New York County Clerk's Indictment No. 71543/2023
Appellate Division Case No. 2025-00648

New York Supreme Court
Appellate Division – First Department

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People of the State of New York,

Plaintiff-Respondent,

against

Donald J. Trump,

Defendant-Appellant.

_____

BRIEF FOR AMICUS COOLIDGE-REAGAN FOUNDATION

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Robert E. Brown, Esq.
ROBERT E. BROWN, P.C.
14 Wall Street, 20th Floor
New York, New York 10005
(212) 766-9779
rbrown@robertbrownlaw.com

Dan Backer, Esq.*
Chalmers, Adams, Backer
& Kaufman LLC
10521 Judicial Drive #200-A
Fairfax, VA 22030
(202) 210-5431
DBacker@ChalmersAdams.com

Attorneys for Amicus
Coolidge Reagan Foundation
**Motion for admission*
Pro hac vice forthcoming

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INTRODUCTION

The New York Supreme Court convicted President Donald J. Trump of thirty-four (34) offenses in pervasively unfair proceedings which at least half the country recognizes as fundamentally illegitimate. The District Attorney prosecuted President Trump for 34 ***felonies***, *see* N.Y. Penal L. § 175.10, for purportedly seeking to commit, aid, or conceal a ***misdemeanor*** violation of N.Y. Elec. L. § 17-152. The District Attorney's theory is President Trump sought to influence the outcome of the ***November 2016*** presidential election in violation of N.Y. Elec. L. § 17-152 by incorrectly labeling the purpose of his payments primarily from his personal account to attorney Michael Cohen from ***February 2017 through December 2017***—well after the election had concluded and President Trump had been inaugurated. According to the District Attorney, President Trump purportedly sought to defraud people through the bizarre means of labeling the purpose of his payments to Cohen as being for legal services rather than "reimbursements" in his personal checkbook and other internal company records. No member of the public or government official—the purported victims of the fraud—was ever expected to see these records.

To start from the beginning: President Trump was prosecuted by a District Attorney who campaigned on the premise of singling him out for prosecution,[1] in a

[1] *See, e.g.*, *Did Alvin Bragg Campaign on a Promise to Prosecute Trump? What We Know*, NEWSWEEK (May 31, 2024) (bragging "I have investigated Trump and his children and held them accountable for their misconduct with the Trump Foundation" and that he would hold specifically

state whose Attorney General even more explicitly campaigned on prosecuting Trump.[2] The proceedings were held before Judge Juan M. Merchan who repeatedly refused to recuse himself[3] even though, in 2020, he had made political contributions to Biden for President and a group called "Stop Republicans."[4] Judge Merchan's daughter is President of a Democratic political consulting firm paid about $7 million for its work for Kamala Harris and the Democratic National Committee.[5]

Trump "accountable by following the facts where they go"), https://www.newsweek.com/did-alvin-bragg-promise-trump-prosecution-hush-money-guilty-conviction-1906705.

[2] *See, e.g.*, Bobby Cuza, *Letitia James is About to Become NY's Top Legal Officer. Here's How She Plans to Investigate Trump*, NY1 SPECTRUM NEWS (Dec. 24, 2018) ("[W]e will prosecute the president for crimes committed in New York state."), https://ny1.com/nyc/all-boroughs/politics/2018/12/24/how-letitia-james-says-she-plans-to-investigate-president-donald-trump-once-new-york-attorney-general; *Next New York Attorney General Promises to "Use Every Area of the Law" to Probe Trump and Family*, FOX 32 CHICAGO (Dec. 18, 2018) ("We will use every area of the law to investigate President Trump and his business transactions and that of his family as well."), https://www.fox32chicago.com/news/next-new-york-attorney-general-promises-to-use-every-area-of-the-law-to-probe-trump-and-family.

[3] *See, e.g.*, Decision on Defendant's Motion for Recusal (Aug. 13, 2024), https://www.nycourts.gov/LegacyPDFS/press/pdfs/Decision-Motion2Recuse-III.pdf; Decision on Defendant's Motion for Recusal (Aug. 11. 2023). https://www.documentcloud.org/documents/23908816-merchan-rejection-of-recusal-request/

[4] Jeremy Herb, et al., *$35 Political Contribution to Democrats Raises Fresh Scrutiny of Judge Merchan*, CNN POLITICS (Apr. 6, 2023), https://www.cnn.com/2023/04/06/politics/judge-merchan-trump-biden-contribution.

[5] *See* Letter from Chairman Jim Jordan to Ms. Loren Merchan (Aug. 1, 2024), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-08-01%20JDJ%20to%20L.%20Merchan%20re%20Authentic%20Campaigns.pdf.

President Trump was convicted by a jury drawn from a pool where more than half the participants admitted they could not be fair to him,[6] in a city with repeated large-scale protests against him[7]—including a person who literally set himself on fire, killing himself through immolation in front of the courthouse during Trump's trial and garnering inescapable global media attention.[8] The trial court flatly rejected President Trump's concerns that he could not obtain a fair trial given the non-stop, pervasive media coverage of the allegations and trial, as well as New York City's overwhelming political hostility toward him.[9] Following the trial, President Trump

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[6] *See* Decision and Order on Defendant's Motion to Dismiss the Indictment and Vacate the Jury's Verdict Pursuant to CPL §§ 210.20(1)(h) and 210.40(1), at 13-14 (Jan. 3, 2025), https://www.nycourts.gov/LegacyPDFs/press/PDFs/People%20v.%20DJT%20Clayton%20Decision.pdf; *see also* President Donald J. Trump's Motion to Dismiss Pursuant to CPL §§ 210.20(1)(h) and 210.40(1), at 64 (Dec. 2, 2024) ("During jury selection on April 15 and 16, 2024, more than half of the 192 potential jurors asked to be removed on the basis of a threshold question regarding impartiality." (quoting Ex. 36, Tr. 123-31, 412-20)), https://www.nycourts.gov/LegacyPDFS/press/PDFs/BlancheLaw_120324.pdf.

[7] *See, e.g.*, Jonathan Allen, *As Trump Criminal Trial Begins, a New York Throng Descends on Courthouse*, REUTERS (Apr. 15, 2024), https://www.reuters.com/world/us/trump-criminal-trial-begins-new-york-throng-descends-courthouse-2024-04-15; Tyler Clifford & Julia Harte, *Trump Backers, Detractors Face Off Outside New York Courthouse*, REUTERS (Apr. 4, 2023), https://www.reuters.com/world/us/trump-supporters-detractors-crowd-around-manhattan-courthouse-ahead-arraignment-2023-04-04/.

[8] *See* Jim Rutenberg, *CNN's Coverage of Man Who Set Himself on Fire Shows Challenges of Live News*, N.Y. TIMES (Apr. 20, 2024), https://www.nytimes.com/2024/04/20/business/media/trump-trial-man-fire-cnn.html; *see, e.g.*, *Hindustan Times*, https://www.hindustantimes.com/world-news/man-self-immolates-outside-donald-trumps-trial-as-jury-selected-101713551486521.html.

