No. 24A666

IN THE

Supreme Court of the United States

DONALD J. TRUMP,

Applicant,

- versus -

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

Respondents.

PEOPLE'S OPPOSITION TO APPLICATION FOR A STAY OF CRIMINAL PROCEEDINGS IN SUPREME COURT, NEW YORK COUNTY

STEVEN C. WU*
Chief, Appeals Division
ALAN GADLIN
Deputy Chief
JOHN T. HUGHES
Assistant District Attorney

New York County District Attorney's Office
One Hogan Place
New York, New York 10013
(212) 335-9326
wus@dany.nyc.gov

*Counsel of Record

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INTRODUCTION

Donald J. Trump is the defendant in a criminal action in Supreme Court, New York County. While he was a private citizen, defendant was charged, tried, and convicted for conduct that he concedes is wholly unofficial, and for which "there is no [presidential] immunity." *Trump v. United States*, 603 U.S. 593, 615 (2024). On May 30, 2024, a jury found defendant guilty of all 34 felony counts charged in the indictment. The only step remaining before entry of final judgment—which has already been postponed six months at defendant's requests—is the sentencing hearing scheduled for January 10, 2025, which defendant will attend by video at the trial court's invitation to minimize any burden. At that sentencing hearing, the trial court has already indicated that it will impose a sentence of unconditional discharge—a sentence the People do not oppose—which is a sentence "without imprisonment, fine or probation supervision," or any other "condition upon the defendant's release." N.Y. Penal Law § 65.20(1)-(2). Once sentenced, defendant may appeal every preserved argument in the ordinary course, including his claims regarding the purportedly erroneous admission of official-acts evidence at trial.

Defendant now asks this Court to take the extraordinary step of intervening in a pending state criminal trial to prevent the scheduled sentencing from taking place—before final judgment has been entered by the trial court, and before any direct appellate review of defendant's conviction. There is no basis for such intervention.

As a threshold matter, this Court lacks jurisdiction over a state court's management of an ongoing criminal trial when defendant has not exhausted his state-law remedies and there has been no "[f]inal judgment[ ] or decree[ ] rendered by" the New York Court of Appeals, or even the state trial court. 28 U.S.C. § 1257(a).

Lack of jurisdiction aside, defendant has not satisfied the stringent standards necessary to support the "extraordinary remedy" of a stay. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). His assertion that *any* invocation of presidential immunity automatically entitles him to a stay pending appeal is incorrect; this Court must instead consider whether a stay is appropriate for the particular claims of immunity that defendant has raised. Here, neither of defendant's specific claims comes close to justifying a stay of the forthcoming sentencing.

First, defendant claims that his recent election as President immediately entitled him to the same immunity from prosecution as the sitting President and thus exempts him from the January 10 sentencing. *See* Application 28. That is, defendant makes the unprecedented claim that the temporary presidential immunity he will possess *in the future* fully immunizes him now, weeks before he even takes the oath of office, from all state-court criminal process. This extraordinary immunity claim is unsupported by any decision from any court. It is axiomatic that there is only one President at a time. Non-employees of the government do not exercise any official function that would be impaired by the conclusion of a criminal case against a private citizen for private conduct. And as this Court has repeatedly recognized, presidential immunity is strictly limited to the time of the President's term in office.

Second, defendant claims that the state trial court improperly admitted evidence of defendant's official acts during trial (Application 19-20) in violation of this Court's holding in *Trump* that certain "testimony or private records of the President or his advisers probing [an] official act" are inadmissible at trial. 603 U.S. at 630-32. But this type of claim, although ostensibly based on immunity, does not support an interlocutory appeal or an automatic stay pending appeal because it is not an argument that defendant is immune *from suit* on the underlying criminal charges, which here are concededly based on defendant's unofficial conduct having no connection to any presidential function. Defendant's evidentiary claim also suffers from multiple threshold and merits defects that make it unlikely that this Court would grant a writ of certiorari in any event.

Finally, the balance of the equities weighs decisively against granting provisional relief. There is a compelling public interest in proceeding to sentencing; the trial court has taken extraordinary steps to minimize any burdens on defendant, including by announcing his intent to sentence defendant to an unconditional discharge; and defendant has provided no record support for his claim that his duties as President-elect foreclose him from virtually attending a sentencing that will likely take no more than an hour. The current schedule is also entirely a function of defendant's repeated requests to adjourn a sentencing date that was originally set for July 11, 2024. The People therefore respectfully request that the application for a stay be denied.

STATEMENT

A. The State Criminal Trial and Defendant's Conviction

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

As described in a Statement of Facts filed with the indictment, and as later established by evidence at trial, defendant and his co-conspirators orchestrated a scheme to interfere with the 2016 presidential election by suppressing negative information that could damage defendant's presidential campaign. They executed the scheme through a variety of means, including by purchasing the rights to, and then refusing to publish, a story about an extramarital affair between defendant and Stormy Daniels, an adult film actress. Opp. App. A.

To effect this catch-and-kill scheme, defendant's personal attorney, Michael Cohen, paid $130,000 to acquire the publication rights to Daniels's story, and defendant reimbursed Cohen an amount calculated to mask the true nature of the reimbursement. Defendant then concealed the reimbursement payments to Cohen by recording them in a New York enterprise's business records as attorney's fees paid to Cohen for services rendered pursuant to a retainer agreement. Those characterizations of the payments were false, because the payments to Cohen were

in fact to reimburse him for the payments he made to Daniels, not to pay him for legal services rendered pursuant to a retainer agreement. Opp. App. A.

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

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

B. The First Federal Removal Proceeding

Defendant was arraigned in state court on April 4, 2023. On May 4, 2023, he filed a notice of removal in the U.S. District Court for the Southern District of New York seeking to remove the charges against him under the federal-officer removal statute, 28 U.S.C. § 1442(a)(1). Opp. App. B. The People moved to remand the case to state court. After an evidentiary hearing, the district court (Hellerstein, J.) issued a written decision concluding that federal-officer removal was unavailable. *New York v. Trump*, 683 F. Supp. 3d 334, 337 (S.D.N.Y. 2023).

