To Be Argued By:
Robert J. Giuffra, Jr.
Time Requested: 15 Minutes

New York County Clerk's Indictment No. 71543/2023

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case No. 2025-00648

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

against

DONALD J. TRUMP,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT PRESIDENT DONALD J. TRUMP

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PRELIMINARY STATEMENT

This is the most politically charged prosecution in our Nation's history. After years of fruitless investigation into decade-old, baseless allegations—and under immense political pressure to criminally charge President Donald J. Trump for *something*—New York's district attorney (DANY) manufactured felony charges against a once-former and now-sitting President of the United States. The DA, a Democrat, brought those charges in the middle of a contentious Presidential election in which President Trump was the leading Republican candidate. These charges against President Trump were as unprecedented as their political context. Targeting alleged conduct that has never been found to violate any New York law, the DA concocted a purported felony by stacking time-barred misdemeanors under a convoluted legal theory, which the DA then improperly obscured until the charge conference. This case should never have seen the inside of a courtroom, let alone resulted in a conviction.

This Court should now reverse. Federal law expressly preempts DANY's misdemeanor-turned-felony charges because those charges rest on an alleged violation of federal campaign regulations that States cannot (and have never) enforced. The trial was fatally marred by the introduction of

official Presidential acts that the Supreme Court has made clear cannot be used as evidence against a President. The jury was instructed incorrectly, allowing a conviction without the unanimity required by both New York law and basic due process. Beyond these fatal flaws, the evidence was clearly insufficient to convict. In addition to all this overwhelming error, the trial was conducted by a judge who refused to recuse himself despite having made political contributions to President Trump's electoral opponents and despite having disqualifying family conflicts. For each of these independent reasons, President Trump's conviction must be set aside.

First, the Federal Election Campaign Act (FECA) expressly preempts DANY's application here of Penal Law § 175.10 (making a false entry in business records) and Election Law § 17-152 (conspiring to promote or prevent election of a person through unlawful means). DANY's theory was that President Trump somehow violated those statutes by engaging in or concealing a conspiracy to make federal campaign contributions that violated FECA. But federal prosecutors had already investigated those alleged violations and took no action against President Trump even after he left office in 2021. That should have barred any prosecution because FECA has a sweeping preemption provision: "The provisions of this Act . . . supersede

and preempt any provision of State law with respect to election to Federal office." 52 U.S.C. § 30143(a). Congress wisely directed that only the federal government, not thousands of local prosecutors, enforce FECA's complex and politically sensitive "regulation[s] of the conduct and financing of campaigns for Federal elective office." *Holtzman* v. *Oliensis*, 91 N.Y.2d 488, 495 (1998).

When President Trump raised preemption at the outset of the proceedings below, DANY claimed that its theory was *not* "limited to violations of . . . Election Law § 17-152 and FECA," A19068, and that its case would stand up "even if you take the election law out of the picture," A19159. But the theory that DANY later put to the jury relied *exclusively* on Election Law § 17-152, and asked the jury to improperly convict based on a violation of FECA. Because DANY's effort to twist New York law to duplicate FECA's restrictions is preempted and thus barred, this Court must reverse.

Second, the trial court violated the Presidential evidentiary immunity confirmed by the U.S. Supreme Court in *Trump* v. *United States*, 603 U.S. 593 (2024), which bars the "use of evidence about" a President's official acts while in office. *Id.* at 631. The jury improperly heard extensive testimony about at least four different kinds of official acts by President Trump: (i) discussions between the President and the White House Communications Director in the

Oval Office over the White House's response to allegations of Presidential wrongdoing; (ii) official Presidential statements on social media; (iii) alleged discussions between the President and the Attorney General about the enforcement of federal campaign regulations; and (iv) President Trump's practices in discharging his Presidential duties, including from the Situation Room. In *Trump*, the U.S. Supreme Court mandated that violations of Presidential evidentiary immunity require automatic reversal of a conviction, without any harmless-error analysis. Even if such analysis were applied, the introduction of the prohibited testimony—which DANY repeatedly relied on and called "devastating" in its summation, A7815—was far from harmless beyond a reasonable doubt.

Third, the trial court erred in instructing the jury that it could convict President Trump of having conspired to "promote or prevent the election of any person to a public office by unlawful means," Election Law § 17-152, without unanimously agreeing on what those "unlawful means" actually were. Instead, the court permitted the jury to convict if some jurors believed only that President Trump had conspired to violate FECA, while others believed only that he had conspired to help others commit tax fraud, and still others believed only that he had conspired to help others make false statements to a

bank. Due process and Section 17-152 do not permit a conviction based on such a haphazard "combination of jury findings." *See Schad* v. *Arizona*, 501 U.S. 624, 633, 650 (1991); N.Y. Const. art. 1, § 6.

Fourth, DANY had no proof that President Trump ever had the "intent to defraud" expressly required by the business-records statute, Penal Law § 175.10. There was zero evidence that President Trump intended to deprive anyone of money or property, and in fact no such deprivation occurred. Having no other choice, DANY advanced the flawed theory, erroneously blessed by the trial court, that "intent to defraud" can include either (i) intent to interfere with unspecified government regulators, or (ii) intent to deceive "the voting public." Making matters worse, DANY did not prove that President Trump acted with either of those intentions in mind.

Finally, Justice Merchan erred in refusing to recuse himself from this uniquely political case. The New York rules of judicial conduct require that a "judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality *might reasonably be questioned*." 22 N.Y.C.R.R. § 100.3(E)(1) (emphasis added). By any measure, Justice Merchan's impartiality was reasonably in doubt here because he violated the clear bar on sitting judges making political contributions by donating both to President Biden and to a

group called "Stop Republicans PAC." In addition, Justice Merchan's daughter was the president and part-owner of an advertising company that was paid millions by the Kamala Harris campaign and other Democrats, including for running advertisements specifically invoking DANY's prosecution of President Trump *in her father's courtroom.* In the face of all these undisputed and damaging facts, Justice Merchan's refusal to recuse created, at the very least, "the appearance of bias," which "erode[s] public confidence in the judicial system" and is yet another clear ground for reversal. *See People* v. *Zappacosta*, 77 A.D.2d 928, 929 (2d Dep't 1980).

RULE 1250.11 STATEMENT

President Trump appeals a judgment of conviction entered by Supreme Court, New York County, on 34 counts of falsifying business records in the first degree under Penal Law § 175.10. The sentence imposed was unconditional discharge. No application for stay of execution of judgment pending appeal was made. No order pursuant to CPL § 460.50 is outstanding. There were no codefendants.

STATEMENT OF QUESTIONS PRESENTED

1. Whether FECA preempts the application of Penal Law § 175.10 and Election Law § 17-152 to alleged violations of federal election campaign laws.

Answer: Yes.

2. Whether the verdict must be set aside because of the admission of evidence barred by the evidentiary immunity for official Presidential acts.

Answer: Yes.

3. Whether the trial court erred by instructing the jury that it did not need to unanimously agree on the "unlawful means" that were ostensibly the object of the alleged conspiracy under Election Law § 17-152.

Answer: Yes.

4. Whether there was insufficient evidence that President Trump had the "intent to defraud" required by Penal Law § 175.10, or whether the jury's verdict on that essential element was against the weight of the evidence.

Answer: Yes.

5. Whether the trial court erred in refusing to recuse in this extraordinary, political case despite significant evidence that would cause a reasonable observer to question its impartiality.

Answer: Yes.

STATEMENT OF THE CASE

A. Background

The Clifford Non-Disclosure Agreement. Michael Cohen became Executive Vice President of the Trump Organization and Special Counsel to Donald J. Trump in 2007. A6330, A6333. In that role, he represented President Trump on various "issues that were of concern." A6333. In 2011, Cohen helped persuade a magazine not to publish salacious and false claims by an adult film star named Stephanie Clifford (a.k.a. "Stormy Daniels"), whom the magazine had paid $15,000 for her story regarding an alleged 2006 encounter between her and President Trump. A5708-5711, A6448-6452.

In October 2016, Clifford again began to seek publicity for her false story. A4252-4253, A6452. This time, Cohen negotiated directly with Clifford's lawyer. A6455-6456. They agreed that Clifford would be paid $130,000 as part of a non-disclosure agreement preventing her from discussing the alleged encounter. A6461. Cohen then set up an LLC and wired the funds using his own personal home-equity line of credit. A6500-6508. President Trump's signature does not appear on any of the relevant documents. A6513-6517.

The Cohen Payments. In January 2017, just as President Trump was about to be inaugurated for the first time, Cohen approached then-Trump Organization CFO Allen Weisselberg to seek reimbursement for the $130,000. A6548. The Trump Organization had handled the President's personal finances for decades. A5534, A5459-5460. Cohen told Weisselberg about the payment without providing any specifics about its purpose. A6548-6549. Cohen also claimed that he was owed $50,000 for a different payment he had made on behalf of President Trump to a company called Red Finch. A6549-6551. Cohen later admitted that he had lied to Weisselberg; Cohen had paid Red Finch much less than that but saw a chance to unjustly enrich himself. A6555, A7122-7124.

Weisselberg decided to pay back Cohen the $180,000 in monthly installments throughout 2017. A6551-6553. He doubled the amount to $360,000, purportedly to make sure that Cohen would be fully repaid even after paying taxes at a 50% rate. A6551-6553. Weisselberg also added a $60,000 "bonus" after Cohen complained that his bonus from the Trump Organization in 2016 was much lower than he expected. A6545, A6549, A6556-6557. That brought the total payment to $420,000, or $35,000 a month for twelve months. A6560.

Weisselberg asked Cohen to send invoices each month beginning in January so that he could process the checks. A5375. In February 2017, Cohen—who by that point had taken on a new role as a personal attorney to the President, A7269—emailed Weisselberg an invoice requesting payments of $35,000 for January and February "pursuant to the retainer agreement." A8070. Cohen signed the message with his title: "Personal Attorney to President Donald J. Trump." A8073. Weisselberg emailed another Trump Organization employee that the invoice was "Ok to pay as per agreement with Don [Jr.] and Eric" Trump, A8069, who had taken over running the Trump Organization once President Trump took office. There is no mention of an agreement with President Trump in any document.

Other employees of the Trump Organization then set about processing the payment to Cohen from the President's personal funds. They used Cohen's invoice to create the necessary entries in an electronic ledger. A5516. Reflecting the language of the invoice and Cohen's role as President Trump's personal attorney, the ledger entries categorized the payment as one for a "legal expense" under a "retainer." A8033. The check generated by the computer system likewise had "retainer" in the description line. A8035.

Cohen sent an additional, identical invoice for each month from March until December 2017. A6592-6608; A8036-8066. Each time, the same process took place, resulting in an internal ledger entry and a check to Cohen, signed either by Eric Trump and Weisselberg or by President Trump himself. A5518-5554.[1]

Michael Cohen's Contradictory Stories. Only one person, Michael Cohen himself, has ever claimed that President Trump knew at the time about either the Clifford NDA or Cohen's reimbursement arrangement with Weisselberg. But even Cohen did not state that at first. Up through the middle of 2018, Cohen told anyone who asked that President Trump knew nothing about the reimbursement deal. Cohen even said that to his own attorneys in April 2018, to whom he had no reason to lie: "I swear to God"; "I don't have anything on Donald Trump"; "President Trump knew nothing about th[e]se payments." A7301, A7305.

Indeed, from President Trump's perspective, there would have been nothing noteworthy—let alone nefarious or criminal—about the payments to

[1] Eric Trump and Weisselberg signed the checks for January, February, and March because those checks were mistakenly paid from the Donald J. Trump Revocable Trust. A5350, A5520, A8035, A8039. Starting in April 2017, the payments to Cohen were correctly paid from President Trump's personal account. A5528, A5471-5472.

Cohen, his personal lawyer at the time, being made for legal services, when those payments were made in 2017. Cohen had performed and was continuing to perform personal legal services for President Trump and his family. A7139-7146. Cohen was making $35,000 per month, or $420,000 per year, similar to the $525,000 per year he had previously made at the Trump Organization. A6335. Simply put, President Trump had no reason to question these payments and no notice that there was anything potentially wrong about them.

By August 2018, however, Cohen's story had changed. As his own criminal conduct came under investigation, Cohen began telling the diametrically opposed story on which DANY's prosecution was built. According to this new version of events, President Trump supposedly knew all along about the Clifford payment and purported reimbursement scheme between Cohen and Weisselberg.

Cohen had a clear motivation to fabricate that story. He had been hiding millions in non-Trump Organization income from the IRS, had lied to his personal bank in loan applications, and had lied under oath to Congress in late 2017. A6684, A6686. The FBI investigated Cohen's crimes, culminating in an April 2018 raid on Cohen's home and office. A6650-6651. Four months later, Cohen pleaded guilty in federal court and was sentenced to 36 months of

incarceration followed by 36 months of supervised release. A6876. Notably, only then did Cohen make his about-face and claim that President Trump was behind the Clifford payment and reimbursement. Cohen later sought to parlay his "cooperation" against President Trump with both federal prosecutors and DANY into a reduction in his sentence. A6785-6789.

B. DANY's Investigation

Around when Cohen's legal troubles became public, DANY formed a special task force to investigate the sitting President of the United States. *See* A432-433. A great deal about that investigation and the resulting prosecution is public because its lead lawyer, former Special Assistant District Attorney Mark Pomerantz, wrote a book about it called *People vs. Donald Trump: An Inside Account* (2023). *See* A430, A434, A457-459, A18223-18229 (discussing and excerpting book at length).