[9] *See* Decision and Order on Defendant's Motion for Further Adjournment Based on Pre-Trial Publicity (Apr. 12, 2024), https://www.nycourts.gov/LegacyPDFS/press/pdfs/People-v-Donald-Trump-Pre-Trial-Publicity-Decision-4-12-24.pdf.

notified the trial court in a heavily redacted letter of "grave juror misconduct during the trial,"[10] but Judge Merchan rejected it on procedural grounds.[11]

The prosecution deluged President Trump in the midst of his historic re-election campaign with "well over one million pages of discovery."[12] As the eleventh hour approached, it dumped 100,000 additional pages of new discovery materials on him, which the trial court gave him only a month to review.[13]

The District Attorney charged President Trump with recordkeeping offenses which are typically prosecuted as misdemeanors[14] and hardly ever brought as "the 'top' or most serious charge on an indictment."[15] The records identified in the

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[10] *See* Letter from Todd Blanche to Hon. Juan M. Merchan, Re: People v. Trump, Ind. No. 71543/23 (Dec. 3, 2024), https://www.nycourts.gov/LegacyPDFs/press/PDFs/Letter4.pdf.

[11] *See* Letter from Judge Juan M. Merchan to Todd Blanche & ADA Joshua Steinglass, Re: *People v. Trump*, Ind. No. 71543-2023, at 4-5 (Dec. 16, 2024), https://www.nycourts.gov/LegacyPDFs/press/PDFs/330.30-LetterOrder.pdf.

[12] Decision and Order on Defendant's Motion to Dismiss the Indictment and Vacate the Jury's Verdict Pursuant to C.P.L. § 330.30(1), at 25 (Dec. 16, 2024) [hereinafter, "Posttrial Order"], https://www.nycourts.gov/LegacyPDFs/press/PDFs/CPL330.30Dec.pdf.

[13] *See* Letter from Judge Juan M. Merchan to Counsel of Record, Re: People v. Trump, Ind. No. 71543-2023 (Mar. 15, 2024), https://www.nycourts.gov/LegacyPDFS/press/pdfs/Letter-03-15-24.pdf; *see also* Decision on Defendant's Motion for Discovery Sanctions (May 23, 2024), https://www.nycourts.gov/LegacyPDFS/press/PDFs/Decision%20and%20Order%20motion%20for%20Discovery%20Sanctions.pdf

[14] *See* Bruan Bennett, et al., *Your Questions About Trump's Indictment, Answered*, TIME (Apr. 5, 2023) ("Under New York law, the falsification of business records is typically only a misdemeanor."), https://time.com/6267724/trump-stormy-daniels-indictment-arraignment/.

[15] Chris Glorioso, *I-Team: Falsification of Business Records Rarely the Top Charge on NY Indictments*, 4 NBC NEW YORK (Apr. 7, 2023), https://www.nbcnewyork.com/news/local/i-team-falsification-of-business-records-rarely-the-top-charge-on-ny-indictments/4222710/.

indictment were revealed to no one, misled no one, and defrauded no one of any money or property. The District Attorney's case rested on a novel, complicated, multi-layered legal theory involving a veritable buffet of potential variations. The jury was expected to parse three different levels of alleged wrongdoing: President Trump allegedly violated N.Y. Penal L. § 175.10 with the intent of committing, aiding, or concealing a violation of N.Y. Election L. § 17-152 through one of three different potential "unlawful means," including violations of the Federal Election Campaign Act ("FECA"), violations of federal or state tax laws, or violations of N.Y. Penal L. § 175.05.

To support this felony charge, the prosecution had to resuscitate an obscure, desuetudinal state election law,[16] N.Y. Elec. L. § 17-152, which had never previously been construed by the courts much less applied in this manner:[17]

> "I've never heard of it actually being used, and I've practiced election law for 53 years," Brooklyn attorney and former Democratic NY state Sen. Martin Connor said of section 17-152.

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[16] Luc Cohen, *Who is Alvin Bragg, the Prosecutor Who Got Donald Trump Convicted?*, REUTERS (June 3, 2024) ("untested legal theory"), https://www.reuters.com/world/us/trump-hush-money-trial-shape-prosecutor-alvin-braggs-legacy-2024-05-23; Quinta Jurecic, *Charting the Legal Theory Behind* People v. Trump, LAWFARE (Apr. 25, 2024) ("Bragg's legal theory is genuinely tangled . . . ."), https://www.lawfaremedia.org/article/charting-the-legal-theory-behind-people-v.-trump.

[17] David Nakamura, *This Obscure N.Y. Election Law is at the Heart of Trump's Hush Money Trial*, WASH. POST (May 6, 2024), https://www.washingtonpost.com/politics/2024/05/06/trump-hush-money-trial-election-law/.

> "I would be shocked — really shocked — if you could find anybody who can give you an example where this section was prosecuted," agreed Joseph T. Burns, attorney for the Erie County Republican Committee in Buffalo, New York.[18]

And the FECA theory at the heart of the prosecution's case involved alleged violations of federal campaign finance law which neither of the federal agencies actually charged with enforcing those restrictions—the Federal Election Commission and U.S. Department of Justice—deemed actionable against President Trump. Because, of course, President Trump's conduct—spending personal, non-campaign funds for purposes for which the FECA prohibits statutorily regulated campaign funds from being used—does not violate federal election law. The jury returned verdicts on the thirty-four separate counts in this grab-bag of legal fiction the day after deliberations began.[19]

These anomalous, politically-motivated proceedings have besmirched the integrity of New York's criminal justice system. Under the totality of the circumstances, before even reaching the specific legal arguments at issue in this appeal, ***this Court should exercise its broad supervisory authority and discretion to overturn President Trump's convictions in the interests of justice.*** *See* N.Y. Crim.

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[18] Laura Italiano, *Old, Unused, and "Twisty"—Meet the Obscure NY Election-Conspiracy Law that Just Might Get Trump Convicted*, BUSINESS INSIDER (Apr. 27, 2024), https://www.businessinsider.com/trump-hush-money-case-relies-never-used-election-conspiracy-law-2024-4.

[19] *Posttrial Order*, *supra* note 14, at 1.

Proc. L. § 470.15(3)(c) (authorizing Appellate Division to "revers[e]" or "modif[y]" any "judgment, sentence or order . . . [a]s a matter of discretion in the interest of justice"). At every stage of these proceedings, "special circumstances deserving of recognition" exist warranting the exercise of this court's "interest of justice jurisdiction." *People v. Williams*, 145 A.D.3d 100, 107-08 (1st Dep't 2016) (quoting *People v. Chambers*, 123 A.D.2d 270, 270 (1st Dep't 1986)); *see also People v. Rickert*, 58 N.Y.2d 122, 133 (1983) ("[A]n intermediate appellate tribunal . . . in an appropriate case possesses the power to review the facts and substitute its discretion for that of nisi prius even in the absence of abuse.").

BACKGROUND

A. *President Trump is Blackmailed into Paying "Hush Money" to Prevent the Spread of Malicious Lies About Him*

This case arose from President Donald J. Trump being blackmailed by porn star Stormy Daniels to prevent her from tarnishing his reputation, undermining his multi-billion dollar global multimedia commercial brand, and harming his marriage by spreading false claims about non-existent sexual encounters. According to the trial court, the "evidence adduced at trial" showed President Trump; his attorney Michael Cohen; and David Pecker, the Chairman of American Media, Inc. ("AMI"), met in Trump Tower in 2015. *Posttrial Order*, *supra* note 14, at 16; *see also* Decision

and Order, at 1-2 (Feb. 15, 2024) [hereinafter, "Pretrial Indictment Order"];[20] *Statement of Facts*, ¶ 12 (Apr. 4, 2023).[21] AMI owns a variety of nationally distributed publications including the *National Enquirer*, *In Touch*, *Us Weekly*. *Posttrial Order*, *supra* note 14, at 16 n.13.