First, the court concluded that the charges against defendant were not "for or relat[ed] to" any act defendant took under color of his federal office. The court found that the People's allegation about defendant's payments to Cohen "overwhelmingly suggests that the matter was a purely a personal item of the President—a cover-up of an embarrassing event." *Id.* at 345. "Hush money paid to an adult film star is not

related to a President's official acts" and "does not reflect in any way the color of the President's official duties." *Id.* As the hearing evidence established, and defendant himself conceded, defendant had hired Cohen to "attend to his private matters"; the payments to Cohen were made from "private funds" that did not "depend on any Presidential power for their authorization"; and the documents recording those payments were maintained by "a private enterprise." *Id.* Based on that record, the court concluded that the charges against defendant were based on his "private acts," not "acts under the color of his office." *Id.*

Second, the district court concluded that defendant failed to identify a colorable federal defense, thus independently defeating federal-officer removal. The court explained that defendant had "expressly waived" any defense of "absolute presidential immunity," and that defendant had instead asserted that he was immune because his conduct—namely, his decision to retain Michael Cohen as his personal lawyer—arose out of his duties as President. *Id.* at 346. This defense was not colorable as a factual matter, the court held, because there was "[n]o evidence" that the reimbursements to Cohen constituted an official presidential act. *Id.* at 346-47. There was also no colorable preemption defense. Defendant conceded that federal law did not directly preempt N.Y. Penal Law § 175.10. *See id.* at 349. And the court rejected defendant's claim that federal law indirectly preempted N.Y. Penal Law § 175.10, by preempting the crimes that defendant sought to commit or conceal by making the false business records. *See id.* at 349-50.

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

C. Defendant's Post-Trial Motion to Vacate in State Court

On July 1, 2024, after defendant's conviction and ten days before the originally scheduled sentencing, this Court decided *Trump v. United States*. The dispute in that case was whether defendant could be criminally prosecuted for official acts that he performed during his tenure as President. *See* 603 U.S. at 601-02. This Court held that the President is at least presumptively immune for his official "acts within the outer perimeter of his official responsibility," and "is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority." *Id.* at 609, 614-15. However, this Court confirmed that "the President enjoys no immunity for his unofficial acts, and not everything the President does is official." *Id.* at 642.

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

In response to this Court's decision, defendant sought leave to file a motion in this case to set aside the jury's verdict pursuant to N.Y. Criminal Procedure Law ("CPL") § 330.30. On July 2, 2024, the state trial court granted defendant's motion; set a briefing schedule for defendant's CPL § 330.30 motion; and adjourned the sentencing hearing to September 18, 2024, "if such is still necessary." Opp. App. C.

On July 10, 2024, defendant filed a motion to dismiss the indictment and vacate the jury's verdict pursuant to CPL § 330.30(1). In that motion, defendant argued that the People had improperly introduced evidence of official presidential acts before the grand and petit juries in violation of *Trump v. United States*. In particular, defendant's claim pertained to certain testimony by three witnesses: Hope Hicks, Madeleine Westerhout, and Michael Cohen. His claim also related to his postings on social media and a financial disclosure form known as OGE Form 278e for 2017. Pet. App. 158A-212A. On July 24, 2024, the People filed their response to defendant's CPL § 330.30(1) motion. Opp. App. E.

While defendant's CPL § 330.30 motion was pending, on August 14, 2024, defendant moved to adjourn the sentencing "until after the 2024 Presidential election" to allow "adequate time to assess and pursue state and federal appellate options" in response to any adverse ruling on the pending CPL § 330.30 motion. Def.'s Ltr. (Aug. 14, 2024). On September 6, 2024, the trial court granted defendant's motion to adjourn, in order to "avoid any appearance—however unwarranted—that the proceeding has been affected by or seeks to affect the approaching Presidential election in which the Defendant is a candidate." Opp. App. D at 3. The court

accordingly adjourned sentencing (if necessary) to November 26, 2024. *Id.* at 4. (As noted below, that sentencing date was adjourned again to permit defendant to file another post-trial motion following the presidential election on November 5, 2024.)

On December 16, 2024, the trial court denied defendant's CPL § 330.30(1) motion. As an initial matter, the court found that defendant had failed to preserve his objections to the trial testimony of Westerhout and Cohen, and to any evidence that was introduced before the grand jury. In any event, on the merits, the court found that none of the disputed proof constituted a "core official act," nor did any of it "fall within the outer perimeter" of defendant's "official duties." In the alternative, the court found that even if certain communications described by Westerhout, Hicks, or Cohen fell within the "outer perimeter" of defendant's presidential authority, the court would "also find that other, non-privileged trial testimony provided ample non-motive related context and support to rebut a presumption of privilege" and demonstrate "that Defendant was acting in his personal capacity and not pursuant to his authority as President." Similarly, this evidence posed "no danger of intrusion on the authority and function of the Executive Branch." Finally, the court ruled that even if any of the disputed evidence amounted to proof of "official acts under the auspices of the *Trump* decision," the court would still deny defendant's motion because "introduction of the disputed evidence constitutes harmless error." Pet. App. 285A-325A.

D. Defendant's Motion for Leave to File an Untimely Second Notice of Removal

On September 3, 2024, defendant filed a motion for leave to file a second notice of removal in the U.S. District Court for the Southern District of New York. Defendant argued, among other things, that this Court's intervening decision in *Trump v. United States* supplied good cause for a second, untimely notice of removal. Opp. App. F.

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

Defendant appealed the denial of his motion to the U.S. Court of Appeals for the Second Circuit. That appeal is currently pending, and the People's response brief is due January 13, 2025. Defendant also sought a stay of the district court's denial of his motion for leave to file a second removal notice from both the district court and the Second Circuit. Both courts denied the stay requests. *See* Order Denying Stay, *New York v. Trump*, No. 24-2299, Dkt. 31.1 (2d Cir. Sept. 12, 2024); Order & Opinion Denying Mot. for Stay, *New York v. Trump*, No. 23 Civ. 3773, ECF No. 54 (S.D.N.Y. Sept. 6, 2024).

