No. _____

In the Supreme Court of the United States

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

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

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

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QUESTIONS PRESENTED

The questions presented are:

I. Whether President Trump is entitled to an automatic stay of criminal proceedings against him in state court while his claims of Presidential immunity from criminal prosecution are addressed on interlocutory appeal to New York's appellate courts and, if necessary, this Court.

II. Whether the trial court's admission and use of evidence of President Trump's official acts in a state-court jury trial on criminal charges violated the doctrine of Presidential immunity recognized in *Trump* v. *United States*, 603 U.S. 593 (2024).

III. Whether a sitting President's complete immunity from criminal prosecution during his term in office extends to the President-Elect of the United States during the brief but crucial period between his election, his certification as the President-elect, which has now occurred, and his inauguration, as he conducts Presidential transition activities that are integral and preparatory to his imminent assumption of the Executive power of the United States.

PARTIES TO THE PROCEEDING

The applicant is President Donald J. Trump ("President Trump").

The respondents are the People of the State of New York by District Attorney of New York County Alvin L. Bragg, Jr. ("District Attorney"), and Acting Justice Juan M. Merchan, A.J.S.C., of the Supreme Court of New York County, New York ("Justice Merchan," or "the trial court").

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INTRODUCTION

This application requests an emergency stay to prevent further criminal proceedings in New York state court—including a sentencing hearing scheduled for Friday, January 10, at 9:30 a.m.—against the President-Elect of the United States at the apex of his Presidential transition, and after his electoral win his been certified by a joint session of both houses of Congress, while he pursues a meritorious interlocutory appeal raising claims of Presidential immunity. On Friday, January 3, 2025, the Supreme Court of New York County wrongly denied President Trump's pending motion to dismiss the criminal case based on Presidential immunity and, contrary to accepted practice, New York Law, and due process, abruptly set the matter for criminal sentencing less than a week later. President Trump promptly filed an interlocutory appeal and notified the trial court that it is subject to an automatic stay, but the New York courts have erroneously refused to honor that stay.

This Court should enter an immediate stay of further proceedings in the New York trial court to prevent grave injustice and harm to the institution of the Presidency and the operations of the federal government. The commencement of President Trump's interlocutory appeal raising claims of Presidential immunity causes an automatic stay of proceedings in the trial court under *Trump* v. *United States*, 603 U.S. 593 (2024) ("*Trump*"), and related case law. This appeal will ultimately result in the dismissal of the District Attorney's politically motivated prosecution that was flawed from the very beginning, centered around the wrongful actions and false claims of a disgraced, disbarred serial-liar former attorney, violated

President Trump's due process rights, and had no merit. In the meantime, the New York trial court lacks authority to impose sentence and judgment on President Trump—or conduct any further criminal proceedings against him—until the resolution of his underlying appeal raising substantial claims of Presidential immunity, including by review in this Court if necessary.

As discussed herein, this Court should order an immediate stay of criminal proceedings against President Trump in the New York trial court, including but not limited to the criminal sentencing hearing scheduled for January 10, 2025, at 9:30 a.m. If necessary, the Court should also enter a temporary administrative stay of those proceedings while it considers this stay application. *See, e.g., United States* v. *Texas*, 144 S. Ct. 797, 798 (2024) (Barrett, J., concurring in denial of applications to vacate stay) ("After receiving an emergency application, this Court frequently issues an administrative stay to permit time for briefing and deliberation.").

STATEMENT

I. The Trial Court Erroneously Admitted Extensive Evidence of President Trump's Immune Official Acts in a Criminal State-Court Jury Trial.

On March 30, 2023, President Trump was indicted in the Supreme Court of New York on 34 counts of supposedly falsifying business records in violation of New York law. The meritless case was tried before a Manhattan jury beginning on April 15, 2024. On February 22, 2024, the District Attorney provided a disclosure of anticipated trial evidence. App'x 5A-57A. This disclosure included evidence of President Trump's official acts performed while he was in office as President of the

United States. On March 7, 2024, President Trump moved to exclude evidence of those Presidential official acts at trial, on the ground of Presidential immunity. App'x 58A.

In his motion, President Trump specifically challenged admissibility of several portions of proposed evidence that were based on official acts of the President shielded by Presidential immunity. These included, without limitation, statements issued through his official Presidential Twitter 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. App'x 62A-63A.

The trial court wrongly denied President Trump's motion on April 3, 2024, citing supposed timeliness issues. App'x 89A. The trial court "decline[d] to consider" whether Presidential immunity precludes evidence of President Trump's official acts at trial. App'x 89A. The trial court also rejected President Trump's request to stay the trial pending this Court's decision on Presidential immunity in *Trump* v. *United States*. On April 10, 2024, President Trump filed an interlocutory appeal in New York's Appellate Division seeking, *inter alia*, a writ of prohibition as to the trial court's April 3, 2024 Decision and Order. App'x 90A. This Petition was denied on May 23, 2024, by which time trial was nearly concluded. App'x 157A. In denying the Petition, the New York Appellate Division erroneously reasoned that President Trump's claims of Presidential immunity "may be raised in a direct appeal," and thus

that the New York appellate courts need not address them before trial, App'x 157A—a holding that this Court would soon squarely contradict.

On April 15, 2024, the first day of jury selection, the District Attorney made an offer of proof involving official acts of President Trump while in office in 2018. App'x 446A-451A. In response, President Trump renewed his objection to use of such evidence, asserting the doctrine of Presidential immunity, including referencing the pending *United States* v. *Trump* case then in front of this Court. App'x 452A-454A. Likewise, on April 15, 2024, President Trump submitted his objections to the trial court, 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. App'x 152A. On April 19, 2024, Justice Merchan ruled that President Trump would have to wait until trial to make such immunity objections, and that the court would not rule on such objections pre-trial, but would address them if and when such objections would arise during trial proceedings, App'x 455A—another holding that this Court would soon completely contradict.

