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

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

PLEASE TAKE NOTICE that, upon the Verified Article 78 Petition brought by Order to Show Cause, dated January 6, 2025, President Donald J. Trump, as Petitioner herein, will move this Court, at a Term to be held at the Courthouse thereof, located at 27 Madison Avenue, New York, NY 10010, on the 27 day of January, 2025, at 9:30 a.m., or as soon thereafter as counsel can be heard, for an Order on the first cause of action, finding that the denials by Justice Merchan of President Trump's claims of Presidential immunity, both Presidential official-acts immunity based on the evidentiary misuse of official acts before the grand jury and at trial, and the absolute immunity of a sitting President from any criminal process, state or federal, which extends into the brief but crucial period of transition when President Trump is the President-Elect, are in excess of Supreme Court's jurisdiction under CPLR § 7803(2); and for such other and further relief as this Court may deem just and proper.

Dated: January 6, 2025
New York, New York

Respectfully submitted,

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VERFIFIED ARTICLE 78 PETITION

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

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

PRELIMINARY STATEMENT

1. President Trump brings this Article 78 proceeding to redress the serious and continuing infringement on his Presidential immunity from criminal process that he holds as the 45th and soon-to-be 47th President of the United States of America. In this Petition, President Trump seeks review of two closely related, interlocking, and erroneous decisions by Justice Merchan denying President Trump's claims of Presidential immunity: (1) Justice Merchan's December 16, 2024 Decision and Order denying President Trump's Post-Trial Presidential Immunity Motion, which (among other things) asserted Presidential immunity based on evidentiary misuse of official acts before the grand jury and at trial, in violation of *Trump v. United States*, 603 U.S. 593 (2024) ("Presidential official-acts immunity"); and (2) Justice Merchan's January 3, 2025 Decision and Order denying President Trump's post-trial motion that asserted, among other grounds, President Trump's undisputed absolute immunity from criminal process as the sitting President, which extends into the brief, crucial transitional period under which President Trump is President-elect and is conducting the work necessary to assume the Executive power of the United States ("sitting-President immunity"). These errors violate the doctrine of Presidential immunity and completely undermine the erroneous jury verdict in this meritless, politically motivated case that violated

President Trump's fundamental due process rights and rested heavily on the testimony of disbarred, disgraced serial liar Michael Cohen.

2. Justice Merchan's erroneous decisions threaten the institution of the Presidency and run squarely against established precedent disallowing any criminal process against a President-Elect, as well as prohibiting the use of evidence of a President's official acts against him in a criminal proceeding. Under *Trump*, the Supremacy Clause of the United States Constitution, U.S. CONST. art. VI, cl. 2, and other established law and jurisprudence, *see* N.Y. CONST. art. I, § 6, Justice Merchan is without authority under the law to proceed to sentencing while President Trump exercises his federal constitutional right to challenge these rulings, and the erroneous jury verdict in the underlying criminal case must be vacated and the charges against President Trump must be dismissed with prejudice, without further delay.

JURISDICTION AND VENUE

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

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

THE PARTIES

5. President Trump is the 45th and will soon be the 47th President of the United States. President Trump is a defendant in the matter captioned *People v. Trump*, Indictment No. 71543-23, currently pending before Supreme Court, New York County, Criminal Division, and is currently the President-Elect of the United States of America. On January 20, 2025, President Trump will be sworn in again as President of the United States.

6. Respondent Justice Merchan is an Acting Justice of the Supreme Court, New York County. Justice Merchan is the Justice presiding in the matter captioned *People v. Trump*, Ind. No. 71543-23.

7. Respondent Alvin L. Bragg, Jr., Manhattan District Attorney, for the People of the State of New York, is responsible for the prosecution of the matter *People v. Trump*, Ind. No. 71543-23.

FACTUAL BACKGROUND

Procedural History

I. Pre-Trial Proceedings

8. On February 28, 2024, the United States Supreme Court granted certiorari in *Trump v. United States* to determine "[w]hether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office." 2024 WL 833184, at *1 (Feb. 28, 2024). Less than a week earlier, DANY had disclosed their intention to present evidence at trial involving official actions by President Trump while in office during his first term as President. Ex. 1 at 50.

9. Within a week of the United States Supreme Court's grant of certiorari, on March 7, 2024, President Trump moved to exclude evidence of President Trump's official acts at trial and for an adjournment to allow time for the United States Supreme Court to decide the immensely significant constitutional issue of presidential immunity, a matter of first impression. Ex. 2. President Trump, when discussing the timing of his motion, pointed to the recent grant of certiorari and the recent emphasis on federalism principles by the United States Supreme Court in *Trump v. Anderson*, 601 U.S. 100 (2024). *Id.* at 2. In his motion, President Trump specifically challenged admissibility of several pieces of proposed evidence that reflected official acts of the President shielded by Presidential immunity. These included statements issued through his official

Presidential Twitter (now known as X) account to the American people in 2018, statements to the press in official Presidential media appearances, documentary evidence reflecting official Presidential actions, and testimony of former White House employees regarding official actions taken by President Trump during his first term as President. *Id.* at 3-4.

10. Justice Merchan denied President Trump's motion on April 3, 2024, citing supposed timeliness issues. Ex. 3. He "decline[d] to consider" whether Presidential immunity precludes evidence of President Trump's official acts at trial. *Id.* at 6.

11. On April 10, 2024, President Trump filed a Verified Article 78 Petition seeking, *inter alia*, a writ of prohibition as to Justice Merchan's April 3, 2024 Decision and Order. *Trump v. Merchan*, No. 2024-02413 (1st Dep't Apr. 10, 2024). This Petition was denied on May 23, 2024. *Id.*, NYSCEF No. 21. In denying the Petition, the Court reasoned that the immunity issues "may be raised in a direct appeal" and need not be addressed pre-trial. *Id.* at 4. On July 1, 2024, this reasoning was directly refuted by the United State Supreme Court in *Trump v. United States*, 603 U.S. 593, 635 (2024) ("If the President is . . . immune from prosecution, a . . . denial of immunity would be *appealable before trial*.") (emphasis added); *see also id.* at 636 (noting the "need for pretrial review" of claims of Presidential immunity).

12. On April 15, 2024, the first day of jury selection, DANY made an offer of proof involving official acts of President Trump while in office in 2018. Ex. 4, Tr. 41-46. In response, President Trump renewed his objection to the use of such evidence, under the doctrine of Presidential immunity. Later on April 15, 2024, President Trump submitted his objections to Justice Merchan, including objections to statements issued through his official Presidential Twitter account to the American people in 2018, documentary evidence reflecting official Presidential actions, and

witness testimony regarding official actions taken by President Trump during his first term in office. Ex. 5.

13. On April 19, 2024, Justice Merchan ruled that President Trump would have to wait until trial to make such immunity objections, to be addressed as and when such objections would arise during trial proceedings. Ex. 4, Tr. 802. This ruling runs directly against the requirement of *Trump* that immunity issues must be resolved *pre-trial*. *Trump*, 603 U.S. at 635-36. Thus, Justice Merchan violated the doctrine of Presidential official-act immunity by (among other violations) requiring President Trump to sit through an entire criminal trial and object to official-acts evidence on a case-by-case basis, instead of considering the People's proffer of anticipated evidence and excluding it before trial.