E. Defendant's Post-Trial Motion to Dismiss

On November 5, 2024, defendant was reelected as President of the United States. As a result of that election, defendant asked the District Attorney by letter dated November 8 to dismiss this prosecution and consent to a stay of trial court proceedings pending consideration of his dismissal request. The People asked the trial court for an adjournment to evaluate that request, which defendant joined, and which the Court granted on November 10. The People then advised the Court on November 19 that, after carefully evaluating defendant's request, the People believed the appropriate course was for the trial court to set a briefing schedule for defendant to present his arguments for dismissal to the court, and for the court to adjourn further proceedings pending resolution of that motion. That day, defendant filed a letter requesting permission to file a motion to dismiss pursuant to N.Y. CPL § 210.40. Opp. App. G. The trial court granted defendant's motion for leave to file a motion to dismiss and stayed sentencing. Opp. App. H.

On December 2, 2024, defendant filed a motion to dismiss with the trial court, requesting that it dismiss the indictment and vacate the jury's verdict pursuant to N.Y. CPL § 210.40. Pet. App. 213A-284A. On December 9, 2024, the People filed their opposition. Opp. App. I.

On January 3, 2025, the trial court denied defendant's motion to dismiss and scheduled his sentencing for January 10, 2025. As relevant here, the trial court found that defendant had no viable claim to be immune from sentencing on that date because "Presidential immunity from criminal process for a sitting president does not extend to a President-elect." The court further noted that because there was "no legal

impediment to sentencing," and because "Presidential immunity will likely attach once Defendant takes his Oath of Office," it was "incumbent" upon the court to schedule the sentencing before defendant's inauguration on January 20, 2025. The trial court observed that it had an obligation to "sentence Defendant within a reasonable time following verdict" and to permit defendant to "avail himself of every available appeal, a path he has made clear he intends to pursue but which only becomes fully available upon sentencing." Pet. App. 326A-343A.

The court also noted that although it could not make a final "determination on sentencing" before allowing the parties to be heard, it intended "to not impose any sentence of incarceration." Rather, after balancing the relevant concerns, including "the Presidential immunity doctrine," the court stated that an unconditional discharge "appear[ed] to be the most viable solution to ensure finality and allow Defendant to pursue his appellate options." The court also permitted defendant to appear virtually for the January 10 sentencing. *Id.* at 342A. Defendant has opted to appear virtually if sentencing is held on that date.

F. Defendant's Motion for a Stay in the Appellate Division

On January 7, 2025, defendant filed a petition in the Appellate Division, First Department, purporting to challenge the state trial court's two post-trial orders under article 78 of New York's Civil Practice Law and Rules. Pet. App. 361A-426A. Defendant also filed an application for interim relief seeking "an immediate stay" of the proceedings in his underlying criminal case pending resolution of the article 78 petition. Pet. App. 407A. The People filed a letter opposing defendant's request for an interim stay. Opp. App. K. The same day, a justice of the Appellate Division denied

defendant's request for an interim stay. Opp. App. L. Defendant's article 78 petition remains pending before the Appellate Division.

G. Defendant's Stay Application to the New York Court of Appeals

Defendant's application to this Court on Tuesday, January 7 represented that he was "simultaneously filing an application for an emergency stay to the New York Court of Appeals" to prevent the sentencing. Application 9. In fact, defendant did not file an application with the New York Court of Appeals until 4 p.m. on Wednesday, January 8. On January 9, a single judge of the New York Court of Appeals declined to grant defendant's request for interim relief.

ARGUMENT

THE COURT SHOULD DENY PETITIONER'S REQUEST FOR AN EMERGENCY STAY

I. This Court Lacks Jurisdiction Over This Non-Final State Criminal Proceeding.

As a threshold matter, this Court lacks jurisdiction to grant defendant's request for emergency relief, for two related reasons: there has been no "[f]inal judgment[] or decree[] rendered by the highest court" of New York, 28 U.S.C. § 1257(a); and he has not exhausted his state-court remedies. These jurisdictional defects alone require denying defendant's application because this Court may only grant a stay in a case if it would otherwise be "subject to review . . . on writ of certiorari." 28 U.S.C. § 2101.

This Court's jurisdiction to review state court decisions is limited to the review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). Here, however, there has not even been a

final judgment issued by the state trial court (because defendant has yet to be sentenced), let alone by the New York Court of Appeals. *See Florida v. Thomas*, 532 U.S. 774, 777 (2001) ("In a criminal prosecution, finality generally is defined by a judgment of conviction and the imposition of a sentence." (quotation marks omitted)).

Nor does this case present any of the "limited set of situations" where review of a federal issue may be had despite the absence of a final state judgment, *O'Dell v. Espinoza*, 456 U.S. 430, 430 (1982) (per curiam), commonly called the four "*Cox* exceptions," *Nike, Inc. v. Kasky*, 539 U.S. 654, 660 (2003) (Stevens, J., concurring). *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975). Three of the *Cox* exceptions require that a federal issue be "finally decided" by the state courts. *Id.* at 480-81, 483. But here neither the Appellate Division nor the New York Court of Appeals has addressed any of defendant's claims on direct appeal. *Compare Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989) (case fit within a *Cox* exception to the finality rule where Indiana Supreme Court had already ruled on the federal issue). Nor is this case one where "the federal issue is conclusive" such that "the outcome of further proceedings [is] preordained." *Cox*, 420 U.S. at 479. To the contrary, as explained further below, defendant's objection to the admission of official-acts evidence is not dispositive at all given harmless-error review, and further state appellate proceedings are not "preordained" because defendant remains free to raise all of his claims on direct appeal.

Defendant has thus failed to exhaust his state-court remedies. It is well settled that "no decision of a state court should be brought [to the Supreme Court] for review

either by appeal or certiorari until the possibilities of review by all state courts have been exhausted." *Gorman v. Washington Univ.*, 316 U.S. 98, 100 (1942); *see also Costarelli v. Massachusetts*, 421 U.S. 193, 195 n.3 (1975). Here, defendant has been denied interim relief by a single justice on the intermediate-level Appellate Division and a single judge on the New York Court of Appeals. But a full panel of the Appellate Division has yet to rule on defendant's stay request. And defendant has plainly not obtained appellate review on the merits from any New York court. Defendant has thus not exhausted his opportunities to obtain review in the state courts.

II. Defendant Has Not Satisfied His Heavy Burden of Justifying This Court's Extraordinary Intervention into an Ongoing State Criminal Proceeding.

