No. 23-13368

In the United States Court of Appeals for the Eleventh Circuit

THE STATE OF GEORGIA

Plaintiff-Appellee,

versus

JEFFREY BOSSERT CLARK,

Defendant-Appellant

On Appeal from the United States District Court
for the Northern District of Georgia, Atlanta Division,
No. 1:23-v-3721-SCJ

MOTION FOR STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISLOSURE STATEMENT

To the best of Appellant's knowledge, no associations of persons, partnerships, or corporations have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock.

The following is a list, in alphabetical order, of all trial judges, attorneys, law firms, and persons with an interest in this appeal:

1. Alksne, Cynthia, *amicus* below
2. Anulewicz, Christopher Scott, attorney for Robert David Cheeley
3. Arora, Manubir, attorney for Kenneth John Chesebro
4. Aul, Francis, attorney for Mark R. Meadows
5. Ayer, Donald B., *amicus* below
6. Barron, Lynsey M., attorney for Scott Graham Hall
7. Beckermann, Wayne R., attorney for Robert David Cheeley
8. Bernard, Catherine S., attorney for Defendant Jeffrey B. Clark
9. Bever, Thomas Dean, attorney for Shawn Micah Tresher Still
10. Bittman, Robert, attorney for Mark R. Meadows
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12. Carr, Christopher M., Attorney General of the State of Georgia
13. Cheeley, Robert David, Defendant in Georgia v. Trump
14. Chemerinsky, Erwin, *amicus* below
15. Chesebro, Kenneth John, Defendant in Georgia v. Trump
16. Christenson, David Andrew, *pro se*, denied intervention below
17. Clark, Jeffrey Bossert, Defendant in Georgia v. Trump
18. Cohen, Darryl B., attorney for Trevian C. Kutti
19. Copeland, Amy, *amicus* below
20. Cromwell, William Grant, attorney for Cathleen Alston Latham
21. Cross, Anna Green, Fulton County District Attorney's Office
22. Cross Kincaid LLC
23. Durham, James D., attorney for Mark R. Meadows in Georgia v. Trump
24. Eastman, John Charles, Defendant in Georgia v. Trump
25. Ellis, Jenna Lynn, Defendant in Georgia v. Trump
26. Englert, Joseph Matthew, attorney for Mark R. Meadows
27. Farmer, John J. Jr., *amicus* below
28. Floyd, Harrison William Prescott, Defendant in Georgia v. Trump
29. Floyd, John Earl, Fulton County District Attorney's Office
30. Francisco, Michael Lee, attorney for Mark R. Meadows

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31. Fried, Charles A., *amicus* below

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35. Giuliani, Rudolph William Louis, Defendant in Georgia v. Trump

36. Griffin Durham Tanner & Clarkson LLC

37. Grohovsky, Julie, *amicus* below

38. Grubman, Scott R., attorney for Kenneth John Chesebro

39. Hall, Scott Graham, Defendant in Georgia v. Trump

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41. Harding, Todd A., attorney for Harrison William Prescott Floyd

42. Hogue, Franklin James, attorney for Jenna Lynn Ellis

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44. Jones, Steve C., U.S. District Court Judge for the Northern District of Georgia

45. Kammer, Brian S., attorney for *amici* below

46. Kelley, Emily E., attorney for Mark R. Meadows

47. Kutti, Trevian C., Defendant in Georgia v. Trump

48. Lake, Anthony C., attorney for David James Shafer

49. Latham, Cathleen Alston, Defendant in Georgia v. Trump

50. Lee, Stephen Cliffgard, Defendant in Georgia v. Trump

51. Little, Jennifer L., attorney for Donald J. Trump

52. Luttig, J. Michael, *amicus* below

53. MacDougald, Harry W., attorney for Jeffrey B. Clark

54. McAfee, Scott, Fulton County Superior Court Judge

55. McFerren, William Coleman, attorney for Shawn Micah Tresher Still

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58. Moran, John S., attorney for Mark R. Meadows

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76. Shafer, David James, Defendant in Georgia v. Trump

77. Smith, Ray Stallings, III, Defendant in Georgia v. Trump

78. Still, Shawn Micah Tresher, Defendant in Georgia v. Trump

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89. Willis, Fani T., Fulton County District Attorney's Office

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91. Wooten, John William, Fulton County District Attorney's Office

92. Wu, Shan, *amicus* below

93. Young, Daysha D'Anya, Fulton County District Attorney's Office

MOTION FOR STAY PENDING APPEAL

Pursuant to FRAP 8(a)(2), Jeffrey Bossert Clark, Defendant in this case, hereby moves for a stay pending appeal of the District Court's September 29, 2023 remand of this removed case to Georgia's Fulton County Superior Court. Mr. Clark moved for a stay below on October 9, 2023, and that motion remains pending. The State did not timely respond to the District Court stay motion. We suspect this is because it lacks a response to the *Coinbase* argument explained below.

