it on our direct case--there's a lot of different categories here--but I don't think we have to wait until the cross-examination of Michael Cohen to address the argument that they have clearly put forth. I'm sure they're going

People also argue that defendant should have raised these issues in his motion in limine and that he forfeited his right to request a pretrial advisory ruling by not raising them then.

This Court's reasoning in the decisions that has been handed down previously remains the same, they are unchanged, the defendant could have raised these arguments at the times that the motions in limine were filed, but did not. Defense could have raised the argument and still relied upon the Supreme Court's decision on presidential immunity ruling coming after the motions in limine deadline. But because the defendant was already briefing the matter, the defense was already aware of the matter and aware of the issue, for whatever reason chose not to raise it at that time. We 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.

So that matter is decided and will not be addressed any further.

Second pre-motion letter that I would like to refer to has to do with the limiting instruction regarding Cohen pleads to FECA and AMI non prosecution agreement.

The defense filed its pre-motion letter on April

MR. BOVE: Judge, there is one evidentiary objection.

THE COURT: No speaking objections.

MR. BOVE: May I approach?

THE COURT: Sure.

(Discussion is held at sidebar, on the record.)

MR. BOVE: Thank you.

Judge, I am sorry.

We want to put on the record our objection on Presidential immunity grounds. I expect there will be testimony from Ms. Hicks related to statements by President Trump while he was President of the United States.

Unless you tell me it is necessary, I prefer not to lodge the objections question by question.

We object to the subject of her testimony based on the authorities we submitted, and our position being that that testimony is evidence of official acts being presented at a criminal trial against the President, and it should be precluded.

MR. COLANGELO: I don't anticipate we will be showing any exhibits that fall within that category.

We intend to elicit testimony, and we have briefed at length the argument that the rule of inadmissibility that Mr. Bove just described does not exist

and is not a rule.

The inadmissibility rule was not a rule that was ever recognized.

Several cases that we have cited has held the exact opposite in the analogous context of consular immunity.

As we cited in other papers holding that evidence of otherwise immune conduct is nonetheless admissible in a trial regarding criminal conduct for non-immune acts.

So, the testimony we intend to elicit involves statements by the Defendant, and there is no doctrine that would allow excluding it.

THE COURT: I believe I ruled on this as well.

So the objection is noted. I don't think you need to object as to each question.

MR. BOVE: Thank you, Judge.

MS. MANGOLD: We want to note for the record that we may recall Ms. Longstreet as a witness at a later point in the trial.

We may recall Ms. Longstreet.

THE COURT: Thank you.

MR. BOVE: Can you address 218, the email?

MR. COLANGELO: We don't intend to admit the parts you identified.

There was a question regarding an exhibit that we

Q. What do you currently do for work?
A. I am a Communications Consultant. So I have my own company. I do what I have always done, which is, give advice to individuals or companies looking for strategic communications advice.
Q. Are you here today in response to a subpoena from the District Attorney's office?
A. I am.
Q. Are you represented by counsel here today?
A. I am.
Q. Who is paying for your lawyer?
A. I am.
Q. In your current role as a consultant, is the defendant Donald Trump a client?
A. He's not.
Q. Do you have any current professional relationship with Mr. Trump?
A. I don't.
Q. When is the last time you were in communication with Mr. Trump?
A. Sometime in the Summer, Fall of 2022.
Q. 2022?
A. Yes.
Q. Please move a little bit forward to the microphone so we can all hear you.

presidential transition?
A Um, I did.
Q What was that role?
A I don't actually know. I think it was just an extension of what I was doing on the campaign.
Q And did you later join the Trump Administration as a White House employee?
A I did.
Q When did you start working in the White House?
A January 20, 2017.
Q How long did you work in the White House?
A I worked there until, um, April 1st of 2018. Um, I left, and then I came back in March of 2020, and left in January of 2021.
Q In between April of 2018, when you left the White House the first time, and March of 2020, when you returned, where did you work?
A I worked at the Fox Corporation.
Q What was your role at the Fox Corporation at that time period?
A I was the Executive Vice President of Communications.
Q So, going back to your first period of White House employment, what was your position when you joined in January 2017?
A When I first joined, I was the Director of Strategic

Communications.

Q What were your responsibilities as the Director of Strategic Communications?

A Similar to the campaign.

I worked closely with -- with the communications team and the press team on message development and organizing events to help showcase Mr. Trump's accomplishments, the agenda of the Administration. I worked closely with Mr. Trump on media opportunities for him. Um -- yeah.

Q And in that role, did you speak regularly with Mr. Trump?

A I did.

Q You mentioned that that was your first role in the White House.

Did you later get another position in the White House in that first period of employment?

A Yes.

Eventually, I became the Communications Director.

Q When did your job change from Director of Strategic Communications to Communications Director?

A I think in August of 2017.

Q When you first started working in the White House in that January, where was your desk located?

A Um, in the outer Oval Office. Right outside the Oval.

Q Can you describe for the jury what the outer Oval

Office is?

A Sure.

It's like a -- a reception area. There's two desks for two assistants. And then there's like a small vestibule that was a coat closet and had like a mini-fridge and a coffee station in it. Um, and -- yeah. That's the outer Oval.

It's a very small space. Very small.

Q And you mentioned there was another desk there.

Who sat at the second desk when you first started working at the White House?

A Madeleine Westerhout.

Q Who's Madeleine Westerhout?

A Madeleine was Mr. Trump's Executive Assistant once we got to the White House.

Q What were -- what were Madeleine Westerhout's responsibilities when you started working there?

A She just looked after Mr. Trump's needs. Worked with various team members on -- on his schedule. Um, kept his call logs. Um, took his messages. Um, worked with him in correspondence.

She is, you know, a very good Executive Assistant.

Q I think I asked you what your responsibilities were as Director of Strategic Communications.

Can you describe what your job responsibilities were when you became the Communications Director?

A Sure.

So, it changed just a little bit to, instead of working with the team, sort of overseeing the team, and just coordinating all of the communication efforts for the Administration from the White House throughout all of the agencies, and making sure that each of principals of the agencies and the agencies themselves were prioritizing Mr. Trump's agenda, and that we were all working together to maximize the impact of any positive messages that we were trying to get out and share with the American people, and, you know, capitalize on any opportunities to showcase Mr. Trump and his work, the President in a good light.

Q In that role, as Communications Director, did you continue to speak regularly with Mr. Trump?

A I did.

Q How often did you speak?

A Every day.

Q Now, did there come a time during your White House employment that the Karen McDougal story resurfaced?

A Um, in January of 2018, there was a story in The Wall Street Journal, not so much about Karen McDougal, but, just, it was about Stormy Daniels.

Q I'll ask you about that story in a second.

Let me ask you, first, are you aware that at some point while you were in the White House, that Karen sued AMI to be

released from her Non-Disclosure Agreement?

MR. BOVE: Objection.

THE COURT: Overruled.

A I recently had my memory refreshed about that.

Q So, are you aware that that happened?

A Yes.

Q Do you know the date of that lawsuit?

A Um, I want to say March 20th.

Q Of what year?

A 2018.

Q I'm going to show just you, I'll show the Court and Counsel, a document that's been marked People's 319.

(Whereupon, the aforementioned parties are shown an exhibit on their screens.)

MR. COLANGELO: People's 319.

Q Do you recognize this document?

A Yes.

Q What is it?

A It's a text message with myself and Madeleine Westerhout.

Q Did your attorney produce this text exchange to the District Attorney's Office in response to a Subpoena?

A Yes.