Lack of jurisdiction aside, defendant has not satisfied the stringent standards necessary to establish his entitlement to the "extraordinary remedy" of a stay. *Winter*, 555 U.S. at 22. Because a stay intrudes on "the ordinary processes of administration and judicial review," *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotation marks omitted), defendant bears the "heavy burden" of justifying such "extraordinary" and disruptive relief, *see Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers). There is no such justification here. This Court is unlikely to grant certiorari on any of the claims that defendant has raised. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). And the balance of the equities supports allowing the state criminal proceeding to complete the final stage of the trial process. *See Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 579-80 (2017) (per curiam).

A. The balance of the equities tips decisively in favor of completing the criminal trial.

The balance of the equities weighs heavily against a stay here. There is a compelling public interest in proceeding to sentencing, especially given New York law's statutory directive that the sentence "be pronounced without unreasonable delay." N.Y. CPL § 380.30(1). This interest has considerable force in light of the jury's guilty verdict, because the sanctity of a jury verdict and the deference that must be accorded to it are bedrock principles in our Nation's jurisprudence. *See Melear v. Spears*, 862 F.2d 1177, 1178 (5th Cir. 1989) (noting the "sanctity of the jury's role in our system of adjudication"); *see also* Pet. App. 328A (citing *United States v. Gaudin*, 515 U.S. 506, 509-510 (1995)).

This Court has also long recognized the "strong judicial policy against federal interference with state criminal proceedings." *Arizona v. Manypenny*, 451 U.S. 232, 243 (1981); *see also O'Shea v. Littleton*, 414 U.S. 488, 500 (1974) (federal courts may not engage in "an ongoing federal audit of state criminal proceedings"); *Younger v. Harris*, 401 U.S. 37, 41 (1971) (describing "the national policy forbidding federal courts to stay or enjoin pending state court proceedings"). To be sure, this Court has jurisdiction to review final judgments in state criminal proceedings. *See* 28 U.S.C. § 1257(a). As discussed, however, there is no final judgment here. Defendant's request is instead for this Court to wade into and disrupt the ordinary process of an ongoing state criminal trial—a violation of the rule that a "federal court must not intervene by way of either injunction or declaratory judgment in a pending state criminal prosecution." *Kugler v. Helfant*, 421 U.S. 117, 123 (1975); *see also Engle v. Isaac*, 456

U.S. 107, 128 (1982) ("The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.").

Finally, any stay here risks delaying the sentencing until after January 20, when defendant is inaugurated and his status as the sitting President will pose much more severe and potentially insuperable obstacles to sentencing and finality. Thus, far from temporarily preserving the status quo, granting defendant's requested "stay" threatens to delay sentencing for years. *See Nken*, 556 U.S. at 429. That result would be particularly inequitable here given that, as the trial court noted, it was defendant who asked that sentencing—originally scheduled for July 11, 2024—be adjourned for repeated serial post-trial motions and then until after the presidential election. Pet. App. 332A. The trial court recognized that those requests by defendant implicitly gave his "consent that he would face sentence during the window between the election and the taking of the oath of office." *Id.* The equities do not favor rewarding a defendant for delays caused by his own litigation choices.

On the other side of the ledger, defendant will face no prejudice by proceeding to sentencing on January 10. The sentencing hearing itself will impose minimal burdens because the state trial court has allowed him to appear virtually, and in the People's experience, it would be feasible to complete sentencing in less than an hour. In addition, the court has declared its intent to impose "a sentence of an unconditional

discharge," Pet. App. 342A, which the People do not oppose and which will prevent defendant from being subject to any ongoing criminal supervision or other obligations during his presidential term. And sentencing will not foreclose defendant from pursuing any of his challenges to this criminal proceeding on appeal, including the claims of presidential immunity that are the basis of his current stay request—to the contrary, the sentencing is what will enable defendant to file his direct appeals in the first place.

Defendant is wrong to accuse the trial court of acting with "abruptness and extreme haste." Application 39. A sentencing hearing more than seven months after a guilty verdict is aberrational in New York criminal prosecutions for its delay, not its haste. N.Y. CPL § 380.30(1). And if the ability of New York's appellate courts to conduct any interlocutory review here has been truncated, that too was a result of defendant's strategic choice. The trial court ruled on December 16, 2024 both on defendant's claim of evidentiary immunity *and* his claim of President-elect immunity. Pet. App. 285A-325A; Opp. App. J (Dec. 16, 2024 Letter Order). Defendant, however, did not commence any efforts at appellate review for three weeks, despite defendant's previous representations to the trial court that defendant would seek immediate injunctive relief if the trial court indicated its intent to rule on defendant's post-trial motions. Pet. App. 284A.

B. The question of whether any invocation of presidential immunity triggers an automatic stay pending appeal is not squarely implicated here.

Defendant asserts that this case presents the question of whether a "claim of Presidential immunity" entitles a defendant to an automatic stay pending an

interlocutory appeal. Application 11. But this Court has never said that *any* invocation of immunity—whatever its form—automatically triggers an appellate stay. To the contrary, this Court has recognized the need for an interlocutory appeal principally in cases where a public official asserts immunity from being sued *for his official conduct*. For example, in *Trump v. United States*, the dispute was over whether defendant could be criminally prosecuted for "official acts during his tenure in office." 603 U.S. at 606. And in cases involving absolute or qualified immunity, the question is always whether a public official may be required to stand trial for "the consequences of official conduct." *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985). Here, by contrast, defendant has conceded that the underlying criminal charges involved purely private and unofficial conduct that "does not reflect in any way the color of the President's official duties." *Trump*, 683 F. Supp. 3d at 345.[1] This criminal proceeding thus does not implicate the legal question that defendant asks this Court to review.

The advanced stage of the state criminal proceeding also distinguishes this case from the decisions cited by defendant. The traditional rationales for staying trial-court proceedings pending an immunity-based appeal simply do not apply when the state trial is nearly complete and defendant faces no sanction other than entry of judgment. In the qualified-immunity context, for example, this Court has been concerned with "subject[ing] government officials either to the costs of trial or to the

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[1] As noted *supra*, Defendant dismissed his appeal of the district court's remand order in the first removal proceeding, in which the district court found that the charged crimes were based on purely unofficial acts. *People v. Trump*, No. 23-1085, 2023 WL 9380793 (2d Cir. 2023).

burdens of broad-reaching discovery," *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982); *see also Mitchell*, 472 U.S. at 527 (recognizing "an entitlement not to stand trial or face the other burdens of litigation"). And in *Trump*, this Court similarly expressed the concern that "the possibility of an extended proceeding alone may render [the President] unduly cautious in the discharge of his official duties." 603 U.S. at 636.