Special Timing Request: We seek resolution of this Motion ***as a threshold matter***. It would ***not*** be appropriate to carry it with the case to the merits panel. That makes sense only in purely discretionary stay cases. But here there are powerful grounds for granting an automatic stay. Parts I & II, *infra*. Briefing and an oral argument no earlier than December 2023 without a stay will be inadequate relief because it will expose Mr. Clark to months of wasteful state proceedings that should be halted pending appeal.

PROCEDURAL BACKGROUND

Mr. Clark was indicted in Fulton Superior Court on August 14, 2023 as a co-defendant in *State v. Trump*, Case No. 23SC188947. On August 21, 2023, he removed the prosecution against him to the Northern District of Georgia principally pursuant to 28 U.S.C. § 1442, the federal officer removal statute, but also pursuant to 28 U.S.C. §§ 1331, 1441, 1446, and 1455. On August 24, 2023, pursuant to 28

U.S.C. § 1455(b)(4), District Judge Steve C. Jones declined to summarily remand back to Fulton Superior Court. After receiving briefing, Judge Jones held an evidentiary hearing on September 18, 2023. On September 29, 2023, the District Court issued its remand order. On October 9, 2023, Mr. Clark filed his Notice of Appeal as contemplated by 28 U.S.C. § 1447(d). Mr. Clark then filed a motion for stay pending appeal that same day. We waited to file here until after the State let its October 23, 2023 deadline to oppose lapse without filing an opposition.

Before the remand Order below, the Fulton Superior Court severed the case against Mr. Clark and numerous others from two other defendants who had requested a speedy trial. On September 29, 2023, the Fulton Superior Court amended the Case Specific Scheduling Order for Mr. Clark and the severed defendants to provide that their discovery is due on December 4, 2023, and their motions are due on January 8, 2024.

ARGUMENT AND CITATION OF AUTHORITY

There are multiple grounds for confirming a mandatory stay (*infra* Parts I through III) and one for granting a discretionary stay (*infra* Part IV).

I. A MANDATORY/AUTOMATIC STAY SHOULD BE APPLIED UNDER *COINBASE V. BIELSKI*, 599 U.S. 736 (2023).

The Supreme Court's recent ruling in *Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023), requires a mandatory stay to be entered pending appeal. *Coinbase* involved an interlocutory appeal concerning arbitrability but its logic controls here as well.

The *Coinbase* automatic stay applies whenever the issue on appeal is purely which tribunal will hear a case. That is precisely the situation here.

The first paragraph of *Coinbase* states:

> When a federal district court denies a motion to compel arbitration, the losing party has a statutory right to an interlocutory appeal. *See* 9 U.S.C. § 16(a). The sole question here is whether the district court must stay its pre-trial and trial proceedings while the interlocutory appeal is ongoing. The answer is yes: The district court must stay its proceedings.

Coinbase, 599 U.S. at 738.

This conclusion was not by statutory command but by the rule of *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982), which *Coinbase* described as "a clear background principle" that a stay pending appeal must be granted whenever the issue on appeal is which tribunal will hear the case. *Coinbase*, 599 U.S. at 740.

> The *Griggs* principle resolves this case. Because the question on appeal is whether the case belongs in arbitration or instead in the district court, the entire case is essentially "involved in the appeal." 459 U.S. at 58. As Judge Easterbrook cogently explained, when a party appeals the denial of a motion to compel arbitration, whether "the litigation may go forward in the district court is precisely what the court of appeals must decide." *Bradford-Scott Data Corp. v. Physician Computer Network*, Inc., 128 F.3d 504, 506 (C.A.7 1997). Stated otherwise, the question of whether "the case should be litigated in the district court ... is the mirror image of the question presented on appeal." *Id*., at 505. ***Here, as elsewhere, it "makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one."*** *Apostol v. Gallion*, 870 F.2d 1335, 1338 (C.A.7 1989). In short, *Griggs* dictates that the district court must stay its proceedings while the interlocutory appeal on arbitrability is ongoing.

