IN THE SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION — FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK, Appellee, v. DONALD J. TRUMP, Defendant-Appellant.	Appellate Division Docket No. 2025-00648 New York County Clerk's Index No. 71543/2023

NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

PLEASE TAKE NOTICE THAT, upon the annexed Affirmation of Sarmad Khojasteh, dated November 7, 2025, the United States of America will move this Court, at the Courthouse located at 27 Madison Avenue, New York, NY 10010, on November 17, 2025 at 10:00 a.m., or as soon thereafter as counsel may be heard, for an order granting leave to file a brief as amicus curiae in support of Defendant-Appellant. A copy of the proposed amicus brief is attached to the affirmation.

Respectfully submitted,

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November 2025

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AFFIRMATION OF SARMAD KHOJASTEH

I, Sarmad Khojasteh, an attorney duly admitted to practice in the courts of the State of New York, hereby affirms under penalty of perjury pursuant to CPLR 2106, that the following statements are true:

1. I am an attorney with the U.S. Department of Justice, Civil Division, with offices at 950 Pennsylvania Avenue NW, Washington, DC, 20530, attorneys for proposed amicus curiae the United States of America in the above-captioned matter. I submit this affirmation in support of the United States' motion for leave to file a brief as amicus curiae.

2. Pursuant to this Court's Rule of Practice § 1250.4(f), the United States requests leave to file the appear as *amicus curiae* in the above-captioned case.

3. As explained in greater detail in the tendered brief (attached hereto), the United States has a significant interest in this case, which addresses the criminal prosecution of

the President of the United States. The United States has a substantial interest in protecting the Office of the President and the powers and duties vested in that office by Article II of the Constitution. The United States is therefore directly interested in whether admission of official-act evidence in a prosecution of a former president constitutes structural error.

4. This case also involves the scope of preemption under the Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 3 (codified at 52 U.S.C. § 30101 et seq.), as amended. The United States has a substantial interest in the resolution of that issue because the federal government is responsible for administering and enforcing FECA and other federal campaign-finance laws.

5. Congress has authorized the Department of Justice to "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State." 28 U.S.C. § 517. Furthermore, permitting the United States to participate as *amicus curiae* would benefit the Court in light of the government's perspective on the federal issues raised in this appeal.

6. Counsel for appellant consents to the United States' filing an amicus brief in this action. Counsel for appellee does not oppose the United States' filing an amicus brief in this action.

WHEREFORE, I respectfully request that the Court enter an order (i) granting the United States leave to submit the proposed brief as amicus curiae and (ii) accepting the proposed brief that has been filed and served along with this motion.

I affirm this 7th day of November, 2025, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

/s/ Sarmad Khojasteh
SARMAD KHOJASTEH

No. 2025-00648

IN THE SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION — FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,
Appellee,

v.

DONALD J. TRUMP,
Defendant-Appellant.

On Appeal from the New York Supreme Court
New York County
Index No. 71543/2023

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

STATEMENT OF THE CASE 4

ARGUMENT 7

I. Admitting official-act evidence against a former President in a criminal prosecution constitutes structural error. 8

A. The district court admitted official-act evidence against President Trump. 8

B. The unique evidentiary immunity recognized in *Trump v. United States* is not susceptible to harmless error review. 12

II. FECA preempts N.Y. Election Law § 17-152 as applied in this case. 17

CONCLUSION 23

PRINTING SPECIFICATIONS STATEMENT

TABLE OF AUTHORITIES

Cases: **Page(s)**

Blassingame v. Trump,
87 F.4th 1 (D.C. Cir. 2023) 9

Bunning v. Kentucky,
42 F.3d 1008 (6th Cir. 1994) 18, 20

Carroll v. Trump,
151 F.4th 50 (2d Cir. 2025) 16

Chapman v. California,
386 U.S. 18 (1967) 13, 15

Council on Am. Islamic Rels. v. Ballenger,
444 F.3d 659 (D.C. Cir. 2006) 11, 12

Geier v. American Honda Motor Co.,
529 U.S. 861 (2000) 21

Griffin v. United States,
502 US 46 (1991) 20

Holtzman v. Oliensis,
91 N.Y.2d 488 (1998) 18

Marcus v. Holder,
574 F.3d 1182 (9th Cir. 2009) 10

Marshall v. Lonberger,
459 U.S. 422 (1983) 15

New York v. Trump,
683 F. Supp. 3d 334 (S.D.N.Y. 2023) 20-21

Nixon v. Fitzgerald,
457 U.S. 731 (1982) 14

Office of Att'y Gen., In re,
269 A.D.2d 1 (1st Dep't. 2000) 19

OpenRisk, LLC, v. Microstrategy Servs. Corp.,
876 F.3d 518 (4th Cir. 2017) 19

Operation Rescue Nat'l v. United States,
975 F. Supp. 92 (D. Mass. 1997),
aff'd, 147 F.3d 68 (1st Cir. 1998) 11