II. Trial Proceedings Regarding Official-Acts Immunity

14. Throughout the course of the trial in this meritless case, President Trump renewed his objections based on Presidential immunity regarding evidence involving his official acts as President, which were repeatedly and erroneously denied by Justice Merchan. *See, e.g.*, Ex. 4, Tr. 2121-22 (witness testimony of former White House employee's official-capacity interactions with then-President Trump and the press); *id.* at 2370 (documentary evidence reflecting official presidential actions)

15. The trial elicited lengthy testimony regarding the official acts of President Trump.

16. For example, DANY elicited such testimony from former White House Communications Director Hope Hicks. Hicks joined President Trump's Administration in 2017 as his Director of Strategic Communications. Ex. 4, Tr. 2207-08. Her official duties included highlighting the President's agenda. *Id.* at 2208.

17. Hicks became the White House Communications Director in August 2017, working in close proximity to the Oval Office and speaking with President Trump "[e]very day." Ex. 4, Tr. 2208-10. Her duties included coordinating the Administration's communication efforts throughout all government agencies to ensure the President's agenda was prioritized, and to maximize the impact of positive messaging about the President and his work to the American people. *Id.* at 2210.

18. At trial, Hicks testified about her official-capacity communications with President Trump and the press concerning the January 12, 2018 *Wall Street Journal* article offered into evidence by DANY. *See* Ex. 4, Tr. 2215-16. Hicks testified that she spoke with President Trump about "how to respond to the story" and about "a team" response. *Id.* at 2217.

19. Hicks also testified about her communications with President Trump regarding a February 2018 *New York Times* article discussing Michael Cohen's payments, Ex. 4, Tr. 2219-21, and about a Karen McDougal interview on CNN in March 2018. *Id.* at 2214-15. Hicks testified, "I did speak to Mr. Trump. I was the Communications Director. This was a major interview. Yes. We just spoke about the news coverage of the interview, how it was playing out." *Id.*

20. At trial, DANY also offered evidence from Madeleine Westerhout, a Special Assistant to the President and Executive Assistant to the President in the White House, which discussed in detail President Trump's conduct of official business in the White House, including invasive testimony about President Trump's Presidential practices in communications with his Chief of Staff and other key aides, his work habits in the Oval Office and on Air Force One, and the manner in which President Trump conducted official business on behalf of the United States. Notwithstanding that this testimony exclusively discussed President Trump's *official* conduct,

Justice Merchan erroneously held that Ms. Westerhout's testimony "reflected unofficial conduct in its entirety." Ex. 6 at 22.

21. During trial, DANY offered evidence of official Presidential communications made in 2018 by President Trump's official White House Twitter account used to communicate with the American people. Ex. 7 (discussing issues of public importance surrounding witnesses and allegations involved in this case)].

22. During trial, DANY offered documentary evidence reflecting official Presidential actions, including the 2017 Office of Government Ethics (OGE) form signed by President Trump regarding compliance of the President with applicable laws and regulations. Ex. 8; Ex. 4, Tr. 2365-76.

23. During DANY's trial summation, DANY repeatedly emphasized official-acts testimony from Hicks and the statements issued by President Trump through his official White House Twitter account to the jury, as well as the inadmissible documentary evidence. *See* Ex. 4, Tr. 4598, 4621, 4747, 4756, 4766, 4790.

24. On May 30, 2024, the trial in this matter concluded and the jury was discharged.

25. On July 1, 2024, the United States Supreme Court issued its decision in *Trump v. United States*, 603 U.S. 593 (2024). The Court held that the President has absolute immunity from criminal prosecution for exercising his core constitutional powers, and at least "presumptive immunity" for other official actions within the "outer perimeter" of his official responsibilities. *Id.* at 606, 618. The Court held that the doctrine of Presidential immunity prevents the *evidentiary* use of official acts against a President at trial, because it prohibits a jury from "examin[ing] acts for which a President is immune" "even on charges that purport to be based only on his unofficial conduct." *Id.* at 630-31. The Court held that immunity issues "must be addressed at the outset of a proceeding." *Id.* at 636.

26. Following the United States Supreme Court's decision, President Trump, on July 1, 2024, sought leave to file a motion to set aside the jury verdict based upon that decision. Justice Merchan granted this request on July 2, 2024, setting a briefing schedule and delaying the sentencing date to allow consideration of the issue. Ex. 9.

27. President Trump then filed a detailed motion to vacate the jury verdict and dismiss the indictment based on extensive misuse of evidence of his official acts, both to the grand jury and at trial, which was unconstitutional under *Trump v. United States*, 603 U.S. 593 (2024). *See* Ex. 15, which is incorporated by reference herein.

28. On December 16, 2024, Justice Merchan denied President Trump's motion to dismiss based on official-acts immunity. Ex. 6.

29. Justice Merchan's Decision and Order wrongly concluded that all of the contested evidence at trial "relate[d] entirely to unofficial conduct entitled to no immunity protections." Ex. 6 at 41. As discussed more fully under Count I, below, this Decision and Order contains many errors, and President Trump challenges all such errors in this Article 78 proceeding.

30. Justice Merchan conceded that many of President Trump's claims were properly preserved, particularly in regard to the testimony of White House Communications Director Hope Hicks, President Trump's official communications with the American people via Twitter, and President Trump's official submissions as President of the OGE forms. Ex. 6 at 40. He wrongly found other claims were unpreserved, despite acknowledging objections based on Presidential immunity made by counsel both before, during, and after trial, including "approximately 170 times during the course of the trial." *Id*. at 9-15.

31. In so finding, Justice Merchan disregarded the United States Supreme Court's strict instruction that "[q]uestions about whether the President may be held liable for particular actions,

consistent with the separation of powers, must be addressed at the outset of a proceeding"—*Trump*, 603 U.S. at 636—and instead focused improperly on the "obligation of counsel to make timely objections" during trial proceedings. Ex. 6 at 15. In addition to the fact that timely objections were in fact lodged, Presidential immunity violations are unwaivable "mode of proceedings" errors because they result in institutional harms to the structure of the federal government. *See People v. Mairena*, 34 N.Y.3d 473, 482 (2019); *People v. Mack*, 27 N.Y.3d 534, 540 (2016) ("Mode of proceedings errors are immune not only from the rules governing preservation and waiver but also from harmless error analysis."); *see also, e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993) (reasoning that "structural defects in the constitution of the trial mechanism . . . defy analysis by harmless-error standards" because those errors "infect the entire trial process" (cleaned up)).

32. Justice Merchan erroneously held that none of the evidence regarding White House Communications Director Hope Hicks' testimony, nor testimony from the other witnesses, was covered by the Presidential Immunity doctrine. Ex. 6 at 40-41.

33. In so finding, Justice Merchan gave no weight to Hope Hicks' official role in the White House, which was to ensure the President's agenda was prioritized and to maximize the impact of the President's message to the American people. Ex. 4, Tr. 2208-10. Justice Merchan declined to follow *Trump*, which specifically forbids "testimony" from a President's "advisors" for the purpose of "probing the official act" and wrongly found no issue with such "highly intrusive" inquiries into the President's motives by means of intimate communications among President Trump and his close advisors about how to respond to the American people over matters of public concern. *Trump*, 603 U.S. at 632 n.3. In particular, these communications involved public concern by the American people about public accusations against President Trump made in 2018 regarding the same issues in this case. *See* Ex. 6 at 19-20.