"Enthusiastic" to join DANY's special task force and "happy to work without pay," Pomerantz joined the already two-year-old investigation into President Trump in early 2021. A430. DANY's investigation at that point was "unfocused and sprawling": "everybody seemed to be investigating everything." *Inside Account* 15, 104. Although acknowledging that "prosecutors should target crimes, not criminals," *id.* at 112, Pomerantz

believed that DANY was "warranted in throwing the book at" President Trump because, although not a "cold-blooded killer," he had a "history of unlawful behavior" on the level of "Al Capone" or "John Gotti." *Id.* at 109-110; *see* A457. To Pomerantz and his colleagues, no amount of "new tricks" or "creative theorizing" was off-limits in their effort to try to criminally charge President Trump. *Inside Account* 34, 58; *see* A18228.

Critically, that charge had to be a felony. Pomerantz admits that DANY had little interest in the Clifford payment if it resulted in "only a misdemeanor." A430. Pomerantz thought DANY could argue that the supposed "hush money and phony invoicing scheme had generated false business records" in violation of Penal Law § 175.05. A18828. The records were "false," Pomerantz thought, to the extent they indicated that the payments to Cohen had been for "legal expenses" under a "retainer." Of course, Cohen had been providing legal services to the President at all relevant times. But even if the records could somehow be shown to be false, "creating false business records is only a misdemeanor under New York law." A430. DANY was not interested in a misdemeanor. *Id.*

Instead, DANY doggedly searched for a way to somehow transform the records charge into a felony. Because falsifying business records is a felony

under Penal Law § 175.10 if it is done with the "intent to commit another crime or to aid or conceal the commission thereof," Pomerantz thought DANY could claim that President Trump had intended to "conceal a federal election law violation," *Inside Account* 40, on the theory that Cohen's NDA payment to Clifford had been an illegal campaign contribution under FECA. But, recognizing the preemption problem with this theory, DANY had been concerned that the predicate "[]other crime" had to be a *state* crime, not a federal campaign violation. And DANY saw "no comparable state crime in play," *id.*—no "state crime that Trump or Cohen intended to conceal by falsifying the hush money payment or reimbursement records," *id.* at 272; A430. DANY thus dropped the notion of a prosecution based on the Clifford payments in 2019. A434.

At Pomerantz's direction, DANY "revisit[ed]" that decision two years later. *Inside Account* 43. This time, Pomerantz urged internally that President Trump had intended to conceal the predicate crime of *money laundering*. His idea was that Clifford had committed extortion, and that President Trump had purportedly laundered the "proceeds" of his own victimization. *Id.* at 46. Pomerantz's boss, then-DA Cyrus Vance, "raised his

eyebrows at the notion that [DANY] would be claiming that Donald Trump was a victim of blackmail." *Id.* at 58.

By February 2022, unwilling to give up on the effort to find a way to charge President Trump with a felony, Pomerantz conceived yet another theory: President Trump had supposedly overstated the value of his assets to sophisticated financial institutions. But his DANY supervisors considered this theory, like the others, "weak," infected by "many fatal flaws," and "way out there." *Inside Account* 191-192. One key flaw was that Pomerantz's case depended heavily on Michael Cohen's word. *See* A18828-18829. One DANY supervisor explained that "she did not trust anything he said." *Inside Account* 159.

Pomerantz also had to persuade the newly elected District Attorney, Alvin Bragg, to authorize the first-ever prosecution of a former President. Bragg had campaigned (like the New York Attorney General Letitia James) on a platform of investigating President Trump, boasting that he "ha[d] investigated Trump and his children and held them accountable" before and would "hold [them] accountable" as DA. A458. Yet even Bragg apparently viewed Pomerantz's dreamed-up felony theory as too tenuous to prosecute. A458-459.

In response, Pomerantz resigned and authored his tell-all account, publicly chastising Bragg for supposedly failing to hold President Trump "accountable for his crimes." A18758. Pomerantz's resignation and subsequent media tour ignited a firestorm of criticism and political pressure on Bragg, then only a few months into the job as DA. A459. Bragg responded with a highly irregular public statement, insisting that his investigation of President Trump could still "move forward with an indictment." Dan Mangan, *Manhattan DA Says Trump Criminal Investigation Continues Despite Two Prosecutors Quitting*, CNBC (Apr. 7, 2022).

Yet after four years of turning over every rock, DANY still had no basis to indict President Trump for a felony. DANY remained stuck with the payments to Cohen—a theory Pomerantz himself had dubbed the "zombie case" since DANY kept having to revive it. A430. Plus, by now, the two-year statute of limitations for even a (baseless) misdemeanor charge in this "zombie case" had lapsed.

C. Indictment

In November 2022, President Trump officially announced his candidacy for the Presidency. Less than three months later, in January 2023, DANY impaneled a special grand jury.

On March 30, 2023, in the middle of the Republican primary campaign, DANY obtained its long-sought indictment. President Trump was charged with 34 counts of felony falsification of business records in violation of Penal Law § 175.10. A27-41. Each count related to one of three kinds of documents associated with the $35,000 payments to Michael Cohen: 11 invoices from Cohen (one combining the months of January and February 2017); 11 checks to Cohen (same); and 12 internal ledger entries (one for each month) reflecting President Trump's personal account, from which the checks had been drawn. An accompanying statement of facts alleged that these records were supposedly false because Cohen "was not being paid for legal services rendered" and "there was no retainer agreement." A76. Notably, neither the indictment nor the statement of facts specified what "[]other crime" President Trump had allegedly intended to commit or conceal. It was thus unclear how DANY had elevated the charges from alleged misdemeanors under Penal Law § 175.05 to alleged felonies under Penal Law § 175.10.

D. Pre-Trial Proceedings

Bill of Particulars. In April 2023, exercising his right to seek a bill of particulars, President Trump requested that DANY specify the precise predicate crime. A88-89. DANY wrongly refused that appropriate request.

It instead responded that, "without limiting the People's theory at trial," the "other crime" required by Penal Law § 175.10 "may include violations of New York Election Law § 17-152; New York Tax Law §§ 1801(a)(3) and 1802; New York Penal Law §§ 175.05 and 175.10; or violations of the Federal Election Campaign Act." A220.

Election Law § 17-152 is a particularly obscure provision, never prosecuted in modern New York history, that makes it a misdemeanor to "conspire to promote or prevent the election of any person to a public office by unlawful means." Yet DANY even refused President Trump's request that he be told what the alleged "unlawful means" for an Election Law § 17-152 violation might be. A221.

Removal. In May 2023, President Trump removed the prosecution to federal district court pursuant to the federal-officer removal statute, 28 U.S.C. § 1442(a). President Trump argued that removal was proper because the prosecution was "for or relating to" his official acts as President, *id.*, and was based on alleged "election law violations that have a federal preemption defense." A142. President Trump emphasized that FECA expressly preempts "any provision of State law with respect to election to Federal office." 52 U.S.C. § 30143(a); *see* A147-148.

DANY moved to remand, arguing that the charges had "no connection" to President Trump's "official duties and responsibilities as President," and that President Trump had no colorable preemption defense because "DANY's theory [did] not depend solely on underlying violations of federal law." A19047, A19053-19054. DANY claimed that the charges were "not limited to violations of New York Election Law § 17-152 and FECA," A19068, and that the case would stand up "even if you take the election law out of the picture." A19159. These assertions would later prove incorrect.

In July 2023, relying on DANY's assurances, the federal district court remanded the case to state court. *New York* v. *Trump*, 683 F. Supp. 3d 334 (S.D.N.Y. 2023). Vitally, however, the federal court agreed with President Trump that FECA would preempt any "application" of a "provision[] of New York's election law" that "directly target[ed] campaign contributions and expenditures." *Id.* at 350.

Motion To Exclude Official-Acts Evidence. In February 2024, the U.S. Supreme Court granted review in *Trump* v. *United States* to address the scope of constitutional Presidential immunity from prosecution. President Trump promptly moved to adjourn his upcoming trial pending the Supreme Court's decision in *Trump*. A2748. The President also requested that the trial

court order DANY not to introduce at trial any evidence of his official acts as President. A2748. The trial court denied President Trump's motion on procedural grounds without prejudice to its renewal at trial. A2895-2898; *see* A3870.

Gag Order. On March 26, 2024, right before jury selection, the trial court granted DANY's request for an extraordinary gag order on President Trump in the middle of the Presidential campaign. A2877. The court barred President Trump from "making . . . public statements about" Michael Cohen, A2877, even as Cohen was constantly urging the public to conclude that President Trump was guilty and vote against him for President, A2713.1-2713.5. The court also prohibited any public discussion of the conflicts of interest created by Justice Merchan's daughter's paid political work. A2887. This Court later denied President Trump's Article 78 petition seeking review of that order. *See Trump* v. *Merchan*, 227 A.D.3d 518, 519 (1st Dep't 2024).

Motion For Change Of Venue. On April 8, 2024, President Trump moved this Court to transfer venue from New York County to one of Orange, Richmond, Rockland, or Suffolk Counties. *People* v. *Trump*, Case No. 2024-02365, NYSCEF Doc. No. 4 (1st Dep't Apr. 8, 2024). President Trump made clear that the New York County jury pool had been exposed to such

overwhelming negative media coverage about this prosecution that, according to a survey, 61% of potential jurors had already determined that President Trump was guilty, compared to 37% or lower in the surrounding counties. *Id.* at 22. Justice Michael denied President Trump's request for an immediate stay, *id.* NYSCEF Doc. No. 7, and a full panel later denied the motion. *People* v. *Trump*, Case No. 2024-02646 (1st Dep't May 23, 2024).

E. Trial

Under a worldwide media spotlight, President Trump's trial began with opening statements on April 22, 2024. Over the next six weeks, DANY sought to persuade the judge and jury of two key points: (i) President Trump "was involved" in both the Clifford NDA and the monthly reimbursement arrangement that Cohen had worked out with Weisselberg, A7659; and (ii) President Trump had the "intent to commit or conceal another crime" required by Penal Law § 175.10, thus supposedly transforming the alleged falsification of records from a time-barred misdemeanor into a felony. Tellingly, for nearly all of the trial, DANY refused to explain what that "[]other crime" might be.

President Trump's Supposed Knowledge. DANY relied exclusively on Cohen's testimony in trying to prove that President Trump knew all along that

his payments to Cohen were in part reimbursement for the Clifford NDA payment—and not just payment for legal services that Cohen was undisputedly providing in 2017. Cohen claimed that he routinely updated President Trump, usually by phone, on the status of his negotiations with Clifford. A6456, A6468, A6479, A6484, A6486, A6488, A6492, A6499, A6513. Trying to buttress Cohen's story, DANY introduced records of phone calls between President Trump and Cohen in October 2016. But no evidence corroborated Cohen's account of what was said, and Cohen admitted that he and President Trump routinely discussed other matters. A6484-6485.

Cohen also testified that President Trump personally signed off on the plan to pay Cohen back for the Clifford NDA with monthly "retainer" payments. According to Cohen, immediately after he and Weisselberg discussed Cohen's reimbursement in mid-January 2017—mere days before the inauguration in Washington—the two men "went to Mr. Trump's office" in Trump Tower, where Weisselberg explained the arrangement. A6558-6561. Again, no other evidence corroborates that account. DANY did not even call Weisselberg to testify. But DANY did call Clifford herself, whom the trial court allowed to testify in lurid, gratuitous, and prejudicial detail about her alleged encounter with President Trump. A5680-5683.

The Supposed Predicate Crime. Seeking to conjure up a felony under Penal Law § 175.10, DANY tried to prove that the payments to Cohen were intended to conceal a purportedly grand "conspiracy to influence the 2016 election," supposedly hatched at a Trump Tower meeting in August 2015. A3945. This "election conspiracy" was a supposed plan between President Trump, Cohen, and David Pecker, then-Chairman and CEO of American Media, Inc. (AMI) and publisher of the National Enquirer, to "conceal[] negative information about Mr. Trump." A3926-3930, A3952. Specifically, Pecker would "act as eyes and ears for the campaign in an effort to locate damaging information . . . and then take steps to try to bury it." A3932.

As the trial testimony showed, there is nothing unusual or untoward about tabloid editors working with celebrities or politicians to "provide a heads up" about a "potentially negative story" that the tabloid might be able to squash. A4352. Pecker testified that such arrangements are "standard operating procedure" because they are "mutually beneficial": the tabloid ingratiates itself with the celebrity while the celebrity protects his or her image. A4352-4354; *see* A4358 (describing AMI's arrangement with Arnold Schwarzenegger); A4361 (Tiger Woods); A4364 (Mark Wahlberg); A4366 (Rahm Emanuel). Pecker also testified that "there was no discussion of a

financial dimension to any agreement" reached at the August 2015 meeting at Trump Tower. A4427.

Nevertheless, DANY attempted to paint a misleading picture of an illegal "election conspiracy," supposedly "executed through three different transactions." A3932, A3950. One was the Clifford NDA set up by Cohen. The second was a deal between AMI and a former Trump Tower doorman, Dino Sajudin, who absurdly claimed that President Trump had fathered a daughter with a maid. A3933. AMI paid Sajudin $30,000 in exchange for the rights to that so-called "story," which it never published. The third was a transaction between AMI and Karen McDougal, who claimed to have had an affair with President Trump. A3935. AMI paid McDougal $150,000 for the rights to her story, which AMI also did not publish. Again, as Pecker explained, such arrangements are common in the tabloid world. A4352-4366.

AMI's dealings with Sajudin and McDougal had no legal relevance to the monthly payments that Cohen had worked out with Weisselberg. AMI was not a party to the Clifford (a.k.a. Daniels) NDA. Indeed, Pecker himself testified that he "did not consider the Stormy Daniels story to be a part of any agreement that [he] had in August 2015." A4469. And DANY never explained how the supposed falsification of internal records pertaining to alleged

reimbursements for the Clifford NDA would have aided or concealed much earlier transactions involving AMI and third parties—transactions to which neither Cohen, Clifford, nor President Trump were parties.