Q Is this an exact copy of text messages that you sent and received?

A Yes.

MR. COLANGELO: I offer People's 319 into evidence.

MR. BOVE: No objection.

THE COURT: Accepted into evidence.

(Whereupon, the exhibit is received in evidence.)

MR. COLANGELO: Let's display 319 to everyone, please.

(Whereupon, an exhibit is shown on the screens.)

MR. COLANGELO: Let's zoom in on the top of the screenshot.

Q Can you let the jury know what that says?

A It says, "Madeleine."

Q And what initials does it show?

A "MW."

Q I think you testified that these are texts with Madeleine Westerhout; yes?

A Yes.

MR. COLANGELO: Let's scroll down to the bottom of the text message, please. Just the last message, showing the date.

(Whereupon, an exhibit is shown on the screens.)

Q What is the date of this text message?

A Tuesday, March 20th, 2018.

Q And is this a message from Ms. Westerhout to you?

A Yes.
Q What does that message say?
A It says: "Hey. The President wants to know if you called David Pecker again?"
Q I think you testified that March 20th was the same day that Karen McDougal sued American Media regarding her NDA agreement?
A Yes.
Q Did you speak to Mr. Pecker that day?
A I have no recollection of speaking to David.
Q You have no memory of that one way or the other?
A I -- I don't.
I don't believe I called him, but I don't know. I don't have a memory of it.
Q So, are you saying it didn't happen, or you just don't know one way or the other?
MR. BOVE: Objection.
THE COURT: Overruled.
A I don't know one way...
Q And shortly after that -- shortly after filing that lawsuit, did Ms. McDougal give an interview to Anderson Cooper on CNN?
A Yes.
Q Do you remember when she gave that interview?
A Um, March 24th?

Q So, it was --
A March 22nd?
Q Sometime not long after the exchange we just described?
A Yes.
Q Within a couple of days?
A Seems like it, yeah.
Q Did you -- were you aware of that interview when it happened?
A Yes.
Q Did you watch the interview?
A Yes.
Q After Ms. McDougal went on Anderson Cooper, did you have any discussions with Mr. Trump and David Pecker about that interview or about the AMI deal?
A I have no recollection of speaking to Mr. Pecker after that interview.
Q Okay.
I'll ask the same question I asked before. Are you saying you don't know one way or the other whether it happened?
A I don't believe that that happened.
Q So, your testimony is, you didn't speak to them after the interview?
A To my knowledge, I did not speak to Mr. Pecker.
To be clear, I did speak to Mr. Trump. I was the

Communications Director. This was a major interview. Yes. We just spoke about the news coverage of the interview, how it was playing out.

But, I don't recall him mentioning Mr. Pecker in those conversations or having a conversation with Mr. Pecker.

Q And, when did you -- you testified that you left the White House after an initial period of -- when was that relative to the events I just described?

A Five days later.

Q Did there -- did there come a time during your White House employment that the Stormy Daniels story surfaced?

A Yes.

Q When was that?

A January 12, 2018.

Q Describe how you -- describe how you learned that the story was coming back.

A I can't remember exactly, but, um, someone -- either myself or another press communications team member -- got an inquiry from the same reporter, Michael Rothfeld, of The Wall Street Journal, describing a story they planned to publish that, you know, Stormy Daniels, who was a footnote in the November 4th story from the previous year, had, in fact, received a payment of $130,000.

Q So, you first heard about it before the story was posted; and later the article was published; right?

A Yes.
Q When you first heard about it, did you speak to Michael Cohen about the girls from The Wall Street Journal?
A I can't remember.
Q You have no recollection of it, especially with Mr. Cohen, at all?
A Sitting here right now, no.
But, if you have anything to refresh my memory.
MR. COLANGELO: Let's show the document just to Counsel, the Court, and the witness, that I previously marked for identification as 509H.
(Whereupon, an exhibit is shown on the screens of the aforementioned parties.)
MR. COLANGELO: Let's go to Page 703.
Q Go ahead and review that, and let me know when you're finished.
A So, this helped. Thank you.
Do --
Q Please go ahead and let me know.
A Sorry.
When you were asking the question, I was thinking sequentially, like right when the story came out.
I believe we got -- I think the 12th was a Friday night. I'm not positive. Maybe Thursday or Friday night. And I don't remember speaking to Michael right then.

But, at some point in the aftermath of that story, I spoke to him, I spoke to him about it. And I do remember that.

Q What do you remember about that conversation?

A I remember Michael just, um, saying that this wasn't true, that no payment had been made, and that he had a statement from Stormy Daniels, either personally or her attorney, stating that no relationship had transpired.

Q And --

A And that he had documentation to prove that -- that no payment had been made.

Q I think you testified a minute ago that you also discussed this story with Mr. Trump; is that right?

A Yes.

Q And what did you discuss with Mr. Trump?

A Just how to respond to the story, how he would like a team to respond to the story.

Q Did you relay to him the substance of the conversation you had with Mr. Cohen?

A I don't recall the sequencing, and I believe I spoke to Mr. Cohen after I spoke to Mr. Trump.

MR. COLANGELO: Let's bring up People's 181 in evidence.

This can be displayed to everybody.

(Whereupon, an exhibit is shown on the screens.)

Q Is this the article we were just discussing?

A Yes.
Q Let me direct your attention to the second page of the article.
(Whereupon, an exhibit is shown on the screens.)
Q Let's look at the third paragraph, please.
A I see it.
Q Can you go ahead and read that third paragraph, please?
A It says: "These are old, recycled reports, which were published and strongly denied prior to the election, a White House official said, responding to the allegation of a sexual encounter involving Mr. Trump and Ms. Clifford. The official declined to respond to questions about an agreement with Ms. Clifford. It isn't known whether Mr. Trump was aware of any agreement or payment involving her."
Q Are you the White House official quoted in the story?
A No, I'm not.
Q Who was the White House official quoted in the story?
A Um, I can't say for sure. Um -- I can't say for sure, but I -- I think that it was, um, Hogan Gidley. He was the Deputy Press Secretary.
Q And as the Communications Director at the time -- withdrawn.
Did you discuss this statement with Mr. Trump before it was issued?

A Yes.

Q To your knowledge, did Mr. Trump communicate directly with Mr. Cohen about these reports that Stormy Daniels was paid $130,000 a month before the election to stay silent about her allegations?

A I only know of one instance where they communicated directly with one another, but I can't say about other than that.

Q And for the one instance that you know of, when did that conversation take place?

A Sometime in the middle of February.

Q How did you learn about it?

A Mr. Trump told me about it.

Q And can you describe the conversation that you had with him about the conversation he had with Mr. Cohen?

A I believe it was the day after -- the morning after Michael had given a statement to The New York Times, saying that he had, in fact, made this payment, um, without Mr. Trump's knowledge.

And, um -- so, Mr. Trump was saying that he had spoken to Michael, um -- sorry. This -- President Trump was saying he spoke to Michael, and that Michael had paid this woman to protect him from a false allegation, um, and that -- you know, Michael felt like it was his job to protect him, and that's what he was doing. And he did it out of the kindness of his

own heart. He never told anybody about it. You know. And he was continuing to try to protect him up until the point where he felt he had to state what was true.

Q And this is what President Trump told you Michael Cohen said to him?

A That's right.

Q How long had you known Michael Cohen by that point?

A Three-and-a-half years.

Q And did the idea that Mr. Cohen would have made a $130,000 payment to Stormy Daniels out of the kindness of his heart, was that consistent with your interactions with him up to that point?