During trial, the District Attorney repeatedly offered evidence of President Trump's official acts. As discussed further below, this evidence included: (1) evidence of President Trump's Tweets on his official Twitter account communicating with the American people about matters of public concern; (2) testimony from close, confidential White House Advisors, such as White House Communications Director

Hope Hicks and Executive Assistant to the President Madeleine Westerhout, about confidential internal discussions of White House communications strategy and about the President's conduct of official business on behalf of the United States; (3) evidence regarding the President's alleged involvement in federal investigations and anticipated use of the Pardon power; and (4) evidence of the President's submission of information on official government forms required by law for his official position.

In addition to raising his objections in a pre-trial motion, a pre-trial interlocutory appeal, and at the outset of trial, President Trump repeatedly renewed his Presidential-immunity objections during trial. *See, e.g.*, App'x 456A-457A (witness testimony of former White House employee's official-capacity interactions with then-President Trump and the press); App'x 479A (documentary evidence reflecting official presidential actions)]. The trial court overruled these objections. The trial concluded on May 30, 2024, with an adverse verdict on all 34 counts.

On July 1, 2024, this Court issued its decision in *Trump* v. *United States*, 603 U.S. 593 (2024) ("*Trump*"). This Court held that the President of the United States has absolute immunity from criminal prosecution for exercising his core constitutional powers and has at least "presumptive immunity" for other official actions within the "outer perimeter" of his official responsibilities. *Id.* at 606, 618. This Court further held that Presidential immunity protects against the *evidentiary use* of official acts against a President in criminal proceedings, because Presidential immunity prohibits a court or 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 also held that claims of Presidential immunity should not be reserved for trial but "must be addressed at the outset of a proceeding." *Id.* at 636.

On July 1, 2024, President Trump sought leave from the trial court to file a motion to set aside the jury verdict based upon this Court's decision in *Trump* v. *United States*. On July 10, 2024, President Trump filed a Post-Trial Motion To Dismiss Based on Presidential Immunity, seeking vacatur of the jury verdict and dismissal of the case based on the misuse of official-acts evidence, both at trial and before the grand jury. App'x 158A. President Trump's motion challenged in detail the erroneous admission of all the official-acts evidence cited above. App'x 186A-212A.

On December 16, 2024, the trial court erroneously denied President Trump's motion to dismiss based on Presidential official-acts immunity. App'x 285A. The trial court's Decision and Order wrongly concluded that all the contested evidence at trial "relate[d] entirely to unofficial conduct entitled to no immunity protections." App'x 325A. That decision, among many others made by the trial court, was made in error and, if allowed to stand, would gravely undermine the American Presidency as we know it. *See, e.g., Trump*, 603 U.S. at 613-14.

II. The Trial Court Wrongly Refused to Recognize the Immunity from Prosecution of the President-Elect During the Period of Presidential Transition.

Meanwhile, on November 5, 2024, President Trump was re-elected as the 47th President of the United States in a historic landslide victory. Once President Trump was re-elected, he became the President-Elect of the United States for the period

between November 5, 2024, and January 20, 2025. *See* 3 U.S.C. § 102 note ("Presidential Transition Act").

On December 2, 2024, President Trump filed a motion to vacate the jury verdict and dismiss the criminal case, based, *inter alia*, on the doctrine of sitting-President immunity. App'x 213A. President Trump noted that, upon his inauguration as the 47th President of the United States on January 20, 2025, he will be completely immune from all criminal process, state or federal. App'x 250A; *see also Trump*, 603 U.S. at 616 n.2 ("In the criminal context, . . . 'the separation of powers precludes the criminal prosecution of a sitting President.'"). President Trump also stated that the doctrine of sitting-President immunity shields him from criminal process during the brief but crucial period of Presidential transition, while he engages in the extraordinarily demanding task of preparing to assume the Executive power of the United States. App'x 256A. Accordingly, President Trump sought immediate dismissal of the criminal case against him—consistent with the contemporaneous voluntary dismissals filed by the federal Special Counsel's Office.

On January 3, 2025, the trial court denied President Trump's motion. App'x 343A. In the January 3, 2025 Decision and Order, the trial court acknowledged that a sitting President is immune from federal prosecution, and it further acknowledged that this immunity extends to state prosecution as well. App'x 330A ("[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 it erroneously concluded that "Presidential immunity from criminal process for a sitting president does not

extend to a President-elect." App'x 330A. The January 3, 2025, Decision and Order, issued on a Friday afternoon, set President Trump's criminal sentencing for 9:30 a.m. one week later, on Friday, January 10, 2025—not only at the apex of the Presidential Transition period, but even after President Trump's electoral college victory has been certified by Congress. App'x 343A.

III. The New York Courts Erred in Refusing to Stay Criminal Proceedings in the Trial Court Pending the Resolution of President Trump's Interlocutory Appeal on Presidential Immunity.

The trial court denied President Trump's motion to dismiss based on Presidential immunity in the late afternoon of Friday, January 3, 2025, and set the case for criminal sentencing one week later, January 10, 2025—just ten days before President Trump's inauguration, and in violation of standard practice, due process, and New York criminal law. App'x 343A. On Sunday, January 5, 2025, President Trump notified the trial court and the District Attorney that he was pursuing an immediate appeal of the trial court's adverse rulings on Presidential immunity, and provided his Notice that trial-court proceedings are automatically stayed pending that interlocutory appeal. App'x 344A. In the alternative, President Trump asked the trial court to impose a discretionary stay. App'x 344A. On Monday, January 6, 2025, President Trump filed an interlocutory appeal under N.Y. C.P.L.R. § 7801 et seq. in the nature of a writ of prohibition in the New York Appellate Division, First Department, seeking interlocutory review of the trial court's erroneous denials of both Presidential official-act immunity and sitting-President immunity. App'x 361A.