Pecker purportedly promised to buy the rights to embarrassing or unfavorable stories about President Trump to prevent their publication. *Id*. at 16; *see also Pretrial Indictment Order*, *supra* note 26, at 1-2. Pursuant to this arrangement, Pecker arranged a transaction in 2016 in which Cohen made a blackmail payment to Stormy Daniels of $130,000 to refrain from spreading malicious rumors she had an affair with then-citizen Trump. *Posttrial Order*, *supra* note 14, at 16; *see also Pretrial Indictment Order*, *supra* note 26, at 2-3; *Statement of Facts*, *supra* note 27, ¶¶ 18, 21. The District Attorney argued President Trump "was concerned about the negative impact that information could have on his campaign for President of the United States." *Pretrial Indictment Order*, *supra* note 26, at 1.

Cohen sought reimbursement from either Mr. Trump personally or his trust by submitting a series of eleven (11) invoices, on a monthly basis, from February through December 2017 to the Donald J. Trump revocable trust [hereinafter "DJT

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[20] https://www.nycourts.gov/LegacyPDFS/press/PDFs/People-v-DonaldTrump2-15-24Decision.pdf.

[21] https://www.politico.com/f/?id=00000187-4dd5-dfdf-af9f-4dfda6e80000

Trust"], requesting payment for legal services. *See Posttrial Order*, *supra* note 14, at 17; *see also Pretrial Indictment Order*, *supra* note 26, at 3; *Statement of Facts*, *supra* note 27, ¶¶ 26, 28-29. Each month, the Trump Organization generated a digital "voucher" for that month's invoice in the Organization's "detail general ledger." *Posttrial Order*, *supra* note 14, at 17; *see also Pretrial Indictment Order*, *supra* note 26, at 3; *Statement of Facts*, *supra* note 27, ¶ 31. Cohen then received a $35,000 check;[22] the first two checks were from the DJT Trust, the other nine (9) were from President Trump's personal bank account. *Pretrial Indictment Order*, *supra* note 26, at 3; *Statement of Facts*, *supra* note 27, ¶¶ 18, 21, 32-33. The court opined that the parties wanted to generate the appearance these payments were made in connection with a supposed retainer agreement for Cohen's legal representation in order "to conceal the payment Mr. Cohen made to Ms. Daniels, to prevent her allegations from becoming public." *Posttrial Order*, *supra* note 14, at 27.

Trump paid Cohen a total of $420,000, including $130,000 to reimburse Cohen for his blackmail payment to Daniels, $60,000 for work Cohen had performed for the Trump Organization in 2016,[23] $50,000 for expenses Cohen had incurred,

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[22] The first invoice and check, dated February 14, 2017, were for $70,000, apparently covering two months' worth of payments. *See infra* notes 33-35. Each of the remaining invoices and checks, issued monthly from March through December, was for $35,000.

[23] To the extent both the prosecution and the trial court acknowledge at least $60,000 was paid to Cohen in connection with services rendered to the Trump Organization rather than Daniels' blackmail payments or attendant costs, *see Pretrial Indictment Order*, *supra* note 26, at 10, the convictions for at least one $35,000 check, $35,000 invoice, and associated voucher are legally

and $180,000 "to ensure Cohen was fully reimbursed after taxes." *Pretrial Indictment Order*, *supra* note 26, at 3; *see also Statement of Facts*, *supra* note 27, ¶ 25. Thus, the arrangement's structure ensured the State of New York would receive substantial tax revenue to which it was not legally entitled.

B. ***District Attorney Alvin Bragg Fulfills His Campaign Promise by Indicting His Republican Political Target***

District Attorney Alvin Bragg, carrying out his campaign promise, secured an indictment against President Trump for 34 counts of falsifying business records in the first degree, in violation of N.Y. Penal L. § 175.10, in order "to conceal criminal conduct that hid damaging information from the voting public during the 2016 presidential election." *Statement of Facts*, *supra* note 23. Each count alleged President Trump, "with intent to defraud and intent to commit another crime and aid and conceal the commission thereof, made and cause a false entry in the business records of an enterprise." *Indictment* (undated).[24] Eleven (11) counts of the indictment were for the various invoices Cohen had submitted, twelve (12) counts were for the vouchers entered into the DJT Trust general ledger, and eleven (11) counts related to the checks and check stubs used to pay Cohen.[25]

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insufficient as a matter of law insofar as the entries concerning the payment's purpose neither are fraudulent nor further some extrinsic crime.

[24] https://www.manhattanda.org/wp-content/uploads/2023/04/Donald-J.-Trump-Indictment.pdf

[25] The first two checks were identified as being drawn on the Donald J. Trump revocable trust, *see* Indictment, *supra* note 31, Counts 4, 7; the rest originated from the "Donald J. Trump account."

To establish a violation of § 175.10, the State was required to prove President Trump made or caused a false entry in the "business records" of an "enterprise" with: (1) the "intent to defraud" that (2) included an intent to commit, aid, or conceal the commission of "***another*** crime." N.Y. Penal L. § 175.10 (emphasis added); *see also id*. § 175.05. The indictment, however, failed to specify the "[]other crime" Trump purportedly sought to commit or assist. The prosecution materially changed its theory of the case between the indictment stage and the jury instruction stage. At the indictment stage, the prosecution argued there were four possible crimes which could serve as predicates for the alleged § 175.10 violation: (1) violations of the FECA; (2) violations of N.Y. Election L. § 17-152; (3) violations of N.Y. Tax L. §§ 1801(a)(3), 1802; and (4) still additional violations of N.Y. Penal L. §§ 175.05 and 175.10 (i.e., falsifying business records) by AMI. *Pretrial Indictment Order*, *supra* note 26, at 12-18. The court held the prosecution had introduced legally sufficient evidence to the Grand Jury only for the first three theories, however. *Id*. at 13, 17-18.

C. ***District Attorney Alvin Bragg Changes His Theory of the Case***

By the time of trial, the prosecution's theory had changed, growing even more complex. It contended President Trump had violated N.Y. Penal L. § 175.10 by falsifying business records to "commit, aid, or conceal" only a single offense: a

violation of N.Y. Election L. § 17-152. *See Post-Summation Instructions*, at 30, 43 (May 29, 2024).[26] That statute provides:

> Any two or more persons who conspire to promote or prevent the election of any person to a public office by unlawful means and which conspiracy is acted upon by one or more of the parties thereto, shall be guilty of a misdemeanor.

N.Y. Election L. § 17-152. Notably, the state now sought to prosecute President Trump for 34 felonies for purportedly seeking to commit, aid, or conceal a misdemeanor—a misdemeanor with which the State lacked the temerity to charge him directly.