MR. BOVE: Objection.

THE COURT: Overruled.

A I would say that would be out of character for Michael.

Q Why would it be out of character for Michael?

MR. BOVE: Objection.

THE COURT: Overruled.

A I didn't know Michael to be an especially charitable person, um, or selfless person.

Um, he's the kind of person who seeks credit.

Q Did Mr. Trump say anything else about this issue when he told you that Michael made the payment?

A Um, just that he thought it was a generous, um, you

know, thing to do, and he was appreciative of the loyalty. That's all I remember.

Q Did he say anything about the timing of the news reporting regarding --

A Oh, he -- yes.

He wanted to know how it was playing, and just my thoughts and opinion about this story versus having the story -- a different kind of story before the campaign had Michael not made that payment.

And I think Mr. Trump's opinion was it was better to be dealing with it now, and that it would have been bad to have that story come out before the election.

Q Thank you.

MR. COLANGELO: No further questions.

THE COURT: Your witness.

MR. BOVE: Thank you.

May I inquire?

THE COURT: You may.

CROSS-EXAMINATION

BY MR. BOVE:

Q Ms. Hicks, I want to start by talking a little bit about your time at The Trump Organization, if that's okay.

A (Nods yes).

Q I think you said you started around October of 2014?

A (Nods yes). Yes.

Let us know again what box number seven reports?
A Non-employee compensation.
Q What's the amount recorded in box seven?
A $315,000.
Q What do you understand that $315,000 to reflect?
A Those were payments made out of the DJT account to Michael Cohen for calendar year 2017.
Q And what's the total amount reflected in the two 1099s?
A $420,000.
Q So, are these the 1099s that the Trump Organization issued to Mr. Cohen to reflect the $420,000 payments that Mr. Cohen received in 2017?
A Yes.
Q And you testified earlier that these 1099s go both to the payor and to the Federal Internal Revenue Service?
A Recipient and the Internal Revenue Service.
Q Thank you.
You can take that exhibit down.
Mr. McConney, are you familiar with a Federal agency called the Office of Government Ethics?
A Yes, I am.
Q Is that agency sometimes referred to as OGE?
A Yes.
Q Did your responsibilities, when you worked at the

Trump Organization, include helping to prepare an Annual Financial Disclosure Report for Mr. Trump to be submitted to the Office of Government Ethics?

A Yes.

Q Did you have a name for that Annual Financial Disclosure Report?

A We called -- we used to call it by the form number. It was 278E, as in Edward.

Q Can you describe what the form 278E is?

A It -- it is a filing -- it's what's called a Conflict of Interest Form that the Government requires certain individuals to file annually, semi-annually.

I am not too sure of other reports, but the President had to file this form annually.

Q Did he file it both when he was a candidate for presidency and as President?

A He -- we filed reports from -- when he declared his candidacy in 2015 until when he left office in 2017.

He is a candidate now. I am not there, so I don't know if he filed anything.

Q During your time at the Trump Organization, did you work on the Form 278E before Mr. Trump became President?

A Yes.

Q What kinds of financial interests are required to be disclosed on the Office of Government Ethics Form 278E?

A I am not sure I understand the question.

Q You mentioned, Mr. McConney, that the 278E is a Conflicts Disclosure Form?

A Conflicts of Interest, yes.

Q What kinds of information are collected and reported on that form?

A There is a schedule that lists all the entities you belong to, your position in those entities, I believe the date you acquire that position or interest in the company, the date you disposed of it.

A listing of your assets, the value of the assets, location of the assets, the income for that assets.

I think there were retirement funds, retirement payments. Your spouse's assets. Your stock holdings, bond holdings, bank accounts, liabilities. I think gifts.

I think that's most of the major, if not all of them.

Q What was your role in preparing the report when you worked at the Trump Organization?

A The first time I was involved with something, we went through the whole document from A to Z. Since it took so long, at one point we were up at four o'clock in the morning just filing the document.

That may be normal for you, but not normal for my life.

So we kind of split it up. So I took care of a few

pieces of the form and someone else took care of the rest of the form.

Q Which aspects of the form did you take care of later in the process?

A I took care of Mrs. Trump's assets, stock holdings, stock transactions, bank accounts, brokerage accounts, liabilities. I think that's it.

Q Did you help prepare Mr. Trump, and then President Trump's, submission to the Office of Government Ethics for each year Mr. Trump was a candidate or a Federal official while you still worked there?

A Yes. I filed it through, or helped file it, through January of 2017.

Q Please display for the witness, the Court and parties, the documents marked for identification as People's 81.

And, Mr. McConney, please let me know when you have that on your screen.

A It's here.

Q Do you recognize this document?

A Yes, I do.

Q What is it?

A This is a 278E.

Q Is this the first page of that document?

A Yes, it is.

Q So this is -- is this a copy of the Annual Financial

Disclosure Report of the kind you helped prepare?

A Yes.

Q Is this the signed -- a Certified Annual Report for year 2017?

A Yes.

Q Did you help prepare this document?

A Yes.

Q Did you have an opportunity to review each page of People's 81 before testifying?

A Yes.

Q Is this an exact copy of the signed and Certified Annual Report for President Trump for the year 2017?

A I believe so, yes.

MR. COLANGELO: I offer People's 81 into evidence.

MR. BOVE: Objection.

THE COURT: Please approach.

(Discussion is held at sidebar, on the record.)

MR. BOVE: Thank you, Judge.

My first objection to this exhibit is based on the presidential media argument we made.

This is a document that President Trump signed in 2018 as President of the United States. And so, we believe it is an official act that should not come into evidence at

the trial.

THE COURT: Okay.

MR. COLANGELO: So, for the same reasons I believe we briefed and argued previously, there is no evidentiary inadmissibility doctrine for official acts.

And, in any event, the regulations require the filing of the OGE Form 278 for presidential candidates, candidates for Federal office and Federal officials, for reasons including for the purpose of ensuring compliance with the Federal Conflict of Interest Law.

It is not a document entitled to any evidentiary exclusion at all.

THE COURT: I agree.

MR. BOVE: The second objection is, that there are parts of this disclosure form that appear to be based on business records that the witness is familiar with.

There are other factual assertions in here that I don't know he laid a foundation for, including factual foundations, or governmental official offices adopting the form, on the first page.

I don't think that can come in as a business record. I don't think as proffered right now, as a business record, it can come in.

MR. COLANGELO: We are admitting this to show, or offering this into evidence to show that this is a signed

and certified statement by the Defendant.

One page, Page 45 of that document includes a footnote describing his liabilities and acknowledging that in 2016 Mr. Cohen incurred expenses on his behalf, and the Defendant repaid those expenses in 2017.

That is an admission.

THE COURT: Okay. I will let it in.

MR. COLANGELO: Thank you.

(Discussion at sidebar concluded, and the following occurred in open court.)

THE COURT: Overruled.

The document is accepted into evidence.

BY MR. COLANGELO:

Q Please publish, People's 81.

Mr. McConney, please tell the jury what this document is.

A This is the President's annual filing of the Non-disclosure Form or Conflict of Interest Form, which I believe is for -- for probably the first 20 days of 2017.

Q Mr. McConney, let me direct your attention to the top of the first page to the boxes in the top left corner.

Do you see that?

A Yes, sir.

Q Can you read out loud the report type?

A Report type is, Annual.

Q And can you read out loud both the year indicator and the year?

A The year is -- it says, Year Annual Report Only, 2017.

Q Do you understand this to be an Annual Report as opposed to a new entry report?

A Yes.