Here, however, the state criminal trial concluded seven months ago, and the entire criminal action has been nearly completed, save only for a sentencing hearing that will lead to an unconditional discharge. N.Y. CPL §§ 1.20(11), 16. Defendant, in his new status as President-elect, will not face any discovery, any trial, or any "extended proceeding." The only step remaining in the state criminal trial is a brief sentencing hearing that defendant has opted to attend virtually—an accommodation the trial court offered defendant precisely to minimize any burden. And defendant's stated concern about the "actual imposition of a criminal sentence of incarceration" (Application 32) is entirely illusory when the trial court has already stated its intent to impose "a sentence of an unconditional discharge" (Pet. App. 342A), "without imprisonment, fine or probation supervision." N.Y. Penal Law § 65.20(2). Defendant thus faces none of the burdens that have traditionally animated the need for an interlocutory stay of trial proceedings.

Finally, this Court has already held that federal procedural rules providing for an interlocutory appeal from qualified-immunity denials do not bind the state courts, which are free to deny "appellate review for the vast majority of interlocutory orders."

Johnson v. Fankell, 520 U.S. 911, 920 (1997). Defendant attempts to distinguish *Johnson* by claiming that the Constitution mandates a right to an interlocutory appeal here (Application 17 n.2), but this Court has never so held, and did not do so in *Trump*.

In any event, defendant's objections to New York's procedural rules on this front are misplaced given that, as he acknowledges (Application 17-18 n.3), New York law *does* provide a procedural channel for criminal defendants to raise legal objections to the Appellate Division on an interlocutory basis—essentially, by bringing a collateral civil proceeding in the Appellate Division against the presiding judge, *see* N.Y. C.P.L.R. §§ 506(b)(1), 7804(i)—and authorizes stays to be issued in such collateral proceedings, *see* N.Y. C.P.L.R. § 7805. Although such stays are discretionary, not automatic, there is no indication that these procedures would be inadequate to provide interim relief in cases involving meritorious claims of presidential immunity. *Cf. Matter of Rush v. Mordue*, 68 N.Y.2d 348, 351 (1986) (granting article 78 relief "to raise the claim of [transactional] immunity and interdict the prosecution"). And, as this Court has long recognized, given that "the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status," even constitutional concerns do not support "straitjacketing the States" in their choice of criminal procedural rules. *Oregon v. Ice*, 555 U.S. 160, 171 (2009). For this reason as well, defendant's claim that any invocation of presidential immunity must be subject to identical procedural rules in every state-

court system does not raise a claim that would warrant this Court's grant of certiorari.

C. Defendant's novel invocation of President-elect immunity does not warrant this Court's premature intervention in a pending state criminal trial.

Defendant claims that, as the President-elect, he is entitled to the same immunity from prosecution as the sitting President and thus may not be subject to sentencing in this criminal proceeding on January 10, 2025. *See* Application 28. This claim is arguably a claim of immunity from suit. But it is so baseless that it cannot support defendant's request for an interlocutory stay of this state criminal trial. *See Coinbase, Inc. v. Bielski*, 599 U.S. 736, 745 (2023) (recognizing that trial courts may proceed when a defendant raises a patently meritless interlocutory appeal); *Behrens v. Pelletier*, 516 U.S. 299, 310-11 (1996) (recognizing that "frivolous" claims of qualified immunity on appeal will not stay trial-court proceedings); *Mitchell*, 472 U.S. at 525 (recognizing that only "a substantial claim of absolute immunity" may entitle the defendant to an interlocutory appeal "before final judgment").

No judicial decision or guidance from the Department of Justice has ever recognized that the unique temporary immunity of the sitting President extends to the President-elect. Such an extension would conflict with this Court's holdings that Article II vests the entirety of the executive power in the incumbent President alone, *see Trump*, 603 U.S. at 607 (quoting U.S. Const. art. II, § 1, cl. 1), and that "only the incumbent is charged with performance of the executive duty under the Constitution," *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 448 (1977). The President-elect is, by definition, not yet the President. The President-elect therefore does not

perform any Article II functions under the Constitution, and there are no Article II functions that would be burdened by ordinary criminal process involving the President-elect.

Recognizing President-elect immunity would also be inconsistent with the "justifying purposes" of presidential immunity, which "are to ensure that the President can undertake his constitutionally designated functions effectively, free from undue pressures or distortions." *Trump*, 603 U.S. at 615-16 (quotation marks omitted). Because only the incumbent President has any "constitutionally designated functions," *id.*, and because the President-elect is not the President, there is no risk that "the President's decisionmaking is . . . distorted" by a pre-existing criminal case involving unofficial conduct against a defendant who later becomes the President-elect. *Id.* at 615.

Defendant's assertion of President-elect immunity also disregards that any presidential immunity from criminal process is limited in duration: as the Department of Justice's Office of Legal Counsel has explained, it is "a temporary immunity from such criminal process *while the President remains in office*." *See* Memorandum from Randolph D. Moss, Assistant Att'y Gen., Office of Legal Counsel, *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 Op. OLC 222, 238 (Oct. 16, 2000) (emphasis added), *at* 2000 WL 33711291. This Court confirmed as much when it held that even a "sitting President" may be criminally charged "after the completion of his term." *Trump v. Vance*, 591 U.S. 786, 803 (2020).

By the same token, a President has no immunity from criminal process before his term begins.