People v. Crimmins,
36 N.Y.2d 230 (1975) 13

People v. Martinez,
83 N.Y.2d 26 (1993) 20

Rose v. Chase Bank USA, N.A.,
513 F.3d 1032 (9th Cir. 2008) 19

Seila Law LLC v. CFPB,
591 U.S. 197 (2020) 10-11

Stern v. General Elec. Co.,
924 F.2d 472 (2d Cir. 1991) 22

Teper v. Miller,
82 F.3d 989 (11th Cir. 1996) 18

Trump v. Hawaii,
585 U.S. 667 (2018) 11, 12

Trump v. Mazars USA, LLP,
591 U.S. 848 (2020) 14

Trump v. United States,
603 U.S. 593 (2024) 1, 2, 3, 5, 6, 7, 8, 9, 10, 12, 14, 15, 16, 17

Trump v. Wilcox,
145 S. Ct. 1415 (2025) 11

United States v. Boruff,
909 F.2d 111 (5th Cir. 1990) 17

United States v. Colon-Munoz,
192 F.3d 210 (1st Cir. 1999) 17

United States v. Dowdy,
479 F.2d 213 (4th Cir. 1973) 16

United States v. Helstoski,
442 U.S. 477 (1979) 16

United States v. Johnson,
383 U.S. 169 (1966) 16

United States v. Scarfo,
41 F.4th 136 (3d Cir. 2022) 17

United States v. Suescun,
237 F.3d 1284 (11th Cir. 2001) 17

United States v. Swindall,
971 F.2d 1531 (11th Cir. 1992) 16

Weaver v. Massachusetts,
582 U.S. 286 (2017) 13

Williams v. United States,
71 F.3d 502 (5th Cir. 1995) 11

WinRed, Inc. v. Ellison,
59 F.4th 934 (8th Cir. 2023) 18

Wuterich v. Murtha,
562 F.3d 375 (D.C. Cir. 2009) 11

Statutes:

Federal Election Campaign Act of 1971,
Pub. L. No. 92-225, 86 Stat. 3 (1972)
(codified at 52 U.S.C. § 30101 *et seq.*) 1
52 U.S.C. § 30109(a)(5)(C) 10
52 U.S.C. § 30143(a) 3, 18, 19

N.Y. Election Law § 17-152 ..... 5, 20, 21, 22

N.Y. Penal Law § 175.05 4

N.Y. Penal Law § 175.10 4

Regulatory Materials:

11 C.F.R. § 108.7(b)(2) 3

11 C.F.R. § 108.7(b)(3) 18, 20

Other Authorities:

Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* (2017) 17

Carl Wittke, *The History of English Parliamentary Privilege* (1921) 17

INTEREST OF THE *AMICUS CURIAE*

This case involves a criminal prosecution of the President of the United States by a district attorney in the State of New York. The United States has a substantial interest in protecting the autonomy and independence of the Office of the President from encroachment by State authorities. Furthermore, in July 2024—after the conclusion of trial in this case, but before the trial court's entry of judgment—the United States Supreme Court issued a landmark decision defining the contours of a President's federal constitutional immunity from criminal prosecution, including a broad evidentiary immunity prohibiting even federal prosecutors from inviting a jury to probe a President's official acts. *Trump v. United States*, 603 U.S. 593 (2024). This is the first appeal on the merits from a criminal conviction of a President in the Nation's history, and this Court will be the first appellate court, state or federal, to consider the scope and effect of a President's evidentiary immunity under *Trump*. The United States therefore has a substantial interest in the Court's resolution of President Trump's immunity defense.

This case also involves the scope of federal preemption under the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified at 52 U.S.C. § 30101 *et seq.*) (FECA), as amended. The United States has a substantial interest in the resolution of that issue because the federal government is responsible for administering and enforcing FECA—including Congress's explicit choice in

FECA to preempt State efforts to regulate campaign contributions for federal elections.