34. Justice Merchan committed the same error with respect to the testimony of Special Assistant to the President and Executive Assistant to the President Madeleine Westerhout, by allowing invasive "testimony" from a President's "advisors" for the purpose of "probing the official act[s]" of President Trump. *Trump*, 603 U.S. at 632 n.3. The prospect that a President's most confidential White House aides might be forced to testify against him in a criminal trial about his conduct of official business and the course of sensitive internal discussions in the White House raises a grave and manifest risk of deterring bold and unhesitating decisionmaking by the Chief Executive.

35. Justice Merchan erroneously found that none of the Twitter postings by President Trump to the American public constituted "official acts." Ex. 6 at 32; *see also* Ex. 4, Tr. 55 ("If the argument is that tweets that your client sent out while he was President cannot be used because they somehow constitute an official presidential act, it's going to be hard to convince me that something that he tweeted out to millions of people voluntarily cannot be used in court when it's not being presented as a crime. It's just being used as an act, something that he did. But we'll wait until we get that submission.").

36. In so finding, Justice Merchan reasoned that, while "[u]ndoubtedly, there are Tweets . . . that a President makes that qualify as official communications with the public regarding matters of public concern," the Tweets at issue "d[id] not fit that mold" because they were "entirely personal in nature" and did not "advance a policy concern or other public interest." Ex. 6 at 34.

37. Justice Merchan declined to follow the clear instruction in *Trump* that "most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities," and thus be immune, "[e]ven when no specific federal responsibility requires his communication." *Trump*, 603 U.S. at 627, 629. These public communications through

an official White House social-media account were indisputably official actions of the President. *See, e.g.*, *Lindke v. Freed*, 601 U.S. 187, 191 (2024) (holding that "such speech is attributable to the State only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media"). Here President Trump possessed actual authority to speak on behalf of the Executive Branch, and he purported to exercise that authority when he tweeted on matters of public concern to the American public.

38. Justice Merchan reasoned that a President's "decision making is not distorted by the threat of future litigation stemming from" the sort of Tweets at issue, notwithstanding that the Tweets were permitted by Justice Merchan to become a focal point of this very criminal action against President Trump. Ex. 6 at 34. In so reasoning, Justice Merchan disregarded *Trump's* strict instruction against use of a President's public statements on matters of public concern in criminal proceedings, as such use would chill the President's willingness and ability to communicate with the public. *Trump*, 603 U.S. at 618.

39. Justice Merchan incorrectly found that the evidence of President Trump's statements on the OGE forms, completed in his official capacity as President, were "not deemed official conduct." Ex. 6 at 26.

40. In so finding, Justice Merchan acknowledged that "the President is . . . required to complete [the] OGE Form" and conceded that "Defendant's statement that he 'was required to make the disclosures on the Form in his official capacity as President' may be true." Ex. 6 at 26.

41. Justice Merchan reasoned in error that, since other federal employees were required to complete OGE forms in their own various official capacities, the President completing the form in his official capacity did not render the communications made therein "within the outer perimeter of his authority." Ex. 6 at 26. Justice Merchan did not address the instruction of *Trump* that the

President's speaking to the American people regarding the "public concern," which is involved in the purpose behind the OGE forms, "certainly can qualify as official" conduct. *Trump*, 603 U.S. at 618, 629.

42. Justice Merchan wrongfully found that even if all the evidence constituted official acts subject to Presidential immunity, the admission of such evidence was "harmless." Ex. 6 at 38. In so finding, Justice Merchan wrongly ignored the fact that the *Trump* Court rejected the notion that "as-applied challenges in the course of the trial suffice to protect Article II interests." *Trump*, 603 U.S. at 635.

43. Justice Merchan found that evidence presented to the Grand Jury did not consist of official acts but, rather, "nothing more than conversations about personal matters." Ex. 6 at 40.

44. Justice Merchan relied on his previous findings regarding the evidence at issue, and he disregarded *Trump's* admonition that "[e]ven if the President were ultimately not found liable for certain official actions, the possibility of an extended proceeding alone may render him unduly cautious in the discharge of his official duties." *Trump*, 603 U.S. at 636 (cleaned up).

45. Justice Merchan also erred and violated the doctrine of Presidential immunity by admitting extensive testimony about President Trump's interactions with Cabinet-level officials, public statements about federal investigations, and similar matters.

46. For example, at trial, DANY presented a February 2018 text message from convicted perjurer Michael Cohen indicating that President Trump had "approved" Cohen addressing the FEC complaint, both formally and through a public statement. Ex. 11; *see also* Ex. 12. Contrary to Justice Merchan's erroneous decision admitting this statement, these communications involved President Trump using a third-party (Cohen) to make "public communications" that "are likely to

fall comfortably within the outer perimeter of his official responsibilities." *Trump*, 603 U.S. at 598.

47. In addition, Cohen testified that President Trump "told" him that the FEC inquiry would be "taken care of" by then-Attorney General Jeff Sessions, and that Cohen conveyed that information to another individual. Ex. 4, Tr. 3576-77. Even if this conversation had happened, which we do not concede, Cohen's testimony included information regarding President Trump's "exclusive authority and absolute discretion" to "decide which crimes to investigate and prosecute, including with respect to allegations of election crime." *Trump*, 603 U.S. at 620 (cleaned up). This reflects the exercise of core, unreviewable Executive power, and Justice Merchan plainly abused his discretion by admitting it. *Id.*

48. During trial, Cohen sought to justify his perjury before Congress by reference to President Trump's public position in response to the investigations by Congress and Special Counsel Mueller that "there was no Russia-Russia-Russia." Ex. 4, Tr. 3550. But President Trump's public statements in response to the Congressional and Special Counsel investigations were part of his official authority to address the American people. Moreover, Presidential power includes the authority to engage in the "hurly-burly, the give-and-take of the political process between the legislative and the executive." *Trump v. Mazars USA, LLP*, 591 U.S. 848, 859 (2020) (cleaned up). The evidence relating to President Trump's responses to these Congressional and Special Counsel investigations are "at least" entitled to "presumptive immunity." *Trump*, 603 U.S. at 614.

49. DANY also elicited testimony from Cohen suggesting that he was seeking the "power of the President" in 2017 to protect him in connection with Congressional investigations. Ex. 4, Tr. 3549. Cohen was more explicit with respect to 2018 communications with attorney Robert Costello, which he described as a means of "back channel communication to the President." *Id.*

at 3594. Specifically, Cohen told the jury that a June 13, 2018 email, GX 207, referred to "potential pre-pardons" that Cohen and Costello discussed after President Trump allegedly referenced the concept. Again, this testimony addressed the exercise of the President's Pardon Power, which is a core, unreviewable Executive power subject to absolute immunity. "The President's authority to pardon," established in Article II, § 2, cl. 4, is one of the "core" constitutional powers "invested exclusively in [the President] him by the Constitution." *Trump*, 603 U.S. at 606, 609. Justice Merchan plainly erred and abused his discretion by admitting such testimony about the exercise of core Executive power.

50. These and other fatal errors in Justice Merchan's ruling on official-acts immunity entail that Justice Merchan's ruling should be reversed, the jury verdict vacated, and the case dismissed with prejudice.

III. President Trump's Re-Election And Sitting-President Immunity

51. On November 5, 2024, President Trump was re-elected as the 47th President of the United States in a historic landslide victory.

52. Once President Trump was re-elected, he became the President-Elect of the United States for the brief but crucial period of 75 days between November 5, 2024, and January 20, 2025, as reflected in the Presidential Transition Act, 3 U.S.C. § 102 note.