To establish a violation of § 17-152, the State must prove the following elements:

1. the defendant conspired with one or more other people;

2. the defendant intended for the conspiracy to promote or prevent any person's election to "public office;"

3. the defendant must have further intended the conspiracy's goal be achieved "***by unlawful means***" and

4. someone performed an act in furtherance of the conspiracy.

Id.; *see also Post-Summation Instructions*, at 30, 43 (May 29, 2024) (emphasis added).

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[26] https://www.nycourts.gov/LegacyPDFS/press/PDFs/People%20v.%20DJT%20Jury%20Instructions%20and%20Charges%20FINAL%205-23-24.pdf

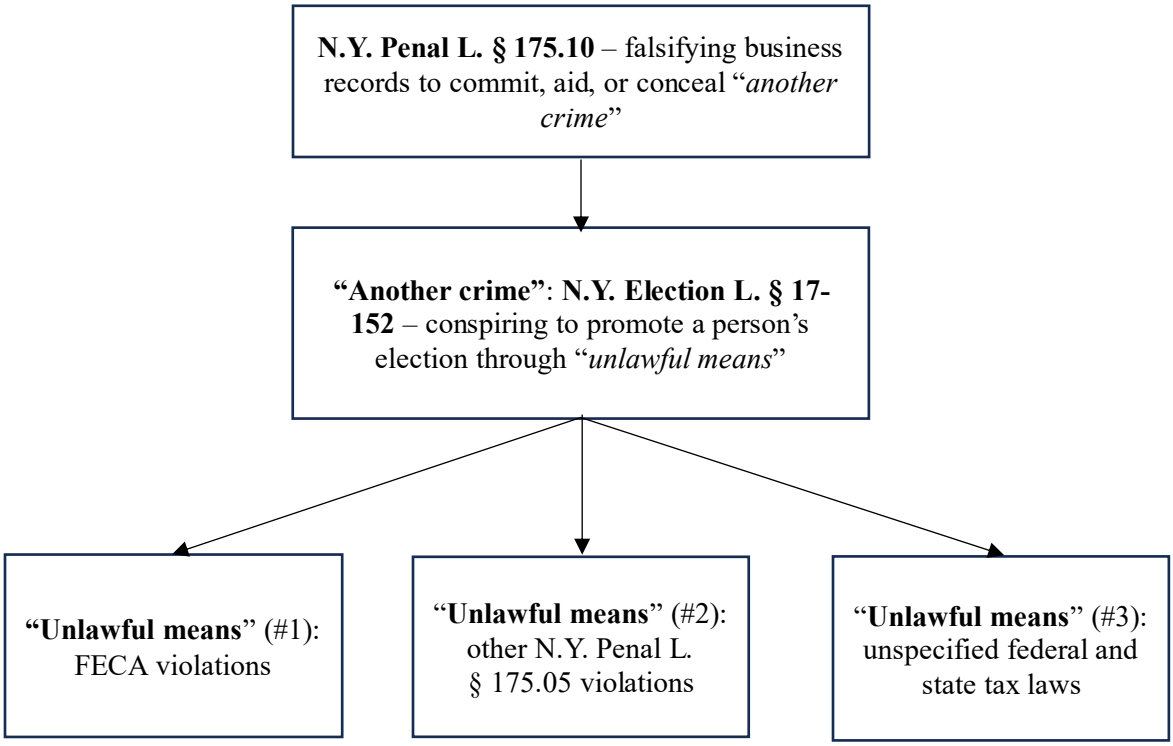
The court instructed the jury on three different potential "unlawful means" through which President Trump purportedly tried to promote his election as President:

1. **FECA violations**—Under the prosecution's first theory, the blackmail payments President Trump directed Michael Cohen to make to Stormy Daniels violated the FECA because they constituted either an excessive individual contribution from Cohen to President Trump's campaign or a prohibited corporate contribution to the Trump campaign. *Post-Summation Instructions*, at 30-32, 44-45 (May 29, 2024); *see also Pretrial Indictment Order*, *supra* note 26, at 12.

2. **Falsifying Business Records in the Second Degree**—The state's alternate theory is that, like a series of Russian nesting dolls, President Trump falsified business records in order to aid or conceal a conspiracy to promote his presidential candidacy by falsifying ***other*** business records belonging to Michael Cohen. *Post-Summation Instructions*, at 32-33, 45-46 (May 29, 2024); *see also Pretrial Indictment Order*, *supra* note 26, at 12.

3. **Federal and State Tax Violations**—Finally, the prosecution hypothesized President Trump falsified business records in order to aid or conceal a conspiracy to promote his presidential candidacy by committing federal and state tax fraud by having Cohen falsify his tax returns, thereby resulting in him paying more money than he legally owed to the United States and New York governments. *Post-Summation Instructions*, at 34, 47 (May 29, 2024); *see also Pretrial Indictment Order*, *supra* note 26, at 12.

Thus, the prosecution's theory involved three levels of embedded offenses:



President Donald J. Trump was convicted of all thirty-four (34) counts of Falsifying Business Records in the First Degree, N.Y. Penal L. § 175.10. *See* Verdict Sheet (May 30, 2024).[27]

ARGUMENT

This Court should reverse President Trump's convictions because they suffer from at least three fundamental deficiencies. ***First***, most basically, all of President Trump's convictions for falsifying business records in the first degree under N.Y.

[27] https://www.nycourts.gov/LegacyPDFS/press/PDFs/Trump-Verdict-Sheet.pdf.

Penal L. § 175.10 rest on his purported efforts to commit, aid, or conceal violations of N.Y. Election Law § 17-152. Section 17-152, however, does not even purport to apply to presidential elections. ***Second***, the District Attorney argued President Trump conspired to violate § 17-152 by, among other things, participating in illegal contributions under the FECA. The FECA, however, absolutely preempts state efforts to enforce federal contribution limits and prohibitions, including indirectly as elements of conspiracy-related and other offenses. ***Finally***, the transactions ultimately at issue in this case do not even violate the FECA.

The District Attorney prosecuted President Trump under state law for seeking to violate federal election law based on actions which did ***not*** violate federal election law. The FECA's "personal use" restrictions are clear: campaign funds cannot be used to make blackmail payoffs. Such payments had to be made, if at all, solely from personal funds which are not regulated by the FECA—exactly what the District Attorney alleges occurred here. President Trump cannot be convicted, directly or indirectly, for failing to spend FECA-regulated campaign funds on something for which the FECA prohibits the use of such funds.

I. PRESIDENT TRUMP'S CONVICTIONS ARE INVALID BECAUSE THE PRESIDENCY IS NOT A "PUBLIC OFFICE" UNDER N.Y. ELECTION L. § 17-152

President Trump was convicted of thirty-four counts of violating N.Y. Penal Law § 175.10 by falsifying business records with the intent to commit, and, or

conceal another crime—specifically, a conspiracy to influence the 2016 presidential election through unlawful means in violation of N.Y. Election Law § 17-152. President Trump could not have intended to conceal a conspiracy to violate N.Y. Election L. § 17-152, however, since that statute is inapplicable to federal elections.