At the conclusion of DANY's case-in-chief, President Trump moved for a trial order of dismissal for failure to introduce legally sufficient evidence. A7345-7352. The trial court reserved decision. A7359, A7361.

Jury Instructions and Summation. Not until its proposed jury instructions did DANY finally reveal the alleged predicate crime here. Despite DANY's earlier representation to a federal judge in opposing removal that its case would stand up "even if you take the election law out of the picture," A19159, DANY asked the trial court to instruct the jury that "the other crime the defendant intended to commit, aid, or conceal is a violation of New York Election Law [S]ection 17-152," *and no other crime*. A17655. DANY's theory was that President Trump had allegedly falsified the internal payment records at issue to "cover up a conspiracy to promote or prevent the election of a candidate by unlawful means" in violation of Section 17-152. A7659; *see* A17749-17750.

DANY's proposed instructions then identified three kinds of "unlawful means" that it claimed could support this purported Section 17-152 conspiracy:

"(1) violations of the Federal Election Campaign Act"; "(2) the falsification of other business records; or (3) violation of tax laws." A17750.

DANY spent virtually all of its summation discussing the first: FECA. A7870-7874. DANY argued that AMI's payments to Sajudin and McDougal were "FECA violations" because they were "corporate campaign contribution[s]," and "corporations are not allowed to donate to candidates" under FECA. A7870. DANY also argued that Cohen's payment to Clifford supposedly to "keep her quiet for the purpose of influencing the election was a campaign contribution" that was unlawful because it "massively exceeded [FECA's] $2,700 limit" for individual campaign contributions. A7873.

As an alternate "unlawful means," DANY also half-heartedly argued that the jury could rely on Penal Law § 175.05, the misdemeanor version of the prohibition on falsification of business records. DANY pointed to "(i) bank records associated with Michael Cohen's account formation paperwork for" the accounts he had used to pay Clifford; "(ii) bank records associated with [that] wire"; (iii) another allegedly false invoice that AMI had planned to use (but never did) in connection with the McDougal payment; and "(iv) the 1099-MISC [tax] forms that the Trump Organization issued to Michael Cohen" describing the $35,000 payments as compensation rather than

reimbursements for expenses. A17752; *see* A7874-7875. DANY also briefly argued that "those 1099s . . . violated City and State and Federal Tax law, yet another unlawful means," although DANY conceded that the alleged conduct did not "result in any underpayment of taxes." A7875; *see* A17752.

DANY thus concocted a felony by combining two separate layers of misdemeanor predicates. According to DANY, President Trump committed felony (not time-barred misdemeanor) falsification of business records because he committed the misdemeanor with the intent to commit or conceal "another crime." That "[]other crime," in turn, was a misdemeanor agreement to influence an election by some other "unlawful means." And that "unlawful means," in turn, was a violation of any one of three further laws. As a bipartisan group of commentators explained at the time, DANY's case was plainly a house of cards.[2]

Compounding its error, at DANY's urging, the trial court wrongly

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[2] *See, e.g.*, Elie Honig, *Prosecutors Got Trump—But They Contorted The Law*, Intelligencer (May 31, 2024); Ruth Marcus, *The Trump Indictment Is A Dangerous Leap On The Highest Of Wires*, Wash. Post (Apr. 4, 2023); Richard L. Hasen, *Donald Trump Probably Should Have Not Have Been Charged With (This) Felony*, Slate (Apr. 4, 2024); Andrew C. McCarthy, *What Happens When The Law And The Indictment Do Not State What The Crime Is*, National Review (Apr. 30, 2024); Alan Dershowitz, *Trump's Trial Is A Stupendous Legal Catastrophe*, The Telegraph (May 8, 2024).

instructed the jury that it "need not be unanimous as to what [the] unlawful means were" to "conclude . . . that the defendant conspired to promote or prevent the election of any person to a public office by unlawful means." A17750. DANY twice emphasized that point in its summation: "you don't have to agree on what those unlawful means are." A7870; *see* A7876. Thus, the jury was permitted to convict so long as each juror individually concluded that President Trump had entered into (and intended to conceal) one of three different purported conspiracies to unlawfully influence the 2016 election, even if each juror concluded that he did *not* enter into any of the other proposed conspiracies. The trial court also rejected President Trump's request to require a special verdict form on which the jury would record its vote on each alleged "unlawful means" predicate. A17684.

On May 31, 2024, the jury returned a verdict of guilty on the 34 counts. A8017-8020. The trial court then denied, without explanation, President Trump's oral motion for judgment of acquittal. A8024-8025.

F. Post-Trial Proceedings

On July 1, 2024, the U.S. Supreme Court issued its opinion in *Trump* v. *United States*, holding that a former President is at least presumptively immune from prosecution for all official acts. 603 U.S. at 606. The Supreme

Court also held that Presidential immunity not only protects former Presidents from being "indicted based on conduct for which they are immune from prosecution," but also unequivocally bars any "use of evidence about such conduct, even when [the] indictment alleges only unofficial conduct." *Id.* at 630-631. On July 10, President Trump moved to vacate the verdict in light of the *Trump* decision, demonstrating that DANY had impermissibly introduced a great deal of evidence of his official acts as President. A17866.

The trial court denied the motion to vacate in December 2024. A20190. Several weeks later, the trial court also denied President Trump's motion to dismiss the indictment in light of his victory in the 2024 Presidential election and his status as President-Elect. A20213.

Prior to sentencing, President Trump applied to the U.S. Supreme Court for a stay, citing the evidentiary immunity recognized in *Trump*. Application for a Stay of Criminal Proceedings, *Trump* v. *New York*, 145 S. Ct. 1038 (2025) (No. 24A666). In denying this stay, the Supreme Court emphasized that "the alleged evidentiary violations at [the] state-court trial can be addressed in the ordinary course on appeal." *Trump* v. *New York*, 145 S. Ct. 1038, 1038 (2025) (mem.). Notably, four Justices dissented and would

have granted the application to stay the proceedings pending resolution of an immediate interlocutory appeal regarding Presidential immunity. *Id.*

On January 10, 2025, days before President Trump's second inauguration, the trial court sentenced President Trump to a term of "unconditional discharge." A26. This appeal followed.

STANDARD OF REVIEW

This Court reviews all questions of law *de novo*. *People* v. *Sin*, 2025 WL 1458088, at *3 (N.Y. May 22, 2025). This Court's "weight of the evidence de novo review" recognizes that "[e]ven if all the elements and necessary findings are supported by some credible evidence, the court must examine the evidence further" and "in effect, sit[] as a thirteenth juror." *People* v. *Covington*, 18 A.D.3d 65, 68 (1st Dep't 2005). In evaluating a challenge to the sufficiency of the evidence, the Court asks "whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the fact finder on the basis of the evidence at trial, viewed in the light most favorable to the People." *Id.* at 69.

ARGUMENT

This is a case of many damaging firsts. It is the first time a New York statute has ever been held to regulate political contributions to a candidate for *federal* office. It is the first time a jury has convicted a former President of a

crime based on testimony about his official acts in office. It is the first time that a jury has been excused from the requirement to unanimously agree on the unlawful object of an alleged conspiracy. It is the first time the statutory phrase "intent to defraud" has been construed to encompass a vague "intent to deceive the voting public." And it is the first time that a judge has presided over the mid-campaign prosecution of a Presidential candidate, even though the judge himself had recently contributed to the defendant's electoral opponents, and his daughter had sold partisan political ads touting that very prosecution.

In permitting this unprecedented prosecution to proceed to a jury and then to a verdict, the trial court committed at least five independent legal errors. Each independently requires that President Trump's conviction be set aside.

I. FECA'S EXPRESS PREEMPTION CLAUSE REQUIRES REVERSAL OF THE VERDICT.

President Trump's wrongful conviction rests on a preempted (and therefore constitutionally invalid) application of New York criminal law to federal electoral campaigns. To morph President Trump's alleged falsification of business records from a time-barred misdemeanor into a felony under Penal Law § 175.10, DANY was required to prove that President Trump falsified

business records with the "intent to commit another crime or aid or conceal the commission thereof." DANY offered only one such predicate crime: Election Law § 17-152, which makes it a misdemeanor for "two or more persons [to] conspire to promote or prevent the election of any person to a public office by unlawful means." The trial court gave the jury three options for the "unlawful means" that President Trump purportedly used, one of which was a conspiracy to make political contributions that violate FECA. Tellingly, DANY spent the bulk of its summation on the alleged FECA violations, A7870-7874, calling them the "most obvious" predicate "other crime." A7870.

By its terms, FECA squarely preempts that application of Section 17-152 to campaign contributions to candidates for federal office. Were it otherwise, any district attorney in New York (or any other State) could prosecute any alleged violation of FECA by packaging it as a violation of a state law like Section 17-152, even where, as here, federal authorities declined to pursue the alleged violation. *See* A2176, A2318-19, A18272. Congress foresaw and expressly foreclosed that kind of state regulation of federal campaigns. As explained below, because the jury's "general verdict of guilty may have been"—indeed, almost certainly was—"based on [this] unlawful

theory" of the supposed crime President Trump allegedly intended to conceal, the verdict must be set aside. *People* v. *Martinez*, 83 N.Y.2d 26, 33 (1993).

A. Because The Conviction Rests On A Preempted Application Of Section 17-152, It Must Be Set Aside.

1. A state law that is preempted by federal law is null and void.

Under the Supremacy Clause of the U.S. Constitution, applications of state law that are preempted by federal statute are null and void. *See Perez* v. *Campbell*, 402 U.S. 637, 649, 652 (1971) (such laws are "rendered invalid by the Supremacy Clause" and "thus may not stand"). In those instances, the state law is entirely "without effect." *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981); *see Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) ("state law is nullified to the extent that it actually conflicts with federal law").

2. FECA preempts and therefore nullifies Section 17-152 as applied to federal campaign violations.

When it comes to federal elections, Congress was clear: only the federal government may enforce federal campaign-finance law. Congress wrote the rules governing federal campaign finance into a federal statute, FECA; placed civil enforcement of the statute within the Federal Election Commission's (FEC's) "*exclusive* jurisdiction," 52 U.S.C. § 30106(b)(1) (emphasis added);

and authorized the FEC to refer "knowing and willful" violations to the U.S. Department of Justice (DOJ) for criminal prosecution, *id.* § 30109(a)(5)(C). Congress also enacted a sweeping express preemption provision: "The provisions of this Act, and of rules prescribed under this Act, *supersede and preempt any provision of State law with respect to election to Federal office*." 52 U.S.C. § 30143(a) (emphasis added). Congress used that broad language to "make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated." H.R. Rep. No. 1239, 93d Cong., 2d Sess. 10 (1974).

Here, DANY improperly charged President Trump on the theory that Election Law § 17-152 prohibits making (or conspiring to make) federal campaign contributions that are unlawful under FECA. That construction of Section 17-152 is plainly a "provision of State law with respect to election to Federal office." It is therefore expressly preempted and invalid as applied in this case.

The plain language of FECA's express preemption clause is dispositive. "[T]he primary concern of courts engaged in preemption analysis is ascertaining the intent of Congress," and "[t]here is no plainer indication of

preemptive intent than the express language of a statutory provision." *State ex rel. Grupp* v. *DHL Exp. (USA), Inc.*, 19 N.Y.3d 278, 283 (2012) (citation omitted). Here, Congress chose the most expansive language: FECA preempts "*any* provision of state law *with respect to* election to Federal office." 52 U.S.C. § 30143(a) (emphasis added). A state law "is 'with respect to' a preempted subject matter when it concerns that subject matter." *Galper* v. *JP Morgan Chase Bank, N.A.*, 802 F.3d 437, 446 (2d Cir. 2015).

FECA's preemption provision bars DANY's attempt to apply Election Law § 17-152 to regulate federal campaign contributions. To be sure, nothing in FECA limits the authority of New York to regulate *state* elections. And even with respect to federal elections, Section 17-152's prohibition on "unlawful means" may cover activities unrelated to FECA's regulation of campaign contributions—say, violence at the polls. But when, as here, DANY seeks to apply Section 17-152 to the alleged making or conspiring to make *unlawful payments* to candidates for *federal* office, that application undeniably "concerns" "election[s] to Federal office," 52 U.S.C. § 30143(a), and is plainly preempted. *See Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526 (1977) (preemption "inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied"). Federal

campaign-contribution violations are the very core of what FECA regulates, and what States may *not* regulate.

Both federal and New York courts have unanimously recognized that FECA squarely preempts state laws that "regulat[e]" the "financing of campaigns for Federal elective office." *Holtzman*, 91 N.Y.2d at 495 ("FECA occupies the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates.") (citation omitted); *see, e.g.*, *Seltzer* v. *N.Y. State Democratic Comm.*, 293 A.D.2d 172, 175 (2d Dep't 2002) (finding preempted a state law that purported to "prohibit[] a party committee from spending party funds" in federal elections); *Weber* v. *Heaney*, 995 F.2d 872, 877 (8th Cir. 1993) (finding preempted a state law that awarded state funds to candidates who agreed to limit their expenditures).[3]

[3] *See also Teper* v. *Miller*, 82 F.3d 989, 991-992 (11th Cir. 1996) (finding preempted state law "prohibit[ing] a member of the General Assembly from accepting contributions for a campaign for federal office while the General Assembly is in session"); *Central Maine Power Co.* v. *Maine Comm'n on Governmental Ethics & Election Pracs.*, 721 F. Supp. 3d 31, 43 (D. Me. 2024) (finding preempted state statute that prohibits "foreign spending in elections for federal office"); *Republican Party of New Mexico* v. *King*, 850 F. Supp. 2d 1206, 1215 (D.N.M. 2012) (same for state dollar limit on contributions to political committees that are "directed to candidates for federal elective offices").