Coinbase, 599 U.S. at 741.

This case is controlled by the same reasoning. Namely, it makes no sense for trial in Fulton County, Georgia to go forward while the Eleventh Circuit cogitates on whether the case should be heard in state court or federal court. Mr. Clark's interlocutory appeal of right under Section 1447(d) is equivalent for this analysis to the right of interlocutory appeal of arbitrability in 9 U.S.C. § 16(a). As *Coinbase* further explained, both the Moore's and the Wright & Miller federal procedure treatises agree that where the appeal is, in essence, "the whole ballgame," an automatic stay pending appeal must be entered. *Coinbase*, 599 U.S. at 741-42. The purpose of such an automatic-stay is to avoid "an entirely wasted trial," *id.* at 742—here an entirely wasted trial in Fulton County Superior Court that is forecast to last ***for months***.

"A right to interlocutory appeal of the arbitrability issue without an automatic stay of the district court proceedings is therefore like a lock without a key, a bat without a ball, a computer without a keyboard—in other words, not especially sensible." *Coinbase*, 599 U.S. at 743. The same is true here. The Court further indicated that when Congress wants to turn off the default rule that automatic stays are required in interlocutory appeal situations like this one, it says so explicitly—in what the Court calls a "non-stay" provision. *Id.* at 744 n.6 (collecting authorities). Of course, Section 1447(d) is not burdened by a "non-stay" provision. As discussed

below in Section III, 28 U.S.C. § 1455(b)(3) does not operate as a non-stay provision in this case because (1) it does not act as an explicit non-stay provision as to interlocutory appeals; and (2) the removal and appeal here also includes not just a criminal matter controlled by Section 1455(b)(3), but the ancillary civil-in-nature Special Purpose Grand Jury ("SPGJ") that Fulton County used for an investigation that fed into the ordinary grand jury that handed down the indictment. The SPGJ, however, is a purely civil device as it lacks the power to initiate criminal charges.

Coinbase is an independent ground requiring a stay the Supreme Court describes as "automatic." *E.g.,* 599 U.S. at 742. Hence, the Court should grant the requested stay pending the duration of the appeal.

II. A MANDATORY STAY CONTINUING THE AUTOMATIC STAY OF SECTION 1446(d) ALSO APPLIES UNDER *BP V. MAYOR AND CITY COUNCIL OF BALTIMORE*.

In *BP v. Mayor and City Council of Baltimore*, 141 S. Ct. 1532 (2021), Baltimore brought common law nuisance and tort climate change claims against BP. 141 S. Ct. at 1535. BP removed to federal court under, *inter alia*, the federal officer removal statute, Section 1442. *Id.*

The District of Maryland remanded and BP appealed. The Fourth Circuit affirmed. The Supreme Court vacated the Fourth Circuit's decision and held that "when a district court's removal order rejects all of the defendants' grounds for removal, § 1447(d) authorizes a court of appeals to review each and every one of

them." *Id.* at 1538.

In reaching its holding, the Supreme Court rejected several arguments put forward by the City. The first was "the worthy goal of allowing the parties to get on with litigating the merits of their cases in state court." *Id.* at 1542.

> For that subset of cases [*i.e.*, when Congress has provided an exception to the non-appealability of remand orders], Congress has expressed a heightened concern for accuracy, authorized appellate review, ***and accepted the delay it can entail***.

BP, 141 S. Ct. at 1542 (emphasis added). The inherent delay in interlocutory appeals in federal officer removal cases was a trade-off that Congress intended: "***Here, too, Congress has deemed it appropriate to allow appellate review before a district court may remand a case to state court***." *BP*, 141 S. Ct. at 1536 (emphasis added).

In sum, Section 1446(d) means what it says: "a state court may not proceed 'further unless and until the case is remanded.'" *BP*, 141 S. Ct. at 1539 (quoting Section 1446(d)). Allowing the case to proceed in state court would frustrate the *BP* majority's (and Congress's) "heightened concern for accuracy" and defeat the whole purpose of federal officer removal and potentially moot the interlocutory appeal right.

Mr. Clark has maintained from the inception of this case and argued below that Section 1446(d) automatically stayed the Fulton County proceedings. Notice of Removal, Dkt. # 1 at ¶¶ 62-64 (incorporated here by reference). That bar applies to any proceedings seeking a judicial order. 28 U.S.C. § 1442(d)(1). A stay is

appropriate because, without it, Fulton County is determined to and is moving forward.