Section 17-152 provides: "Any two or more persons who conspire to promote or prevent the election of any person to a ***public office*** by unlawful means and which conspiracy is acted upon by one or more of the parties thereto, shall be guilty of a misdemeanor" (emphasis added). By its plain text, § 17-152 applies only to an "election" for "public office." Neither the Election Law as a whole, *see* N.Y. Election L. § 1-104, nor Article 17 (in which § 17-152 is codified) in particular, *see id*. § 17-100, defines the term "public office." Section 17-100, however, specifies, "The term 'public officer' as used in this article shall be deemed to apply to any person who holds an elective or appointive office of ***the state***, separate authority ***or any political subdivision*** of the state with authority to supervise other personnel within such subdivisions." *Id*. § 17-100(4) (emphasis added). This definition applies throughout Article 17 of the Election Law, including § 17-152.

Thus, the term "public officer" applies only to state and local officials—not federal officials. With one anomalous and unexplained exception from a decade-and-a-half ago, *see Matter of Johannesen v. Flynn*, 76 A.D.3d 710 (2d Dep't 2010), no previous case under any provision within Article 17 has ever used the terms "public

office" or "public officer" to refer to federal offices or officials. *E.g.*, *Matter of Hill v. N.Y. State Bd. of Elections*, 18 Misc. 3d 1146(A) (Albany Cnty. Sup. Ct. 2005) (New York Supreme Court Justice is "public office" under Article 17); *Matter of Imre v. Johnson*, 20 Misc. 3d 1139(A) (Nassau Cnty. Sup. Ct. 2008) (specifying state senate as "public office" in case arising involving N.Y. Election L. § 17-122); *Ragusa v. Roper*, 2001 N.Y. Misc. LEXIS 799 (Kings Cnty. Sup. Ct. Aug. 17, 2001) (district attorney and civil court judge for the City of New York are "public office[s]" in case involving N.Y. Election L. § 17-122); *see also Matter of Vincent v. Sira*, 131 A.D.3d 787, 789 (3d Dep't 2015) (county judge and surrogate are public offices in case involving N.Y. Election L. § 17-122(8)); *Matter of Haygood v. Hardwick*, 110 A.D.3d 931 (2d Dep't 2013) (specifying county executive as a "public office" and suggesting N.Y. Election L. § 17-122(4) was applicable); *Adams v. Klapper*, 182 Misc. 2d 51, 51 (Kings Cnty. Sup. Ct. 1999) (civil court judge is "public office" in case involving N.Y. Election L. § 17-122).

Since the President does not qualify as a "public officer" for purposes of Article 17 of the Election Law, the Presidency should not be deemed a "public office" under § 17-152. The District Attorney's only theory is President Trump falsified business records in order to conceal a conspiracy to influence his election ***as President*** through unlawful means in violation of § 17-152. Even assuming the District Attorney's theory were factually true, the alleged conspiracy President

Trump purportedly attempted to conceal could not have violated § 17-152 as a matter of law. Therefore, the District Attorney failed to prove his proposed predicate offense for President Trump's convictions under N.Y. Penal L. § 175.10. This Court should overturn those convictions.

II. PRESIDENT TRUMP'S CONVICTIONS ARE INVALID BECAUSE AT LEAST ONE OF THE THEORIES THE DISTRICT ATTORNEY PRESENTED TO THE JURY, CONCERNING ALLEGED FECA VIOLATIONS, IS LEGALLY INVALID

All of President Trump's convictions under N.Y. Penal L. § 175.10 arise from his purported intend to commit, aid, or conceal violations of another statute, N.Y. Election L. § 17-152. That law, in turn, prohibits conspiracies to influence elections through "unlawful means." The District Attorney identified three different potential "unlawful means": (i) violations of the FECA through illegal or excessive contributions from Michael Cohen to President Trump's presidential campaign, (ii) falsification of other business records, or (iii) violation of unspecified federal and state tax laws. The first of those theories, which was the main focus of the District Attorney's arguments, is legally invalid.

"A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." *Hedgpath v. Pulido*, 555 U.S. 57, 58 (2008) (per curiam) (citing *Stromberg v. California*, 283 U.S. 359 (1931)); *see also Skilling v. United States*, 561 U.S. 358, 414 (2010) (reiterating "constitutional error occurs when a jury is instructed on

alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory"). Under this principle, this Court should overturn President Trump's convictions under N.Y. Penal L. § 175.10 based on his purported efforts to commit, aid, or conceal violations of N.Y. Election L. § 17-152. The District Attorney's FECA-related predicate underlying President Trump's alleged N.Y. Election L. § 17-152 violation is invalid.

First, the FECA preempts state laws which regulate federal campaign contributions. *See* 52 U.S.C. § 30143(a). The district attorney's attempt to bootstrap N.Y. Penal L. § 175.10 convictions based on alleged efforts to conceal FECA violations—allegedly excessive or prohibited contributions for federal office—is therefore preempted as well. ***Second***, President Trump's blackmail payments through Cohen to prevent Daniels from spreading malicious lies about him are not governed by the FECA. To the contrary, ***the FECA would have prohibited President Trump from making those blackmail payments using campaign funds*** raised subject to the FECA's contribution limits and other restrictions. *See* 52 U.S.C. § 30114(b)(2). The prosecution of President Trump for violating the FECA by *not* violating the FECA through his use of personal or business funds for personal or business purposes is fundamentally absurd. Accordingly, because one of the potential "unlawful means" for violating N.Y. Election L. § 17-152 on which the jury was instructed—in fact, the State's primary theory—is legally invalid, and

President Trump's convictions under N.Y. § 175.10 rested on his purported intent to commit, aid, or conceal violations of that statute, his § 175.10 convictions must be reversed.

A. *The FECA Preempts State Laws Involving FECA Violations, Particularly FECA Violations Arising from Excessive or Illegal Contributions*

Both the FECA's plain language as well as its extraordinarily detailed legislative history confirm it preempts application of N.Y. Election L. § 17-152 to purportedly illegal campaign contributions to a federal candidate or other such FECA violations.

1. The FECA's Text Demonstrates Its Broad Preemptive Sweep

The FECA provides, in relevant part, "[T]he 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). "Use of the word 'respecting' in a legal context generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject." *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 717 (2018); *accord Patel v. Garland*, 596 U.S. 328, 339 (2022). The term has the same meaning as "relating to," which the Court reads "expansively." *Id*. (quoting *Coventry Health Care of Mo., Inc. v. Nevils*, 581 U.S. 87, 95-96 (2017)). A "state law may 'relate to'" a particular matter, "and therefore be preempted, even if the law is not

specifically designed to affect such [matters], or the effect is indirect." *Morales v. TWA*, 504 U.S. 374, 386 (1992).

Under these standards, FECA's preemption provision bars states from enforcing state laws regulating contributions and expenditures governed by the FECA, even when those state-law provisions do not single out federal elections and are entirely consistent with the FECA. *See, e.g.*, *Teper v. Miller*, 82 F.3d 989, 995 (11th Cir. 1996) (holding a Georgia law was preempted because its effect was to "place a limitation on [a federal candidate's] fundraising for his federal campaign"); *Matter of Seltzer v. N.Y. State Democratic Comm.*, 293 A.D.2d 172, 173 (2d Dep't 2002) (per curiam) (holding the FECA preempts N.Y. Election L. § 2-126's bar on expenditures by party committees in primary elections as applied to federal offices); *see also Bunning v. Kentucky*, 42 F.3d 1008, 1012-13 (6th Cir. 1994) (holding the FECA preempts state's prohibition on exploratory expenditures as applied to a congressional candidate considering running for governor). Indeed, even under a "narrow[]" interpretation of the FECA's preemption provision, it bars enforcement of state laws relating to federal "candidates' behavior." *Weber v. Heaney*, 995 F.2d 872, 876 (8th Cir. 1993); *see also Kermani v. N.Y. State Bd. of Elections*, 487 F. Supp. 2d 101, 104 n.4 (N.D.N.Y. 2006) ("The provisions of the Federal Election Campaign Act of 1971 ('FECA') preempt State laws that purport to regulate activities in Federal elections.").