The FEC has also issued a regulation stating that "Federal law supersedes State law concerning . . . [l]imitation on contributions and expenditures regarding Federal candidates." 11 C.F.R. § 108.7(b)(3). Again, that is precisely what Election Law § 17-152 would do on DANY's incorrect reading: regulate the kind of payments that individuals and corporations can make to federal candidates to influence a federal election.

Confirming that its prosecution of President Trump is preempted, DANY did not just read Section 17-152 to regulate contributions to federal candidates—it claimed that Section 17-152 duplicates FECA's restrictions and embeds them into New York law. At DANY's urging, the trial court instructed the jury on the elements of FECA. The court explained that the statute makes it "unlawful for an individual to willfully make a contribution to any candidate with respect to any election for federal office . . . which exceeds a certain limit" or make "a third party's payment of a candidate's expenses." A17750-17751. The trial court even defined "the term[] CONTRIBUTION" for the jury. A17751.[4]

[4] The trial court also blocked President Trump's offer of testimony from Bradley Smith, a former FEC Commissioner, regarding the application of FECA to the allegations in this case. A7052-7503, A7068-7085. The court explained that it was up to the jury "whether the alleged conduct in this case

That was all error. In adopting sweeping preemption language, Congress made clear that it was strictly prohibiting states and localities from enforcing FECA's highly technical set of campaign-finance regulations, or supplementing that federal law with copycat laws. Instead, Congress mandated that federal candidates would be governed by a uniform set of rules established by Congress itself, rather than countless bodies of law enacted by states and localities. Just as importantly, Congress intended that enforcement of those rules would be handled by a single expert federal agency that is statutorily required to have partisan balance among the commissioners, *see* 52 U.S.C. § 30106(a)(1), rather than left to state and local prosecutors—some of whom, as elected officials themselves, might be tempted to abuse campaign-finance law for partisan purposes. *See, e.g.*, 93 Cong. Rec. 7896 (1974) (statement of Rep. Thompson).

3. President Trump's conviction must be reversed because the jury's verdict rested on a preempted, and therefore invalid, state law.

Because FECA preempts the application of Section 17-152 to federal campaign contributions, President Trump could not be prosecuted for

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does or does not constitute a violation of the Federal Election Campaign Act." A7053. That explanation simply confirmed that this prosecution is preempted.

allegedly violating Penal Law § 175.10—even if (as DANY wrongly claimed) President Trump falsified business records with the intent to "commit" or "conceal" a conspiracy to violate FECA. Such a conspiracy to violate FECA cannot be unlawful under Section 17-152 because the application of Section 17-152 to an alleged FECA violation is preempted and thus null and void. DANY could not convict President Trump by proving that he intended to conceal an alleged agreement that, as a matter of law, was not a crime.

President Trump's conviction must therefore be reversed. It is established that "where the jurors in reaching their verdict may have relied on an illegal ground or on an alternative legal ground and there is no way of knowing which ground they chose," the "general verdict of guilt must be set aside." *Martinez*, 83 N.Y.2d at 32; *see People* v. *Kims*, 24 N.Y.3d 422, 438 (2014) (same). Here, the trial court instructed the jury that it could find a violation of Section 17-152 by finding "(1) violations of . . . FECA; (2) the falsification of other business records; or (3) violation of tax laws." A17750. The trial court also (wrongly) instructed the jury that it was not required to unanimously agree on any one of those predicates. It is therefore possible, and indeed highly likely, that at least one juror relied on the alleged FECA predicate in voting to convict. After all, DANY's summation specifically

invited the jury to focus primarily on the FECA violations. A7870-7876. Again, that application of Section 17-152 was undoubtedly preempted. Because the jury's "verdict may have relied on [that] illegal ground," the "general verdict of guilt must be set aside." *Martinez*, 83 N.Y.2d at 32.

Even though President Trump has repeatedly pressed preemption throughout this case, *see* A147-148; A446-447; A18235-18236, the trial court and the federal district court that considered removal did not address these arguments. That was because DANY obscured its ultimate theory of liability from both courts at the time those courts rendered their respective preemption decisions. DANY opposed removal in federal court by arguing that the "charges here *do not relate* to the specific disclosures mandated by FECA." A380 (emphasis added). DANY then repeated that argument in opposing President Trump's motion to dismiss the indictment. A1639-1640. The federal court relied on those representations and found no preemption—and thus no federal defense justifying removal—on the assumption that "the conduct prohibited by" Section 17-152 in this case would *not* be "covered by any other provision of FECA." *Trump*, 683 F. Supp. 3d at 350. Justice Merchan then adopted the federal court's reasoning without providing any further analysis. A1969. In the end, both courts' assumptions turned out to

be wrong: DANY's theory of liability so heavily depended on "the specific disclosures" and contribution limits "mandated by FECA" that (i) Justice Merchan extensively instructed the jury on those aspects of the federal statute, A17750-17751, and (ii) DANY pressed in summation that FECA violations were the "most obvious" grounds for conviction, A7870.

In reality, the federal district court's reasoning—adopted by Justice Merchan—actually *supports* preemption. The federal court repeatedly recognized that "provisions of New York's election law that" *do* "directly target campaign contributions and expenditures . . . are preempted." *Trump*, 683 F. Supp. 3d at 350; *see id.* ("FECA does not preempt . . . except if the law, *or its application, constitutes a specific regulation of conduct covered by FECA*.") (emphasis added). DANY's actual theory of Section 17-152 in fact directly targeted federal campaign contributions. That may not have been clear at the outset of this prosecution, but it was by the end. Because President Trump's conviction rests on that preempted application of Section 17-152, this Court must reverse on that ground alone.

B. FECA Also Preempts Penal Law § 175.10 As Applied To Federal Campaign Violations.

There is more. FECA preempts not just the *predicate* statute as applied here (Election Law § 17-152), but also the *charged crime itself* (Penal Law

§ 175.10) as applied here. DANY charged President Trump with allegedly falsifying business records to "commit" or "aid or conceal the commission" of an unlawful federal campaign contribution. Applied to that conduct, Section 175.10 too functions as a "provision of state law *with respect to* election to Federal office," 52 U.S.C. § 30143(a) (emphasis added), as it plainly "concerns that subject matter," *Galper*, 802 F.3d at 446. That application of Section 175.10 is accordingly preempted by FECA and is therefore null and void.

Such preemption accords with Congressional intent because FECA's scheme already comprehensively addresses the matter of public disclosure of the ways in which federal candidates finance their electoral campaigns. Specifically, FECA requires federal candidates to file detailed disclosures of campaign contributions and expenditures with the FEC. *See* 52 U.S.C. §§ 30102, 30104. Failure to comply with these reporting requirements can trigger a federal criminal prosecution. *Id.* § 30109(d).

DANY's prosecution of President Trump for allegedly mislabeling the purpose of supposed campaign-related payments in internal records effectively duplicates that kind of federal case under FECA—which, again, federal authorities chose not to pursue. DANY cannot avoid preemption by reframing the alleged failure to report a campaign contribution as a failure to

accurately document that contribution. Permitting such an easy workaround would contravene Congress's evident desire to ensure that "Federal law will be the sole authority under which such elections will be regulated," H.R. Rep. No. 1239, at 10, as well as the Supremacy Clause.

II. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF OFFICIAL PRESIDENTIAL ACTS.

President Trump's conviction must also be set aside because the trial court repeatedly erred in admitting evidence of President Trump's official acts as President, in violation of the evidentiary immunity later confirmed by the Supreme Court in *Trump*, 603 U.S. at 631.

A. DANY Impermissibly Used President Trump's Official Acts As Evidence At Trial.

In *Trump*, the Supreme Court held that a former President is "entitled to immunity" from "criminal prosecution for official acts during his tenure in office." 603 U.S. at 606. Such immunity, the Court reasoned, is necessary to "ensure that the President can undertake his constitutionally designated functions effectively, free from undue pressures or distortions" caused by the fear of future prosecution. *Id.* at 615.

Critically here, this immunity not only protects former Presidents from being "indicted based on conduct for which they are immune"—which

presumptively includes all official Presidential acts—but also bars any use at trial "of evidence about such conduct, even when an indictment alleges only unofficial conduct." *Trump*, 603 U.S. at 631. The Supreme Court explained that 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," as it would "permit a prosecutor to . . . invite the jury to examine [such] acts" and "thereby heighten the prospect that the President's official decisionmaking will be distorted." *Id.* (citations omitted). The Court also stressed that "[a]llowing prosecutors to ask or suggest that the jury probe official acts" would "raise a unique risk that the jurors' deliberations will be prejudiced by their views of the President's policies and performance while in office." *Id.*

In violation of those constitutional mandates, the trial court repeatedly "admit[ted] testimony or private records of the President or his advisers probing [his] official act[s]," and improperly allowed DANY to "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 relevant here, DANY introduced at least four categories of impermissible official-acts evidence at trial.

1. Discussions With The White House Communications Director. DANY subpoenaed Hope Hicks, White House Communications Director during the first Trump Administration, to testify about certain conversations she had with President Trump in the Oval Office in early 2018. A5195. Hicks testified that she had discussed with the President "how he would like a team to respond to" a forthcoming article in the Wall Street Journal about the Clifford NDA. A5285. She testified that she discussed with the President the content of specific statements to appear in the story from a "White House official." A5283, A5286-5287. Hicks also testified that she and President Trump discussed how a different New York Times article "was playing," as well as Hicks's "thoughts and opinion about th[e] story." A5287-5289. And Hicks also testified that she and the President discussed the "news coverage of" an interview Karen McDougal gave to CNN and "how [that story] was playing out" as well. A5282-5283.

All of this testimony is prohibited by *Trump*, which squarely held that a President's "discussions with" government officials about "their official responsibilities" or "official matters," or that "concern [the official's] role," "are readily categorized" as "official conduct." 603 U.S. at 617, 622-624, 637. Discussions between the President and the White House Communications

Director concerning coverage of the President's fitness for office, and the White House's official response, concern Ms. Hicks's official role as White House Communications Director. Were there any doubt, Ms. Hicks testified without contradiction that her official responsibilities included "coordinating all of the communication efforts for the Administration from the White House throughout all of the agencies, and making sure that each of [the] principals of the agencies and the agencies themselves were prioritizing Mr. Trump's agenda" and "capitaliz[ing] on any opportunities to showcase . . . the President in a good light." A5278.

The trial court erroneously held that President Trump's communications with Hicks were not official because, in the court's view, they were "about personal matters involving an alleged affair and a sexual encounter that occurred prior to [President Trump] taking . . . office." A20170. But discussions about how to *respond* to those matters of public concern were undoubtedly official. The press strategy of the White House and the content of on-the-record statements to be credited to a "White House official," A5286, were official government business, not simply "personal matters." Clifford's accusations against President Trump were matters that could directly affect the President's "prestige as head of state and his influence upon public

opinion." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

Indeed, the Supreme Court has stated that when the President or "persons authorized to speak for the President publicly . . . deny[]" allegations of misconduct occurring before taking office, such denials "may involve conduct within the outer perimeter of the President's official responsibilities." *Clinton* v. *Jones*, 520 U.S. 681, 686 (1997); *see Council on Am. Islamic Relations* v. *Ballenger*, 444 F.3d 659, 664-666 (D.C. Cir. 2006) (finding "clear nexus between [a] congressman answering a reporter's question about the congressman's personal life and [his] ability to carry out his representative responsibilities effectively," bringing such statements within the scope of his official employment). Thus, statements by White House officials in other Administrations, such as those concerning President George W. Bush's college grades or President Obama's relationship with his former pastor, were clearly official. So too here.

The trial court also claimed that President Trump had not "referenced any Constitutional authority upon which he was acting" in his discussions with Ms. Hicks. A20169. But *Trump* is clear that "Presidential conduct . . . certainly can qualify as official even when not obviously connected to a

particular constitutional or statutory provision." 603 U.S. at 618. And one of the Supreme Court's examples applies here: the "long-recognized aspect of Presidential power" of "using the office's 'bully pulpit' to persuade Americans," including by speaking on "matters of public concern that may not directly implicate the activities of the Federal Government." *Id.* at 629. When a President or other government officials speak about accusations of misconduct, they are undoubtedly addressing a matter of public concern.

2. Official Presidential Statements On Twitter. DANY also introduced several sets of posts by President Trump, made while in office, on a Twitter account that he consistently used for official White House communications. A6059-6060. One post in April 2018 criticized The New York Times for "going out of their way to destroy Michael Cohen and his relationship with [President Trump] in the hope that he will 'flip.'" A17501. Another was a May 2018 post in which President Trump reported to the public facts that he had learned about the Clifford NDA and the way in which Cohen had been reimbursed. A17502-17504. Two other posts criticized Cohen in connection with his decision to falsely accuse President Trump of wrongdoing. A17505-17506.

Trump makes clear that these statements were official acts: "most of a President's public communications," including "*in the form of Tweets*," "are likely to fall comfortably within the outer perimeter of his official responsibilities." 603 U.S. at 629 (emphasis added). Although the format, content, and style of these statements may have differed from official statements made by Presidents who served before social media, that is irrelevant. President Trump used an official communications channel of the White House to "speak[] forcefully or critically . . . in ways that [he] believe[d] would advance the public interest." *Id.*

The trial court wrongly held otherwise on the ground that, in its view, President Trump's statements did "not advance a policy concern or other public interest." A20183; *see, e.g.*, A20184 (concluding that one statement, "in this Court's view, merely contains [President Trump's] thoughts on the services of his former private attorney" Michael Cohen). But the Supreme Court made clear that Presidential speech is official when "*the President believes*" he is "persuad[ing] Americans" on a "matter[] of public concern" "in ways that . . . advance the public interest." *Trump*, 603 U.S. at 629 (emphasis added). It is up to the President to decide when, and how, "to speak to his fellow citizens and on their behalf" in that official capacity. *Id.* It was not up

to the trial court to second-guess the "officialness" of such statements on the ground that, in the court's view, they did not "advance . . . [a] public interest," A20183.