INTRODUCTION AND SUMMARY OF ARGUMENT

Our system of government "has always demanded an energetic, independent Executive." *Trump v. United States*, 603 U.S. 593, 642 (2024). The U.S. Supreme Court recognized in *Trump* that to allow any of the Nation's more than 2,300 prosecutors' offices to indict a former President for his official conduct would risk chilling every President in the vigorous discharge of the duties of his office. The Court concluded, furthermore, that to be effective, this constitutional immunity must preclude not merely the conviction of a President for his official conduct, but also the admission of official-act evidence against a President in any criminal proceeding. Admitting such evidence in a criminal case, the Court emphasized, would "eviscerate the immunity" guaranteed by the Constitution by "invit[ing] the jury to examine" the President's official acts—acts about which, because of the President's visibility and political character, the members of the jury may have passionate feelings incompatible with a fair and impartial assessment of the evidence. *Id.* at 631.

In this case, the trial court allowed the prosecution to present evidence of President Trump's official acts to the jury. That error requires reversal. The trial court concluded that the evidence it admitted—including evidence about the President's conversations with his White House aides about communications strategy and about alleged instructions he gave the Attorney General concerning a federal investigation—

related only to the President's personal conduct. That conclusion was baseless. The trial court also held that any error would be harmless. For the reasons explained by the U.S. Supreme Court in *Trump* itself, however, presidential immunity is uniquely not susceptible to harmless-error review. The Court recognized that the "prosaic tools" of criminal law, such as "'evidentiary rulings' and 'jury instructions,'" "may suffice to protect the constitutional rights of individual criminal defendants" in ordinary cases. 603 U.S. at 631–32. But the Court stressed that those same "prosaic tools" provide "an inadequate safeguard against the peculiar constitutional concerns implicated in the prosecution of a former President." *Id.* at 631. That is because introducing official-act evidence "raise[s] a unique risk that the jurors' deliberations will be prejudiced by their views of the President's policies and performance while in office." *Id.* Such an error, by its nature, cannot be harmless: under the logic of *Trump*, the bell cannot be unrung. President Trump is entitled to reversal because the prosecution presented evidence of his official acts to the jury.

Reversal is also required for the independent reason that the trial court permitted the jury to find President Trump guilty based on a legal theory expressly preempted by federal law. The trial court instructed the jury on FECA's contribution limits and told the jury that it could find an element of the charged offense met if it concluded that President Trump intended to violate those limits. But FECA expressly preempts state laws regulating campaign contribution limits for federal offices. 52 U.S.C. § 30143(a); 11 C.F.R. § 108.7(b)(2). Under FECA's express preemption

provision, New York plainly could not make violations of FECA a state crime, nor could it criminalize a conspiracy to violate FECA. It follows that New York cannot make an alleged intent to commit a FECA violation a basis for stepping-up a misdemeanor to a felony offense. The prosecution's theory of the case falls in the heartland of FECA's express preemption provision. Because the jury may have found President Trump guilty on invalid grounds, its verdict cannot stand.

STATEMENT OF THE CASE

1. In March 2023, a New York County grand jury returned an indictment charging President Donald J. Trump with 34 counts of falsifying business records, in violation of N.Y. Penal Law § 175.10. A27–41. That statute makes it a felony for any person, "with intent to defraud" that "includes an intent to commit another crime or to aid or conceal the commission thereof," to "[m]ake[] or cause[] a false entry in the business records of an enterprise." N.Y. Penal Law §§ 175.05, 175.10 (McKinney). As alleged in a statement of facts, the criminal charges were based on reimbursements for payments made during the runup to the 2016 presidential election, which were recorded as attorney's fees in the business records of the Trump Organization. A81–84. President Trump moved to dismiss the indictment on, *inter alia*, the grounds that FECA preempted the prosecution. The trial court denied that motion. A1969.

The case proceeded to trial. The trial court allowed the prosecution to present evidence relating to the President's official duties in the White House, including testimony from Michael Cohen concerning a conversation President Trump allegedly

had with the Attorney General about a potential Federal Election Commission (FEC) investigation. A6644–45. The trial court also allowed former White House Communications Director Hope Hicks to testify about how the White House would respond to a negative *Wall Street Journal* article. A5283–90.

To step-up the charges to felonies, the prosecution argued that President Trump "conspire[d] to promote or prevent the election of any person to a public office by unlawful means" in violation of N.Y. Election Law § 17-152. The trial court instructed the jury that it could find the unlawful-means element met based on "violations of the Federal Election Campaign Act," "the falsification of other business records," or "violation of tax laws." A7912. As relevant here, the jury was instructed that under FECA "it is unlawful for an individual to willfully make a contribution to any candidate with respect to any election for Federal office, including the office of President of the United States, which exceeds a certain limit" or for "any corporation to willfully make a contribution of any amount to a candidate or candidate's campaign in connection with any Federal election, or for any person to cause such a corporate contribution." A7912–13.