Q Let's take a look at the middle of the first page and can you blowup that date, please?

What's the date that this was signed and certified?

A May 15, 2018.

Q So I think you said a minute ago that this was a report related to the first 20 days of 2017.

Having looked at the report type, year and date, do you have a different understanding?

A I was going by the upper left-hand corner, which was the date. I misread it.

Yes, the years, I misinterpreted the years.

Q Well, do you understand this to be the annual report for 2017, which was signed and certified and submitted in 2018?

A Yes.

Q Thank you.

Do you recognize the signature on that first signature line?

A Yes.

Q Whose signature is it?

A That's President Trump's signature.
Q How do you recognize that signature?
A I have seen it many times.
Q And tell us, again, what the date is on this document?
A May 15, 2018.
Q Please take a look at the language just above the signature.
Do you see a line that reads, Filer's Certification?
A Yes.
Q Please read that line out loud?
A I certify that the statements I have made in this report are true, complete and correct to the best of my knowledge.
Q And that's Mr. Trump's signature in the certification box below that filing certification line?
A Yes.
Q Let me direct your attention to the 45th page of this document.
At the top of the page, can you read what section of the submission we are in?
A Part Eight, Liabilities.
Q And can you -- now, let me direct your attention to the language at the very bottom of that page. The language in small type.
If we can zoom in. Make that as large as we can and

highlight there.

Mr. McConney, can you read what that line says?

A Sure.

In the interest of transparency, while not required to be disclosed as reportable liabilities on Part 8, in 2016, expenses were incurred by one of Donald J. Trump's attorneys, Michael Cohen.

Mr. Cohen sought reimbursement of those expenses and Mr. Trump fully reimbursed Mr. Cohen in 2017.

The category of value would be $100,001 to $250,000 and the interest rate would be zero.

Q Let me ask you a question about the category of value.

In your work on the Financial Disclosure Report, this 278E Form, do you have an understanding of how liabilities are required to be disclosed?

A Yes.

Q What is that understanding?

A They are reported within a range of a certain point and anything within that range.

Q Okay.

So a filer is not required to report a specific dollar amount, but instead is required to disclose the dollar value range of a given liability, is that right?

A Well, the range that that dollar amount would fall into.

Q Tell us, again, what the category of value is for the line you described?

A $100,001 to $250,000.

Q Earlier today, you testified about your discussions with Allen Weisselberg about money that was owed to Michael Cohen, right?

A Yes.

Q And you testified that the two payments owed were $130,000 for the wire to Keith Davidson and $50,000 for Red Finch Tech Services?

A That's correct.

Q And that adds up to $180,000, is that correct?

A Yes, sir.

Q Is that consistent with the disclosure on the Certified Government Ethics Form of an obligation to Michael Cohen in the range of $100,001 to $250,000 for expenses incurred in 2016?

A It was a long question.

Can you just repeat it again?

I remember pieces of it.

Q Sorry. Let me back up a few seconds.

You testified about discussions with Allen Weisselberg in January of 2017?

A Yes.

Q About money that was owed to Michael Cohen?

A Yes.
Q And the two amounts that were owed were $130,000 to Keith Davidson and $50,000 to Red Finch?
A Yes.
Q And what does those total up to?
A $180,000.
Q Is it consistent to the disclosure of a liability in the range of a $100,001 to $250,000?
A Yes.
MR. COLANGELO: Thank you.
No further questions.
THE COURT: Your witness.
You may inquire.
MR. BOVE: Thank you.
CROSS-EXAMINATION
BY MR. BOVE:
Q Good afternoon, Mr. McConney.
A Good afternoon, sir.
How are you?
Q I am well.
My name is Emil Bove and I represent President Trump.
We haven't met before, right?
A No, sir.
Q And you just testified about a series of payments that were made to Michael Cohen in 2017, right?

In April of 2018, did Mr. Avenatti release a sketch of the man who you believed you had that encounter with in 2011?

A Yes.

Q And in response to that sketch, did Mr. Trump tweet that the sketch was essentially a con job?

A Yes.

Q And, to your understanding, was that defamation case filed based only on that tweet about whether the sketch was a con job?

A Yes, it was about the tweet.

Q Did the defamation claim have anything to do with whether or not you were paid for the NDA before the election?

A No.

Q Did the claim of defamation have anything to do with whether or not you had a sexual encounter with Mr. Trump or any other interactions with him?

A No.

Q What is your understanding about whether the Court in that case made any finding with respect to your credibility whatsoever?

A There were none.

Q Is it your understanding that the Court determined in that case that Mr. Trump was free to tweet con job because it was what the Court called rhetorical hyperbole?

A Correct.

Q And is that the reason or something like just an exaggeration?
A Yes.
Q And, as a result of that, the Court's finding that Mr. Trump was entitled to make that tweet, did the Courts in California award Mr. Trump some legal fees?
A Yes.
Q Just as they had awarded you legal fees earlier --
MS. NECHELES: Objection to the leading, your Honor.
THE COURT: Sustained.
Q Is Michael Avenatti still your lawyer?
A No.
Q Why is he not -- why is he not still your lawyer?
MS. NECHELES: Objection, relevance.
THE COURT: Overruled.
You can answer.
A Because I fired him and then later he was found guilty of stealing from not just myself, but from several clients and he was disbarred and is in prison.
Q Was he found guilty in the criminal case in which you testified?
A Yes.
Q And were you cross-examined in that case?
A Yes.

THE CLERK: Thank you.
COURT OFFICER: Pull your chair up.
State your full name, spelling your last name.
THE WITNESS: Madeleine Westerhout.
W-E-S-T-E-R-H-O-U-T.
COURT OFFICER: County of residence.
THE WITNESS: Orange County.
THE COURT: Good afternoon.
You may inquire.
MS. MANGOLD: Thank you.

DIRECT EXAMINATION

BY MS. MANGOLD:

Q. Good afternoon, Ms. Westerhout.
A. Good afternoon.
Q. Can you please tell the jury where you work?
A. I work as geopolitical consulting firm.
Q. What do you do there?
A. I am Chief of Staff to the Chairman.
Q. How long have you worked there?
A. About a year and a half.
Q. Do you know Former President Trump, Donald Trump?
A. I do.
Q. How do you know him?
A. I was his Executive Assistant and Director of Oval Office Operations in the White House.

Q. Are you testifying voluntarily today or were you compelled to appear pursuant to a subpoena?
A. I was compelled to appear by subpoena.
Q. Have you testified in a legal proceeding before?
A. No, I have not.
Q. Have you been inside of a courtroom before today?
A. No, I have not.
Q. Are you nervous to testify today?
A. I am now, yes.
Q. Are you represented by counsel?
A. Yes.
Q. Is your counsel here today?
A. Yes, he is.
Q. Who is paying for your lawyer?
A. He is graciously taking this case pro bono.
Q. Can you tell the jury a little bit about your educational background.
A. Sure.
I went to the College of Charleston. Got my undergraduate degree in political science.
Q. What did you do after you graduated?
A. I moved to Washington D.C., where I had an internship on Capital Hill for a couple of weeks while I was looking for a job.
Then I got a job full-time job at the Republican

Q. And for those who may not know, what is the Resolute Desk?

A. That is the desk where the President sits in the Oval Office.

Q. After working closely with Mr. Trump for two and a half years, did you develop an understanding of his work habits?

A. I did, yes.

Q. How about list preferences?

A. I hope so.

Q. How about Mr. Trump's relationships and contacts?

A. Yes.

Q. Are you familiar with the way that he used social media?

A. Yes.

Q. Are you familiar with the way that he interacted with others at the White House?

A. Yes.

Q. And are you familiar with the way that he interacted with his family?

A. Yes.

Q. So, turning now to his work habits, what was Mr. Trump's preferred method of communication?

A. He liked speaking with people in person or on the phone.

Q. And about how many calls did Mr. Trump typically take

in a day?