To be sure, *Trump* recognized that the President "may" sometimes "speak[] in an unofficial capacity," "perhaps as a candidate for office or party leader." 603 U.S. at 629. But the Supreme Court also made clear that the categorization would depend on an "objective analysis" of the attendant circumstances, *id.*, not a subjective determination of how "official" a statement seems to a prosecutor or judge later. The court might, for example, look to "who was involved in transmitting the electronic communication[]" at issue. *Id.* at 630.

Here, the only testimony on that score came from the Special Assistant to the President and Director of Oval Office Operations Madeleine Westerhout, who testified that both she and another government employee assisted President Trump with posting the statements on Twitter. A6059-6060. As the Supreme Court explained in a related context, "an official who uses government staff to make a post" on a social media platform "will be hard pressed to deny that he was conducting government business." *Lindke* v. *Freed*, 601 U.S. 187, 203 (2024); *see Knight First Amend. Inst. at Columbia*

Univ. v. *Trump*, 928 F.3d 226, 234 (2d Cir. 2019) ("We conclude that the evidence of the official nature of [President Trump's Twitter account] is overwhelming."), *vacated as moot*, 141 S. Ct. 1220 (2021).

3. Discussion With The Attorney General. DANY elicited testimony from Michael Cohen about a conversation he had with AMI's David Pecker, whose company had received an FEC complaint alleging violations of FECA. According to Cohen, he assured Pecker that "[i]t's going to be taken care of." A6642. Cohen then elaborated that "the person . . . who [was] going to be able to do it [was] Jeff Sessions," A6645, and that President Trump had supposedly told Cohen that the FEC complaint would "be taken care of" by Attorney General Sessions. A6645.

To be clear, President Trump denies any such interaction with then-Attorney General Sessions about a pending FEC complaint. The point here, however, is that DANY introduced evidence that such immunized official conduct did occur. Under *Trump*, Presidential evidentiary "immunity extends to official discussions between the President and his Attorney General." 603 U.S. at 637. Such purported discussions, whatever their motivation, "plainly implicate Trump's conclusive and preclusive authority" under the Constitution "to decide how to prioritize and how aggressively to pursue legal actions

against defendants who [allegedly] violate the law." *Id.* at 620 (internal quotation marks omitted).

The trial court mistakenly reasoned that an FEC investigation falls outside the President's and Attorney General's official powers. It determined that the "FEC has exclusive jurisdiction with respect to the civil enforcement of FECA" and that, as a consequence, "neither the President nor the Attorney General has authority to interfere with an FEC investigation." A20181 (internal quotation marks omitted). That was doubly wrong. First, complaints before the FEC can lead to criminal referrals and prosecution by the Department of Justice. *See* 52 U.S.C. § 30109(a)(5)(C). More fundamentally, the U.S. Constitution empowers the President to supervise and direct the Executive Branch's handling of FEC complaints, whether by DOJ or the FEC. As *Trump* explained, the President's duties "plainly encompass[] enforcement of federal election laws passed by Congress." 603 U.S. at 627. That is because the "entire 'executive power' belongs to the President alone." *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 213 (2020). The trial court's apparent view that the FEC is a fourth branch of the federal government—free of supervision by the President—was simply incorrect. *Id.* at 216 n.2; *see, e.g.*, *Trump* v. *Wilcox*, 145 S. Ct. 1415, 1415 (2025).

4. Exercise Of Article II Authority And Operation Of The White House. Finally, DANY also subpoenaed Westerhout to testify at length about President Trump's "work habits," "preferences," "practices," and "contacts" while serving as President. A17879-17880; *see* A6054-6060. Based on her former position as Director of Oval Office Operations, Westerhout testified about "calls made by the situation room" to President Trump. A6056. She testified that President Trump preferred hard-copy documents and "often brought things back and forth to his residence or Air Force One or Marine One" to review. A6056-6057. She also testified in detail about how President Trump crafted his official statements on Twitter, including that he "like[d] to see the tweets that went out" and that "there were certain words that he liked to capitalize." A6059-6060.

This testimony, too, undoubtedly "threaten[ed] the independence [and] effectiveness of the Executive," as it invited the jury to scrutinize the "President's exercise of his official duties" in a "highly intrusive" manner. *Trump*, 603 U.S. at 632 n.3 (quoting *Trump* v. *Vance*, 591 U.S. 786, 805 (2020)). Just as prosecutors may not compel a legislative aide to testify in detail about how his boss whips votes, *see Gravel* v. *United States*, 408 U.S. 606 (1971), or require a judge's law clerk to testify in detail about how the judge drafts

opinions, prosecutors may not expose the general functioning of the office of the Presidency to such "probing," "second-guessing," or "inspection." *Trump*, 603 U.S. at 632 n.3.

B. The Errors Require Reversal Of President Trump's Conviction.

The trial court's error in permitting DANY to introduce immunized testimony about official Presidential acts compels reversal. *First*, President Trump's Presidential evidentiary immunity arguments are not waivable and are fully preserved. *Second*, violations of that immunity are structural errors under the U.S. Constitution that cannot be assessed under a harmless-error standard and instead require automatic reversal. *Third*, even under harmless-error review, which does not apply, the trial court's admission of official-acts testimony was not close to "harmless beyond a reasonable doubt." *People* v. *Ayarde*, 161 A.D.3d 630, 631 (1st Dep't 2018). The trial court erred in concluding otherwise in its post-trial ruling. *See* A20186-20187.

1. President Trump's immunity arguments are fully preserved.

The trial court correctly held that President Trump preserved his objection to the testimony of Hope Hicks and to the official statements on Twitter discussed above. A20161, A20163, A20165. The court disagreed,

however, that President Trump had preserved an objection to Cohen's testimony regarding Attorney General Sessions or to the testimony of Madeleine Westerhout. The trial court reasoned that President Trump's counsel did not specifically object during the relevant colloquies at trial. A20162-20165. Nevertheless, the trial court went on to consider the merits of President Trump's immunity arguments regarding both categories of evidence. A20171-20174, A20175-20181.

There was no failure to preserve here. *First*, as explained below (at pp. 58-61), violations of Presidential evidentiary immunity cannot be waived or forfeited. Rather, such errors are structural or "mode of proceedings" errors that are "exempt from preservation requirements." *People* v. *Feliz*, 66 A.D.3d 503, 503 (1st Dep't 2009) (citation omitted).

Second, President Trump fully preserved his objections to the challenged testimony of Cohen and Westerhout. It is black letter law that a defendant is "not required, in order to preserve a point, to repeat an argument that the court ha[d] definitively rejected." *People* v. *Finch*, 23 N.Y.3d 408, 413 (2014). That principle applies here in spades. Long before Westerhout or Cohen ever took the stand, President Trump filed a pre-trial motion seeking to preclude official-acts evidence, including specifically testimony from Cohen

"about [his] conversations with President Trump . . . as President," A2751. President Trump also sought a writ of prohibition from this Court seeking the same ruling. *Trump* v. *Merchan*, Case No. 2024-02413, NYSCEF Doc. No. 5 ¶¶ 241-244 (1st Dep't Apr. 10, 2024). He then again renewed that request during jury selection. A17611. All three motions were denied.

Then, when Hope Hicks took the stand during the trial (before Westerhout or Cohen), President Trump *yet again* renewed his Presidential evidentiary immunity objection. A5189-5190. DANY responded that President Trump's proposed "rule of inadmissibility . . . does not exist and is not a rule." A5189-5190. The trial court agreed and overruled the objection, stating that it had already "ruled on this," and that *counsel did not "need to object as to each question*." A5190 (emphasis added). President Trump's counsel followed that direction and thus declined to lodge repeat immunity objections to Cohen's and Westerhout's testimony. After all, the court had already ruled that no such immunity exists as a matter of law and advised that no further objections were necessary. That is not forfeiture.

Third, this Court can and should resolve what even the trial court recognized were "very significant constitutional question[s]," A20154 (quoting *Trump*, 603 U.S. at 616), in the interests of justice. *See, e.g.*, *People* v. *Rosado,*

96 A.D.3d 547, 548 (1st Dep't 2012). After all, the trial court has already rendered a lengthy merits decision on immunity guided by the parties' "exhaustive[]" briefing below. A20156.

2. Violations of Presidential evidentiary immunity are *per se* reversible errors.

The trial court's mistaken decision to admit testimony barred by the Presidential evidentiary immunity requires automatic reversal, without resort to harmless-error review. The U.S. Supreme Court has long held that certain violations of the U.S. Constitution are "structural" and require automatic reversal regardless of their impact on the trial. *Weaver* v. *Massachusetts*, 582 U.S. 286, 294 (2017). New York law recognizes a similar category of "mode of proceedings" errors that rise to the level of a "*fundamental* defect[] in judicial proceedings" and thus require *per se* reversal. *See People* v. *Agramonte*, 87 N.Y.2d 765, 769-770 (1996); *People* v. *Robinson*, 144 A.D.3d 40, 43 (1st Dep't 2016). Whether a federal constitutional violation is a structural error is a "federal question" to be decided under "the Federal Constitution itself." *Chapman* v. *California*, 386 U.S. 18, 21 (1967). As the Supreme Court explained in *Weaver*, "at least three broad rationales" support treating an error as structural. 582 U.S. at 295. The Court's discussion of Presidential evidentiary immunity in *Trump* implicates all three separate rationales.

First, "an error has been deemed structural . . . if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Weaver*, 582 U.S. at 295. That describes the Presidential evidentiary immunity to a tee: It "protect[s] *not the President himself, but the institution of the Presidency*," *Trump*, 603 U.S. at 632 (emphasis added), and guards against harms to that institution that would result "[e]ven if the President were ultimately not found liable," *id.* at 637. Given the threat to the Presidency as an institution, the Court made clear that the ordinary "prosaic tools" courts use "to protect the constitutional rights of individual criminal defendants," such as "evidentiary rulings and jury instructions," do not "protect adequately" that institution. 603 U.S. at 631-632.

Second, a "structural error" is one that "affect[s] the framework within which the trial proceeds." *Weaver*, 582 U.S. at 295. Presidential evidentiary immunity checks that box too. *Trump* held that immunity determinations "must be addressed at the outset of a proceeding," not left to the exercise of the President's "procedural rights" to object "during trial." 603 U.S. at 636. Again, the ordinary tools such as "as-applied challenges in the course of the trial," "evidentiary rulings," and "jury instructions" do not "suffice to protect Article II interests." *Id.* at 632, 635.

Third, "an error has been deemed structural if the effects of the error are simply too hard to measure" or "always result[] in fundamental unfairness." *Weaver*, 582 U.S. at 295-296. That yet again describes Presidential evidentiary immunity. As *Trump* explained, "allowing prosecutors to ask or suggest that the jury probe official acts for which the President is immune" raises "a unique risk that the jurors' deliberations will be prejudiced by their views of the President's policies and performance while in office," rather than guided by a fair assessment of the evidence. 603 U.S. at 631, 632 n.3. Put differently, inviting exploration of the President's performance in office—as happened here—will always result in a fundamentally unfair trial.

In addition to the three *Weaver* rationales, the limited precedent addressing trial violations of the Speech or Debate Clause evidentiary immunity for legislators, U.S. Const. art. 1, § 6, cl. 1, confirms that the error here is structural. Like Presidential evidentiary immunity, Speech or Debate immunity prohibits the use at trial of "evidence of legislative acts" or "the legislator's motivation in conducting official duties." *United States* v. *Helstoski*, 442 U.S. 477, 489-490 (1979). Federal courts of appeals have recognized that if a violation of Speech or Debate Clause immunity "occurs at

trial, a conviction cannot stand." *United States* v. *Swindall*, 971 F.2d 1531, 1549 (11th Cir. 1992); *see id.* at 1546 n.19 ("[V]iolations of the privilege at trial, if they stood alone, would require a new trial on the affected counts."); *see United States* v. *Dowdy*, 479 F.2d 213, 227-228 (4th Cir. 1973) (reversing convictions where jury "was permitted to rely on evidence of legislative acts").

If the improper admission of evidence in these cases—which feature the prosecution of individual members of the legislature—constitutes a structural error, then the same result must follow *a fortiori* when the prosecution is directed at the President. Unlike Congress, which comprises multiple members, "[t]he President occupies a unique position in the constitutional scheme as the only person who alone composes a branch of government." *Trump*, 603 U.S. at 610. Erosion of the immunities that undergird the proper functioning of the Presidency thus poses a unique risk to the "effective functioning of government." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 751 (1982). Given the "singular importance of the President's duties," *id.*, the immunities that attach to the Executive must, at a minimum, match those afforded to other branches.

3. DANY's introduction of the inadmissible official-acts evidence was not harmless beyond a reasonable doubt.

The trial court's errors require reversal even if harmless-error analysis applies. A "constitutional error may be harmless only if it is harmless beyond a reasonable doubt, that is, there is *no reasonable possibility* that the erroneously admitted evidence *contributed to the conviction*." *People* v. *Hamlin*, 71 N.Y.2d 750, 756 (1988) (emphasis added). "In making that determination, the court considers two discrete factors: (1) the quantum and nature of the evidence against defendant if the error is excised and (2) the causal effect the error may nevertheless have had on the jury." *Id.*; *see People* v. *Davis*, 225 A.D.3d 62, 80 (1st Dep't 2024).