There is no serious dispute the State of New York is preempted from itself enforcing the FECA's contribution prohibitions and limits for presidential candidates. *See Wis. Dep't of Indus., Labor & Human Rels. v. Gould, Inc.*, 475 U.S. 282, 286 (1986) (holding a preemption provision bars states "from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited" by federal law"). The State is therefore likewise preempted from punishing conspiracies to violate those prohibitions and limits. *See Baltrusaitis v. Int'l Union*, 133 F.4th 678, 693 (6th Cir. 2025) (holding where federal law preempts state enforcement of certain legal restrictions, the state cannot indirectly enforce them through a civil conspiracy claim); *see also Teamsters Local Union No. 705 v. Burlington N. Santa Fe, LLC*, 741 F.3d 819, 826 (7th Cir. 2014). The District Attorney's only theory is President Trump violated N.Y. Penal L. § 175.10 to commit, aid, or conceal a violation of N.Y. Election L. § 17-152 to impact the presidential election by violating the FECA's contribution prohibitions and limits. New York is preempted from enforcing § 17-152 based on conspiracies to violate the FECA's contribution prohibitions or limits. Accordingly, that preempted statute cannot serve as the predicate offense to support convictions under N.Y. Penal L. § 175.10.

2. The FECA's Legislative History Confirms Congress's Clear Intent to Preempt State Laws Involving FECA Violations

The FECA's legislative history confirms states may not punish people for conduct relating to purportedly excessive or prohibited contributions to federal candidates. As originally adopted in 1971, the FECA's preemption provision was very narrow. Section 403 stated:

> (a) Nothing in this Act shall be deemed to invalidate or make inapplicable any provision of any State law, except were compliance with such provision of law would result in a violation of a provision of this Act.
>
> (b) Notwithstanding subsection (a), no provision of State law shall be construed to prohibit any person from taking any action authorized by this Act or from making any expenditure . . . which he could lawfully make under this Act.

Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 403, 86 Stat. 3, 20 (Feb. 7, 1972). As originally enacted, the FECA preempted only state laws which would require people to violate the FECA's substantive restrictions or prohibit people from engaging in conduct the FECA affirmatively authorized.

Two years later, Congress dramatically expanded the scope of the FECA's preemptive scope. The process started on May 22, 1973, when the Senate Commerce Committee reported a bill which would have amended the FECA's preemption provision while retaining its narrow scope: "The provisions of this Act, and of regulations promulgated under this Act, supersede any provision of State law ***with***

which they conflict with respect to campaigns for nomination for election, or for election, to Federal office . . . .” S. 372, § 10, 93rd Cong., 1st Sess. (as reported by S. Commerce Comm. May 22, 1973) (emphasis added). Under this provision, the FECA would not “affect state law except where compliance with state law would constitute a [FECA] violation.” *Hearings Before the S. Subcomm. on Communs. Commerce Comm. on the Federal Election Campaign Act of 1973, S. 372*, Serial No. 93-4, at 184 (Mar. 7, 8, 9, and 13, 1973) (section-by-section analysis of Congressional Election Finance Act of 1973); *see also* S. Rpt. No. 93-170, at 15, 19 (May 22, 1973) (explaining the committee amended the bill so the FECA and its implementing regulations would “supersede any provision of State law with which they conflict”).

The bill was then referred to the Senate Rules Committee which re-numbered the preemption provision and deleted the qualifying phrase “with which they conflict.” *Executive Session of S. Comm. on Rules & Admin.* 75-77 (June 27, 1973). The Rules Committee’s amendment dramatically expanded the provision’s preemptive scope: “The provisions of this Act, and of regulations promulgated under this Act, ***supersede any provision of State law with respect to campaigns for nomination for election, or for election, to Federal office*** . . . .” S. 372, 93rd Cong., 1st Sess. § 15 (as reported by S. Rules & Admin. Comm. July 11, 1973) (emphasis added); *accord* S. Rpt. No. 93-310, at 11 (July 11, 1973). The Committee wished to

ensure that the FECA completely barred enforcement of any state law concerning campaign finance and disclosure issues in federal elections, regardless of whether those state laws conflicted with the FECA. *See Executive Session of S. Comm. on Rules & Admin.* 75-77 (June 27, 1973); *see also id*. at 114-15.

A colloquy further clarified the amended language's sweeping preemptive scope:

> Mr. HATHAWAY Do I correctly understand that the Federal law will preempt the State law with respect to any Federal candidate, ***regardless of whether or not Federal law covers a certain area that the State law might cover?***
>
> Mr. CANNON Mr. President, it's the intent of the committee to ***completely supersede State law with respect to Federal elections***. Once a man becomes a Federal candidate, he is required to meet the requirements of Federal law, and we do not interpret this to mean that he would then be required to meet other requirements that have been written into individual State laws insofar as his candidacy for Federal office is concerned ***including . . . all other matters we can conceivably think of at this point.***
>
> * * *
>
> Mr. HATHAWAY ***If the State had a law which is not covered by the Federal law, which applied to elections in general, the candidate for Federal office would not be obligated to conform with those State provisions***?
>
> Mr. CANNON Other than insofar as is required to become a candidate. . . . Once a man is candidate for Federal

> office, we feel we have ***preempted the field*** in this act.

119 Cong. Rec. 26,600 (July 30, 1973) (statement of Sen. Cannon and Sen. Hathaway) (emphasis added).

The Senate then broadened the provision yet again, changing the phrase "supersede" to "supersede and preempt." *Id*. at 26,607 (July 30, 1973). Senator Cook explained, "'[S]upersede' is a word of art. So that we may have no question about it, this amendment adds 'and preempt' any provision of State law with respect to campaigns for nominations for election to Federal office." *Id*. The Senate passed S. 372 with this sweeping preemptive language. *See id*. at 26,613, 26,618, 26,622 (July 30, 1973). The House failed to act on the bill by the end of that session, however. *See* 120 Cong. Rec. 7,941 (Mar. 22, 1974).

During the following session of Congress, the Senate considered S. 3044, which contained most of S. 372's language, *see id*. at 7940-42 (Mar. 22, 1974) (statement of Sen. Cannon); *see also Executive Hearing of S. Comm. on Rules & Admin.* 2 (Feb. 4, 1974) (statement of Chief Counsel Jim Duffy) [hereafter, "*Exec. Hearing*"]. In particular, S. 3044's preemption provision was materially indistinguishable from the one contained in S. 372. *Exec. Hearing*, *supra* at 63-64 (statement of Chairman Cannon).