A. A lot.

Q. Do you know, approximately, when he started taking calls in the day?

A. I remember times where, you know, I knew he was taking calls as early as 6 in the morning.

Q. And when would he stop taking calls at the end of the day?

A. Again, it depended. I recall times he would be on the phone late into the night after I went to bed, so I always felt guilty about that.

Q. How did you call the President at work? Can anybody call the President of the United States. Is this a more complicated process?

A. There is a rather complicated process. If the President is in the Oval Office and someone calls in and they had my desk phone number, they could just call that number. If the President was available, I would patch them through.

If someone was calling in, John Smith, you know, off the street and just calling 1-800 White House, obviously, they wouldn't be patched through to the Oval Office.

But there were operators that took calls and then kind of determined if that person was someone that needed to get patched through either to myself or other members of the President's staff.

There were also calls made by the situation room. Calls that were more secure that might need to be on a secure line. People might call through the situation room.

Q. Once the White House operators had screened calls, did you see the calls that came to you after that?

A. I am sorry.

Q. Let me say that again.

After the calls were screened, did they typically come to you before going to Mr. Trump?

A. If he was in the Oval Office, yes.

Q. So you were able to see much of the many people that he spoke to while he was there in 2017?

A. Yes.

Q. Did Mr. Trump use a computer?

A. Not to my knowledge.

Q. Did Mr. Trump have an email account?

A. Not to my knowledge.

Q. Did Mr. Trump prefer electronic documents or hard copy documents?

A. He liked hard copy documents.

Q. And did Mr. Trump like to read?

A. Yes.

Q. Did his role in 2017 require a lot of reading?

A. It did, yes.

Q. Where did he actually do his work?

A. After a few weeks, he kind of moved his working space into a room off of the side of the Oval Office, known as the dining room. He really just, I remember, wanted to keep the Resolute Desk very pristine and kind of keep that more for meetings.

Then he spent most of the time when he was working, reading, going over documents in the dining room. And that was really his working office.

Q. Were the hard copy documents that he liked to review kept in the dining room?

A. Yes.

Q. Was there an organization system there?

A. 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. I thought he always knew where things were.

Q. In general, is he the type of person who would pay attention to details?

A. In my experience, yes.

Q. How about his signature practices? Did he have to sign things that you saw in that first year in 2017?

A. He did.

Q. Did he use an automated signature or prefer to sign himself?

A. He preferred to sign things himself.
Q. That was signing by hand?
A. Yes.
Q. Was there a particular style of pen he liked to use?
A. My recollection is he liked to use a Sharpie or a felt-tip pen.
Q. Based on working with him for two and a half years, can you recognize Mr. Trump's signature?
A. Yes.
Q. Did Mr. Trump have to review and sign a lot of documents that year in 2017?
A. Yes.
Q. In your experience, did he typically read things before signing them?
A. Yes.
Q. Do you know if Mr. Trump used social media while he was in the White House?
A. He did, yes.
Q. What was the primary social media platform that he used?
A. Twitter.
Q. Is that now called something else?
A. X.
Q. Do you know what Mr. Trump's Twitter handle was in 2017?

A. @realdonaldtrump.
Q. Did Mr. Trump post tweets himself using that Twitter handle?
A. He did, yes.
Q. Did anyone else have access to the @realdonaldtrump Twitter account in 2017?
A. It's my understanding that Dan Scavino had access to it.
Q. Was there anybody other than Mr. Trump and Mr. Scavino?
A. Not to my knowledge.
Q. In the two and a half years when you worked with Mr. Trump, did you ever see Mr. Scavino post a tweet without Mr. Trump's approval?
A. I did not see Dan post, I didn't see the President or Dan ever post a single tweet. Not to my knowledge.
If there was a video recap of an event or something that might have gone out without the President's approval, it's my understanding and recollection that the President did like to see the tweets that went out.
Q. Do you know if that account was password protected?
A. I believe so, yes.
Q. Did you ever work directly with Mr. Trump on his Twitter posts?
A. Once in a while, if Dan wasn't available, the President would call me and dictate a tweet to me. I would quickly

scribble it down and then go back to my computer and type it up so that the President could actually read it because he wasn't able to read my handwriting. Sometimes print it back out, give it to him so he could look over it. It just depended if he put it out or held onto it or made edits to. That was the extent of it.

Q. He would dictate a tweet to you, then you would go type it up on your computer?

A. Yes.

Q. Then you would print a hard copy document?

A. Yes.

Q. And take that in for him to review?

A. Yes.

Q. Would he then edit sometimes the hard copy printout?

A. Sometimes, yes.

Q. Would he ask you to make additional changes and then show it to him?

A. Sometimes.

Q. Did he have any particular preferences when it came to the way that he wrote social media posts?

A. My recollection is that there were certain words that he liked to capitalize. Words like "country." And he liked to use exclamation points.

Q. Did he also periodically correct other punctuation, like commas or comma locations?

A. It's my understanding that he liked to use the Oxford comma.

Q. Now, during that first year in the White House in 2017, would you describe that as a transition period, that first year that Mr. Trump was in the White House?

A. Yes. I think, you know, the first year of any administration is a transition year. We were all trying to learn our way around and, you know, do the best work we could for the American people.

Q. And you and others were doing things for the first time that year?

A. Yes.

Q. And was Mr. Trump busy that year?

A. Yes.

Q. Was he constantly being pulled in a lot of different directions?

A. Yes.

Q. Based on your experience, were there things he overlooked or forgot during that period? Was he still attentive to the things that were brought to his attention?

A. My understanding is he was attentive to things that were brought to his attention.

Q. During that first year in the White House, in 2017, when things were in transition, did you coordinate with The Trump Organization?

A. On some things, yes.
Q. Did you ever have questions for employees at The Trump Organization?
A. Yes.
Q. And did Trump Organization employees ever have questions for you?
A. Yes.
Q. Who was your main point of contact at The Trump Organization in 2017?
A. Rhona Graff.
Q. And, again, that was Mr. Trump's Trump Organization's Executive Assistant?
A. Yes.
Q. And she remained at The Trump Organization after Mr. Trump moved to Washington D.C.?
A. Yes.
Q. When Trump Organization employees had questions for Mr. Trump, did you pass those along?
A. Yes, sometimes.
Q. Were there ever times that you didn't pass along something you were asked to?
A. No, but it could have been they asked somebody else.
Q. When Mr. Trump had questions for Trump Organization employees, did you pass those along?
A. Yes.

Q. What types of things did you coordinate with Ms. Graff on during that year in 2017. Did you coordinate on Mr. Trump's contacts?
A. Yes, we did.
Q. How about calls to and from Mr. Trump?
A. Yes.
Q. How about Mr. Trump's calendar?
A. Yes.
Q. Mr. Trump's travel schedule?
A. Yes.
Q. Mr. Trump's golf schedule?
A. Yes.
Q. How about the First Family's travel?
A. Yes.
Q. Personal mail for Mr. Trump?
A. Yes.
Q. What other logistical issues?
A. Such as?
Q. For example, if there was an issue getting through on a particular number or other things that were lost in translation, anything like that?
A. Sure. Yes.
Q. Overall, how frequently were you in touch with The Trump Organization in 20127?
A. Especially the first few months, I think Rhona and I

spoke at least weekly. Sometimes daily. But that trickled off as I kind of grew in the role and the contacts kind of shifted over to more of the White House side.