President Trump also sought an immediate stay of trial-court proceedings from the New York Appellate Division. App'x 402A. On Tuesday, January 7, the Appellate Division denied President Trump's request for a stay. App'x 2A. Due to the time-sensitivity of this matter, with sentencing currently scheduled for Friday, January 10, at 9:30 a.m., President Trump is now simultaneously filing an application for an emergency stay to the New York Court of Appeals, and this stay application in this Court.[1]

ARGUMENT

"The standards for granting a stay of mandate pending disposition of a petition for certiorari are well established." *White* v. *Florida*, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers). "[1] There must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; [2] there must be a significant possibility of reversal of the lower court's decision; and [3] there must be a likelihood that irreparable harm will result if that decision is not stayed." *Id.* (quoting *Times-Picayune Publ'g Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974)

[1] President Trump's counsel have acted diligently to seek a stay from the trial court and the intermediate New York appellate court. The shortness of time created by the trial court's decision to schedule a criminal sentencing hearing five business days after denying President Trump's claim of immunity constitutes "extraordinary circumstances" under this Court's Rule 23.3. Though an applicant is ordinarily required to seek relief from the state appellate courts first, this Court has entertained simultaneous stay applications to this Court and the highest state appellate court when the circumstances warranted it. *See, e.g.*, *Volkswagenwerk A.G.* v. *Falzon*, 461 U.S. 1303 (1983) (O'Connor, J., in chambers); *Nebraska Press Association* v. *Stuart*, 423 U.S. 1319 (1975) (Blackmun, J., in chambers); *Nebraska Press Association* v. *Stuart*, 423 U.S. 1327 (1975) (Blackmun, J., in chambers). Because it is highly questionable whether the New York Court of Appeals will act in the next 48 hours, filing applications in both courts appears to be the only viable option. Counsel for President Trump will promptly notify the Court and the parties in the event that the New York Court of Appeals acts on his stay application in that court.

(Powell, J., in chambers)); *accord Karcher* v. *Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers); *Whalen* v. *Roe*, 423 U.S. 1313, 1316-17 (1975) (Marshall, J., in chambers). In addition, "in a close case it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Karcher*, 455 U.S. at 1305–06.

Further, a stay is more likely warranted where, as here, "[t]he underlying issue in th[e] case … has not heretofore been passed upon by this Court and is of continuing importance." *McLeod* v. *Gen. Elec. Co.*, 87 S. Ct. 5, 6 (1966) (Harlan, J.). Thus, "the existence of an important question not previously passed on by this Court" is a factor that weighs in favor of a stay. *Shiffman* v. *Selective Serv. Bd. No.5*, 88 S. Ct. 1831, 1832 n.3 (1968) (Douglas, J., dissenting); *Certain Named and Unnamed Non-Citizen Children and Their Parents* v. *Texas*, 448 U.S. 1327, 1332 (1980) (Powell, J., in chambers) (holding that a case that "presents novel and important issues" warrants a stay). Where the appeal "raises a difficult question of constitutional significance" that "also involves a pressing national problem," a stay is warranted. *Texas*, 448 U.S. at 1331.

I. There Is a Reasonable Probability That This Court Will Grant Certiorari.

First, there is a reasonable probability that the Court will grant certiorari in this case, because this case satisfies this Court's traditional criteria for discretionary review. Regarding the first two questions presented—(1) whether President Trump is entitled to an automatic stay of trial-court proceedings pending interlocutory appeal on Presidential immunity, and (2) whether the evidentiary use of President

Trump's official acts violated the doctrine of Presidential immunity—the New York courts have "decided an important federal question in a way that conflicts with relevant decisions of this Court" and other federal courts. Sup. Ct. R. 10(c). On the third question presented—(3) whether a sitting President's immunity from criminal process also shields a President-elect from criminal prosecution during the brief but crucial period of Presidential transition—the New York courts have "decided an important question of federal law that has not been, but should be, settled by this Court." *Id.* Indeed, these "underlying immunity question[s] . . . 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.

A. The New York Courts Contradicted This Court's Precedent and That of Other Courts by Denying a Stay of Criminal Proceedings Pending the Resolution of President Trump's Interlocutory Appeal on Immunity.

Before this Court's decision in *Trump*, the U.S. District Court for the District of Columbia held that "Defendant's appeal [on Presidential immunity grounds] *automatically stays* any further proceedings that would move this case towards trial or impose additional burdens of litigation on Defendant." *United States* v. *Trump*, No. CR 23-257 (TSC), 2023 WL 8615775, at *1 (D.D.C. Dec. 13, 2023) (emphasis added). This Court's holding and reasoning in *Trump* resoundingly confirm the correctness of that holding that a stay is mandated. *Trump* explicitly holds that a claim of Presidential immunity is subject to interlocutory appeal before further criminal proceedings may occur, and its logic dictates that this interlocutory appeal must be accompanied by an automatic stay of trial-court proceedings while that

interlocutory appeal is adjudicated. *See, e.g.*, 603 U.S. at 630, 635. The federal courts honored this clear and compelling doctrine, but the New York courts are indefensibly disregarding it.

In *Trump*, this Court emphasized that "[t]he essence of immunity 'is its possessor's entitlement not to have to answer for his conduct' in court." *Trump*, 603 U.S. at 630 (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 525 (1985)). Because "the President is . . . immune from prosecution, a district court's denial of immunity" must be "appealable before trial." *Id.* at 635 (citing *Mitchell*, 472 U.S. at 524-30). "[Q]uestions of immunity are reviewable before trial because the essence of immunity is *the entitlement not to be subject to suit*." *Id.* (emphasis added).

This Court explained that the criminal process's extensive "safeguards, though important, do not alleviate the need for pretrial review," because "under our system of separated powers, criminal prohibitions cannot apply to certain Presidential conduct to begin with.... [W]hen the President acts pursuant to his exclusive constitutional powers, Congress cannot—as a structural matter—regulate such actions, and courts cannot review them." *Id.* at 636 (emphasis added). That is because "the interests that underlie Presidential immunity seek to protect not the President himself, but the institution of the Presidency." *Id.* at 632.