Although defendant relies on the Presidential Transition Act to argue that he has already begun engaging in official functions, the limited authority interpreting that statute has concluded otherwise, holding that the Act "does not—and cannot—deem any of the President-elect's actions 'official' before he or she complies with the Oath and Affirmation Clause." *United States v. Williams*, 7 F. Supp. 2d 40, 51 (D.D.C. 1998), *vacated in part on other grounds sub nom. United States v. Schaffer*, 240 F.3d 35 (D.C. Cir. 2001). And to the extent that defendant is instead raising the empirical claim that his responsibilities during the transition are too onerous to make time for even a brief virtual sentencing proceeding (*e.g.*, Application 34), defendant has failed to establish any record on that front aside from assertions in his current application. There is also good reason to doubt that any such claim could be made. This Court has previously recognized that even a sitting President's duties are not so "unremitting" as to excuse him from complying with a state criminal subpoena. *Vance*, 591 U.S. at 795, 808-09. And the trial court here has made multiple, extraordinary accommodations to minimize any burdens on defendant from the January 10 sentencing. Defendant's duties as the President-elect thus also do not support his sweeping claim of categorical immunity from criminal process.

D. Defendant's objection to certain evidence admitted at trial does not raise a claim of immunity from suit that is entitled to any interlocutory appeal or stay.

1. Defendant claims that the state trial court improperly admitted evidence of defendant's official acts during trial (Application 19-20), in violation of this Court's

holding in *Trump* that certain "testimony or private records of the President or his advisers probing [an] official act" are inadmissible at trial. 603 U.S. at 630-32. But this type of ostensibly immunity-based claim does not support an interlocutory appeal or a stay pending appeal because it is not an argument that defendant is immune *from suit* on the underlying criminal charges. It thus lacks the essential feature that this Court has relied upon in finding that a "defendant's claim of right not to *stand trial*," *Mitchell*, 472 U.S. at 527, should be fully litigated before the trial takes place.

Defendant is wrong to assert that this Court's discussion of interlocutory appeals in *Trump* was meant to extend to that decision's separate holding on the admissibility of official-acts evidence. Application 14. To the contrary, this Court explained that "pretrial review" should be available only for "[q]uestions about whether the President *may be held liable* for particular actions." *Trump*, 603 U.S. at 636 (emphasis added). Nowhere in the Court's discussion of official-acts evidence, *id.* at 630-32, did it suggest that similar "pretrial review" is available for a purely evidentiary objection.

There is also a fundamental mismatch between the stay that defendant requests here and the target of his immunity-based evidentiary claim. Defendant asserts that presidential immunity precluded the admission of certain official-acts evidence. But that evidence was already admitted during his criminal trial, and no stay can unwind that admission. By contrast, the January 10 sentencing will not involve the introduction of evidence at all, let alone evidence of defendant's official acts. The stay of sentencing that defendant requests thus does nothing to prevent the

improper admission of official-acts evidence. Nor is a stay necessary to preserve his ability to challenge the use of that evidence at his trial last year; to the contrary, it is the sentencing and entry of final judgment that will enable defendant to raise his evidentiary claims on direct appeal and seek reversal on that basis. *See* N.Y. CPL § 450.10(1)-(3) (authorizing defendant to appeal from a "judgment" or "sentence"). A stay is thus not warranted on defendant's objection to the admission of official-acts evidence because such interim relief will simply not redress the asserted legal error.

2. Even if this Court were to consider defendant's evidentiary arguments now, it would be unlikely to grant certiorari because two threshold issues would either eliminate or substantially narrow defendant's objections to the admission of official-acts evidence: the trial court's finding of harmless error, and defendant's failure to preserve objections to the majority of the evidence that is the subject of his arguments.

a. After carefully examining the trial evidence, the state court concluded that any error in admitting official-acts evidence was harmless in light of the other overwhelming evidence of defendant's guilt. *People v. Crimmins*, 36 N.Y.2d 230, 237 (1975); *see* Pet. App. 335A-336A ("[A] total of 22 witnesses testified at trial, and over 500 exhibits were admitted, all of which supported the jury's verdict."); Pet. App. 319A-322A (holding that if any evidence were improperly admitted, that error was harmless "in light of the overwhelming evidence of guilt"); *see generally* Opp. App. 75A-96A (detailing trial evidence); Opp. App. 154A-163A (same). Given that defendant's guilt was easily established without reference to any of the evidence that

he asserts is subject to official-acts immunity, this Court would be unlikely to grant certiorari because the harmless-error finding would make it unnecessary to reach the evidentiary immunity issue altogether. *See, e.g.*, *United States v. Ricardo*, 472 F.3d 277, 286 (5th Cir. 2006); *United States v. Saada*, 212 F.3d 210, 223 (3d Cir. 2000).

b. In addition, defendant failed to preserve his objections to nearly all of the evidence that he opposed in his post-trial motion and that he now raises in his stay application to this Court.

Defendant argues that the trial court erroneously admitted six categories of evidence: (1) testimony from Hope Hicks about events that occurred while she was the White House Communications Director; (2) testimony from Madeleine Westerhout about office process and procedures when she worked in the White House; (3) four Tweets posted to defendant's personal Twitter account; (4) testimony from Cohen about why he lied to Congress; (5) testimony from Cohen about conversations he had with other third parties about Federal Election Commission ("FEC") investigations; and (6) a public financial disclosure form defendant submitted to the federal Office of Government Ethics ("OGE") in 2018. Application 20-28.

Under New York law, a trial court may not set aside a jury verdict of guilt based on an alleged error that was not properly preserved at trial. *People v. Everson*, 100 N.Y.2d 609, 610 (2003); *People v. Sudol*, 89 A.D.3d 499, 499-500 (1st Dep't 2011); *see* N.Y. CPL § 330.30(1). Here, as the trial court found, defendant raised immunity objections to only a subset of three of the six categories of evidence he opposed after trial: Hicks's testimony as it related to statements by defendant while he was

President; the admission of defendant's public financial disclosure form; and the four Tweets posted to defendant's personal account. *See* Pet. App. 293A-300A. Defendant raised no immunity objection to any of the other categories of evidence, including to any of the trial testimony from Westerhout or Cohen, or to testimony by Hicks unrelated to defendant's statements while he was President.[2] *Id.*; *see also* Opp. App. 45A-48A (citing the trial record).

This Court has recognized that a state court's finding of lack of preservation can be an independent and adequate state ground that would preclude federal review of an asserted constitutional error. *Sochor v. Florida*, 504 U.S. 527, 534 (1992). The trial court's decision here would substantially narrow the scope of official-acts evidence that this Court could even consider. For this reason, too, this Court would not likely grant certiorari to review defendant's evidentiary objections.