53. As sitting President of the United States, President Trump is shielded by sitting-President immunity: absolute Presidential immunity from any criminal investigation or prosecution, state or federal. "In the criminal context, . . . 'the separation of powers precludes the criminal prosecution of a sitting President.'" *Trump*, 603 U.S. at 616 n.2 (2024) (quoting the Brief of the United States). "Given the potentially momentous political consequences for the Nation at stake, there is a fundamental, structural incompatibility between the ordinary application of the criminal process

and the Office of the President." Memorandum from Randolph D. Moss, Assistant Attorney General, OLC, *A Sitting President's Amenability to Indictment and Criminal Prosecution* ("2000 OLC Memo"), 2000 WL 33711291, *28.

54. DANY concedes that, once President Trump assumes office on January 20, 2025, the underlying criminal case against him cannot proceed in any fashion.

55. As Justice Story wrote, the President's Executive power includes "the power to perform [his duties], without any obstruction or impediment whatsoever. *The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office* . . . ." 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1563, pp. 418-19 (1st ed. 1833) (emphasis added). "[T]he indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions." 2000 OLC Memo, at *1.

56. Sitting-President immunity protects President Trump from both state and federal criminal investigations or prosecutions. The Supreme Court has held for over 200 years that "States have no power . . . to retard, impede, burden, or in any manner control the operations" of the federal government. *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819). As the Supreme Court reaffirmed in 2020, "the Constitution guarantees 'the entire independence of the General Government from any control by the respective States.'" *Trump v. Vance*, 591 U.S. 786, 800 (2020) (quoting *Farmers and Mechanics Sav. Bank of Minneapolis v. Minnesota*, 232 U.S. 516, 521 (1914)). "It follows that States also lack the power to impede the President's execution of those laws." *Id.* at 801. Under this principle, "[t]he Supremacy Clause prohibits state judges and prosecutors from interfering with a President's official duties." *Id.* at 806. Because federal prosecutors may not

charge or proceed in any way against a sitting President, it follows *a fortiori* that state prosecutors may not do so either. *See id.*

57. Accordingly, once a President assumes office, any pending criminal cases against him, whether state or federal, must be dismissed. *See, e.g., Vance*, 591 U.S. at 806.; 2000 OLC Memo, at *8. To leave a criminal indictment—or, as here, a legally erroneous conviction, sentencing, and judgment—hanging over the President of the United States while he is in office would "boggle[] the imagination" and play "Russian roulette" with America's vital interests and national security. 2000 OLC Memo, at *8.

58. Sitting-President immunity also shields the *President-elect* from criminal process during the brief but crucial period between his election and his inauguration, during which he prepares to assume Office and exercise the Executive power of the United States.

59. The federal Special Counsel's Office recently recognized this reality by completely dismissing its criminal cases against President Trump *before* he takes office on January 20, 2025.

60. In the Presidential Transition Act, 3 U.S.C. § 2 note, Congress emphasized the continuity and identity between the President's transitional duties and his official duties upon inauguration: "The national interest requires that such transitions in the office of President be accomplished so as to assure continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal Government, both domestic and foreign." 3 U.S.C. § 2 note. The President-elect's transition activities are *Presidential* activities whose burden or disruption threatens the national interest: "Any disruption occasioned by the transfer of the executive power could produce results detrimental to the safety and well-being of the United States and its people." *Id.* Accordingly, under the Act, "*all officers of the Government*" are required to "so conduct the affairs of the Government for which they exercise responsibility and authority as . . . to take appropriate lawful

steps to avoid or minimize disruptions that might be occasioned by the transfer of the executive power, and . . .to promote orderly transitions in the office of President." *Id.* (emphasis added).

61. Citing the Presidential Transition Act, DOJ explained: "Based on a recognition that 'the orderly transfer of the executive power in connection with the expiration of the term of office of a President and the inauguration of a new President' is in the 'national interest,' Congress believed that *transition efforts are a public function* that should be financed by government funds rather than by private interests." *Reimbursing Transition-Related Expenses Incurred Before The Administrator Of General Services Ascertained Who Were The Apparent Successful Candidates For The Office Of President And Vice President* (2001 OLC Memo), 2001 WL 34058234, at *3 (emphasis added).

62. The Presidential nature of transition activities has been recognized by many, including President Kennedy and many members of Congress: "[E]xpenses incurred by the President-elect and Vice-President-elect after the election . . . are precisely the sort of expenses that Congress felt it was important to fund publicly because they viewed these activities as: 'expenses that are necessary and pertinent to the job of the Presidency and the Vice Presidency,' 109 Cong. Rec. at 19,738 (Senator Jackson); 'a public function,' *id.* at 13,346 (Rep. Rosenthal); 'an integral part of the presidential administration,' *id.* at 13,347 (Rep. Monagan); and, as President Kennedy expressed in his letter transmitting the proposed legislation that was to become the Presidential Transition Act, 'the reasonable and necessary costs of installing a new administration in office.'" 2001 OLC Memo, *4 (final quote from *Letter of Transmittal from the President of the United States to the President of the Senate and the Speaker of the House of Representatives* (May 29, 1962), *reprinted in* H.R. Rep. No. 88-301, at 9, 12 (1963)).

63. "As Congressman Charles Joelson put it during the floor debates over the enactment of the Presidential Transition Act of 1963: '[O]nce a man is President-elect, he is not the Democratic President-elect; he is not the Republican President-elect; he is the President-elect of the people of the United States of America. In that interim time he is called upon probably to make more fateful decisions than he will have to make after he is, indeed, sworn into office." Joshua P. Zoffer, *The Law of Presidential Transitions*, 129 Yale L. J. 2500, 2504 (2020) (quoting 109 Cong. Rec. 13348 (1963)).

64. Similarly, the "structure of the Constitution" and "the separation of powers" compel the conclusion that the President-elect is completely immune from criminal process. 2000 OLC Memo, at *11, *18. The separation of powers prevents the criminal prosecution of the President because it would "prevent the executive from accomplishing its constitutional functions." *Id.* at *19 (cleaned up). "Three types of burdens merit consideration" in this analysis, *id.*—all of which strongly support the immunity of the President-elect.

65. First, "the actual imposition of a criminal sentence of incarceration . . .would make it physically impossible for the President to carry out his duties." 2000 OLC Memo, at *19. This is plainly true of the President-elect as well as the President.

66. Any criminal sentence, or even the distraction of ongoing criminal proceedings—including appeals necessary to vindicate the Presidential immunity doctrine and President Trump's individual constitutional rights—threatens to disrupt the enormously burdensome task of undergoing a Presidential transition. As the General Services Administration describes, "[t]he process of a presidential transition is a monumental undertaking. In just over ten weeks between the election and the inauguration, a president-elect must prepare to take control of an executive branch that comprises over 140 agencies, hundreds of sub-components, and millions of civilian

and uniformed personnel." U.S. General Services Administration, *Presidential Transition Directory*, at https://www.gsa.gov/governmentwide-initiatives/presidential-transition-2024/ethics-and-accountability. Defending criminal litigation amid this "monumental undertaking" is wholly impracticable.