As reported by the Senate Rules and Administrations Committee, S. 3044's preemption provision stated, "The provisions of this Act, and of regulations

promulgated under this Act, preempt any provision of State law with respect to campaigns for nomination for election, or for election, to Federal office . . . ." S. 3044, 93rd Cong., 2d Sess., § 213 (as reported by S. Rules & Admin. Comm. Feb. 21, 1974). The Senate later changed the term "regulations" to "rule" by unanimous consent, 119 Cong. Rec. 10,946 (Apr. 11, 1974), to reflect the language of the federal Administrative Procedures Act, *see* 5 U.S.C. § 551(4), then passed the bill, 119 Cong. Rec. 10,952, 10,960 (Apr. 11, 1974).

H.R. 16090 was the companion measure for S. 3044 in the House. The House Administration Committee report for H.R. 16090 explained, "It is the intent of the Committee ***to preempt all state and local laws***." H. Rpt. No. 93-1239, at 10 (July 30, 1974) (emphasis added). The committee elaborated, "Federal law is construed to ***occupy the field*** with respect to elections for Federal office and . . . Federal law will be the sole authority under which such elections will be regulated." *Id*. (emphasis added). Furthermore, "Federal law is intended to be the ***sole source of criminal sanctions for offenses involving political activities in connection with Federal elections***." *Id*. (emphasis added); *see also id*. at 31 (explaining, under the committee's amendment, the FECA will "supersede and preempt any provision of State law"). Even the minority report stated, "By preempting state law, the Committee bill will alleviate candidates from the requirements that they comply with several sets of rules and regulations." *Id*. at 116 (minority views).

During a House Rules Committee hearing on the bill, one member commented, "[Y]ou have brought about what I would call ***total preemption of state law in connection with federal elections.*** I personally agree with you and want to commend your committee for this action." *Hearing of H. Rules Comm. on H.R. 16090, Federal Election Campaign Act Amendments*, at 26-A (Aug. 5, 1974) (statement of Rep. Sisk) (emphasis added). In the ensuring floor debates, Representative Hays declared, "I think if we are going to preempt State laws—and if there was any one thing that nearly every Member of this body asked us to do, that was to preempt State laws so that all candidates would know where they stood, and live under one set of regulations and have one set of laws to go to." 119 Cong. Rec. 27,461 (Aug. 8, 1974) (statement of Rep. Hays). Representative Ed Koch from the State of New York—future Mayor of New York City—added, "[P]reemption is essential. We are all national legislators. . . . We have the same duties and obligations and the legislation we are passing today should apply equally to everyone. To do otherwise will put this legislation and the fight for reform back in the hands of 50 State legislatures." *Id*. at 27,464 (Aug. 8, 1974) (statement of Rep. Koch).

Because the House's version of the bill differed from the Senate's, the chambers convened a conference committee. Congress adopted the conference committee's recommendation and, in relevant part, it remains the law today: "[T]he provisions of this Act, and of rules prescribed under this Act, supersede and preempt

any provision of State law with respect to election for federal office." 52 U.S.C. § 30143(a) (emphasis added); *see* H. Rpt. No. 93-1438, at 100-01 (Oct. 7, 1974) (conference report); S. Rpt. No. 93-1237, at 100-01 (Oct. 7, 1974) (same). The conference committee report explained:

> The conference substitute follows the House amendment. It is clear that the Federal law occupies the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees, but does not affect State laws as to the manner of qualifying as a candidate or the dates and places of elections.

H. Rpt. No. 93-1438, at 100-01 (Oct. 7, 1974); *accord* S. Rpt. No. 93-1237, at 100-01 (Oct. 7, 1974); 119 Cong. Rec. 34,220 (Oct. 7, 1974) (House).

The legislative history of FECA's preemption provision yields three important insights. ***First***, state laws concerning federal candidates are preempted even when they do not conflict with the FECA. Congress amended FECA's previous preemption provision, *see* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 403, 86 Stat. 3, 20 (Feb. 7, 1972), and rejected narrower preemption language which originally appeared in the 1974 amendments, *see* S. 372, § 10, 93rd Cong., 1st Sess. (as reported by S. Commerce Comm. May 22, 1973), specifically to ensure the FECA's preemptive effect would be far broader than that.

Second, as Senator Cannon explained in his floor colloquy, the FECA preempts state-level restrictions on candidates' conduct under laws which "appl[y]

to elections in general," even if those laws are otherwise consistent with the FECA. 119 Cong. Rec. 26,600 (July 30, 1973) (statement of Sen. Cannon and Sen. Hathaway). "Federal law is intended to be the sole source of criminal sanctions for offenses involving political activities in connection with Federal elections." H. Rpt. No. 93-1239, at 10 (July 30, 1974). ***Third***, even more broadly, Congress intended for the FECA to preempt the entire field of federal campaign finance regulation. H. Rpt. No. 93-1438, at 100-01 (Oct. 7, 1974) (conference committee report); *accord* S. Rpt. No. 93-1237, at 100-01 (Oct. 7, 1974) (conference committee report); H. Rpt. No. 93-1239, at 10 (July 30, 1974); 119 Cong. Rec. 26,600 (July 30, 1973) (statement of Sen. Cannon and Sen. Hathaway).

For these reasons, allowing New York to punish people for falsifying records in order to conceal a conspiracy to violate the FECA flies directly in the face of the FECA's clearly intended, broad preemption provision. Accordingly, this Court should reverse President Trump's convictions.

B. *The District Attorney's Legal Theory Concerning President Trump's Conduct Does Not Amount to a FECA Violation*

This Court should also reverse President Trump's convictions because Cohen's blackmail payments to Daniels to prevent her from spreading public lies about the affair did not—and could not—violate the FECA in any event. Accordingly, a FECA violation that didn't occur could not have served as a predicate for N.Y. Election L. § 17-152. President Trump's convictions under N.Y. Penal L. §

175.10 for attempting to aid, commit, or conceal a violation of N.Y. Election L. § 17-152 is therefore invalid.

The District Attorney argued Cohen's payments to Daniels violated the FECA because they were either excessive contributions from Cohen himself which had been coordinated with President Trump, or prohibited corporate contributions since the Trump Organization later reimbursed him for them (even though nearly all of those reimbursement funds came from President Trump's personal account). The underlying premise of both arguments is the payments were ostensibly made "for the purpose of influencing a federal election," 52 U.S.C. § 30101(8)(A)(i) (defining "contribution"), and therefore should have come, if at all, from an account of President Trump's FECA-mandated candidate committee, *see id*. § 30102(e)(1), (h)(1) (requiring candidates to make election-related disbursements through their authorized campaign committees and requiring such committees to designate a depository), to which the FECA's contribution limits, *see id*. § 30116(a)(1), and source prohibitions, *id*. § 30118(a), apply.