Accordingly, "[q]uestions about whether the President may be held liable for particular actions, consistent with the separation of powers, must be addressed at the outset of a proceeding," which includes interlocutory review before further trial-court proceedings on the merits. *Id.* at 636. "Even if the President were ultimately not

found liable for certain official actions, the possibility of an extended proceeding alone may render him unduly cautious in the discharge of his official duties." *Id.* (cleaned up). "Vulnerability to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute." *Id.* (quotation marks omitted). "The Constitution does not tolerate such impediments to 'the effective functioning of government,'" *id.* (quoting *Nixon* v. *Fitzgerald*, 457 U.S. 731, 751 (1982))—and thus the Constitution requires that appellate review of questions of Presidential immunity be completed *before* further proceedings in the trial court. *See id.* at 635 (holding that questions of Presidential immunity from criminal prosecution are "appealable before trial" and "reviewable before trial because the essence of immunity is the entitlement not to be subject to suit").

This Court's citation of *Mitchell* v. *Forsyth* reinforces this conclusion. Like *Trump* itself, *Mitchell* effectively mandates an automatic stay of trial-court proceedings while an immunity claim is reviewed on interlocutory appeal, and it is widely cited for that proposition. *See Mitchell*, 472 U.S. at 525-26; *see also, e.g., Apostol* v. *Gallion*, 870 F.2d 1335 (7th Cir. 1989) (citing *Mitchell* to conclude that an automatic stay applies in an immunity appeal); *Chuman* v. *Wright*, 960 F.2d 104, 104-05 (9th Cir. 1992) (same). Mitchell held that "the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct . . . ." *Id.* at 525. This requires a stay to protect officials from any burdens of litigation while the question of immunity is under review on appeal, including preventing "the

general costs of subjecting officials to the risks of trial," and protecting those officials from "even such pretrial matters as discovery." *Id.* at 525-56. Immunity, *Mitchell* held, is "an entitlement not to stand trial or face the other burdens of litigation." *Id.* at 526. "The entitlement is an immunity from suit rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial." *Id.* Immunity entails "an entitlement *not to be forced to litigate the consequences of official conduct*," *id.* at 527 (emphasis added), at any stage of criminal proceedings, including sentencing, which may impose grave consequences. In fact, the prospect of imposing sentence on President Trump just before he assumes Office as the 47th President raises the specter of other possible restrictions on liberty, such as travel, reporting requirements, registration, probationary requirements, and others—all of which would be constitutionally intolerable under the doctrine of Presidential immunity. Indeed, every adjudication of a felony conviction results in significant collateral consequences for the defendant, regardless of whether a term of imprisonment is imposed.

Furthermore, the trial court's erroneous approach would deprive Presidential immunity of its intended effect. As noted above, *Trump* held that "[t]he essence of [Presidential] immunity 'is its possessor's entitlement not to have to answer for his conduct' in court." *Trump*, 603 U.S. at 630 (quoting *Mitchell*, 472 U.S. at 525). Forcing a President to continue to defend a criminal case—potentially through trial or, even more dramatically here, through *sentencing and judgment*—while the appellate courts are still grappling with his claim of immunity would, in fact, force

that President "to answer for his conduct in court" before his claim of immunity is finally adjudicated. *Id.* *Trump*'s reference to "the threat of trial, *judgment, and imprisonment*" mandate the conclusion that Presidential immunity violations cannot be ignored in favor of a rushed pre-inauguration sentencing. *Id.* at 613 (emphasis added). By insisting on holding a sentencing hearing of President Trump while his interlocutory appeals on Presidential immunity are still pending, the New York courts are doing exactly what this Court repeatedly warned against—they are "depriving immunity of its intended effect." *Id.* at 619.

The fact that President Trump asserts Presidential immunity against the *evidentiary use* of his official acts puts the issue squarely within the purview of *Trump*. Regarding the government's unconstitutional demand to admit evidence of official acts at trial—which underlies one of President Trump's key enumerations of error here—*Trump* held "[t]hat proposal threatens to eviscerate the immunity we have recognized." *Id.* at 631. "If official conduct for which the President is immune may be scrutinized to help secure his conviction, even on charges that purport to be based only on his unofficial conduct, the 'intended effect' of immunity would be defeated." *Id.* at 631 (quoting *Fitzgerald*, 457 U.S. at 756).

Moreover, the automatic stay that President Trump seeks here is a routine feature of such interlocutory appeals, rendering the New York courts' refusal to stay proceedings all the more astonishing and unlawful. As this Court has held in a related context, in such appeals, "whether 'the litigation may go forward in the district court is precisely what the court of appeals must decide.'" *Coinbase, Inc.* v.

Bielski, 599 U.S. 736, 741 (2023) (quoting *Bradford-Scott Data Corp.* v. *Physician Computer Network*, Inc., 128 F.3d 504, 506 (7th Cir. 1997)). For this reason, "the district court must stay its proceedings while [an] interlocutory appeal on arbitrability is ongoing." *Id.* (emphasis added). This logic applies with even greater force to an interlocutory appeal on the far more momentous question of Presidential immunity from criminal prosecution, which squarely included sentencing and all of its momentous exigencies.

Indeed, the "common practice" of entering such automatic stays "reflects common sense." *Id.* at 743. "Absent an automatic stay of [trial] court proceedings," this Court's "decision to afford a right to an interlocutory appeal would be largely nullified." *Id.* "If the [trial] court could move forward with pre-trial and trial proceedings"—or worse, as here, *criminal sentencing and judgment*—while the appeal was ongoing, "then many of the asserted benefits" of Presidential immunity "would be irretrievably lost." *Id.* at 742-43. "[C]ontinuation of proceedings in the [trial] court 'largely defeats the point of the appeal.'" *Id.* at 743 (quoting *Bradford-Scott*, 128 F.3d at 505). "A right to interlocutory appeal … without an automatic stay of the district court proceedings is therefore like a lock without a key, a bat without a ball, a computer without a keyboard—in other words, not especially sensible." *Id.*

For the reasons discussed above, President Trump is entitled to both an interlocutory appeal and an automatic stay pending interlocutory appeal as a matter of federal constitutional law, which is binding on the New York courts under the