Q. And, in total, how many communications would you say you had with The Trump Organization in 2017, a rough estimate?

Is it fair to say it was dozens of communications?

A. Dozens.

Q. Now, one of the things you just mentioned was Mr. Trump's contacts; right?

A. Yes.

Q. And did you get guidance from Ms. Graff on contacts that were important to Mr. Trump?

A. Yes.

MS. MANGOLD: Can we show the jury what is in evidence as People's Exhibit 68. And can we blow up the top portion of the page. All of the portions.

(Displayed.)

Q. Ms. Westerhout, do you recognize this?

A. Yes.

Q. What is this?

A. It's an email exchange between Rhona and myself.

Q. And looking at the bottom-most email on the chain, who is that from?

A. From me to Rhona.

Q. What is date of that email?

And so, the President would often ask, you know, call John Smith, call so and so, and I didn't have their phone numbers.

So, I would call Rhona all the time, asking for phone numbers for people, and that's something -- I guess, four days in, I just asked her to put together a list for me that she thought would be helpful of people that he either spoke to often or might want to speak to.

Q If you look at the top email on the chain, how did Ms. Graff respond?

A She said: "I'm working on it. Hope to have it to you in a little while."

MS. MANGOLD: Can you now pull up what's in evidence as People's 69?

(Whereupon, an exhibit is shown on the screens.)

MS. MANGOLD: Focus on the top portion of the page.

Q Do you recognize this?

A Yes.

Q What is this?

A An email exchange between myself and Rhona.

Q Who is it from?

A Rhona.

Q Who is it to?

A Me.

Q What is the subject?

A Yes.

"Michael. We're confirmed for 4:30 on Wednesday. What I need from you is the following: Full name as it appears on your ID. Date of birth. Social Security number. U.S. citizen, yes or no. Born in U.S., yes or no. Current city and state of residence. Thanks, Madeleine."

Q Do you recall why you were sending this email?

A Mr. Cohen was coming in to meet with the President.

Q Do you recall seeing him when he came to visit?

A Not specifically.

Q Did this visit, ultimately, occur?

A Yes.

MS. MANGOLD: We can take that down.

Q Do you remember David Pecker's name coming up in 2017?

A I have recently been refreshed. My memory has been refreshed, yes.

Q What do you -- after refreshing your recollection, what do you recall?

A I recall an exchange between myself and Hope, a text that I sent her, asking if she had called David.

Q By "Hope", you mean Hope Hicks?

A Yes.

Q And "David" is David Pecker?

A Yes.

Q Do you recall if you ever spoke to Mr. Pecker on the

MS. MANGOLD: The People now offer into evidence Exhibits 407-F, G, H and I.

MR. BLANCHE: Your Honor, the same objection as discussed last week.

THE COURT: Your objection is noted and overruled. People's Exhibits 407-F, G, H and I are accepted into evidence.

(Whereupon, People's Exhibits 407-F, G, H and I were received into evidence.)

MS. MANGOLD: All right.

Can you please display what's now in evidence as People's Exhibit 407-F?

BY MS. MANGOLD:

Q Ms. Longstreet, is this a Twitter post?

A Yes.

Q And I think last time you explained some aspects of the social media platform Twitter and how it operated in 2016?

A Yep.

Q In addition to those questions, can you explain what a thread is?

A Yes. So, Twitter has a character limit which only allows you to put a certain amount of characters for one tweet. So, a way that some users are able to get around the character limit is by posting multiple tweets in the same thread so they are kind of connected to each other in a sense.

Q And is this an example of a thread?
A Yes.
Q Is the first post -- I am sorry -- is the top post shown here the first one in time?
A Yep.
Q Were all of these posts made the same day?
A Yes.
Q What Twitter handle was used to make these posts?
A @realDonaldTrump.
Q What's the date and time shown for the top post?
A April 21st, 2018 at 9:10 am.
Q Can you please focus on just the top post?
Can you read the top post to the jury?
A Yes.
The New York Times and a third-rate reporter named Maggie Haberman, known as a Crooked H flunkie, who I don't speak to and have nothing to do with, are going out of their way to destroy Michael Cohen and his relationship with me in the hope that he will flip. They use -- dot, dot, dot.
MS. MANGOLD: Can you pull up the bottom two posts, please?
Q Can you read those?
A Non-existent sources and a drunk slash drugged up loser who hates Michael, a fine person with a wonderful family, Michael is a businessman for his own account slash lawyer who I

always liked and respected. 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 Michael doing that despite the horrible Witch Hunt and the dishonest media.

Q What's the date for all three of the posts?

A April 21, 2018.

MS. MANGOLD: You can take that down.

Q Did the court filings that you reviewed include a Federal criminal case for Michael Cohen?

A Yes.

Q Was one of the court filings the paralegal team saved for that case a guilty plea?

A Yes.

Q Do you know the date of that guilty plea?

A I believe it was August 21, 2018.

MS. MANGOLD: Now, can we please display what is in evidence as People's Exhibit 407-H?

Q Can you see that, Ms. Longstreet?

A Yes.

Q Is this another Twitter post?

A Yes.

Q What Twitter handle was used to make this post?

A @realDonaldTrump.

Q And what is the date and time for this post?

A It ends August 22, 2018 at 8:44 a.m.?

Q Can you please read this to the jury?
A If anyone is looking for a good lawyer, I would strongly suggest that you don't retain the services of Michael Cohen.
Q And is there an explanation point end of that post?
A Yes. Sorry.
MS. MANGOLD: And can we take this down and display what's in evidence as People's Exhibit 407-I.
Q Is this another Twitter post that you pulled and saved?
A Yes.
Q What is the Twitter handle used to make this post?
A @realDonaldTrump.
Q What is the date and time shown for this post?
A August 22, 2018, at 9:21 a.m.
Q And is that the same day as the last post we just saw?
A Yes.
Q How long after the post we just saw was this one posted?
A I would have to see the timestamp.
Q It's fine. But it was posted the same day?
A Yes.
Q Can you read this post to the jury?
A Yes.
I feel very badly for Paul Manafort and his wonderful

family. Justice took a 12-year-old tax case, among other things, applied tremendous pressure on him and unlike Michael Cohen he refused to break, make up stories in order to get a deal. Such respect for a great man. Explanation point.

MS. MANGOLD: All right.

We can take that down.

Now, finally, can we display what's in evidence as People's Exhibit 407-G, please?

Can you flip through the pages of this Exhibit quickly?

Q Ms. Longstreet, is this another Twitter post that you saved?

A Yes.

Q Is this another example of a thread?

A Yes.

Q And how many parts does this thread have?

A Three.

Q What was the Twitter handle used to make these posts?

A @realDonaldTrump.

Q And what is the date and time shown for the top post?

A May 3rd, 2018 at 6:46 a.m.

Q And can you please read the post for the jury?

A Mr. Cohen, an attorney, received a monthly retainer, not from the campaign and having nothing to do with the campaign, from which he entered into through reimbursement a

private contract between two parties, known as a Non-Disclosure Agreement or NDA. These agreements are -- dot, dot, dot.

MS. MANGOLD: Then move to the second post to the thread.

A Very common amongst celebrities and people of wealth. In this case it is in full force and effect and will be used in arbitration for damages against Ms. Clifford, Daniels. The agreement was used to stop the false and extortionist accusations made by her about an affair --

Q And is this now the final post in the thread?