67. Crucially, the President-elect must immediately begin addressing the most sensitive areas of national security. The Presidential Transition Act provides that transition activities "shall include the preparation of a detailed classified, compartmented summary by the relevant outgoing executive branch officials of specific operational threats to national security; major military or covert operations; and pending decisions on possible uses of military force. This summary shall be provided to the apparent successful candidate for the office of President as soon as possible after the date of the general elections . . . ." 3 U.S.C. § 102 note; *see also* Henry B. Hogue, Cong. Research Serv., R46602, *Presidential Transition Act: Provisions and Funding* 8 (2024).

68. The President-elect's complete engagement and undivided attention to this process are critical for national security: "One of the top priorities of any presidential administration is to protect the country from foreign and domestic threats. While a challenge at all times, the country is especially vulnerable during the time of presidential transitions . . . ." Center for Presidential Transition, *Presidential Transitions Are a Perilous Moment for National Security* (Aug. 16, 2023), https://presidentialtransition.org/reports-publications/presidential-transitions-are-a-perilous-moment-for-national-security/. "[T]he first months of new administrations are an especially vulnerable time for the country's national security. Successful transition planning is essential for minimizing the risk." *Id.*

69. Second, "the public stigma and opprobrium occasioned by the initiation of criminal proceedings . . . could compromise the President's ability to fulfill his constitutionally

contemplated leadership role with respect to foreign and domestic affairs." 2000 OLC Memo, at *19. Indeed, "the severity of the burden imposed upon the President by the stigma arising both from the initiation of a criminal prosecution and also from the need to respond to such charges through the judicial process would seriously interfere with his ability to carry out his constitutionally assigned functions." *Id.* at *22.

70. Once again, the same reasoning applies equally to the President-elect. "[T]he distinctive and serious stigma of indictment and criminal prosecution imposes burdens fundamentally different in kind from those imposed by the initiation of a civil action, and these burdens threaten the President's ability to act as the Nation's leader in both the domestic and foreign spheres." 2000 OLC Memo, at *22.

71. During the transitional period, the President-elect must communicate with world leaders, formulate his agenda for foreign and domestic relations, select key personnel for his incoming administration, and coordinate with the outgoing Administration across all agencies of the federal government. Just as "the severity of the burden" and "the stigma arising . . . from . . . criminal prosecution" would disrupt constitutionally assigned functions of a sitting President and threaten to injure his standing and credibility with world leaders, so also it would undermine the ability of the President-elect to conduct an orderly transition. 2000 OLC Memo, at *22.

72. Third, "the mental and physical burdens of assisting in the preparation of a defense for the various stages of the criminal proceedings . . . might severely hamper the President's performance of his official duties." 2000 OLC Memo, at *19. The same principle extends to Presidential *transition* activities as well. Defending criminal litigation at all stages—*especially*, as here, defending a criminal sentencing—is uniquely taxing and burdensome to a criminal defendant. "Once criminal charges are filed, the burdens of responding to those charges are different in kind

and far greater in degree than those of responding to civil litigation." *Id.* at *22. "The constitutional provisions governing criminal prosecutions make clear the Framers' belief that an individual's mental and physical involvement and assistance in the preparation of his defense both before and during any criminal trial would be intense, no less so for the President than for any other defendant." *Id.* at *23.

73. "The Constitution contemplates the defendant's attendance at trial and, indeed, secures his right to be present by ensuring his right to confront witnesses who appear at the trial." 2000 OLC Memo, at *23. Thus, "a criminal prosecution would require the President's personal attention and attendance at specific times and places . . . . Indeed, constitutional rights and values are at stake in the defendant's ability to be present for all phases of his criminal trial." *Id.* at *24. "[C]riminal litigation uniquely requires the President's *personal* time and energy, and will inevitably entail a considerable if not overwhelming degree of mental preoccupation." *Id.* at *25 (emphasis in original).

74. These demands of time, energy, and attention are just as unconstitutionally burdensome and disruptive during the Presidential transition as during the Presidency itself. They are particularly burdensome when a President-elect faces the prospect of criminal judgment and *sentencing* during his transitional period.

75. Sitting-President immunity requires the complete dismissal of pending criminal cases against the newly elected President, not merely staying those cases until after his term in office.

76. An indictment brought against a sitting President must be immediately dismissed, not stayed until he leaves office. That is because "an indictment hanging over the President while he remains in office would damage the institution of the Presidency virtually to the same extent as an actual conviction." 2000 OLC Memo, at *8. "In addition, there would be damage to the executive

branch 'flowing from unrefuted charges.'" *Id.* Because "the modern Presidency, under whatever party, has had to assume a leadership role undreamed of in the eighteenth and early nineteenth centuries," it follows that "[t]he spectacle of an indicted President still trying to serve as Chief Executive *boggles the imagination*." *Id.* (emphasis added) (cleaned up).

77. Permitting prosecutors to leave an indictment against the sitting President pending during his term in office would play "Russian roulette" with America's vital interests and its national security: "Given the realities of modern politics and mass media, and the delicacy of the political relationships which surround the Presidency both foreign and domestic, there would be *a Russian roulette aspect to the course of indicting the President but postponing trial*, hoping in the meantime that the power to govern could survive." 2000 OLC Memo, at *8 (emphasis added).

78. In his motion to dismiss filed on December 2, 2024, President Trump asserted his sitting-President immunity and immunity as the President-Elect of the United States against the underlying criminal case. He raised the foregoing arguments, among many others, and requested vacatur of the jury verdict and complete dismissal of the case. *See* Ex. 10, which is incorporated by reference herein.

79. On January 3, 2025, Justice Merchan entered a Decision and Order erroneously denying President Trump's claim of sitting-President immunity and setting President Trump's sentencing hearing for seven days later, on January 10, 2025. Ex. 13.

80. In the January 3, 2025 Decision and Order, Justice Merchan acknowledged that a sitting President is immune from federal prosecution, and he further acknowledged that this immunity extends to state prosecution as well. Ex. 13 at 4 ("[I]t is logical to infer that the three concerns expressed in the 2000 OLC memorandum can overlap with criminal prosecutions that occur in

state court."). But he erroneously concluded that "Presidential immunity from criminal process for a sitting president does not extend to a President-elect." *Id.*

81. Justice Merchan's entire analysis is erroneous because it relies on a *case-specific* application of the three factors discussed in the 2000 OLC Memo—the disruptive nature of criminal punishment, the public stigma associated with criminal prosecution, and the mental and physical burdens of defending a criminal case—as applied to the facts of this case. *See* Ex. 13 at 6-7. The entirety of his analysis focuses on whether those three factors would present a significant obstacle to President Trump's transition efforts in the specific context of this case in its unique procedural posture. *Id.*

82. This analysis is obviously wrong and an abuse of discretion, because it dramatically understates the burden, disruption, stigma, and distraction that this case threatens to impose and is already imposing on President Trump in his transition efforts, for the reasons discussed above.