Supremacy Clause.[2] Notably, moreover, the stay President Trump seeks is also fully consistent with ordinary New York law and practice. In fact, the "common practice" of granting such stays, *id.*, applies in New York criminal cases as well. New York appellate courts routinely stay criminal proceedings in the trial court pending the resolution of interlocutory appellate proceedings under New York's Article 78—the procedure employed by President Trump here—that challenge the authority of the trial court to proceed.[3] It is, therefore, wrong, astonishing and improper that the New

[2] These points distinguish this case from *Johnson* v. *Fankell*, 520 U.S. 911 (1997), which held that the defense of qualified immunity derived from 42 U.S.C. § 1983 did not preempt State law barring interlocutory appeals. *See id.* at 922–23. Not only do New York courts permit interlocutory appeals, *contra id.* at 916–17 (noting the Idaho Supreme Court's holding that State law did not permit the appeal), the right of review and immediate stay are constitutionally mandated, *see Trump*, 603 U.S. at 636, and protect not just President Trump's individual federal rights but also "the constitutional structure of separated power," *id.* at 606, and "the independence of the Executive Branch" from state interference, *Trump* v. *Vance*, 591 U.S. 786, 800 (2020). By contrast, the right to interlocutory appeal from a denial of qualified immunity "is a federal procedural right," *Johnson*, 520 U.S. at 921, and the underlying substantive defense is an individual "federal right," *id.* at 919, as opposed to a structural component of the system of separated powers and federalism.

[3] *See* N.Y. C.P.L.R. § 7805 ("On the motion of any party or on its own initiative, *the court may stay further proceedings*, or the enforcement of any determination under review . . . ." (emphasis added)); *see also, e.g., Kisloff* v. *Covington*, 73 N.Y.2d 445, 448 (1989) (noting the Appellate Division stayed the prosecution after the filing of an Article 78 petition "seeking to prohibit further prosecution"); *Dow* v. *Tomei*, 107 A.D.3d 986, 987 (2d Dep't 2013) (staying enforcement of order "compelling the petitioner to appear in court for resentencing"); *Gorghan* v. *DeAngelis*, 25 A.D.3d 872, 872-73 (3d Dep't 2006) ("Thereafter, County Court ... summarily denied petitioner's motion which sought an order prohibiting retrial based on double jeopardy grounds and petitioner initiated this proceeding. By order of this Court, all further proceedings in County Court have been stayed pending this decision."); *McLaughlin* v. *Eidens*, 292 A.D.2d 712, 713 (3d Dep't 2002) ("By order of this Court, all proceedings have been stayed" pending resolution of an Article 78 proceeding challenging the trial court's authority to proceed); *Van Wie* v. *Kirk*, 244 A.D.2d 13, 23 (4th Dep't 1998) ("Upon filing the instant CPLR article 78 petition, petitioner obtained a stay of proceedings" preventing the criminal trial from proceeding); *Lacerva* v. *Dwyer*, 177 A.D.2d 747, 748 (3d Dep't 1991) ("Further proceedings were then stayed by the court to permit preparation of this CPLR article 78 proceeding to prohibit retrial on the ground of double jeopardy. This court stayed the criminal trial pending determination of this proceeding."); *see also Rush* v. *Mordue*, 68 N.Y.2d 348, 352 n.1 (1986) (noting the parties stipulated to a stay in the underlying criminal case pending the outcome of the proceedings and appeal in the Court of Appeals); *James N.* v. *D'Amico*, 139 A.D.2d 302, 309-10 (4th Dep't 1988) (Boomer, J., concurring) (arguing that stays should be issued under CPLR 7805 upon a "showing of probability of success on the merits of the [Article 78] proceeding").

York courts have denied to President Trump the basic procedural protection that it routinely grants to other criminal defendants.

To be sure, President Trump raises, again, Presidential-immunity claims after trial and before sentencing, because the two key developments on which they are based—this Court's decision in *Trump*, and President Trump's re-election as the 47th President of the United States—occurred after trial. But the fact that President Trump is seeking interlocutory review of his claims of Presidential immunity before sentencing does not undermine his entitlement to an automatic stay, if anything the current posture and imminent sentencing heighten the need for a stay. As this Court and others have emphasized, Presidential immunity protects the President from the entire "suit," not just certain procedural stages of the suit. "[Q]uestions of immunity are reviewable before trial because the essence of immunity is the entitlement not to be subject to suit." *Trump*, 603 U.S. at 635. "The essence of immunity is its possessor's entitlement not to have to answer for his conduct in court." *Id.* at 630. "Official immunity, including the President's official-act immunity, is 'immunity from suit rather than a mere defense to liability.'" *Blassingame* v. *Trump*, 87 F.4th 1, 29 (D.C. Cir. 2023) (emphasis added) (quoting *Mitchell*, 472 U.S. at 526). "It is 'an entitlement not to stand trial or face the other burdens of litigation.'" *Id.* (quoting *Mitchell*, 472 U.S. at 526). "Those concerns are particularly pronounced when the official claiming immunity from suit is the President." *Id.* Thus, the President's "immunity from suit," *id.*, extends to immunity from the imposition of criminal sentence and judgment as well as trial, because "[t]he Framers' design of the

Presidency did not envision such counterproductive burdens on the 'vigor' and 'energy' of the Executive." *Trump*, 630 U.S. at 614 (square brackets omitted) (quoting THE FEDERALIST NO. 70, at 471-72). President Trump "must be afforded that opportunity" to litigate his claims on appeal "before the proceedings can move ahead to the merits," *Blassingame*, 87 F.4th at 29—or, even more starkly here, before "moving ahead to" *criminal sentencing and judgment* on "the merits," *id.* (emphasis added). Indeed, undergoing a criminal sentencing is the most extreme example of a President "hav[ing] to answer for his conduct in court." *Trump*, 603 U.S. at 630. The New York courts' insistence on holding a criminal sentencing before President Trump's appeals on immunity are resolved reflects the justice of the Queen of Hearts: "Sentence first—verdict afterwards." L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND (1865).