If Mr. Clark prevails on appeal, the litigation in Fulton County would be rendered a wasteful nullity. Where removability is confirmed on appeal, Superior Court orders issued in between the time of removal and remand are void. *Roman Catholic Archdiocese of San Juan, P.R. v. Acevedo Feliciano*, 140 S. Ct. 696, 700 (2020).[1] Mr. Clark is entitled to an Article III forum under Section 1442 and an appeal as of right on that issue under Section 1447(d). He should not be put to the trouble and expense of litigating in two forums until his appeal rights have been exhausted. This case does not yet present the issue of Mr. Clark's immunity to the charges as a federal official but especially where such immunity arguments are colorable, it would make little sense to not put litigation on hold in the removed-from forum while an appeal on removability goes forward.

Moreover, *Coinbase* dovetails nicely with *BP*—where both the majority and dissent recognized that state proceedings would be halted while the interlocutory

[1] "Once a notice of removal is filed, 'the State court shall proceed no further unless and until the case is remanded.' 28 U. S. C. § 1446(d). The state court 'los[es] all jurisdiction over the case, and, ***being without jurisdiction, its subsequent proceedings and judgment [are] not ... simply erroneous, but absolutely void***.' 'Every order thereafter made in that court [is] *coram non judice*," meaning 'not before a judge.'. . ." *Roman Catholic Archdiocese of San Juan*, 140 S. Ct. at 700 (cites omitted, footnote omitted).

appeal of federal officer removal progressed. The issue in appeals from remand orders in federal officer removal cases is precisely analogous to that in *Coinbase* and *BP*—*i.e.*, each pose the question of which court (state or federal) will hear the case.

The principal difference between *BP* and *Coinbase* is that, in *BP* the Court had an express statute commanding an automatic stay in a civil federal officer removal (which we contend is applicable in this case because the removed ancillary Special Purpose Grand Jury Proceedings are civil in nature), whereas in *Coinbase*, the Court relied on a background or default principle mandating stays pending appeal, along with the inference that absent a non-stay provision an automatic stay must be granted. Both the *BP* express statutory path and the *Coinbase* default-rule path are two complementary ways of reaching the same conclusion—that state court proceedings cannot go forward here until the removal jurisdiction dispute is finally resolved.

III. SECTION 1455(b)(3) DOES NOT BAR AN AUTOMATIC STAY OF THIS HYBRID CIVIL-CRIMINAL CASE.

It would be no answer to say that 28 U.S.C. § 1455(b)(3) bars application of *Coinbase* and *BP* to this case or the State would have quickly filed a timely opposition to our stay motion below. The criminal prosecution here is inextricably linked to the SPGJ, and that matter is therefore removable as ancillary to the prosecution within the meaning of 28 U.S.C. § 1442(d)(1) ("The terms 'civil action' and 'criminal prosecution' include any proceeding (whether or not ancillary to

another proceeding)…"). Special Purpose Grand Juries lack any power to indict and thus lack the defining characteristic that would make them criminal. *Kenerly v. State*, 311 Ga. App. 190, 190 (2011) ("[W]e are called upon to determine whether a special purpose grand jury is authorized to return a criminal indictment. We hold that it is not and therefore reverse."); *State v. Bartel*, 223 Ga. App. 696, 699 (1996) (special purpose grand juries conduct ***civil investigations***).

For purposes of removal, the prosecution's reliance on the SPGJ creates a mixed civil-criminal hybrid, and so takes on the properties of civil removals, which trigger automatic stays of state court proceedings under 28 U.S.C. § 1446(d)—and which run as well through the appeal stage under *BP* (and *Coinbase*).

The District Court did not address *Kenerly's* characterization of Special Purpose Grand Jury Proceedings as civil in nature. Rather, it only rejected one of our fallback arguments that complete preemption applies here. September 29 Order at 29-30. That issue does not alter the civil nature of the Special Purpose Grand Jury Proceedings. The complete-preemption issue is a red herring that is neither here nor there right now. Mr. Clark is entitled to use Section 1442 to remove not only criminal cases but civil cases and *Kenerly* and *Bartel* dictate that the SPGJ Proceedings are civil in nature.