83. More fundamentally, Justice Merchan's analysis is obviously wrong and an abuse of discretion because it directly contradicts the reasoning of the very OLC Memo on which it relies. The OLC Memo emphasizes that the existence of Presidential immunity from criminal process does *not* depend, and must not depend, on the sort of case-by-case analysis that Justice Merchan indulged in his Decision and Order. Ex. 13 at 6-7. Instead, the OLC Memo rightly insists that the existence of Presidential immunity presents a *categorical* question: "Thus a categorical rule against indictment or criminal prosecution is most consistent with the constitutional structure, rather than a doctrinal test that would require the court to assess whether a particular criminal proceeding is likely to impose serious burdens upon the President." 2000 OLC Memo, at *25. Thus, a sitting President, or President-elect, does not have to subject himself in every case to an individual judge's case-by-case balancing of the burdens on the Presidency—an inquiry that itself

would likely violate principles of federalism and the separation of powers. DOJ reaffirmed this reasoning in November 2024 when dismissing the federal prosecution against President Trump, explaining that "the Constitution's prohibition on federal indictment and prosecution of a sitting President" is "categorical." Ex. 14. Justice Merchan's January 3, 2025 Decision and Order, therefore, does exactly what the OLC Memo rejects—it involves "the court . . . assess[ing] whether a particular criminal proceeding is likely to impose serious burdens upon the President[-elect]." 2000 OLC Memo, at *25. This case-by-case approach is wrong as a matter of law. Instead, for the reasons discussed above and below in Count I, the categorical approach necessitates the conclusion that a sitting President's complete immunity from criminal process extends to a President-elect as well—and for virtually the same reasons.

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

This Proceeding Provides The Appropriate Vehicle To Challenge Justice Merchan's Decision And Order.

84. President Trump repeats and realleges each and every allegation in the foregoing paragraphs as it fully set forth herein.

85. CPLR § 7803(2) authorizes a petitioner to challenge in a special proceeding whether a "body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction."

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

87. "[A]buses of power may be identified by their impact upon the entire proceeding as distinguished from an error in a proceeding itself proper." *Holtzman v. Goldman*, 71 N.Y.2d 564, 569 (1988); *see also Rush v. Mordue*, 68 N.Y.2d 348, 353-354 (1986).

88. "Prohibition may lie . . . where the claim is substantial, implicates a fundamental constitutional right, and where the harm caused by the arrogation of power could not be adequately redressed through the ordinary channels of appeal." *Rush*, 68 N.Y.2d at 354; *see also Fischetti v. Scherer*, 44 A.D.3d 89, 91 (1st Dep't 2007); *La Rocca*, 37 N.Y.2d at 579.

89. For the foregoing reasons, this petition pursuant to CPLR § 7803(2) in the nature of prohibition is an appropriate means of challenging Justice Merchan's Decisions and Orders denying President Trump's two claims of Presidential immunity—both (1) Presidential official-acts immunity based on the evidentiary misuse of official acts before the grand jury and at trial, and (2) the absolute immunity of a sitting President from any criminal process, state or federal, which extends into the brief but crucial period of transition when President Trump is the President-elect.

Justice Merchan's December 16 Decision And Order Directly Contradicts *Trump v. United States*

90. On July 1, 2024, the Supreme Court laid out the President's constitutional right to immunity from criminal prosecution and the scope thereof. *Trump*, 603 U.S. at 593. The Court held that, "our constitutional structure of separated powers" and "the nature of Presidential power require[] that a former President have some immunity from criminal prosecution for official acts during his tenure in office." *Id.* at 606. The Court found that, "[a]t least with respect to the President's exercise of his core constitutional powers, this immunity must be absolute." *Id.*

91. The Court explained, "once it is determined that the President acted within the scope of his exclusive authority, his discretion in exercising such authority cannot be subject to further judicial

examination." *Trump*, 603 U.S. at 608. Similarly, criminal laws enacted by legislatures, "either a specific one targeted at the President or a generally applicable one," "may not criminalize the President's actions within his exclusive constitutional power." *Id.* at 609. Thus, "[n]either may the courts adjudicate a criminal prosecution that examines such Presidential actions." *Id.*

92. Further, "for his remaining official actions," President Trump "is also entitled to immunity." *Trump*, 603 U.S. at 606. This immunity, the Court held, is "at least a *presumptive* immunity from criminal prosecution" extending over all of a President's acts "within the outer perimeter of his official responsibility." *Id.* at 614 (emphasis in original).

93. The President "occupies a unique position in the constitutional scheme." *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). The President "alone composes a branch of government." *Mazars USA, LLP*, 591 U.S. at 868.

94. The Constitution, as designed by the Framers, seeks "'to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many.'" *Trump*, 603 U.S. at 610 (quoting *Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in judgment)). "The purpose of a vigorous and energetic Executive, they thought, was to ensure good government, for a feeble executive implies a feeble execution of the government." *Id.* (cleaned up).

95. The President, therefore, is "vested" by the Constitution with "'supervisory and policy responsibilities of utmost discretion and sensitivity'" and must make "'the most sensitive and far-reaching decisions entrusted to any official under our constitutional system.'" *Trump*, 603 U.S. at 610-11 (quoting *Fitzgerald*, 457 U.S. at 750, 752). The Court held, "[a]ppreciating the 'unique risks to the effective functioning of government' that arise when the President's energies are

diverted by proceedings that might render him 'unduly cautious in the discharge of his official duties,' we have recognized Presidential immunities and privileges 'rooted in the constitutional tradition of the separation of powers and supported by our history.'" *Id.* at 611 (quoting *Fitzgerald*, 457 U.S. at 749, 751-52 & n.32). Thus, in the civil context, the Court has recognized "absolute immunity from damages liability predicated on . . . official acts" "within the 'outer perimeter' of [a President's] official responsibility" due to the "functionally mandated incident of [the President's] unique office." *Id.* (quoting *Fitzgerald*, 457 U.S. at 749, 756).

96. Criminal prosecution, as compared to civil damages, poses "a far greater threat of intrusion on the authority and functions of the Executive." *Trump*, 603 U.S. at 613. The Court reasoned that such "danger is akin to, indeed greater than, what led us to recognize absolute Presidential immunity from civil damages liability" such that "the President would be chilled from taking the 'bold and unhesitating action' required of an independent Executive." *Id.* (quoting *Fitzgerald*, 457 U.S. at 745). The Court explained that "if a former President's official acts are routinely subjected to scrutiny in criminal prosecutions, 'the independence of the Executive Branch' may be significantly undermined." *Id.* at 613-4 (quoting *Vance*, 591 U.S. at 800).

97. In determining whether actions of the President are official or unofficial, the Court stressed that such determinations can "raise[] multiple unprecedented and momentous questions about the powers of the President and the limits of his authority under the Constitution." *Trump*, 603 U.S. at 616. It involves "applying the principles" underlying Presidential immunity and "can be difficult." *Id.* at 616-17. Such determinations involve "the breadth of the President's discretionary responsibilities" and "his innumerable functions" extending to the "outer perimeter" of the President's official responsibilities. *Id.* at 617-18 (cleaned up).

98. The Court elaborated that "some Presidential conduct—for example, speaking to and on behalf of the American people—certainly can qualify as official even when not obviously connected to a particular constitutional or statutory provision." *Id.* at 618 (citing *Trump v. Hawaii*, 585 U.S. 667, 701 (2018)). "[A] long-recognized aspect of Presidential power is using the office's 'bully pulpit' to persuade Americans, including by speaking forcefully or critically, in ways that the President believes would advance the public interest." *Id.* at 629. In fact, the President "is even expected to comment on those matters of public concern that may not directly implicate the activities of the Federal Government." *Id.* Thus, "most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities." *Id.*

99. Moreover, the Court held, when distinguishing official from unofficial conduct, "courts may not inquire into the President's motives." *Trump*, 603 U.S. at 618. "It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive . . . if . . . the President was under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry." *Id.* (cleaned up).

100. "Nor may courts deem an action unofficial merely because it allegedly violates a generally applicable law." *Trump*, 603 U.S. at 619.