In sum, the question whether a President of the United States is entitled to an automatic stay of criminal proceedings against him, pending the adjudication of his claims of Presidential immunity in an interlocutory appeal, is a significant federal question that the New York courts have decided in contradiction of this Court's precedent, as well as in contradiction to the case law of other federal courts. This question alone warrants this Court's review and an immediate stay of trial-court proceedings.

B. The Official-Acts Holding Contradicts This Court's Precedent.

The two substantive questions of Presidential immunity raised in this appeal will also warrant this Court's review. First, by repeatedly admitting evidence of

President Trump's official acts during trial, the trial court violated the principles of Presidential immunity that this Court enumerated in *Trump*. This question warrants this Court's review because the trial court's rulings involve a direct, repeated conflict between the New York courts and this Court on a "momentous" question of federal constitutional law. *Trump*, 603 U.S. at 616.

1. Evidence of President Trump's public statements to the American people through official White House channels.

During trial, the District Attorney 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. App'x 436A-445A. These "communications in the form of Tweets" constitute one method by which the President "speak[s] to his fellow citizens and on their behalf." *Trump*, 603 U.S. at 629 (quoting *Trump* v. *Hawaii*, 585 U.S. 667, 701 (2018)). "[S]ome 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 *Hawaii*, 585 U.S. at 701). "[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.*

Even if the public communications solely address attacks on the President's conduct, that fact does not undermine their official nature. A public official's public statements defending his character and reputation are official acts, because they directly advance the public official's effectiveness in his public role. Thus, in *Clinton* v. *Jones*, this Court recognized that President Clinton's public denials of allegations of sexual misconduct by Paula Jones "may involve conduct within the outer perimeter of the President's official responsibilities." 520 U.S. 681, 686 (1997). Similarly, the D.C. Circuit held that "a congressman acted 'within the scope of employment' when he discussed his marital status in his office, during regular business hours, in response to a reporter's inquiries." *Council on Am. Islamic Relations* v. *Ballenger*, 444 F.3d 659, 661 (D.C. Cir. 2006). *Ballenger* held that "[a] Member's ability to do his job as a legislator effectively is tied … to the Member's relationship with the public and in particular his constituents and colleagues in the Congress." *Id.* at 665. Thus, "there was a clear nexus between the congressman answering a reporter's question about the congressman's personal life and the congressman's ability to carry out his representative responsibilities effectively." *Id.* at 665-66.

Here, the trial court admitted that "[u]ndoubtedly, there are Tweets . . . that a President makes that qualify as official communications with the public regarding matters of public concern," but held that 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." App'x 318A. This reasoning is in full violation of *Trump*, *Clinton*, and *Ballenger*, among other accepted jurisprudence. Indeed, these public

communications through President Trump's social-media account—through which he routinely communicated with the public on matters of public concern during his Presidency—were official actions of the President that could not be used against him during trial. *See, e.g., Lindke* v. *Freed*, 601 U.S. 187, 191 (2024). When he communicated with the public on Twitter during his Presidency, President Rump "possessed actual authority to speak on the [Executive Branch's] behalf," and "purported to exercise that authority when he spoke on social media," thus rendering those Tweets official acts. *Id.*

2. Evidence of confidential communications with senior White House advisors in their official capacity.

The trial court committed the same fatal error with respect to the testimony of the communications with and observations of President Trump by senior Presidential advisors Hope Hicks and Madeleine Westerhout. The trial court allowed 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 District Attorney offered, and the trial court admitted, evidence of these White House advisors' official communications with and observations of President Trump in his conduct of official acts. At trial, former White House Communications Director Hope Hicks testified about her official-capacity communications with President Trump and the media concerning press inquiries about the underlying conduct. *See* App'x 467A-468A. Hicks testified that she spoke with President Trump about "how to respond to the story" and about "a team" response. App'x 469A. Hicks also testified about her communications with President Trump regarding a February

2018 New York Times article discussing Michael Cohen's payments, App'x 471A-473A, and about a Karen McDougal interview on CNN in March 2018. App'x 466A-467A. 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." App'x 466A-467A. These were undoubtedly Presidential Communications with President Trump's key senior White House staff.

In addition, the District Attorney offered, and the trial court admitted, testimony from Madeleine Westerhout, a Special Assistant to the President and Executive Assistant to the President in the White House. This testimony discussed details about President Trump's conduct of official business in the White House, including invasive testimony about President Trump's Presidential practices in his 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. App'x 488A-502A.

The admission of this evidence directly violated this Court's prohibition in *Trump*: "What the prosecutor may not do … is admit testimony or private records of the President or his advisers probing the official act itself. Allowing that sort of evidence would invite the jury to inspect the President's motivations for his official actions and to second-guess their propriety." *Trump*, 603 U.S. at 632 n.3. "As [this Court] explained, such inspection would be 'highly intrusive' and would 'seriously cripple' the President's exercise of his official duties." *Id.* (quoting, *inter alia*, *Fitzgerald*, 457 U.S., at 745, 756). "And such second-guessing would 'threaten the

independence or effectiveness of the Executive.'" *Id.* (quoting *Trump* v. *Vance*, 591 U.S. 786 (2020)).

Indeed, "special 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). While interacting with Hicks and Westerhout, among others, 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. *Trump*, 603 U.S. at 608. Holding the "pall of potential prosecution" over the sort of communications as those between President Trump and his White House Communications Director and Executive Assistant would result in the President being "chilled from taking the bold and unhesitating action required of an independent Executive." *Id.* at 613 (internal quotations omitted).

3. Evidence regarding President Trump's exercise of core executive powers, including the investigative and Pardon powers.

The trial testimony of convicted perjurer Michael Cohen presented a series of additional violations of Presidential immunity from evidentiary use of official acts.

For example, Cohen testified that President Trump "told" him that an FEC inquiry would be "taken care of" by then-Attorney General Jeff Sessions, and that Cohen conveyed that information to another individual. App'x 513A-514A. Even if this conversation had happened, which is not conceded, 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, that is plainly immune from evidentiary use.