First, the evidence that President Trump knew about or intended to conceal any supposed illegality associated with the Clifford NDA was exceedingly weak. The *only* direct evidence that President Trump was contemporaneously aware of Cohen's dealings with Clifford, let alone Cohen and Weisselberg's reimbursement arrangement, is the word of one man: Michael Cohen. But Cohen is a serial perjurer and convicted fraudster who had previously told even his own attorneys that President Trump had no such

contemporaneous knowledge. *See supra*, p. 11.[5] And Cohen had an obvious motive to pivot to change his story in late 2018: to try to garner leniency as he faced prison time including for unrelated wrongdoing. As the Court of Appeals has explained, "unless the proof of the defendant's guilt, without reference to the [erroneously admitted testimony], is overwhelming," the error cannot be deemed harmless. *People* v. *Crimmins*, 36 N.Y.2d 230, 240 (1975). And the "prosecution's case" is almost by definition "less than overwhelming" when it "rest[s] on the testimony of" a single witness "whose credibility was impugned." *People* v. *Simmons*, 75 N.Y.2d 738, 739 (1989) (finding error not harmless).

In concluding otherwise, the trial court stated that it had "form[ed] an opinion as to [Cohen's] credibility" and "[did] in fact credit his testimony." A20187. But the harmless-error question is whether a *reasonable jury* could have disagreed with that assessment, not whether the trial court actually did disagree. A reasonable jury certainly could have distrusted Cohen. *See, e.g.*,

[5] Cohen even testified in this very case that his sworn confessions to these crimes were themselves lies, echoing a claim he had made while testifying in another case. A6887-6888. As a federal district court rightly pointed out, that leaves only two logical possibilities: "one, Cohen committed perjury when he pleaded guilty," "or, two, Cohen committed perjury in his [later] testimony." *United States* v. *Cohen*, 724 F. Supp. 3d 251, 257 (S.D.N.Y. 2024).

People v. *Roman*, 217 A.D. 2d 431, 432 (1st Dep't 1995) (reversing conviction as against the weight of the evidence based on the "many indicia of the complainant's unreliability as a witness," which was obvious "even on a cold record"); *People* v. *Delvalle*, 229 A.D.3d 715, 719 (2d Dep't 2024) (same where conviction rested on testimony of complainant who "suffered . . . credibility issues" and "had a strong motive to" lie on the stand). Cohen's credibility was so plainly impeachable that even DA Bragg himself reportedly told Pomerantz that he "'could not see a world' in which [DANY] would indict Trump and call Michael Cohen as a prosecution witness." A459.

Second, especially in light of Cohen's unreliability, there is at least a "reasonable possibility" that the official-acts evidence at issue "*might have contributed*" to the jury's determination. *Crimmins*, 36 N.Y.2d at 237 (emphasis added). Indeed, DANY repeatedly invoked that evidence—especially during its summation—to try to bolster its allegation that President Trump knew all along about the Clifford NDA and reimbursement arrangement with Cohen.

Start with Hicks's Oval Office testimony. In summation, DANY relied heavily on that testimony in trying to rebut the argument that "Weisselberg and Cohen approve[d] th[e] reimbursement scheme all on their own," without

President Trump's knowledge. A7804. DANY pointed to President Trump's supposed 2018 statement to Hicks, in the Oval Office, that "it was better to be dealing with" stories about the Clifford NDA "now," and that "it would have been bad to have that story come out before the election." A7815. According to DANY, that reaction corroborated "Cohen['s] testi[mony] that Mr. Trump told him to push the [Clifford] deal out as long as possible, because if he wins, it will have no relevance because he'll already be President." A7816.

DANY thus characterized Hicks's testimony *regarding her conversation with the President in the Oval Office* as "devastating," and claimed that she had "put[] the nail in Mr. Trump's coffin," as supposedly shown by Hicks's "burst[ing] into tears" during her trial testimony. A7815. DANY touted Westerhout's testimony much the same way, calling it a "damaging" and "critical piece[] of the puzzle." A7666. Clearly, "devastating" and "critical" evidence, hammered by the prosecution as "the nail in the coffin," cannot have been harmless beyond a reasonable doubt. *See People* v. *Thompson*, 111 A.D.3d 56, 69 (2d Dep't 2013) ("It is proper to consider" how the "prejudicial effect of [improper evidence] was compounded by the prosecutor's remarks in summation.").

DANY also invoked President Trump's official statements on Twitter as key evidence of his knowledge and intent, arguing that they reflected consciousness of guilt and a motive to entice Cohen not to cooperate, or to intimidate him out of cooperating, with FECA-related investigations. *See*, *e.g.*, A6657 (Q: "What, if any, understanding did you have about that public statement?" A: "That Mr. Trump did not want me to cooperate with [sic] Government and certainly not to provide information or flip."). DANY stressed that theme in summation as well. *See, e.g.*, A7824 ("Cohen told you he interpreted this Tweet the way anyone would, as a way that Mr. Trump was communicating with him, without picking up the phone directly at this point, to send him the message: Stay in the fold. Don't flip."); A7834 ("These tweets were . . . designed to send a clear message to other potential witnesses: Cooperate, and you will face the wrath of Donald Trump."). DANY thus did precisely what the Supreme Court outlawed in *Trump*, "invit[ing] the jury to inspect the President's motivations for his official actions and to second-guess their propriety." 603 U.S. at 632 n.3.

DANY also emphasized in its summation Cohen's claim that the President had discussed with the Attorney General blocking any FEC inquiry. *See* A7817 (Cohen "told Pecker that he had nothing to worry about, that

President Trump had Attorney General Jeff Sessions in his pocket."). DANY used that testimony to further argue President Trump's knowledge and intent, implying that the President would speak to the Attorney General, and convey their conversation to Cohen, only if the President knew that he had a crime to conceal. Because DANY could muster no better evidence than this secondhand account, it cannot be deemed harmless beyond a reasonable doubt. Nor can any of the other testimony of official Presidential conduct that DANY impermissibly introduced at trial.

III. THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT IT DID NOT NEED TO UNANIMOUSLY AGREE ON THE "UNLAWFUL MEANS" UNDER ELECTION LAW § 17-152.

DANY was required to prove that President Trump falsified the records with the "intent to commit another crime or aid or conceal the commission thereof." Penal Law § 175.10. DANY offered only one such "[]other crime": Election Law § 17-152, which makes it a misdemeanor for "two or more persons to conspire to promote or prevent the election of any person to a public office by unlawful means." The trial court charged the jury that, to convict, it had to "conclude unanimously that the defendant conspired to promote or prevent the election of any person to a public office by unlawful means." A17750. But the court then further instructed the jury—as requested by

DANY (A17656), and over President Trump's objection (A17684)—that the jury "need *not* be unanimous as to what those unlawful means were." A17750 (emphasis added). As explained above, the trial court instructed the jury that it could "consider" three such unlawful means, without requiring unanimity: violations of FECA, falsification of other business records, and violations of tax law. A17750. The court issued no written or oral decision providing its reasoning for giving that non-unanimity instruction or denying President Trump's competing request that the jury be required to unanimously agree, *see* A17684.[6]

For two reasons, the trial court committed reversible error in instructing the jury that it could convict President Trump without

[6] In claiming below that President Trump later waived that unanimity demand during the charge conference, A17982-17983, DANY miscited a colloquy in which President Trump's counsel was arguing in the alternative. In context, counsel was clear that President Trump's proposed instruction requiring unanimity was "an accurate statement of the law," A7474; *see* A17684 (citing authority for that view). Counsel *also* argued that the court "ha[d] some discretion" to require the jury to be unanimous even if it disagreed with President Trump and read the statute not to require such unanimity, A7471. Making two alternative arguments does not waive either argument. In any event, the issue was briefed and argued at length before the trial court, *see* A17684; A17656; A17690.10-17690.11; A7471-7476, and will be fully briefed here, so there is no prejudice to DANY from this Court's considering the question in the interest of justice. *See Rosado*, 96 A.D.3d at 548 (addressing unpreserved claim of instructional error); *Peguero* v. *601 Realty Corp.*, 58 A.D.3d 556, 563-564 (1st Dep't 2009) (same).

unanimously agreeing on the "unlawful means" component of the Section 17-152 predicate. *First*, New York law requires that the jury unanimously agree on the "unlawful means" because the object of a Section 17-152 conspiracy is an element of the offense. *Second*, convicting President Trump absent such unanimity violated his rights under the Due Process Clauses of the United States and New York Constitutions. *See* U.S. Const. amend. XIV, § 1; N.Y. Const. art. I, § 6.

A. Election Law § 17-152 Required The Jury To Unanimously Agree On The "Unlawful Means" That Are The Object Of The Alleged Conspiracy.

It is "axiomatic" that the prosecution must "prove independently every element of the crime," *Schad*, 501 U.S. at 636, to the satisfaction of a unanimous jury, *People* v. *DeCillis*, 14 N.Y.2d 203, 205 (1964). But state "legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements," *Schad*, 501 U.S. at 636, allowing the jury to convict without being "unanimous on one theory or the other," *People* v. *Mateo*, 2 N.Y.3d 383, 406 (2002). For example, in a trial for murder, the jury need not unanimously agree whether the defendant pulled the trigger or commanded another to do so. *Id.* at 408. Whether "statutory alternatives constitute independent elements" (and thus require unanimity) or

are mere alternative modes of commission (and thus do not) is a "question of statutory construction." *Schad*, 501 U.S. at 636.

Because violations of Election Law § 17-152 have virtually never before been prosecuted, there is no case law or other authority setting forth its elements. Nevertheless, it is clear that the "unlawful means" of influencing an election is an *element* of the Section 17-152 offense, and thus a matter on which the jury must be unanimous to find that a crime was committed.

1. Section 17-152 is a conspiracy provision where the "unlawful means" is the object of the conspiracy: it forbids "two or more persons [to] *conspire* to promote or prevent the election of any person to a public office *by unlawful means*." Entering into an agreement with another person to promote an electoral candidate is not illegal; it is politics. The sole aspect of an alleged agreement to influence an election that makes it a Section 17-152 *conspiracy* is the agreement to use unlawful means to that end. Thus, the particular unlawful means to be deployed is the object of the conspiracy—the illegal act which the conspirators are agreeing to commit.

Under both New York law and federal law, the universal rule for conspiracy offenses is that the "defendant must be shown to have agreed to commit a *particular offense* and not merely a vague agreement to do

something wrong." *United States* v. *Salameh*, 152 F.3d 88, 147 (2d Cir. 1998) (internal quotation marks omitted). Thus, when "an indictment alleges a conspiracy with multiple object offenses, the jury must unanimously agree on a specific object offense." *United States* v. *Vernon*, 723 F.3d 1234, 1263 (11th Cir. 2013). It is not enough for all twelve jurors to agree that there was some conspiracy if they disagree on *what* the would-be offenders conspired to do.

As this Court has recognized, "the essence of the [conspiracy] offense is an agreement to cause *a specific crime* to be committed." *Robinson* v. *Snyder*, 259 A.D.2d 280, 281 (1st Dep't 1999) (emphasis added); *see People* v. *Ozarowski*, 38 N.Y.2d 481, 489 (1976) (explaining that the government is "required to prove intent to commit the specific crimes charged" in a conspiracy case). The New York pattern jury instructions for general conspiracy (*see* Penal Law §§ 105.00 to 105.17) thus require the government to "specify the object crime." They state that the jury must find the "element[]" that the defendant "agreed with one or more persons to engage in or cause the performance of conduct constituting the felony of *(specify object felony)*." President Trump is aware of no conspiracy conviction under New York law in which the jury did not unanimously agree on the object of the conspiracy.

The same rule applies to federal conspiracy prosecutions. *See People* v. *Kase*, 76 A.D.2d 532, 537 (1st Dep't 1980) (looking to "[t]he Federal rule" when interpreting New York statute with federal analogue). As every federal court of appeals to address the issue has concluded, "the object offense of the conspiracy is an element of the crime," and "the jury must unanimously decide which crime the defendant conspired to commit." *United States* v. *Tragas*, 727 F.3d 610, 616 (6th Cir. 2013); *see, e.g.*, *Vernon*, 723 F.3d at 1263 (11th Cir. 2013); *United States* v. *Mauskar,* 557 F.3d 219, 227 (5th Cir. 2009); *United States* v. *Capozzi*, 486 F.3d 711, 717-718 (1st Cir. 2007); *United States* v. *Pierce,* 479 F.3d 546, 552 (8th Cir. 2007); *United States* v. *Griggs*, 569 F.3d 341, 344 (7th Cir. 2009). For example, a defendant cannot be convicted of conspiracy if six jurors agree that he conspired to sell drugs and six others agree that he conspired to commit securities fraud. In that case, "the defendant would have been convicted of a crime—actually of two crimes—on the basis of a nonunanimous jury verdict, and the convictions would have to be set aside." *Griggs*, 569 F.3d at 343-344.

Section 17-152 must operate the same way. If half the jurors here believed that there was a conspiracy to influence the 2016 election only by the "unlawful means" of violating FECA, and the other half believed that there

was a conspiracy to influence the election only by the "unlawful means" of committing tax fraud, then the jury could not have convicted. In that scenario, the jurors would simply have "fail[ed] to agree on the crime that [was] committed." *Griggs*, 569 F.3d at 344; *cf. People* v. *Keindl*, 68 N.Y.2d 410, 418 (1986) (explaining that New York's bar on duplicitous counts protects defendants from "stand[ing] convicted under [one] count even though the jury may never have reached a unanimous verdict as to any one of the [duplicitous] offenses").