3. Certiorari would not be warranted for the separate reason that the challenged evidence does not constitute prohibited evidence of official acts.

Defendant relies on this Court's holding in *Trump* that evidence about "official conduct for which the President is immune" may not be introduced at trial "even on charges that purport to be based only on his unofficial conduct." 603 U.S. at 631. By its own terms, however, this rule applies only when evidence concerns "official acts

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[2] Defendant's stay application suggests that he first learned of the People's intent to admit the evidence he later opposed on the ground of official-acts immunity through pre-trial motions in limine filed on February 22, 2024 (about eight weeks before the start of trial). Application 2-3. In fact, the challenged exhibits were all identified on pre-trial exhibit lists disclosed to the defense on August 24, 2023 and January 3, 2024—months before trial.

for which the President is immune" from criminal liability; there is no evidentiary bar with respect to unofficial acts by the President (such as the conduct that is the subject of defendant's conviction here). *Id.* As for official acts, this Court separated them into two distinct categories. The first, narrow category consists of acts by the President to carry out an explicit constitutional commitment of exclusive authority; for such conduct, the President has absolute immunity. *Id.* at 607-09. The second category consists of all other acts that a President is authorized to commit; for such conduct, the President is entitled only to presumptive immunity, which can be rebutted by showing that "applying a criminal prohibition to that act would pose no dangers of intrusion on the authority and functions of the Executive Branch." *Id.* at 615 (quotation marks omitted). Finally, even as to official acts for which the President is immune, "of course the prosecutor may point to the public record to show the fact that the President performed the official act." *Id.* at 632 n.3.

In other words, under *Trump*, evidence about defendant's conduct during his Presidency may be properly admitted if *any* of the following is true: the evidence concerns defendant's unofficial conduct; the evidence concerns official conduct for which the presumption of immunity has been rebutted; or the evidence consists of a public record of an official act. As described below, one or more of these factors applies to all of the evidence that defendant challenged after trial. *See* Opp. App. 48A-69A.

a. Defendant objected to the admission of four Tweets from his Twitter account. Application 20-22; Pet. App. 436A-445A. Three Tweets reflected defendant's opinion about Cohen, his personal attorney; the fourth contained defendant's observations

about "a private contract between two parties." Pet. App. 436A-445A. The subject matter of these Tweets consisted solely of "unofficial acts" for which "there is no immunity." *Trump*, 603 U.S. at 615. This Court specifically recognized that defendant could make public statements—including Tweets—"in an unofficial capacity," such as if he spoke "as a candidate for office or party leader," rather than as the President exercising his Article II powers. *Id.* at 629. All four of the challenged Tweets referred to Cohen, defendant's personal attorney at the time; and one provided defendant's opinion about—in his own words—"a private contract" between Cohen and Stormy Daniels. Pet. App. 436A-445A. Defendant was thus "speak[ing] in an unofficial capacity," *Trump*, 603 U.S. at 629, when he commented on a private contract between private individuals that was signed before his presidency and that had no relationship to any official presidential duty.

Nor do these Tweets bear any resemblance to the kinds of public comments that this Court indicated would qualify as official presidential conduct. *E.g.*, Pet. App. 443A ("If anyone is looking for a good lawyer, I would strongly suggest that you don't retain the services of Michael Cohen!"). Defendant did not "purport[ ] to discharge an official duty" in issuing the Tweets. *Lindke v. Freed*, 601 U.S. 187, 203 (2024). The Tweets did not seek to "persuade Americans" to pursue a pressing policy in the public interest, or respond to a public emergency or tragedy that required a national voice, or advance any particular initiative or public work, or touch on any of the "vast array of activities" of "American life" that Presidents may be expected to address. *Trump*, 603 U.S. at 629; *see also Blassingame v. Trump*, 87 F.4th 1, 15 (D.C. Cir. 2023). To

the contrary, the Tweets reflected defendant's personal opinion about private individuals and entirely unofficial conduct committed prior to his presidency.[3]

Even if the Tweets were official acts for which defendant would be immune, they were admissible because the People admitted nothing more than the "public record" of those Tweets "to show the fact that the President performed the official act"—i.e., that he made those statements on Twitter. *Trump*, 603 U.S. at 632 n.3. The trial court therefore correctly concluded that their admission did not violate official-acts immunity. Pet. App. 316A-319A; *see* Opp. App. 49A-56A.

b. Nor was there any error in the admission of testimony from former White House employees Hope Hicks and Madeleine Westerhout. Pet. App. 302A-309A; Opp. App. 56A-65A. The only testimony that the People elicited from Hicks regarding any conversations with defendant while he was President related solely to unofficial conduct—namely, discussions between defendant and Hicks about the hush-money scheme that was then being reported in the press. Opp. App. 58A-60A. As defendant has long conceded, that scheme was entirely personal and largely committed before the election, and it had no relationship whatsoever to any official duty of the

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[3] Defendant incorrectly suggests (Application 20) that *Clinton v. Jones*, 520 U.S. 681 (1997), held that a President engages in official conduct when he directs White House officials to make public statements about a private sexual affair. The courts in the *Clinton* case expressly declined to resolve that issue altogether: the U.S. Court of Appeals for the Eighth Circuit found unpreserved any argument about whether "actions alleged to have been taken by [Clinton's] presidential press secretary while [Clinton] was President . . . fall inside the outer perimeter of the President's official responsibility," *Jones v. Clinton*, 72 F.3d 1354, 1359 n.7 (8th Cir. 1996); and this Court similarly refused to address the issue, *see Clinton*, 520 U.S. at 686 n.3.

presidency. A President's discussions about a purely private matter, even with a White House advisor, do not constitute "official acts for which the President is immune," *Trump*, 603 U.S. at 631, because neither the internal discussions nor the subject matter have any "connection with the general matters committed by law to his control or supervision," *Blassingame*, 87 F.4th at 13 (quotation marks omitted).