A Yes.

Despite already having signed a detailed letter admitting that there was no affair, prior to its violation by Ms. Clifford and her attorney, this was a private agreement. Money for the campaign or campaign contributions played no role in this transaction.

MS. MANGOLD: Thank you.

Can we take that down, please?

Now, can we show everyone what's already in evidence as People's Exhibit, 171 A?

Q Ms. Longstreet, do you recognize this?

A Yes.

Q And how do you recognize it?

A This was something that the paralegal team had to analyze in response to subpoena compliance.

A I did.
Q And who was paying for that attorney?
A The Trump Organization.
Q Was that important to you at the time that The Trump Organization was paying for your attorney?
A Very much so.
Q Was your attorney also part of something called a Joint Defense Agreement?
A Yes, ma'am.
Q Can you explain a little bit to the jury what that is?
A So the Joint Defense Agreement is when there is several different lawyers representing, obviously, different people and they are all working together for a common goal.
Q At the time, what, if anything, did you feel about wanting the power of the President to protect you in this matter?
A I felt I needed it. It was extremely important to me.
Q Did you make false statements to Congress in 2017 in connection with the written statement that you submitted and your testimony?
A I did.
Q Generally, what did those false statements relate to?
A They dealt with The Trump Tower Moscow real estate project, specifically the number of times that I claimed to have spoken to Mr. Trump about the project, as well as the time

period for those conversations.

Q What, essentially, did you communicate to Congress in terms of the time period?

A I told them that it was a truncated time period and that I had only spoken to Mr. Trump about this project three times.

Q And, in truth, how many times had you?

A Ten times.

Q And did you also communicate to them that it was -- that those communications stopped at an earlier date than they actually did?

A Yes.

Q Why did you make those false statements to Congress?

A Because I was staying on Mr. Trump's message that there was no Russia-Russia-Russia and, again, in coordination with the Joint Defense Team, that's what was preferred.

Q Now, let me direct your attention to the early months of 2018.

Did you continue to lie about Mr. Trump's involvement in the Stormy Daniels payoff?

A Yes.

Q And did you continue to pressure other people, for example, like Keith Davidson, to lie about the payoffs to Karen McDougal and to Stormy Daniels?

A Yes.

can't cause you harm or damage. I will always protect Mr. Trump.

Q And why did you write that?

A Because it was a statement that validated what was in the second paragraph about me providing my own personal funds to facilitate the payment.

And the last line: I will always protect Mr. Trump, was to validate that specific line.

MS. HOFFINGER: Thank you.

You can take that down.

Q Now, around that same time that you released that statement -- that you were going to be releasing that statement to the press publicly, did you also provide that statement to someone named Jay Sekulow?

A I did.

Q Who was Jay Sekulow at the time?

A He was representing Mr. Trump.

Q And is he an attorney?

A He is.

Q And explain why you sent that public statement that you were going to send out to Mr. Sekulow?

A I was referred to Mr. Sekulow, actually, by Sean Hannity to speak about this FEC Complaint. And I was instructed to by Mr. Trump, to keep in touch with Jay Sekulow because he was in contact with Mr. Trump.

everyone and blow up the communication on February 19th of 2018?

(Displayed.)

Q Can you read that communication?

Who was that communication from?

A This is from me to Jay Sekulow.

I apologize, from Jay Sekulow to me.

Q Was this after you sent him the public statement that you were going to be making about the FEC Complaints?

A Yes. Yes.

Q Can you read in what Mr. Sekulow wrote to you?

A He says: Client says thanks for what you do.

Q And what is your understanding about who he was referring to when he was referring to, client?

A Client here is referred as President Donald Trump. And, for what you do, that dealt with the statement that I was putting out to the press on the FEC.

Q You're denying his involvement?

A Yes, ma'am.

Q Now, also in February of '18, 2018, did you -- withdrawn.

Around the same time in February of 2018, did The Wall Street Journal reach out to you about an article they were going to write concerning AMI's payoff of Karen McDougal?

A Yes, ma'am.

previously instructed them upon why the AMI evidence came in and that instruction still applies.

THE COURT: Okay.

(Discussion at sidebar concluded, and the following occurred in open court.)

THE COURT: So, Jurors, you may recall that I previously gave you an instruction regarding AMI.

The testimony that you just heard now is consistent with my previous instructions that that evidence was permitted to assist you, the jury, in assessing David Pecker's credibility and to help provide context for some other surrounding events.

You may consider that testimony and what you just heard for those purposes only.

Mr. Blanche, is that satisfactory?

MR. BLANCHE: Thank you, your Honor.

BY MS. HOFFINGER:

Q Mr. Cohen, just getting back to where we left off in my questions.

In terms of the substance of your conversation with David Pecker about his receipt of the Complaint from the FEC, did you tell him that someone in particular in the administration would be able to assist in that manner?

A Yes.

Q What did you tell him?

A I told him that the matter is going to be taken care of and the person, of course, who is going to be able to do it is Jeff Sessions.

Q Who was Jeff Sessions at the time?

A The Attorney General.

Q Why did you tell him that?

A Because that was post my conversation with the President.

Q And when you say, post, had you previously been told that by President Trump?

A Yes, ma'am.

Q Now, I know you mentioned previously the work that you did on the Temporary Restraining Order related to Stormy Daniels.

Do you remember that testimony?

A Yes, ma'am.

Q Did there come a time when, as a result of some of the public statements you were making about your being the only one involved in the payment, and the fact that -- withdrawn. That is a long sentence -- a long question.

Did there come a time around this time period that you made certain statements to news reporting, indicating that only you had made the payment and that, in fact, no sexual encounter had occurred?

A Yes.

following occurred in open court.)

THE COURT: The objection is sustained.

The answer is stricken from the record, and the jury is directed not to consider that response.

MS. HOFFINGER: Thank you, your Honor.

BY MS. HOFFINGER:

Q Through much of 2018, while you were acting as Mr. Trump -- then President Trump's personal attorney, did you continue to lie about his role in the payoff to Stormy Daniels?

A Yes, ma'am.

Q I want to direct your attention now to April 9th of 2018.

What happened to you on that day?

A I was raided by the FBI.

Q Can you tell the jury a little bit about that?

A So, at the time I was residing at the Lowes Regency because my apartment had been flooded by the apartment above. We had moved into the Regency while the construction was taking place in the apartment.

At seven o'clock in the morning, there was a knock on the door. And I looked through the peephole, and I saw a ton of people out in the hallway. And so, I saw a badge. So, I opened the door. They identified themselves as the FBI, asked me to step into the hallway, which I did.

I found out that simultaneously they had also, the

A Extremely.

MS. HOFFINGER: Can we show People's Exhibit 407-F, please, in evidence?

Can we blow up the top tweet?

(Displayed.)

Q And I am going to ask Mr. Cohen to read them.

First of all, were you aware of these three tweets made by President Trump at that time on April 21st of 2018.

A Yes.

Q And can you read those, please, to the jury?

A This is from Mr. Trump's Twitter feed.

The New York Times and a third rate reporter named Maggie Haberman, known as a Crocked H flunkey, who I don't speak to and have nothing to do with, are going out of their way to destroy Michael Cohen and his relationship with me in the hope that he will flip.

They use nonexistent sources and a drunk/drugged up loser who hates Michael, a fine person with a wonderful family.

Michael is a businessman for his own account slash lawyer who I have always liked and respected. Most people will flip if the Government let's them out of trouble. Even if it means lying or making up stories.