101. Nor may any official acts for which the President is immune "be scrutinized to help secure his conviction, even on charges that purport to be based only on his unofficial conduct." *Trump*, 603 U.S. at 631. The Court found that "[u]se of evidence about such conduct, even when an indictment alleges only unofficial conduct, would thereby heighten the prospect that the President's official decisionmaking will be distorted." *Id.*

102. Ultimately, it is the "Government's burden to rebut the presumption of immunity." *Trump*, 603 U.S. at 624. Further, "whether the President may be held liable for particular actions . . . must be addressed *at the outset of a proceeding*." *Id.* at 636 (emphasis added).

103. As discussed further herein, Justice Merchan's Decision and Order of December 16, 2024, violates all these principles, as well as the Supremacy Clause. With respect to the latter, Justice Merchan completely misunderstood the relevant authorities. Ex. 6 at 8 n.6. He cited to discussion in *New York v. Trump*, 683 F. Supp. 3d 334 (S.D.N.Y. 2023), of a distinct argument under the Supremacy Clause under *In re Neagle*, 135 U.S. 1, 75 (1890). *Neagle*, however, requires that immunity derive from a "law of the United States." 135 U.S. at 75. But "some Presidential conduct . . . certainly can qualify as official"—and, thus, be subject to immunity—"even when not obviously connected to a particular constitutional or statutory provision." *Trump*, 603 U.S. at 618. *Neagle* also includes a proportionality element, *i.e.*, whether a federal employee's official actions entailed "no more than what was necessary and proper for him to do." 135 U.S. at 75. Under *Trump v. United States*, a President's official actions are no less immune simply because a prosecutor or a court deems the actions to be disproportionate to the matter at hand. The Supreme Court left open the possibility that prosecutors could rebut presumptive immunity for official acts within the "outer perimeter" of Presidential power, but only where prosecutors can establish that use of the official-acts evidence "would pose no dangers of intrusion on the authority and functions of the Executive Branch." *Trump*, 603 U.S. at 614-15 (cleaned up). Thus, Justice Merchan erred, badly, by relying on inapposite reasoning from an earlier removal decision in *New York v. Trump*, and ignoring the full application of the Supremacy Clause under the circumstances presented here.

104. DANY unconstitutionally relied upon official-acts evidence.

A. President Trump's Official Communications With His Advisor, Hope Hicks

105. DANY unconstitutionally elicited testimony from Hope Hicks regarding her official-capacity communications with President Trump in 2018 concerning matters of public concern. *See* Ex. 4, Tr. 2214-21.

106. Hope Hicks, who served as the White House Communications Director, worked closely with President Trump, speaking with him "every day," and was tasked with coordinating President Trump's communication efforts throughout all government agencies to ensure the President's agenda was prioritized and to maximize the impact of the President's message to the American people. Ex. 4, Tr. 2208-10.

107. *Trump* specifically forbids prosecutors from offering "testimony" from a President's "advisors" for the purpose of "probing the official act." 603 U.S. at 632 n.3. *Trump* also forbids such "highly intrusive" inquiries into the President's motives, inquiries probing intimate communications among President Trump and his close advisors, such as communications with his White House Communications Director over matters of public concern. *Id.* at 619, 632 n.3; *see also Fitzgerald*, 457 U.S. at 745, 756.

108. "[S]pecial considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 385 (2004). Holding the "pall of potential prosecution" over the sort of communications as those between President Trump and his Communications Director would result in the President being "chilled from taking the bold and unhesitating action required of an independent Executive." *Trump*, 603 U.S. at 613 (cleaned up).

109. The testimony DANY elicited concerned President Trump's internal deliberations about how to respond to the January 12, 2018 Wall Street Journal article, the February 2018 New

York Times article discussing Michael Cohen's payments, and the March 2018 CNN interview by Karen McDougal. Ex. 4, Tr. 2215-21.

110. President Trump's internal deliberations about the official White House response to these matters of public concern are absolutely immune. While interacting with Hicks, President Trump was "supervis[ing]" someone who was "wield[ing] executive power on his behalf" which "follows from the text of Article II" and is, thus, absolutely immune conduct. *Trump*, 603 U.S. at 608 (cleaned up).

111. Moreover, President Trump was communicating to the American people on matters of public concern, coordinating the official White House response to these issues. This "long-recognized aspect of Presidential power" is "expected" from the President and "fall[s] comfortably" within the "outer perimeter" of his official responsibilities as President. *Trump*, 603 U.S. at 629.

112. Justice Merchan's failure to appreciate the seriousness of the interests the Constitution required him to balance is encapsulated in the following reasoning regarding Hicks' testimony: "even if this Court were to find that the communications do fall within the outer perimeter of his Presidential authority, it would also find that other, non-privileged trial testimony provided ample non-motive related context and support to rebut a presumption of privilege and that Defendant was acting in his personal capacity and not pursuant to his authority as President." Ex. 6 at 21-22. Because President Trump's statements were plainly within the outer perimeter of his authority, "[t]he question then becomes whether that presumption of immunity is rebutted under the circumstances." *Trump*, 603 U.S. at 623. DANY bore the burden of rebutting that presumption by demonstrating that use of that evidence would "pose no dangers of intrusion on the authority and functions of the Executive Branch." *Id.* at 615 (cleaned up). Justice Merchan

completely ignored the critical issue that the U.S. Supreme Court required him to address. Further, with respect to that burden, Justice Merchan was manifestly wrong to assign relevance to evidence he believed suggested President Trump was "acting in his personal capacity and not pursuant to his authority as President." Ex. 6 at 21-22. The only question at that point in the analysis was whether the evidence threatened intrusions on the executive function, and it is most certainly the case that the prospect of local prosecutors using evidence of interactions in the White House among the President and his confidential advisers intrudes on the President's ability to communicate effectively with advisers and staff. DANY bore the burden on this issue, and they offered no evidence to the contrary. Equally important, if not more so, is the manner in which Justice Merchan's failure to even appreciate the question he was required to address illustrates the dangerousness of his opinion to the "institution of the Presidency" regarding "a question of lasting significance" that will "have profound consequences for the separation of powers and for the future of our Republic." *Trump*, 603 U.S. at 632, 641.

113. Therefore, DANY should have been barred from using evidence of President Trump's interactions with Hicks, and Justice Merchan erred in denying relief on this ground.

B. President Trump's Official Communications to the American People Via Twitter

114. Similarly, DANY unconstitutionally used official-acts evidence relating to Tweets attributed to President Trump from 2018 concerning issues of public importance surrounding witnesses and allegations in this case. Ex. 7.

115. "[C]ommunications in the form of Tweets" constitutes one method by which the President "'speak[s] to his fellow citizens and on their behalf.'" *Trump*, 603 U.S. at 629 (quoting *Hawaii*, 585 U.S. at 701).

116. The United States Supreme Court was very clear that "most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities" and thus be immune. *Trump*, 603 U.S. at 629.

117. "[E]ven when no specific federal responsibility requires his communication—to encourage [state officials] to act in a manner that promotes the President's view of the public good" can fall within the President's official duties. *Trump*, 603 U.S. at 627.

118. Moreover, DANY may not "inquire into the President's motives" when attempting to use this evidence to show that President Trump was somehow directing secret messages to witnesses in the case rather than communicating with the American people. *Trump*, 603 U.S. at 618.