The jury returned a verdict of guilty on all counts.

2. On July 1, 2024, after President Trump's state criminal trial, the U.S. Supreme Court held in *Trump v. United States*, 603 U.S. 593 (2024), that the President is entitled to absolute immunity from criminal prosecution with respect to the exercise of his "core constitutional powers," and that he is further entitled to "at least a

presumptive immunity" from prosecution for acts within the "outer perimeter of his official responsibility." *Id.* at 606, 614 (emphasis omitted). The Court further held that, although the President is entitled to "no immunity" for his unofficial acts, *id.* at 615, evidence concerning the President's official acts for which he is immune from prosecution cannot be used to "prove his liability on any charge," even if the charge is unrelated to the exercise of the President's official responsibilities, *id.* at 631. *See also id.* at 632 n.3 (acknowledging that a "prosecutor may point to the public record" to show that the President performed an official act but could not "admit testimony or private records of the President or his advisers probing the official act itself" which would "invite the jury to inspect the President's motivations for his official actions and to second-guess their propriety").

After the decision in *Trump v. United States*, President Trump filed a post-trial motion to dismiss the indictment and vacate the jury's verdict based on presidential immunity. He argued that the prosecution had improperly introduced evidence of official presidential acts in the criminal proceedings. The trial court denied that motion. A20189–90. The court stated that the state criminal charges "stem from the private acts of [President Trump] made prior to taking the Office of the President," which left only the question whether evidence of official acts had been used to convict him. A20156. The court determined that President Trump had preserved a presidential immunity objection only with respect to certain evidence introduced at trial, A20158–65, but it nevertheless evaluated all the challenged evidence and

determined that none of it amounted to official-act evidence, A20165–84. The court also determined that if any of the disputed evidence was admitted in error, the error was harmless. A20184–87.

3. On January 10, 2025, the trial court sentenced President Trump to an unconditional discharge.

ARGUMENT

The United States submits this amicus brief to highlight two errors committed by the trial court of particular institutional significance to the federal government. Each of these errors independently warrants reversal.

First, the trial court allowed the prosecution to present evidence to the jury of President Trump's official acts as President, in direct contravention of the evidentiary immunity recognized by the U.S. Supreme Court in *Trump v. United States*, 603 U.S. 593 (2024). For example, the trial court permitted the jury to hear testimony about an alleged conversation between the President and the Attorney General concerning a potential FEC investigation and about how the White House would respond to negative publicity. By allowing the jury to consider this and other official-act evidence, the trial court "eviscerate[d] the immunity" recognized in *Trump* and "raise[d] a unique risk that the jurors' deliberations w[ould] be prejudiced by their views of the President's policies and performance while in office." *Id.* at 631. Such error can never be excused as harmless.

Second, the trial court permitted the jury to find that elements of the charged felony offenses were satisfied if it found that President Trump intended to commit a FECA violation. That instruction was contrary to FECA's express preemption provision, which forbids States from regulating contribution limits to federal campaigns. The trial court thus permitted the jury to return guilty verdicts on an invalid legal basis.

I. Admitting official-act evidence against a former President in a criminal prosecution constitutes structural error.

A. The district court admitted official-act evidence against President Trump.

In *Trump*, the U.S. Supreme Court held that the President is entitled to absolute immunity from criminal prosecution with respect to the exercise of his "core constitutional powers," and that he is further entitled to "at least a presumptive immunity" from prosecution for acts within the "outer perimeter of his official responsibility." 603 U.S. at 606, 614 (emphasis omitted). The presumption of immunity can be overcome only if the prosecution "can show that applying a criminal prohibition to that act would pose *no dangers* of intrusion on the authority and functions of the Executive Branch."[1] *Id.* at 615 (emphasis added) (cleaned up). The Court further held that, although the President is entitled to "no immunity" for his

[1] The Court left open the possibility that the President enjoys absolute immunity for official acts beyond his conclusive and preclusive powers. *See Trump*, 603 U.S. at 615.

unofficial acts, *id.*, evidence concerning the President's official acts for which he is immune from prosecution cannot be used to "prove his liability on any charge," even if the charge is unrelated to the exercise of the President's official responsibilities, *id.* at 631. In the rare event of a criminal trial of a President, the trial court must exclude evidence that "invite[s] the jury to inspect the President's motivations for his official actions and to second-guess their propriety." *Id.* at 632 n.3.