The District Attorney 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. App'x 509A. Cohen was more explicit with respect to 2018 communications with Attorney Robert Costello, stating that these were a means of pursuing a "back channel communication to the President." App'x 518A. Specifically, Cohen told the jury that a June 13, 2018 email, App'x 431A-432A, referred to "potential pre-pardons" that Cohen and Attorney Robert Costello discussed after President Trump allegedly referenced the concept, implying that they had knowledge that President Trump was willing to use the Pardon Power in their favor. App'x 522A. 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 607-08.

In another instance, during trial, Cohen sought to justify his perjury before Congress by reference to President Trump's public statements in response to the investigations by Congress and Special Counsel Mueller, noting that "there was no Russia-Russia-Russia." App'x 510A. Vitally, 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)—a process that is exclusively vested in the President's discretion through the Recommendations Clause, U.S. CONST. art. II, § 3. The evidence relating to President Trump's responses to these Congressional and Special Counsel investigations are absolutely immune. At worst, such communications are entitled to "presumptive immunity." *Trump*, 603 U.S. at 614.

At trial, the District Attorney also presented a February 2018 text message from Cohen indicating that President Trump had "approved" Cohen publicly addressing an FEC complaint, both formally and through a public statement. App'x 435A; *see also* App'x 429A (Cohen's 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. This was another clear violation of Presidential immunity, resulting in a series of violations of the doctrine during the testimony of a single witness.

4. Evidence of the submission of government forms required by the President's official role as Chief Executive.

During trial, the trial court admitted 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. App'x 427A, 474A-485A. The trial court, wrongly and rather bafflingly, found that the evidence of President Trump's statements on the OGE forms, which were required to be completed, and were completed, in his official capacity as President, were "not deemed official conduct." App'x 310A. In so finding, the trial court acknowledged that "the President is . . . required to complete [the] OGE Form" by virtue of his official position, 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." App'x 310A. Yet the trial court reasoned that, since other federal employees were required to complete OGE forms in *their own* 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." App'x 310A. This reasoning is plainly wrong.

Moreover, the President's speaking to the American people regarding the "public trust" qualifies as official conduct. *Trump*, 603 U.S. at 618, 629. 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). 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. This was inadmissible official-acts evidence, the admission of which fully violated Presidential immunity under *Trump* and related jurisprudence.

Considering all this overwhelming evidence, the trial court also wrongly found that even if all the evidence constituted official acts subject to Presidential immunity, which it did, the admission of such evidence was somehow "harmless." App'x 322A. First, the errors were far from harmless, especially considering that the prosecution used official-acts evidence in their summation. Second, in *Trump*, this Court explicitly 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. The trial court's harmless-error analysis is part and parcel of the approach of providing "as-applied challenges in the course of trial," which this Court rejected.

C. The New York Court's Denial of Immunity to the President-Elect Commits a Grave Error on an Important Question of Federal Law.

All parties agree that the sitting President of the United States enjoys 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. 593, 616 n.2 (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." *A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 U.S. Op. O.L.C. 222 (2000), 2000 WL 33711291, *28 ("2000 OLC Memo"); *see also* 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1563, pp. 418-19 (1st ed. 1833). "The indictment or criminal prosecution of a sitting President would

unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions." 2000 OLC Memo, at *1.

Like other aspects of Presidential immunity, sitting-President immunity binds state prosecutors and state courts under the Supremacy Clause. "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. (4 Wheat) 316, 436 (1819). "[T]he 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.

The New York courts erred, however, in holding that this immunity provides no protection to the *President-Elect* in the brief but crucial period between his election in early November and his inauguration on January 20 of the following year. On the trial court's view, state prosecutors and state courts may charge, prosecute, put on trial, sentence, and even *imprison* the President-elect during the critical and sensitive period of Presidential transition. That conclusion is indefensible, and it contradicts the logic of the authorities supporting sitting-President immunity.

In the Presidential Transition Act, Congress emphasized the close relationship and continuity 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. § 102 note (§ 102 of the Presidential Transition Act). The President-elect's transition activities are crucial to his future exercise of the Executive Power, and thus "[a]ny 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, "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.*

Many authorities recognize the crucial and sensitive nature of Presidential transition activities as integral to, and preparatory to, the incoming President's assumption of the Executive Power of the United States on January 20. *See, e.g.*, *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*, 25 Op. O.L.C. 7, 2001 WL 34058234, at *3 (emphasis added). These authorities include President Kennedy and 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.'"

Id. at *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)). "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))

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 *10, *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. "Three types of burdens merit consideration" in this analysis, *id.*—all of which strongly support extending the same immunity of the President-elect.

First, "the actual imposition of a criminal sentence of incarceration . . . would make it physically impossible for the President to carry out his duties." *Id.* This is just as true of the President-elect as the President. Yet the logic of the trial court's position entails that state prosecutors and courts could imprison the President-elect during transition and release him only at 11:59:59 a.m. on Inauguration Day—thus allowing state actors to completely thwart the Presidential transition.

Moreover, any criminal sentencing, and even the distraction of ongoing criminal proceedings, disrupts and will continue to disrupt the enormously burdensome and sensitive tasks of the 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.

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).

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.*

Second, "the public stigma and opprobrium occasioned by … criminal proceedings" during the Presidential transition "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.

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." *Id.* 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. Indeed, President Trump has been actively engaged in all these tasks since November 5, subject to the unconstitutional disruption of this state-court criminal proceeding. "Potential criminal liability, and the peculiar public opprobrium that attaches to criminal proceedings, are plainly more likely to distort Presidential decisionmaking" than civil lawsuits, *Trump*, 603 U.S. at 613, and they are equally likely to disrupt the Presidential transition.

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.

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.

Notwithstanding all these authorities, the trial court concluded that President Trump possesses no immunity from criminal process until 12:00 p.m. on January 20, 2025. In so holding, the trial court relied on a *case-specific* analysis, imposing its own tendentious view of burdens on President Trump's transition activity, and erroneously concluding that appearing for a criminal sentencing 10 days before his Inauguration would be not-too-burdensome on President Trump. App'x 342A-343A. This analysis is wrong, 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. Moreover, if the trial court imposes sentence on January 10, that will require President Trump to pursue a series of criminal appeals during his term as President, including the possibility of remand for further criminal proceedings in the trial court—a situation that the doctrine of Presidential immunity squarely rejects.