2. The U.S. Supreme Court's decision in *Richardson* v. *United States*, 526 U.S. 813 (1999), confirms that President Trump's conviction cannot stand. In *Richardson*, as here, the Court construed a novel statute to determine whether a certain requirement is an element requiring a unanimous jury determination. *Richardson* concerned 21 U.S.C. § 848(a), which prohibits engaging in a "continuing criminal enterprise" and defines such an enterprise to involve "a continuing series of violations" of federal drug laws. The Supreme Court interpreted the statute to require a jury to "agree unanimously about which specific violations make up the 'continuing series,'" because "each 'violation' . . . amounts to a separate element." 526 U.S. at 815, 818. As the Court explained, "the criminal law ordinarily entrusts a jury with

determining whether alleged conduct 'violates' the law," and the "jury must act unanimously when doing so." 526 U.S. at 818.

The same reasoning applies here. There is nothing unlawful about two persons agreeing to "promote or prevent the election" of a given person—indeed, that describes every political campaign ever formed. The agreement to influence a given election becomes illegal under Election Law § 17-152 only if the parties agree to use some "unlawful means" to achieve that end. It is therefore "consistent with . . . tradition" to require the jury to unanimously agree on the "act or conduct that [was] contrary to law" that the defendant allegedly conspired to pursue. *Id.* at 818.

3. If there were any ambiguity in Section 17-152, its "unlawful means" requirement must be construed as an element of the offense to avoid the serious constitutional concerns discussed at pp. 76-78, *infra*. *See People* v. *Epton*, 19 N.Y.2d 496, 505 (1967) (New York courts have an "obligation to construe[]" statutes "so as to preserve [their] constitutionality" in "harmony with the United States Constitution and the Constitution of the State of New York"). Just as in *Richardson*, permitting conviction under Section 17-152 without unanimous agreement on the "unlawful means" at issue would "risk[] serious unfairness" to defendants. 526 U.S. at 819-820. In *Richardson*, the

Supreme Court was concerned that there were at least 90 possible "violations" of the drug laws that could serve as a predicate, "aggravat[ing] the risk" that non-unanimity would "cover up wide disagreement among the jurors about just what the defendant did, or did not, do." *Id.* at 819. The same type of risk is present here because the "unlawful means" element of Election Law § 17-152 presumably encompasses *all* possible civil and criminal violations of both state and federal law. As explained below, that breadth of possibilities creates both notice and fairness problems that would violate due process if treated as mere alternative ways of committing a single crime.

4. In support of its irregular request for a non-unanimous instruction below, DANY compared Election Law § 17-152 to the offenses of burglary and larceny. A17656; A17690.10. In a burglary prosecution, the government "need not establish what particular crime the intruder intended to commit" after unlawfully entering. *People* v. *Mackey*, 49 N.Y.2d 274, 279 (1980). Similarly, "juror unanimity is not required as to the particular method by which [a] larceny is committed." *People* v. *Watson*, 284 A.D.2d 212, 213 (1st Dep't 2001). These analogies do not work.

Both larceny and burglary are clearly distinguishable from a Section 17-152 conspiracy to influence an election by unlawful means. New York's larceny

statute clearly states that "the particular way or manner in which [the] property was stolen" is *not* an element of the offense. Penal Law § 155.45. Not so for Election Law § 17-152—the "unlawful means" at issue is the *sine qua non* of the crime.

As for burglary, as the Court of Appeals explained in *Mackey*, "the reason for the rule is pragmatic: intent is subjective," so if the "State must prove an intent to commit a particular crime as distinct from the general intent to commit crime, the trial of a burglary indictment becomes an exercise in hairsplitting" that might allow "the burglar caught without booty [to] escape the penalties of the law." 49 N.Y.2d at 279-280. The State faces no such "pragmatic" concerns in prosecuting a Section 17-152 conspiracy. Allegedly agreeing to make a prohibited campaign contribution and allegedly agreeing to violate the tax laws cannot be two "alternative modes" of committing the same supposed crime. *Schad*, 501 U.S. at 636.

B. Due Process Protections Require Unanimity On The "Unlawful Means" Under Section 17-152.

Permitting the jury to convict President Trump without unanimously agreeing on the "unlawful means" at issue also violated the Due Process Clauses of both the U.S. and New York Constitutions.

Principles of due process "limit[] . . . a State's capacity to define different courses of conduct, or states of mind, as merely alternative means of committing a single offense." *Schad*, 501 U.S. at 632. As a plurality of the U.S. Supreme Court explained in *Schad*, "nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for a conviction." *Schad*, 501 U.S. at 633; *see id.* at 650 (Scalia, J., concurring in the judgment) (agreeing that convicting a defendant of such a "novel 'umbrella' crime[]" "would seem contrary to due process").

A majority of the Supreme Court later went further in *Richardson*, explaining that "the Constitution itself limits a State's power to define crimes in ways that would permit juries to convict while disagreeing about means . . . where that definition risks serious unfairness and lacks support in history or tradition." 526 U.S. at 820; *see Hernandez* v. *Robles*, 7 N.Y.3d 338, 361-362 (2006) (explaining that New York's Due Process Clause is at least as protective if not "more protective of rights than its federal counterpart," particularly "in cases involving the rights of criminal defendants").

If somehow interpreted not to require unanimity on the "unlawful means," Section 17-152 would violate due process. As explained above, there is no "history or tradition" in this country of enforcing any conspiracy statute without requiring jury unanimity on the object of the alleged conspiracy. *Richardson*, 526 U.S. at 820. And Section 17-152 could easily stretch to match *Schad*'s absurd hypothetical: a jury could convict if some jurors thought that there was a conspiracy to bribe a potential candidate not to run, others thought there was a conspiracy to rob an opposing candidate's offices, and still others thought there was a conspiracy to commit "tax evasion." *Schad*, 501 U.S. at 633. Again, those disparate agreements cannot be defined as the same crime as a matter of constitutional law. The trial court's decision to permit a conviction without requiring unanimity was therefore reversible error.

IV. DANY DID NOT ESTABLISH THAT PRESIDENT TRUMP HAD THE REQUIRED "INTENT TO DEFRAUD."

There was no evidence that President Trump intended to deprive anyone of money or property or anything else of pecuniary value. President Trump accordingly moved for dismissal at the conclusion of DANY's case-in-chief on the ground that DANY had failed to prove that President Trump acted with the "intent to defraud" required by Penal Law § 175.10. *See* A7348-7352. President Trump then renewed that argument in a post-verdict motion for

judgment of acquittal, A8024, which the trial court denied without explanation, A8025. The court presumably relied on its earlier ruling, in denying President Trump's motion to dismiss the indictment, that "intent to defraud" is not limited to intending to cause "financial harm or the deprivation of money or property," but can instead encompass an "intent to defraud either the voting public, the government, or both." A1972. DANY pressed both theories in summation, arguing that there was "ample evidence of the Defendant's intent to defraud, whether that's defrauding regulators or the voting public." A7868-7869; *see* A7696-7698.

For two reasons, the trial court's denial of an acquittal was error. *First*, properly interpreted, the "intent to defraud" element of Section 175.10 requires proof that the defendant intended to cheat or deprive another person or entity out of something of pecuniary value. No "rational jury could have found" that such intent was proved "beyond a reasonable doubt" in this case. *People* v. *Danielson*, 9 N.Y.3d 342, 349 (2007). *Second*, even under the trial court's impermissibly broad construction of the law, no reasonable jury could have concluded that President Trump intended to (i) interfere with regulators, or (ii) deceive the "voting public." At a minimum, the jury's conclusion to the contrary was against the weight of the evidence under CPL

§ 470.15(5). *See Danielson*, 9 N.Y. 3d at 349 ("A legally sufficient verdict can be against the weight of the evidence.").

A. President Trump Did Not Intend To Cheat Or Deprive Any Person Or Entity Of Property Or A Thing Of Value.

1. Section 175.10's requirement of "intent to defraud" required DANY to prove an intent to cheat or deprive another person out of property or a thing of value. That is the ordinary, traditional legal meaning of "defrauding" another person. *See People* v. *Tyler*, 62 A.D.2d 146, 152 (2d Dep't 1978), *aff'd*, 46 N.Y.2d 264 (1978) ("'Defraud' means to cheat or wrongfully deprive another person of some right."); *Carpenter* v. *United States*, 484 U.S. 19, 27 (1987) ("to defraud" has the "common understanding of wronging one in his property rights by dishonest methods or schemes") (citation omitted); Black's Law Dictionary (6th ed. 1990) ("Intent to defraud means an intention to deceive another person, *and* to induce such other person, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property.") (emphasis added). For that reason, the U.S. Supreme Court "recently reiterated that the federal fraud statutes reach only traditional property interests," such that "obtaining the victim's money or property must have been the aim." *Kousisis* v. *United States*, 145 S. Ct. 1382, 1390-1391 (2025) (internal quotation marks omitted).

For many years, the New York pattern jury instructions reflected that ordinary meaning, defining "intent to defraud" for purposes of Section 175.10 as the intent "to cheat or deprive another person of property [or a thing of value] [or a right]." 2 CJI N.Y. Penal Law § 175.05(1) at 1177 (1979). Decisions from New York trial and appellate courts—including a recent decision from the Second Department—have applied that definition. *See People* v. *Wilson*, 238 A.D.3d 909, 910 (2d Dep't 2025) (defining "intent to defraud" as intent to "cause injury or loss . . . by deceit; to trick . . . in order to get money"); *see also People* v. *Saporita*, 132 A.D.2d 713, 715 (2d Dep't 1987); *People* v. *Keller*, 176 Misc.2d 466, 470 (N.Y. Sup. Ct. 1998); *People* v. *Hankin*, 175 Misc.2d 83, 89 (N.Y. Crim. Ct. 1997).

Two decisions from the First Department have arguably departed from this traditional, pecuniary definition of "intent to defraud." *See People* v. *Sosa-Campana*, 167 A.D.3d 464, 464-465 (1st Dep't 2018) ("In order to prove intent to defraud, the People did not need to make a showing of an intent to cause financial harm."); *Morgenthau* v. *Khalil*, 73 A.D.3d 509, 510 (1st Dep't 2010) (same). But this Court may and should "respectfully decline to follow" *Sosa-Campana* and *Khalil* because those cases were "not correctly decided." *Cox* v. *NAP Constr. Co., Inc.*, 40 A.D.3d 459, 461 (1st Dep't 2007). Neither opinion

explained why the phrase should be given anything other than its traditional, ordinary understanding. *See People* v. *Hobson*, 39 N.Y.2d 479, 490 (1976) (calling such barebones opinions "less binding").

Moreover, as a treatise explains, *Sosa-Campana* and *Khalil* created a "split" among New York appellate courts "without discussion" or even apparent recognition. 6 N.Y. Prac., Criminal Law § 17:5 n.19 (4th ed.). At a minimum, that split reveals a "grievous ambiguity or uncertainty in the statute," triggering the "rule of lenity" and requiring a "reading more favorable to the defendant." *People* v. *Badji*, 36 N.Y.3d 393, 404-405 (2021).

2. Under the traditional meaning of "intent to defraud," this Court must reverse and dismiss. CPL § 470.20(2). No evidence supports the conclusion that President Trump intended to cheat or deprive anyone out of property or some other thing of value by creating internal records of a private entity that described certain private payments to a lawyer as for "legal services" rather than "reimbursement." The absence of any such evidence is why both DANY and the trial court instead invoked two other erroneous definitions of "intent to defraud": (i) intent to interfere with regulators' enforcement of the law and (ii) intent to deprive the "voting public" of information relevant to an upcoming election. *See* A1972.

B. President Trump Did Not Intend To Defraud The Government Or The Voting Public.

Even assuming (incorrectly) that "intent to defraud" in Penal Law 175.10 can take on the broader meanings advanced by DANY and accepted by the trial court, no rational jury could have concluded that President Trump had either kind of intent when the records at issue here were created. At a minimum, the jury's contrary conclusion cannot survive a "weight of the evidence de novo review," *Covington*, 18 A.D.3d at 69, in which this Court "independently assess[es] all of the proof and determine[s] whether the verdict was factually correct," *People* v. *Delamota*, 18 N.Y.3d 107, 117 (2011).

First, DANY did not establish beyond a reasonable doubt that President Trump had "intent to interfere with regulators." No evidence suggested that the internal business records here—invoices, checks, and ledger entries—were intended to be seen, or had any reasonable prospect of ever being seen, by any governmental entity. New York courts have consistently held that defendants lack "intent to defraud" when falsifying that kind of purely internal bookkeeping record. *See Hankin*, 175 Misc.2d at 89 (lawyer lacked intent to defraud when "filing [an] investigator's [false] bill with the records of his own law firm"); *People* v. *Bloomfield*, 2002 WL 34393829, at *22 (N.Y. Sup. Ct. July 22, 2002) ("[T]he assertion of an intent to defraud [the] employer and 'bank

regulators,' unaccompanied by allegations that these entities were conducting, or intended to conduct, an inquiry into" the relevant documents "is legally insufficient."); *see also People* v. *Brown*, 140 A.D. 591, 594-595 (1st Dep't 1910) ("We do not deem it possible to attribute an intent to defraud to the making of an entry which was never seen by the parties who gave the credit and who had no knowledge thereof.").

By contrast, the two cases on which both DANY and the trial court relied—*Sosa-Campana* and *Khalil*—involved records that were either actually submitted to a government official or at least designed to be subject to governmental inspection. In *Sosa-Campana*, the defendant handed a fake driver's license to a police officer during a traffic stop. 167 A.D.3d at 464. And in *Khalil*, the defendant falsified records of check-cashing transactions to hide the fact that the transactions were greater than $10,000, allowing him to avoid triggering the requirement to file currency transaction reports with the government. 73 A.D.3d at 510.