119. Permitting prosecutors' use of a President's public statements on matters of public concern in criminal proceedings would chill the President's willingness and ability to communicate with the public. *See Trump*, 603 U.S. at 618.

120. President Trump's communications with the American people are immune under *Trump*.

121. Therefore, DANY should have been barred from using as evidence President Trump's official communications with the American people via Twitter, and Justice Merchan erred in denying relief on that ground.

C. President Trump's Official Disclosures On OGE Forms

122. Further, DANY unconstitutionally offered documentary evidence reflecting official presidential actions, including the OGE form signed by President Trump regarding compliance of the President with applicable laws and regulations. Ex. 8; Ex. 4, Tr. 2365-76.

123. According to OGE, one of the purposes of the form signed by President Trump is "to ensure confidence in the integrity of the Federal Government by demonstrating that they are able to carry out their duties without compromising the public trust." 5 C.F.R. § 2634.104(a).

124. President Trump, by signing and submitting this form as President, was speaking to the American public regarding the "public trust" through his official capacity as President. *See Trump*, 603 U.S. at 618, 629 (such communications "certainly can qualify as official").

125. President Trump signed and submitted this form in his official capacity as President, and the form itself reflects an "Agency Ethics Official's Opinion" that President Trump was "in compliance with applicable laws and regulations." Ex. 8 at 1. By using this documentary evidence in his criminal prosecution, DANY was "second-guessing" the President's official acts to the effect of "threaten[ing] the independence or effectiveness of the Executive." *Trump*, 603 U.S. at 632 n.3 (cleaned up).

126. The documentary evidence offered by DANY is inadmissible, and DANY should have been barred from using such evidence. Justice Merchan erred in denying relief on this ground.

The Use Of Official-Acts Evidence In Grand Jury Proceedings Requires Dismissal Of The Indictment

127. DANY presented evidence of President Trump's official acts, immune under *Trump*, to the grand jury.

128. Presidents "cannot be indicted based on conduct for which they are immune from prosecution." *Trump*, 603 U.S. at 630. This pertains to all criminal proceedings, including grand jury proceedings. *Id.* at 615.

129. "Even if the President were ultimately not found liable for certain official actions, the possibility of an extended proceeding alone may render him 'unduly cautious in the discharge of his official duties.'" *Trump*, 603 U.S. at 636 (quoting *Fitzgerald*, 457 U.S. at 752 n.32).

130. "The Constitution does not tolerate such impediments to 'the effective functioning of government.'" *Trump*, 603 U.S. at 636-37 (quoting *Fitzgerald*, 457 U.S. at 751).

131. Moreover, "[b]oth the Supremacy Clause and the general principles of our federal system of government dictate that a state grand jury may not investigate the operation of [the Executive]." *United States v. McLeod*, 385 F.2d 734, 751 (5th Cir. 1967); *id.* at 752 (noting this would present an "invasion of the sovereign powers of the United States").

132. Therefore, DANY's unconstitutional use of official-acts evidence in the grand jury proceedings requires dismissal of the Indictment.

Use Of Official-Acts Evidence Was Not Harmless And Requires Vacatur Of The Jury Verdict

133. *Trump* requires issues of immunity to be "addressed at the outset of a proceeding." 603 U.S. at 636. The results of a trial conducted in breach of this principle are invalid.

134. *Trump* specifically rejected the argument that "as-applied challenges in the course of the trial suffice to protect Article II interests," 603 U.S. at 635, and yet Justice Merchan insisted that President Trump would have to wait until trial to raise immunity objections, *see* Ex. 4, Tr. 802, and during trial, Justice Merchan repeatedly denied such objections when validly raised. *See, e.g.*, Ex. 4, Tr. 2121-22, 2370.

135. Justice Merchan and the jury lacked authority to "adjudicate" this case because the evidence offered by DANY constituted immune official acts of President Trump. *Trump*, 603 U.S. at 609.

136. The repeated violation of President Trump's constitutional right to Presidential immunity constituted fundamental error underlying the entire trial proceedings, and was not harmless. Indeed, the unconstitutional official-acts evidence was crucial to DANY's case-in-chief. Justice Merchan erred in denying relief on this ground.

President Trump's Immunity From This Prosecution Is Further Mandated By His Status As President-Elect Of The United States

137. For the reasons stated above, which are incorporated by reference herein, President Trump has absolute immunity from any state or federal criminal investigation or prosecution as sitting President of the United States. This immunity also extends to the brief but crucial transitional period between President Trump's election on November 5, 2024, and his inauguration on January 20, 2025. This doctrine of sitting-President immunity mandates the immediate dismissal, not just a stay, of any pending criminal case against President Trump, regardless of the stage of proceedings. Once President Trump was re-elected, the jury verdict in the underlying criminal case should have been immediately vacated, and the case dismissed. Justice Merchan erred in denying Presidential immunity to President Trump on this ground, and further erred by issuing an incredibly disruptive order requiring President Trump to appear for a criminal sentencing on seven-days' notice, on January 10, 2025, at the apex of the Presidential transition.

Justice Merchan's Decisions And Orders Inflict Ongoing Irreparable Injury

138. Justice Merchan's Decisions and Orders violate President Trump's constitutional right to Presidential immunity, intrude upon his constitutional duties while transitioning into his second Administration as President-Elect, and threaten to "distort" the decisionmaking and the independence of future Chief Executives. *Trump*, 603 U.S. at 613. "Few things would threaten our constitutional order more" than a criminal prosecution reliant upon "official acts." *Id.* at 643

(Thomas, J., concurring). "Fortunately, the Constitution does not permit us to chart such a dangerous course." *Id.* The irreparable injury from the Decisions and Orders is manifest.

139. "Questions about whether the President may be held liable for particular actions . . . must be addressed at the outset of a proceeding." *Trump*, 603 U.S. at 636.

140. "A showing of irreparable injury will generally be automatic from the invocation of the immunity doctrine" if criminal proceedings, such as sentencing, continue forward, "because of the irretrievable loss of immunity from suit." *McSurely v. McClellan*, 697 F.2d 309, 317 & n.13 (D.C. Cir. 1982); *see also Nam v. Permanent Mission of the Rep. of Korea to the United Nations*, 2023 WL 2456646, at *2 (S.D.N.Y. 2023) ("But in cases where a party claims immunity, courts have held that proceeding to trial during the appeal causes irreparable harm.").

141. By allowing these criminal proceedings to continue forward in violation of President Trump's constitutional right to Presidential immunity, including both Presidential official-acts immunity and absolute sitting-President immunity, Justice Merchan's Decision and Order inflicts irreparable harm upon President Trump.

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

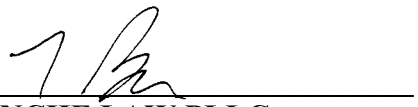
(a) On the first cause of action, finding that Respondents' continued maintenance of criminal proceedings are unlawful, unconstitutional, and in excess of the Supreme Court's jurisdiction under CPLR § 7803(2) and prohibiting any further proceedings pending appeal;

(b) Directing that the jury verdict in the underlying criminal case must be vacated and the case immediately dismissed in its entirety, with prejudice; and

(c) Granting such further and additional relief as the court deems just and proper.

Dated: New York, New York
January 6, 2025

Respectfully submitted,



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Attorneys for President Donald J. Trump

VERIFICATION

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

Dated: New York, New York
January 6, 2025

Todd Blanche