The U.S. Supreme Court emphasized that "the immunity [it] ha[s] recognized extends to the 'outer perimeter' of the President's official responsibilities, covering actions so long as they are 'not manifestly or palpably beyond [his] authority.'" *Trump*, 603 U.S. at 618 (third alteration in original). "[A]n act lies within the outer perimeter of an official's duties" if it has "more or less connection with the general matters committed by law to his control or supervision." *Blassingame v. Trump*, 87 F.4th 1, 13 (D.C. Cir. 2023) (cleaned up).

The trial court here, acting without the benefit of the U.S. Supreme Court's decision, allowed prosecutors to present evidence to the jury of President Trump's official acts. As one example, the trial court permitted Michael Cohen to testify about a conversation President Trump allegedly had with the Attorney General about a potential FEC investigation. A6644–45; *see also* A7817 (in summation, the prosecution asserted that Cohen told another witness that "President Trump had Attorney General Sessions in his pocket"). Such a conversation would "plainly implicate [the President]'s 'conclusive and preclusive' authority" to "decide which crimes to

investigate and prosecute, including with respect to allegations of election crime." *Trump*, 603 U.S. at 620. For the "Attorney General, as head of the Justice Department, acts as the President's chief law enforcement officer who provides vital assistance to him in the performance of his constitutional duty to preserve, protect, and defend the Constitution." *Id.* (cleaned up). "[T]he President is absolutely immune from criminal prosecution" for such conduct, *id.* at 609, and it was error for the trial court to allow the jury to consider that evidence, *id.* at 631.

The trial court believed that the President's alleged conversation with the Attorney General in this case about a potential FEC investigation was not related to his official duties because "the FEC has 'exclusive jurisdiction with respect to the civil enforcement' of FECA." A20181. But FEC investigations can result in criminal prosecutions undertaken by the Department of Justice. *See* 52 U.S.C. § 30109(a)(5)(C) (express authorization to refer cases for prosecution); *see also Marcus v. Holder*, 574 F.3d 1182, 1185 (9th Cir. 2009) (Attorney General has independent authority to investigate and prosecute FECA violations). And more fundamentally, as *Trump* makes clear, that claim misunderstands the President's authority. "Investigative and prosecutorial decisionmaking is 'the special province of the Executive Branch,' and the Constitution vests the entirety of the executive power in the President[.]" *Trump*, 603 U.S. at 620 (cleaned up). The President has the power and duty to exercise "ongoing supervision and control" over every significant exercise of executive power. *Seila Law LLC v. CFPB*, 591 U.S. 197, 224 (2020); *see also Trump v. Wilcox*, 145 S. Ct. 1415, 1415 (2025).

The President's conversation with the Attorney General concerning the enforcement of federal campaign finance law plainly was an official act.

As another example, the trial court permitted prosecutors to elicit testimony from former White House Communications Director Hope Hicks related to how the White House communications team would respond to a negative *Wall Street Journal* article. A5283–90; *see also* A5278 (Hicks described her role as "coordinating all of the communication efforts for the Administration from the White House"). That the *Journal* article in question concerned President Trump's private conduct is of no consequence. Elected public officials act within their official capacities when they respond to media inquiries about their personal lives. *See Council on Am. Islamic Rels. v. Ballenger*, 444 F.3d 659, 665 (D.C. Cir. 2006) (per curiam); *see also Wuterich v. Murtha*, 562 F.3d 375, 383–87 (D.C. Cir. 2009); *Williams v. United States*, 71 F.3d 502, 507 (5th Cir. 1995); *Operation Rescue Nat'l v. United States*, 975 F. Supp. 92, 106–09 (D. Mass. 1997), *aff'd*, 147 F.3d 68 (1st Cir. 1998). That generally applicable duty is even more pronounced for the President, who "possesses an extraordinary power to speak to his fellow citizens and on their behalf." *Trump v. Hawaii*, 585 U.S. 667, 701 (2018). President Trump acted in his official capacity when he spoke to his White House Communications Director about how to respond to the *Wall Street Journal* article, and so her testimony constituted impermissible official-act evidence.

The trial court took too cramped a view of the President's conversations with his White House communications director about White House communications

strategy. The trial court believed that the President's conversations with Hicks were unofficial because they "pertain to unofficial or private conduct and are inextricably intertwined with private discussions and events which began before Defendant's Presidency." A20169. The relevant question, however, is not whether the events described in the *Wall Street Journal* article involved private conduct, but rather whether the President acted in his official capacity in deliberating with White House communications staff about an official White House response to the allegations in that article. For the reasons explained, he clearly did—just as, for example, President Clinton acted in his official capacity when responding to media inquiries about his relationship with Monica Lewinsky. *See Hawaii*, 585 U.S. at 701; *Ballenger*, 444 F.3d at 665. The trial court also dismissed the possibility that "the introduction of that evidence pose[d] any danger of intrusion on the authority and function of the Executive Branch." A20171. But the U.S. Supreme Court in *Trump* rejected exactly that line of reasoning. *See* 603 U.S. at 613 (explaining that the possibility a President "inclined to take one course of action based on the public interest may instead opt for another, apprehensive that criminal penalties may befall him upon his departure from office," raises "unique risks to the effective functioning of government" (cleaned up)).