Neither of the federal agencies charged with enforcing the FECA—the Federal Election Commission, *see* 52 U.S.C. 30107(a)(6), (e), and the U.S. Department of Justice, *id*. § 30109(c)—either concluded President Trump violated the FECA here or brought civil or criminal charges against him in connection with Cohen's payments to Daniels. ***Indeed, the FECA would have flatly prohibited***

President Trump from using any FECA-regulated campaign funds from his candidate account to pay off a blackmailer**,** the very definition of a "personal expense." The FECA provides, "A contribution or donation . . . shall not be converted by any person to personal use." 52 U.S.C. § 30114(b)(1). A contribution is deemed to be "converted to personal use" when it is "used to fulfill any . . . expense of a person that would exist ***irrespective of the candidate's election campaign*** or individual's duties as a holder of Federal office." *Id*. § 30114(b)(2) (emphasis added); *accord* 11 C.F.R. § 113.1(g). Under this standard, FECA-regulated campaign funds may be used only when a "financial obligation" is either "caused by campaign activity" or the "activities of an officeholder." *Expenditures; Reports by Political Committees; Personal Use of Campaign Funds*, 60 Fed. Reg. 7862, 7863-64 (Feb. 9, 1995); *see Costello*, FEC A.O. 1997-12, 1997 WL 529598, at *5 (Aug. 15, 1997) ("[A]ny legal expense that relates directly to allegations arising from campaign or officeholder activity would qualify for 100% payment with campaign funds . . . ."). Conversely, when an expense "would exist even in the absence of the candidacy or even if the officeholder were not in office, then the use of funds for that obligation generally would be personal use." 60 Fed. Reg. at 7864.

Here, the alleged conduct which led to the expenses—an alleged affair with Daniels a decade earlier —was neither "caused by campaign activity" nor the "activities of an officeholder." 60 Fed. Reg. at 7863-64. When particular wrongdoing

does not fall within either of those categories, the FECA prohibits a candidate from using FECA-regulated campaign funds to attempt to address, remedy, or otherwise alleviate the problem. 52 U.S.C. § 30114(b)(2); *see Cooley*, FEC A.O. 1996-24, 1996 WL 419823, at *3-4 (June 27, 1996) (holding when wrongdoing is "unrelated to [a] campaign or officeholder status," drawing on campaign funds would be impermissible "personal use"). This prohibition on "personal use" applies broadly to any expenses relating to alleged misconduct or other "possible liabilities" pre-dating a person's status as a federal candidate or officeholder. *Cooley*, 1996 WL 419823, at *3-4. It extends to all costs associated with defending against particular charges, reaching "financial settlements" with accusers or alleged victims, or otherwise attempting to "rectify" or "remedy" such pre-existing situations. *Id*. at *3, *5.

The affair allegedly occurred in July 2006, well before Trump was either a candidate or an officeholder. Accordingly, it would have been illegal "personal use" for Trump to pay Daniels with campaign-related funds. Rather, such payments are most analogous to a "financial settlement[]" or other effort to "rectify" or "remedy" the situation which had to be paid with funds unrelated to his presidential campaign and not subject to the FECA's restrictions. *Id*. at *5.

The fact the Trump campaign may have benefited from Daniels' silence does not change the analysis. As the FEC has explained in the context of attorneys' fees,

expenses relating to allegations of wrongdoing "will not be treated as though they are campaign or officeholder related merely because underlying [allegations] have some impact on the campaign or the officeholder's status." 60 Fed. Reg. at 7864; *accord Fleischmann*, FEC A.O. 2011-07, 2011 WL 2163318, at *2 (May 26, 2011); *Coleman*, FEC A.O. 2009-12, 2009 WL 1904617, at *4 (June 26, 2009). Thus, expenses such as attorneys' fees "associated with a divorce or charges of driving under the influence of alcohol will be treated as personal, rather than campaign or officeholder related." 60 Fed. Reg. at 7864. If divorce-related expenses are *per se* personal, then expenses relating to a decade-old alleged affair should be deemed categorically personal, as well.

In *FEC v. Craig for U.S. Senate*, 816 F.3d 829, 838 (D.C. Cir. 2016), Senator Larry E. Craig pled guilty to disorderly conduct for allegedly soliciting sex in an airport bathroom. After deciding to remain in in the Senate for the remainder of his term despite the incident, he sought to withdraw his plea. *Id*. The U.S. Court of Appeals for the D.C. Circuit concluded that, "even if the arrest and conviction impacted [Craig's] status as a Federal officeholder," he could not use campaign funds for expenses associated with withdrawing the plea since they would be "similar to 'legal expenses associated with a divorce or a charge of driving while under the influence of alcohol.'" *Id*. (quoting 60 Fed. Reg. at 7868). The court specifically declined to apply § 30114(b)'s "personal use" ban pursuant to an

"officeholder's motive standard," under which campaign funds could be used whenever an incumbent sought to resolve "messy . . . allegations" to "make his reelection viable." *Id*. at 844-85 ("[A] standard that looks to the officeholder's motive is inconsistent with the statutory scheme.").

Likewise, in *Treffinger*, FEC A.O. 2003-17, 2003 WL 21894954 (July 25, 2003), a state county executive who ran in the U.S. Senate primary was indicted on 20 counts. The FEC ruled he could use campaign funds to defend against those charges which "relate[d] directly to the federal campaign." *Id*. at *5. He could not, however, use campaign funds to defend against other charges which arose from alleged corruption during his tenure as Essex County executive. *Id*. at *4. The Commission explained:

> The essence of these allegations is the defrauding of the county of its money and property, and a scheme to cover up such activity. While some of the benefit of the "scheme and artifice" alleged in the indictment may have inured, or may been intended to inure, to Mr. Treffinger's campaign, the primary wrong alleged in the indictment is the defrauding of the non-Federal polity (i.e., the county and its citizens). Thus, these counts are not directly related to campaign activity.

Id. at *4.

Thus, Treffinger could not use FECA-regulated campaign funds for expenses arising from either allegations concerning his conduct before he became a federal candidate or his "scheme to cover up such activity." *Id*. Critically, the fact the coverup might have benefited Treffinger's campaign did not convert such expenses

into campaign-related disbursements. Likewise, here, President Trump was not permitted to—and in fact did not—use his FECA-regulated campaign funds to pay for expenses from "a scheme to cover up" his alleged activities with Daniels from before he became a candidate, regardless of whether he intended any benefit to inure to his campaign. *Id*.

Thus, neither Cohen's blackmail payments to Daniels nor President Trump's reimbursement of those funds violated the FECA's restrictions since such payments could not have been made with FECA-regulated campaign funds. One cannot violate federal election law through the wanton act of not violating federal election law. Purported FECA violations pursuant to an invalid legal theory cannot serve as predicates for a conspiracy under N.Y. Election L. § 17-152. Since President Trump's convictions under N.Y. Penal L. § 175.10 may therefore have been based on an invalid theory, they must be reversed. *Hedgpath*, 555 U.S. at 58.

CONCLUSION

For these reasons, this Court should overturn President Trump's convictions under N.Y. Penal L. § 175.10.

Respectfully submitted,

by: _____

Robert E. Brown, Esq.
ROBERT E. BROWN, P.C.
14 Wall Street, 20th Floor
New York, New York 10005
(212) 766-9779
rbrown@robertbrownlaw.com

Dan Backer, Esq.*
Chalmers, Adams, Backer
& Kaufman LLC
10521 Judicial Drive #200-A
Fairfax, VA 22030
(202) 210-5431
DBacker@ChalmersAdams.com

Attorneys for Amicus
Coolidge Reagan Foundation

**Motion for admission*
Pro hac vice forthcoming