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

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

[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

[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

---

[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

[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

[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

[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*

[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

[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.

* * *

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

[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.

By: /s/ Todd Blanche / Emil Bove
Todd Blanche
Emil Bove
Blanche Law PLLC
99 Wall Street, Suite 4460
New York, NY 10005
212-716-1250
toddblanche@blanchelaw.com

Attorneys for President Donald J. Trump