B. The unique evidentiary immunity recognized in *Trump v. United States* is not susceptible to harmless error review.

1. Generally, error in a criminal proceeding, even constitutional error, does not automatically require reversal. *See People v. Crimmins*, 36 N.Y.2d 230, 237 (1975) (citing

Chapman v. California, 386 U.S. 18 (1967)). The logic of the harmless-error rule is that it "block[s] setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Chapman*, 386 U.S. at 22. Nearly all errors are subject to harmless-error review for this reason.

Courts have recognized, however, a small category of "structural" errors that cannot be deemed harmless. *See Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017). "[I]n the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.'" *Id.* at 299. "The precise reason why a particular error is not amenable to [harmlessness] analysis—and thus the precise reason why the Court has deemed it structural—varies in a significant way from error to error." *Id.* at 299. But the U.S. Supreme Court has identified three "rationales" that have undergirded such a classification in certain instances: (1) "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest"; (2) "the effects of the error are simply too hard to measure"; and (3) "the error always results in fundamental unfairness." *Id.* at 295–96.

2. The admission of official-act evidence against a President in a criminal case constitutes structural error. As the U.S. Supreme Court's decision in *Trump* itself clearly explains, prejudice to the trial process and to the defendant President can neither be measured nor avoided.

Allowing prosecutors to use evidence of a President's own official acts against him poses "unique risks to the effective functioning of government." *Trump*, 603 U.S. at 611 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 751 (1982)). That is because the President is "the only person who alone composes a branch of government." *Trump v. Mazars USA, LLP*, 591 U.S. 848, 868 (2020). He is entrusted with "mak[ing] the most sensitive and far-reaching decisions entrusted to any official under our constitutional system," and those decisions are "likely to arouse the most intense feelings." *Fitzgerald*, 457 U.S. at 752 (quotation marks omitted). And the "prominence of the President's office … and the effect of his actions on countless people" makes him "an easily identifiable target" for prosecution. *Id.* at 752–53; *see also Trump*, 603 U.S. at 613–14.

For these reasons, the U.S. Supreme Court stressed, "[a]llowing prosecutors to ask or suggest that the jury probe official acts for which the President is immune would thus raise a unique risk that the jurors' deliberations will be prejudiced by their views of the President's policies and performance while in office." *Trump*, 603 U.S. at 631. Indeed, the Court held, that risk is so significant that the "prosaic tools" of criminal procedure that normally protect the rights of criminal defendants "are an inadequate safeguard against the peculiar constitutional concerns implicated in the prosecution of a former President." *Id.* This "unique risk" of prejudice escapes the ordinary evidentiary "tools [that] may suffice to protect the constitutional rights of individual criminal defendants." *Id.* at 631–62.

Because "'evidentiary rulings' and 'jury instructions' … are unlikely to protect adequately the President's constitutional prerogatives," the ordinary tools of harmless-error review cannot protect them either. *Trump*, 603 U.S. at 631. The logic of *Trump* does not allow for the possibility that a jury could consider official-act evidence and still render an impartial decision. *See id.* at 632. Were it otherwise, a limiting instruction would suffice. *See Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983) (noting that "the 'crucial assumption' underlying the system of trial by jury 'is that juries will follow the instructions given them by the trial judge.'"). But the Court specifically held that "jury instructions" are among the "prosaic tools" of criminal law that are inadequate to prevent prejudice. *Trump*, 603 U.S. at 631. *Contra id.* at 656 (Barrett, J., concurring in part) (asserting that "the rules of evidence are equipped to handle" concerns of prejudice "on a case-by-case basis" including through jury instructions). It follows that the constitutional error of admitting official-act evidence against a President cannot be found "harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24 (cleaned up).

In sum, because the trial court's admission of official-act evidence was *per se* prejudicial under the logic of *Trump*, the judgment of conviction must be reversed.

3. As noted, the U.S. Supreme Court stressed that inviting a jury to consider a President's official acts raises "unique risk[s]" of prejudice to the trial process. *Trump*, 603 U.S. at 631. The same logic does not extend to other immunity doctrines or other errors implicating the separation of powers.