Second, DANY likewise introduced no evidence to support its theory that President Trump intended to mislead the "voting public" when he supposedly falsified records. For starters, there was no evidence that these payments, made *after* President Trump's inauguration, deceived voters in the

November 2016 election. The earliest possible date on which President Trump's state of mind could be criminally relevant was on or about January 17, 2017. That is the day that Cohen and Weisselberg allegedly devised the reimbursement scheme that would entail falsifying records. Critically, even according to Cohen, that day was the very first time that President Trump learned of the reimbursement plan. *See* A7775; *see supra*, p. 22. There is zero evidence that President Trump ever considered, before that day, the possibility of reimbursing Cohen using payments "disguised" as monthly payments for legal services. President Trump could not have intended to defraud the voting public in *January 2017*, two months *after* the 2016 election.

Nor was there any evidence that, in January 2017, President Trump somehow intended to mislead voters in the *2020 election*. DANY offhandedly suggested that theory in summation, noting that President Trump had "already announced an intention to run for President again" in January 2017. A7876. But no evidence at trial supports the conclusion that President Trump or anyone else was thinking about the 2020 election when allegedly determining how to reimburse Cohen for the Clifford payment. DANY's trial presentation was focused exclusively on the 2016 election and President Trump's supposed need to keep Clifford's false accusations out of the news in

the last critical month before the vote. *See* A7734-7745. Any conclusion by the jury that President Trump had in mind the 2020 election when he allegedly decided to reimburse Cohen in January 2017 would have been pure, evidence-free speculation that could not legally sustain a conviction.

V. THE TRIAL COURT ERRED IN DECLINING TO RECUSE.

The New York rules of judicial conduct require that a "judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." 22 N.Y.C.R.R. § 100.3(E)(1) (emphasis added). Failure to recuse in such circumstances entitles the defendant to "have the judgment vacated and a new trial." *People* v. *Santos*, 68 A.D.3d 899, 900 (2d Dep't 2009); *see People* v. *Warren*, 100 A.D.3d 1399, 1400 (4th Dep't 2012) (same). Here, Justice Merchan repeatedly refused to recuse even as President Trump presented ever more evidence corroborating what were already objectively reasonable concerns about the appearance of bias. *See* A396-401; A3074-3075; A18065-18067. That violation of 22 N.Y.C.R.R. § 100.3(E)(1) requires reversal.[7]

[7] On May 23, 2024, this Court declined to issue a writ of prohibition on the recusal issue because review of that question "may occur in a direct appeal." *Trump* v. *Merchan*, 227 A.D.3d 569, 570 (1st Dep't 2024).

A. There Were More Than Reasonable Grounds To Question Justice Merchan's Ability To Preside Impartially.

1. To begin, Justice Merchan should have recused in light of three improper contributions that he made to political opponents of President Trump. In July 2020, while a sitting judge, Justice Merchan donated $15 to ActBlue earmarked for Biden for President. That same month, he donated $20 to two political action committees (PACs) that exclusively support Democrats, including one called "Stop Republicans PAC," a group explicitly dedicated to defeating President Trump. A284, A291-292. Each of these contributions clearly violated the rules of judicial conduct, which prohibit a sitting judge from "making a contribution to a political organization or candidate." 22 N.Y.C.R.R. § 100.5(A)(1)(h).

These prohibited political contributions standing alone required recusal here. New York's bright-line rule against such contributions exists to guard against the "heightened risk that the public . . . might perceive judges" as biased towards or against "a particular political leader or party." *In re Raab*, 100 N.Y.2d 305, 316 (2003). That risk was at its apex in this extraordinary case. Justice Merchan was presiding over the unprecedented criminal prosecution of the leading Republican candidate for President *in the middle of the Presidential campaign*. This prosecution was a key issue in that campaign.

The case could not be more politically sensitive. Yet in the prior Presidential election in 2020, Justice Merchan had publicly donated to the candidate who opposed President Trump and *was again his opponent in the 2024 campaign*. Justice Merchan had also donated to a group literally called "Stop Republicans." If those contributions did not create an intolerable perception of political bias in these unique circumstances, then the New York rule against political contributions by judges is a dead letter. Indeed, "on these extreme facts the probability of actual bias rises to an unconstitutional level" under the Due Process Clause. *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 887-888 (2009).

This Court should reject Justice Merchan's reasons for declining to recuse. He first claimed that his contributions were "*de minimis*" and "only a small percentage of the total contributions," citing *Anderson* v. *Belke*, 80 A.D.3d 483, 483 (1st Dep't 2011). *See* A400. But *Anderson* concerned contributions *by a lawyer* to a judge's campaign. Because contributions *to* judges are perfectly legal, ethical, and common in New York, they generally do not create an appearance of bias unless they are especially large or significant, so *de minimis* contributions do not necessarily trigger recusal, as *Anderson* explained. *See* 80 A.D.3d at 483. Political contributions *by* judges

are different. No matter the size of the donation, such contributions are uncommon and strictly prohibited precisely because they create a significant appearance of bias.

Justice Merchan also invoked *MacDraw, Inc.* v. *CIT Grp. Equip. Fin., Inc.*, 138 F.3d 33, 38 (2d Cir. 1998), for the proposition that a "judge's identification with a political party is not an indication that a judge is incapable of acting impartially." A400. But *MacDraw* merely rejected the claim that judges are always inherently biased toward "the administration that appointed" them. 138 F.3d at 38. True enough, a judge's political affiliations before he or she takes the bench do not require recusal in all politically charged cases thereafter. But a judge's prohibited political donations *while on the bench* are different—especially when those donations are *specifically and publicly earmarked* toward opposing the criminal defendant (and current candidate for office) appearing before him.

2. At a minimum, the "cumulative effect" of Justice Merchan's prohibited contributions and several other unusual and troubling circumstances surely created at least "some question about impartiality." *In re Martinez-Catala*, 129 F.3d 213, 221 (1st Cir. 1997); *see Zappacosta*,

77 A.D.2d at 930 (overturning conviction based on "review of the amalgam of peculiar circumstances" that required recusal).

First, there was significant evidence that Justice Merchan's daughter had "an interest that could be substantially affected by the proceeding," which the judicial code specifies as one scenario in which a judge's "impartiality might reasonably be questioned." 22 N.Y.C.R.R. § 100.3(E)(1)(d)(iii). Specifically, Ms. Merchan was president and part-owner of Authentic Campaigns, a digital marketing agency that created content for Democrats such as Kamala Harris, whose campaign paid Authentic nearly $5 million in the 2020 election. A397, A2902, A3011.

In 2023 and 2024, Authentic again created digital content for Democrats running for office. A2917, A2920. Critical here, Authentic produced digital advertisements and fundraising pitches for Senate candidate Adam Schiff—who paid Authentic over $10 million for its work—in which the candidate celebrated DANY's prosecution of President Trump. These advertisements used the prospect of President Trump's imprisonment to gin up online engagement and contributions from his opponents. To cite one advertisement: "*The Manhattan District Attorney's office has indicted Donald Trump for criminal offenses* . . . . Rush $10 or more to Adam's campaign right now to

help us prepare for Trump's inevitable attacks." A2906 (emphasis added); *see*, *e.g.*, A2904-2910 (¶¶ 11-13, 17, 19-22, 24-25).

Both Authentic and Ms. Merchan (as executive and part-owner) thus stood to financially benefit from Justice Merchan's decisions in DANY's prosecution of President Trump in her father's courtroom. Had Justice Merchan dismissed the indictment or otherwise issued rulings that cut the case short or prevented a trial or conviction, Authentic would not have been able to run those advertisements and would have lost out on those revenues. There is at least a substantial possibility that Authentic (and thus Ms. Merchan) would have been financially harmed by the loss of those opportunities to run advertising campaigns, such that she had "an interest that could be substantially affected by the proceeding." 22 N.Y.C.R.R. § 100.3(E)(1)(d)(iii).

Under these extraordinary circumstances, Justice Merchan was required to either recuse *or* provide information sufficient to dispel any concern about his daughter's financial interests. He declined even that modest step. *See, e.g.*, A18067. Denying a party's request to disclose facts that concern "a potential basis for recusal" itself "evoke[s] an impermissible appearance of impropriety." *Matter of Roberts*, 91 N.Y.2d 93, 96 (1997); *see In*

re Gumo, 2014 WL 7530145, at *8 (N.Y. State Comm'n on Jud. Conduct Dec. 30, 2014) (same).

Second, Justice Merchan raised further concerns about his objectivity with his improper actions in a separate criminal case brought by DANY against Weisselberg and the Trump Organization. *See People* v. *Trump Corp.*, Ind. No. 1473/2021. In that case, Justice Merchan induced Weisselberg to cooperate and testify against the Trump Organization by promising Weisselberg a lower sentence than DANY was offering in plea negotiations, but only if Weisselberg both (i) provided a "very specific allocution" that would cinch the case against the Trump Organization, and (ii) testified at trial "to the facts underlying" that allocution. A244, A249; *see generally* Jonah E. Bromwich et al., *Inside the Negotiations That Led A Top Trump Executive To Plead Guilty*, N.Y. Times (Aug. 18, 2022) (publicly reporting details of Justice Merchan's "previously unknown role").

By "effectively procur[ing] a witness in support of the prosecution" with the "promise of a more lenient sentence," Justice Merchan "assume[d] the advocacy role traditionally reserved for counsel" and "creat[ed] a specter of bias" against the Trump Organization defendants. *People* v. *Towns*, 33 N.Y.3d 326, 328, 332-333 (2019) (reversing conviction on due-process grounds in case

involving similar facts); *see People* v. *Greenspan*, 186 A.D.3d 505, 506 (4th Dep't 2020) (same). Especially in light of the above circumstances, Justice Merchan's apparent lack of impartiality with respect to the Trump Organization reasonably suggested a similar lack of "objective neutrality" toward President Trump himself. *Towns*, 33 N.Y.3d at 331.

B. The Advisory Committee's Opinion Letter Is Irrelevant And Was Based On Incomplete Information.

To justify his decision not to recuse, Justice Merchan cited a three-page opinion letter from the Advisory Committee on Judicial Ethics concluding that he was not obligated to recuse. *See* A400-401; A404-406; A3074-3075; A18067. But that *ex parte* opinion is "not binding" on this Court. *DeRosa* v. *Chase Manhattan Mortg. Corp.*, 10 A.D.3d 317, 320 (1st Dep't 2004). And the Committee's conclusory analysis was based on an incomplete view of the facts.

First, on the topic of Justice Merchan's improper political contributions, the Committee made two points. It first stated that "none" of the contributions at issue "was made to the defendant or the prosecutor or anyone else involved in the case." A405. That logic is hard to understand. If contributions *to* President Trump's 2020 campaign would have been disqualifying, as the Committee seemed to imply, then surely a contribution directly *against* him—to his opponent in both the 2020 and 2024 Presidential

campaigns—should have been disqualifying as well. There is little doubt that DANY would have cried foul if Justice Merchan had donated $35 to President Trump's 2020 campaign, and rightly so.

The Committee also reasoned that Justice Merchan's contributions were made "more than two years" before the indictment, and that the Committee "seldom require[s] disqualification . . . for more than two years." A405. But the Committee's two citations for this supposed two-year statute of limitations were not remotely on-point. The first was an ethics opinion requiring judges to disclose (for two years) the fact of their having attended an attorney's wedding as a guest. *See* Opinion 22-138. The second was an opinion requiring judges to recuse from any case involving an attorney who personally represented the judge (in the preceding two years). *See* Opinion 22-183. The Committee did not explain how either situation is analogous. More importantly, the judicial code's written provision forbidding political contributions—a provision the Committee did not cite—contains no time limit, let alone a time limit of only two years for Presidential campaigns, which of course take place every *four* years.

Second, the Committee was not apprised of all of the troubling additional facts bearing on Justice Merchan's neutrality. The Committee's opinion

merely referred to Ms. Merchan as a "high-ranking officer" and employee of Authentic Campaigns, rather than *part-owner* with a direct financial interest in the company. A405. At the time of the opinion, President Trump had not yet uncovered Authentic's advertisements specifically discussing DANY's prosecution. Thus, the Committee was under the misimpression that Authentic would not do "*any* work referencing or affected by the criminal charges at issue here." A306. As explained at pp. 90-91, *supra*, that was not accurate. Nor did the Committee address or analyze Justice Merchan's improper conduct with Weisselberg in the separate case against the Trump Organization.

CONCLUSION

As Justice Holmes wrote nearly a century ago, criminal laws must be applied in a manner "that the common world will understand." *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931). DANY's actions make a mockery of that principle. Despite years of rifling through President Trump's business, DANY could not find a felony charge. So it concocted an elaborate theory that has never before been pursued in this State and is plainly preempted by federal law. Like every criminal defendant in a New York courtroom, President Trump was entitled to a fair trial before a properly instructed jury

and a neutral judge. Instead, he was convicted after a trial that featured repeated and clear violations of his constitutional rights, federal law, and New York law, presided over by a judge who was required to recuse. For all these reasons, this Court should reverse the judgment of conviction and dismiss the indictment.

Respectfully submitted,

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STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

against

DONALD J. TRUMP,

Defendant-Appellant.

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1. The indictment number of the case in the Court below is 71543/2023.
2. The full names of the original parties are set forth above. There has been no change to the caption.
3. The action was commenced in the Supreme Court, New York County.
4. This action was commenced on or about April 4, 2023, by the filing of an Indictment. A plea of not guilty was entered on April 4, 2023.
5. The nature and object of the action is the prosecution of 34 counts of falsifying business records in the first degree under PL § 175.10.6.
6. The appeal is from the Judgment of Conviction of the Honorable Juan M. Merchan, entered on January 10, 2025.
7. This appeal is being perfected on the Appendix method.