As to defendant's post-trial objections about Westerhout's testimony, the description of this evidence as involving "details" about the conduct of official business or "invasive testimony" about official "work habits" (Application 23) simply misdescribes the record.[4] Most of Westerhout's testimony described her assistance in handling defendant's private affairs, including her receipt of personal checks from the Trump Organization for defendant to sign—unofficial conduct that is not subject to any claim of immunity. Opp. App. 62A-63A; *see Trump*, 603 U.S. at 629. And Westerhout's general descriptions of defendant's work style do not trigger any concerns about official-acts immunity because she provided no testimony about any particular official act of the President, let alone any specific "exercise of official business in the White House" or "on behalf of the United States." Application 23. Westerhout's testimony thus did not concern any particular "official conduct for which the President is immune." *Trump*, 603 U.S. at 631.

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[4] For example, defendant's claim that this evidence includes "invasive testimony" about defendant's work habits "on Air Force One" refers in its entirety to the following answer from Westerhout: "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." Opp. App. 64A.

Defendant's apparent argument that testimony from Hicks or Westerhout about their time in the White House was categorically inadmissible because they were White House employees (Application 24) is inconsistent with this Court's rejection of any such categorical approach to absolute immunity based on a government official's role. *See Trump*, 603 U.S. at 623-24 (holding that not all of a President's discussions with his Vice President would qualify as official conduct subject to absolute immunity).

c. The challenged testimony from Michael Cohen (Application 24-26) was also properly admitted. Pet. App. 310A-316A. Evidence regarding Cohen's responses to FEC investigations into whether the hush-money payments to Karen McDougal and Stormy Daniels violated campaign finance laws—including evidence that defendant approved Cohen's written response to the FEC, and that Cohen told a third party that defendant said the Attorney General would "take care of" an FEC investigation—are unrelated to any official act. The FEC investigations at issue arose out of conduct that defendant concedes was entirely personal and that involved no official act—i.e., the pre-election hush-money payments to McDougal and Daniels to suppress their stories before the election. And aside from defendant, all of the relevant actors mentioned in this evidence were private parties who were not acting in any official capacity. This Court has recognized that defendant himself "appeared to concede" at the *Trump* oral argument that acts "involving 'private actors' . . . entail 'private' conduct." *Trump*, 603 U.S. at 626; *see also* Tr. of Oral Argument at 29, *Trump v. United States*, No. 23-939 (Apr. 25, 2024).

Defendant argues that Cohen's testimony about the Attorney General "tak[ing] care of" an FEC investigation relates to defendant's "exclusive authority and absolute discretion" to decide which crimes to prosecute. Application 24-25. This argument makes no sense. The FEC's enforcement authority is exclusively civil, not criminal; and it is an independent administrative agency that is not supervised by the Attorney General in any event. 52 U.S.C. § 30107(a)(6), (e); *see Fed. Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 199 n.2 (1982). And because defendant claims it is not established that he actually spoke with the Attorney General about this issue (Application 24), the only "conduct" at issue here would appear to be an empty promise from defendant to reassure his private attorney about an independent agency's investigation into private affairs. That conduct reflects no exercise of actual presidential responsibilities.

Defendant's claim that Cohen improperly testified about "the exercise of the President's Pardon Power" (Application 25) simply misstates the record. Cohen testified about an email exchange between himself and another lawyer (Robert Costello) in which Costello offered to ask Rudy Giuliani to ask defendant to issue a pardon. Defendant was not a party to that email exchange; the participants did not say that they had lodged the pardon request with defendant; the exchange did not attribute any comments to defendant; and defendant never pardoned Cohen. Indeed, defense counsel argued during trial that "[t]here is zero evidence that anything that Mr. Costello said to Mr. Cohen came from President Trump." Opp. App. 69A. A private conversation between two private individuals about a pardon they never

requested from defendant is not testimony about any official presidential act. *See Trump*, 603 U.S. at 626.

d. Finally, defendant's OGE financial disclosure form (Application 26-28) was also properly admitted at trial. The obligation to file this OGE form is not limited to Presidents; it applies to other officials and to political candidates for federal office, and the information disclosed on the form consists of the individual's private finances—which are necessarily separate from any official acts. *See* 5 U.S.C. §§ 13103(b)-(c), (f), 13104. Even assuming that the OGE form nonetheless reflects official conduct, OGE is statutorily required to make these filings publicly available, *see* 5 U.S.C. § 13107(a); *see also id.* §§ 13101(18)(D), 13122(b)(1); and the document is thus a quintessential "public record to show the fact that the President performed the official act." *Trump*, 603 U.S. at 632 n.3. Moreover, in admitting the form, the People did not rely on "testimony or private records of the President or his advisers probing the official act itself." *Id.* To the contrary, the form was admitted through the testimony of Jeffrey McConney, a Trump Organization employee who prepared the form for defendant in his capacity as a private employee and stored it in the records of the Trump Organization. Opp. App. 61A-62A.

Defendant contends that the OGE form constituted an official act of "speaking to the American people regarding the 'public trust.'" Application 27. But there is no evidence whatsoever in the trial record that defendant completed the OGE form in an effort to communicate with the public at large. And although the OGE makes these forms publicly available, merely filing a form with a government agency is simply not

the same as a President using the power of "the office's 'bully pulpit' to persuade Americans . . . in ways that the President believes would advance the public interest." *Trump*, 603 U.S. at 629. The trial court correctly held that defendant's OGE form was admissible. *See* Pet. App. 309A-310A.

Thus, all of the evidence defendant challenged in his post-trial motion either concerned unofficial conduct that is not subject to any immunity, or is a matter of public record that is not subject to preclusion, as the trial court correctly held. Pet. App. 300A-319A (rejecting defendant's arguments on the merits). Defendant is of course entitled to raise his evidentiary objections in his appeal from a final judgment to New York's appellate courts. And this Court could determine at that point to review any preserved, non-harmless evidentiary arguments if the Court believes certiorari is warranted. But at this stage, defendant has not shown a significant possibility of reversal such as to warrant the extraordinary step of enjoining a pending state-court criminal case.

CONCLUSION

The emergency application should be denied.

Dated: New York, NY
January 9, 2025

Respectfully submitted,

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

By: /s/ Steven C. Wu
STEVEN C. WU*
Chief, Appeals Division

ALAN GADLIN
Deputy Chief
JOHN T. HUGHES
Assistant District Attorney

* *Counsel of Record*

One Hogan Place
New York, New York 10013
(212) 335-9326
wus@dany.nyc.gov