For example, in addition to immunizing members of Congress for their legislative conduct, the Speech or Debate Clause prohibits the government from introducing "evidence of a legislative act." *United States v. Helstoski*, 442 U.S. 477, 487 (1979). But the erroneous introduction of legislative-act evidence is susceptible to harmless error review. *See United States v. Johnson*, 383 U.S. 169, 185–86 (1966) (reviewing conviction of Congressman to determine that introduction of privileged material was prejudicial); *United States v. Dowdy*, 479 F.2d 213, 227 (4th Cir. 1973) (same).[2] That distinction makes sense because "presidential immunity differs in both origin and purpose from … other 'structural' immunities" like legislative immunity. *Carroll v. Trump*, 151 F.4th 50, 68 (2d Cir. 2025) (per curiam). Members of Congress are neither as nationally prominent as the President, nor are they individually entrusted with such momentous decisions. Nor do concerns about prejudice to jury deliberations underlie the Speech or Debate Clause, which was designed instead to protect against interbranch rivals. *See Johnson*, 383 U.S. at 179 (purpose of legislative immunity is "protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary" in order to "ensur[e] the independence of the legislature"). *See generally* Carl Wittke, *The History of English Parliamentary Privilege* (1921); Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* 201–

[2] *But see United States v. Swindall*, 971 F.2d 1531, 1548 n.21 (11th Cir. 1992) (opining in dicta that the Speech or Debate privilege is not susceptible to harmless-error analysis).

31 (2017). The "unique risk that the jurors' deliberations will be prejudiced by their views of the President's policies and performance while in office," *Trump*, 603 U.S. 631, has no analogue for an individual legislator, who does not individually personify a branch of government.

Ordinary harmless error review also suffices to remedy other separation-of-powers violations. Errors involving the structure of the federal government are not typically "structural" in the sense of harmless-error doctrine. *United States v. Colon-Munoz*, 192 F.3d 210, 217–18 (1st Cir. 1999). Generally, a court can determine whether a separation-of-powers violation prejudiced a criminal defendant; the "prosaic tools" of criminal law, *Trump*, 603 U.S. at 631, suffice for the task. *See Colon-Munoz*, 192 F.3d at 218; *United States v. Scarfo*, 41 F.4th 136, 174 (3d Cir. 2022); *United States v. Boruff*, 909 F.2d 111, 118 (5th Cir. 1990); *United States v. Suescun*, 237 F.3d 1284, 1288 (11th Cir. 2001). But the President's "unique position in the constitutional scheme," *Trump*, 603 U.S. at 637 (citation omitted), precludes the same analysis for violations of a President's evidentiary immunity. As the U.S. Supreme Court has explained, the "unique risk" of prejudice to the jury is too great for the "prosaic tools" of criminal law to safeguard in this context. *See Trump*, 603 U.S. at 631–32.

II. FECA preempts N.Y. Election Law § 17-152 as applied in this case.

Reversal is also required for the independent reason that the trial court permitted the jury to find President Trump guilty based on a legal theory preempted by federal law.

1. Congress expressly provided that the Federal Election Campaign Act (FECA), and rules issued to implement FECA, "supersede and preempt any provision of State law with respect to election to Federal office." 52 U.S.C. § 30143(a). FEC regulations explain, *inter alia*, that all state law "concerning" the "[l]imitation on contributions and expenditures regarding Federal candidates and political committees" is preempted. 11 C.F.R. § 108.7(b)(3).

Most preemption litigation under FECA concerns state laws that touch on federal elections or campaign contributions only incidentally, such as the application of general state consumer protection laws to fundraising solicitations. *See, e.g.*, *WinRed, Inc. v. Ellison*, 59 F.4th 934, 943 (8th Cir. 2023). At the core of FECA's preemptive scope, however, are efforts by State governments to police limitations on contributions to federal campaigns. FECA expressly preempts all such efforts. *See Holtzman v. Oliensis*, 91 N.Y.2d 488, 495 (1998) (FECA preempts "the regulation of the conduct and financing of campaigns for Federal elective office."); *see also Teper v. Miller*, 82 F.3d 989, 994 (11th Cir. 1996) (FECA "creates an intricate federal statutory scheme governing campaign contributions and expenditures related to federal elections."); *Bunning v. Kentucky*, 42 F.3d 1008, 1012 (6th Cir. 1994) (holding preempted efforts to "impose on a federal political committee" a state's disclosure and expenditure requirements).