More fundamentally, the trial court's analysis directly contradicts the reasoning of the very 2000 OLC Memo on which it relies. That OLC Memo correctly rejected the case-by-case, balancing approach employed by the trial court, and instead emphasized that the existence of Presidential immunity requires a categorical analysis: "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. Criminal sentencing undoubtedly imposes such "serious burdens," and cannot be allowed to proceed.

Thus, a sitting President, or President-elect, does not have to subject himself in any case to an individual judge's case-by-case balancing of the burdens on the Presidency—an inquiry that itself violates the separation of powers and the Supremacy Clause. The trial court'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]." *Id.*

II. There Is a Significant Possibility of Reversal.

For the reasons stated above in Part I, there is more than a "significant possibility" of reversal on each of these three questions, *White*, 458 U.S. at 1302—there is a high likelihood of reversal. The New York courts' rulings on the first two questions are in direct and irreconcilable conflict with this Court's decision in *Trump*, 603 U.S. 593, as well as decisions of other federal courts. The trial court's refusal to recognize the President-elect's immunity from state criminal process during the brief but crucial period of Presidential transition is also erroneous, for the reasons discussed above. *See supra*, Part I.

III. There Is a Likelihood of Irreparable Harm Absent the Stay.

The third factor considers whether the applicant "would … suffer irreparable harm were the stay not granted." *Karcher*, 455 U.S. at 1306. Here, the threat of irreparable injury is clear and manifest. Indeed, President Trump is already suffering grave irreparable injury from the disruption and distraction that the trial court abruptly inflicted by suddenly scheduling a sentencing hearing for the President-Elect of the United States, on five days' notice, at the apex of the Presidential transition. These harms continue to increase as the New York courts deny relief and the sentencing hearing approaches.

First, even the general burdens of defending a criminal case while an immunity appeal is pending constitute irreparable harm. As noted above, absolute immunity is "an entitlement not to stand trial or face the other burdens of litigation…. The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, *it is effectively lost if a case is erroneously permitted to go to trial*." *Mitchell*, 472 U.S. at 526. Absolute immunity's protection is "not limited to liability for money damages," but "also include[s] 'the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.'" *Id.* (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982)). Under absolute immunity, "even such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" *Id.* (quoting *Harlow*, 457 U.S. at 817); *see also Pearson* v. *Callahan*, 555 U.S. 223, 231-

32 (2009) (reaffirming that official immunity is "an immunity from suit rather than a mere defense to liability" that "is effectively lost if a case is erroneously permitted to go to trial"); *Ashcroft* v. *Iqbal*, 556 U.S. 662, 672 (2009); *Behrens* v. *Pelletier*, 516 U.S. 299, 308 (1996); *P.R. Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-44 (1993).

All these injuries are magnified exponentially when the threatened individual is the President-Elect of the United States. President Trump is currently engaged in the most crucial and sensitive tasks of preparing to assume the Executive Power in less than two weeks, all of which are essential to the United States' national security and vital interests. Forcing President Trump to prepare for a criminal sentencing in a felony case while he is preparing to lead the free world as President of the United States in less than two weeks imposes an intolerable, unconstitutional burden on him that undermines these vital national interests. During the transitional period, President Trump is communicating with world leaders, formulating his agenda for foreign and domestic relations, selecting key personnel for his incoming administration, and coordinating 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"—or, more dramatically here, criminal *sentencing*—would disrupt constitutionally assigned functions of a sitting President and threaten to injure his standing and credibility with world leaders, 2000 OLC Memo, at *22, so also it undermines the ability of the President-Elect to conduct an orderly and effective transition.

These irreparable harms are further compounded by the abruptness and extreme haste of the trial court's action. After six months of post-trial litigation on Presidential immunity since this Court's decision in *Trump* on July 1, 2024, the New York trial court suddenly denied the last pending motion on late on Friday afternoon, January 3, 2025, and set the matter for sentencing less than one week later, not even allowing for pre-sentencing submissions by either the prosecution or President Trump. This constitutes an extreme example of the "highly expedited" consideration that this Court cautioned against in *Trump*. 603 U.S. at 616. The one-week period between the denial of President Trump's immunity motion, and criminal sentencing, provides no meaningful window for appellate review of "unprecedented nature of this case" and "the very significant constitutional questions" raised by President Trump's assertions of Presidential immunity. *Id.* In fact, it would be debilitating to our system of government if such a stay, which is frequently granted in ordinary criminal cases, were denied to a President of the United States asserting claims of Presidential immunity from prosecution that "raise[s] multiple unprecedented and momentous questions about the powers of the President and the limits of his authority under the Constitution." *Id.* Yet that is what the New York courts have done in error.

IV. The Balancing of Equities Strongly Favors a Stay.

Since this is not a "close case," the Court need not "balance the equities." *Karcher*, 455 U.S. at 1305-06. But if it does, the balance of harms and the public interest overwhelmingly favor a stay, for all the reasons discussed above. The purpose of a stay pending interlocutory review is to prevent the very doctrine of

Presidential immunity to become futile, thus threatening the effectiveness of the Presidency by distorting Presidential decisionmaking and deterring bold and unhesitating action. *See Trump*, 603 U.S. at 613-14. Most fundamentally, forcing President Trump to defend a criminal case and appear for a criminal sentencing hearing at the apex of the Presidential transition creates a constitutionally intolerable risk of disruption to national security and America's vital interests. By contrast, the State of New York's asserted interest in proceeding with the criminal sentencing of the President-Elect of the United States on politically motivated charges at breakneck speed at the apex of a Presidential transition should be accorded no weight.

CONCLUSION

This Court should immediately order a stay of pending criminal proceedings in the Supreme Court of New York County, New York, pending the final resolution of President Trump's interlocutory appeal raising questions of Presidential immunity, including in this Court if necessary. The Court should also enter, if necessary, a temporary administrative stay while it considers this stay application.

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Respectfully submitted,

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