Sorry, I don't know -- I don't see Michael doing that despite the horrible Witch Hunt and the dishonest media.

Q Who did you understand, at the time, that Mr. Trump

was communicating with or releasing these public statements?

A To me.

Q And what did you understand him to be communicating to you?

A Stay in the fold. Stay loyal. I have you. You are a fine person. Don't flip.

Q And what did these public statements -- what, if anything, did these public statements have on you in terms of an effect on your conduct at the time?

A It reinforced my loyalty and my intention to stay in the fold.

Q Was President Trump or his company, The Trump Organization, still paying your lawyer's legal fees at the time?

A They were.

Q And did you understand that that was part of his support for you?

A Yes.

Q And during this time were you still a part of the Joint Defense Agreement with President Trump and some others?

A I was.

MS. HOFFINGER: We can take that down.

Thank you.

I have one further question.

Can you put that up?

A. He also stated to me that this would be a great way to have a back channel communication to the President in order to ensure that you're still good and that you're still secure.

Q. During that meeting, did you tell Mr. Costello the truth about what Mr. Trump's role was in the payoff to Stormy Daniels?

A. No.

Q. Why not?

A. First, I wasn't sure that I was going to hire him. There was something really sketchy and wrong about him. He came with a Retainer Agreement, and I said, "I'm not going to pay that right now. I am still speaking to other lawyers."

So I certainly wasn't going to expose anything to, one, someone I didn't know, and two, I was having trouble connecting with.

Q. Did you understand that if you provided that information to him about Mr. Trump's involvement in the Stormy Daniels matter, that that information might go somewhere else?

A. I was also concerned, again, when he started talking about his incredibly close relationship to Rudy, that anything I said to him was going to be spoken and told to Rudy Giuliani. And, of course, because Rudy Giuliani at the time was so proximate to Mr. Trump, President Trump, that anything that I said would get back to him.

Q. Did Mr. Costello mention anything to you about

well?

A. Attorney for the President.

Q. Who did you understand, based on this email and your communications with Mr. Costello, that that back channel communication would be with?

A. The back channel was Bob Costello to Rudy to President Trump.

MS. HOFFINGER: Please put up People's Exhibit 205.

(Displayed.)

Q. Mr. Cohen, if you would explain who those emails are to and from and read the email to the jury?

A. It's from Robert Costello. It was sent on Saturday, April 21, 2018, at 8:57 p.m. to me.

Subject: Again, Giuliani.

It is stating: Attorney-client communication, privileged.

"I spoke with Rudy. Very, very positive. You are loved. If you want to call me, I will give you the details. I told him everything you asked me to and he said they knew that. There was never a doubt, and they are in our corner. Rudy said this communication channel must be maintained. He called it crucial and noted how reassured they were that they had someone like me who Rudy has known for so many years in this role. Sleep well tonight. You have friends in high places."

"P.S.: Some very positive comments about you from the White House. Rudy noted how that followed my chat with him last night."

Q. What did you understand Mr. Costello to mean by "you are loved," by whom?

A. By President Trump.

Q. What did you understand him to be referring to when he said "they are in our corner?"

A. Meaning the President and Rudy.

Q. And what did you understand him to be referring to as "friends in high places?"

A. Friends in high places was President Trump.

Q. And the P.S., where he says, "Some very positive comments about you from the White House -- "

MS. HOFFINGER: Can we put up People's 407F that we just saw a little while ago.

(Displayed.)

Q. What is the date, what is the date of these public Truth -- tweets that we saw President Trump issuing about you?

A. April 21, 2018.

Q. Is that the same date as the email that Mr. Costello sent you?

A. Yes.

Q. Did you understand Mr. Costello in his email to be responding to these public tweets that President Trump made

about you?

A. Yes.

Q. What, if any, effect did these emails from Mr. Costello, together with President Trump's support tweets for you on April 21st, what, if any, effect did they have on you?

A. It let me know that I was still important to the team and stay the course, that the President had my back.

MS. HOFFINGER: Can we take a look now at People's Exhibit 206 in evidence.

(Displayed.)

Q. Is this email some months later, now in June of 2018?

A. Yes.

Q. Can you read this email for the jury, please, and the to and from and the dates?

A. It's from Robert Costello. Dated June 7, 2018, at 3:16 p.m. to me.

Marked: Attorney-Client Privilege Communication.

"Michael, to prove to you that Rudy Giuliani called me and I did not call him, I photographed the pages from my iPhone, which I am attaching. They show that you called me at 11:30 a.m. today on my cell and that the next call I had was two incoming calls from Rudy Giuliani at 1:08 p.m., and then at 1:15 p.m., because the first cell call transmission was lost. Calling from Israel."

"And Guilani called me back at 1:15."

(Displayed.)

Q. Read that, Mr. Cohen?

A. "I would suggest that you give this invitation some real thought. Today's newspaper story should not rattle you. The event announced today we thought would be announced Friday or Monday, so it's merely a difference of timing."

"MWE, McDermott Will & Emery, were brought in to a discrete task. They performed those services in an exemplary fashion. This is not a change in plan. Rather, it is exactly what was planned."

"Your message, or the message of MWE, should be positive and not negative in any way. What you do next is for you to decide. But if that choice requires any discussion with my friend's client, you have the opportunity to convey that this evening, but only if you so decide."

Q. Again, what did you understand him to be saying, "If you want to convey something to my friend's client?"

A. Talking about potential pre-pardons, I believe.

MS. HOFFINGER: Can we blow up the third paragraph.

Q. Who is my friend's client in that paragraph?

A. President Trump.

Q. Read the third paragraph.

A. "I must tell you, quite frankly, that I'm not used to listening to abuse like today's conversation. You have called

A. Certainly displeasure that I no longer, I guess, was important to the fold.

Q. What, if anything, did you understand was being communicated to you about whether you should cooperate with law enforcement?

A. No, do not cooperate.

Q. What, if any, effect did it have on you at the time to have the President of the United States tweeting this about you the day after you pled guilty?

A. It caused a lot of angst, anxiety.

MS. HOFFINGER: Now, you can take those down.

Q. Now, in spite of President Trump's public tweets about you, about three months later, on November 29, 2018, did you also plead guilty to one count of Making False Statements to Congress in 2017?

A. Yes, ma'am.

Q. And was that for making false statements to Congress in 2017, in connection with the Russia probe that you described previously to the jury?

A. Yes. A number of times and the duration, which I had stated and submitted as part of the record that I had spoken to Mr. Trump about the Trump Tower Moscow Project.

Q. And were those false statements that you made to Congress in 2017 while were you Mr. Trump's personal counsel?

A. Yes, ma'am.

Q And that was false, correct?
A No, sir.
Q Why was that not false?
A I never asked for it. I spoke to my attorney about it because we had seen on television President Trump talking about, potentially, pre-pardoning everybody and putting an end to this, what I deemed to be a nightmare.
So, I reached out to my attorney to ask him whether or not this is legitimate.
Q So, when you were asked -- when you provided testimony -- and, again, same thing happened on that occasion, you had to prepare remarks that you provided the committee and then you read into the record, right?
A Yes, sir.
Q And both of those prepared remarks in writing and also when you said it in the record under oath you said, and I have never asked for, nor would I accept a pardon from President Trump, correct?
A Correct.
Q Now, that was on February 27th.
Do you remember about ten days later you were deposed in the House Oversight Committee?
A Yes, sir.
Q And do you remember being asked the same question about accepting a pardon and you saying that you directed your