Under settled principles of federal preemption law, furthermore, a State cannot achieve the same result indirectly by making a FECA violation a predicate for liability

under a different state law. *See, e.g.*, *In re Office of Att'y Gen.*, 269 A.D.2d 1, 11 (1st Dep't. 2000) (Clean Air Act preempts state claims because the State sought "to use this State's common law to penalize the manufacturers for producing engines which failed to comply with the Federal standards"); *OpenRisk, LLC, v. Microstrategy Servs. Corp.*, 876 F.3d 518, 525 (4th Cir. 2017) (Copyright Act preempts use of offenses equivalent to copyright infringement as predicate to establish violation of state law); *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1038 (9th Cir. 2008) (National Bank Act preempts liability under state law because it preempts "the 'legal duty that is the predicate of' Plaintiffs' state law claim").

2. Under these principles, New York could not validly enact a state law making violations of FECA a state crime or adding state-law penalties to those provided under federal law for such violations. Nor could New York criminalize a conspiracy to violate FECA or make a state jury's finding of such a violation a predicate for enhanced criminal punishment under New York law. That is because FECA expressly "supersede[s] and preempt[s] any provision of State law with respect to election to Federal office," 52 U.S.C. § 30143(a), involving "[l]imitation[s] on contributions and expenditures regarding Federal candidates and political committees," 11 C.F.R. § 108.7(b)(3).

Yet that is precisely the legal theory on which the trial court instructed the jury in this case. The prosecution argued that the President violated New York's prohibition on promoting his election through unlawful means because he violated

FECA's ban on corporate contributions. Consistent with that theory, the trial court instructed the jury on FECA's contribution limits. *See* A7912–13. Indeed, the trial court specifically instructed the jury that it could find the "unlawful means" element of the offense met if the jury concluded that President Trump intended to violate FECA. A7913.

That instruction was unlawful. FECA expressly preempts any effort by a State to punish a person for FECA violations. *See Bunning*, 42 F.3d at 1012. Because the jury was instructed that it could return a guilty verdict based on an invalid ground of liability, the judgment must be reversed. *See People v. Martinez*, 83 N.Y.2d 26, 32 (1993) (citing *Griffin v. United States*, 502 US 46 (1991)) ("[A] general verdict of guilt must be set aside 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 trial court believed that FECA's express preemption provision was inapplicable because "N.Y. Election Law § 17-152 'does not fit into any of the three categories of state law that FECA preempts.'" A1969 (quoting *New York v. Trump*, 683 F. Supp. 3d 334, 350 (S.D.N.Y. 2023)). But that analysis ignores how the case was actually tried. It is true that prosecutors could have tried to prove their case without ever invoking FECA. But it is a strange defense of prosecutors' legal theory to observe that their error was unnecessary. The prosecution chose to make this case about FECA violations and specifically urged the jury to return guilty verdicts on that

ground. *E.g.*, A7870 (closing arguments described FECA violations as "most obvious" way to find the step-up offense met). The trial court accordingly instructed the jury on FECA's campaign contribution limits and told the jury that it could find an element of the offense met if the jury found that President Trump acted with intent to violate those limits. A7912–13. Because prosecutors used N.Y. Election Law § 17-152 to "directly target campaign contributions and expenditures," its application in this case is "preempted," *New York*, 683 F. Supp. 3d at 350, and reversal is required.

3. In all events, the judgment is void on conflict preemption grounds as well. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 867 (2000). By inviting the jury to consider whether President Trump violated FECA's contribution limits and disclosure requirements, the prosecution created an actual conflict with federal law. As already discussed, when Congress enacted FECA, it made abundantly clear that it did not intend for States to regulate contributions to federal campaigns or to impose punishments for FECA violations. Instead, Congress crafted an exclusively federal enforcement scheme. Yet New York prosecutors here did what Congress forbade and used state law to impose criminal consequences for FECA offenses.

Here too, it is irrelevant that the prosecution offered other potential step-up offenses. A7912. Nor does it matter for these purposes that the trial court believed only a general intent to commit some crime was necessary to convict a defendant of falsifying business records in the first degree. A17750. *But see* Def.'s Br. 67–78. The prosecution chose to emphasize its FECA allegations, and the trial court's jury

instructions authorized the jury to return guilty verdicts on that basis. The trial court thus authorized exactly what Congress sought to avoid: the imposition of state-law penalties for violations of FECA's limitations on contributions to federal campaigns. As applied in this case, therefore, N.Y. Election Law § 17-152 is preempted, *see Stern v. General Elec. Co.*, 924 F.2d 472, 475 (2d Cir. 1991) (state law preempted if it "actually conflict[s]" with FECA), and the judgment must be reversed.

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

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