Finally, the District Court held that it could not permit the removal of the SPGJ Proceedings because it was cited to no authorities holding that a concluded

proceeding of that nature can be removed. September 29 Order at 30. The issue, however, is one controlled by the text of the federal officer removal statute. Section 1442(d) allows the removal of "any proceeding (whether or not ancillary to another proceeding)" connected to a civil or criminal proceeding. The Special Purpose Grand Jury Proceedings fits this text, even if this is the first attempted removal under the federal officer statute of such proceedings. It is also the first ever state criminal prosecution of an Assistant Attorney General of the United States over a draft letter that was never sent. Unique cases arise; removal of them cannot be blocked because this is the first time such a removal has occurred.

Nor does it matter that the SGJ Proceedings are claimed by Fulton County to have concluded. They were not concluded when we removed them. Mr. Clark thus clearly had standing to remove them while they were plainly live. Standing is tested at the time the complaint is filed.[2]

That leaves only mootness as a potential basis to deny the removal of the SPGJ Proceedings. And those proceedings are emphatically not moot. Testimony, etc.

[2] *E.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 189 (2000) ("The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).") (citations omitted); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.5 (1992) (plurality) ("[S]tanding is to be determined as of the commencement of suit."); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989) ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed.").

collected by the Special Purpose Grand Jury was put before the ordinary grand jury. Mr. Clark (and, for that matter, all defendants) are entitled to test whether the SPGJ Proceedings were infected with violations of the Due Process Clause or marred by other legal defects.

For the foregoing reasons, Section 1446(d)'s automatic stay continues to apply to the appellate stage pursuant to *BP* and this Court should confirm the applicability of that automatic stay to this case.

IV. IN THE ALTERNATIVE, A STAY SHOULD ALSO BE GRANTED UNDER THE TRADITIONAL FOUR-PART TEST OF A PROPER EXERCISE OF EQUITABLE DISCRETION.

The four elements of an ordinary discretionary stay pending appeal are:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2009). They are all established in this case.

In *Nken* the Court noted that:

> There is substantial overlap between these and the factors governing preliminary injunctions … *Winter v. Natural Resources Defense Council, Inc*., 555 U.S. 7, 24 (2008); not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined.

Id. at 434. "[F]irst two factors of the traditional standard are the most critical." *Id*.

1. RESPONDENT HAS A STRONG LIKELIHOOD OF PREVAILING IN HIS FEDERAL APPEAL.

Mr. Clark has a strong likelihood of prevailing on appeal because the District Court applied the wrong legal standard to the second prong of federal officer removal under this Court's case law, and because it did not consider or address unrebutted dispositive evidence satisfying that "quite low" "hurdle."

Throughout its Order, the District Court applied the "causal connection" test drawn from *Willingham v. Morgan*, 395 U.S. 402, 409 (1969), and *Jefferson County v. Acker*, 827 U.S. 423 (1999). September 29 Order at 8, 10, 11, 16, 17, n.21, and 27-28. There are two fundamental problems with this formulation. ***First***, those terms do not appear in the statute. The phrase is merely a now-superseded judicial gloss applied to a former version of the statute. ***Second***, as recognized in *Caver v. Central Ala. Elec. Coop.*, 845 F.3d 1135 (11th Cir. 2017), the statute was amended in 2011 to add the emphasized language to § 1442(a)(1): "for ***or relating to*** any act under color of such office …." Textually, this is a broadening amendment, as the Eleventh Circuit explicitly recognized:

> In 2011, Congress amended § 1442(a)(1) to add the phrase "or relating to," which was intended to broaden the scope of acts that allow a federal officer to remove a case to federal court. *In re Commonwealth's Motion [to Appoint Counsel Against or Directed to Def. Ass'n of Phila.]*, 790 F.3d [457] at 471-72 [(3d Cir. 2015)].

Caver, 845 F.3d at 1144, n.8. Thus, the "causal connection" test from *Willingham* and *Acker* should not be applied after the 2011 amendment to Section 1442.

As the *Caver* court recognized, "[t]he phrase 'relating to' is broad and requires only 'a connection' or 'association' between the act in question and the federal office." "The hurdle erected by this requirement is quite low...." *Id*. (cleaned up). In other words, any "relating to" test is vastly broader than any "causal connection" test.

The District Court also erred by effectively requiring Mr. Clark "to definitively 'exclude[ ] the possibility that the suit is based on acts or conduct not justified by his federal duty' before removal." *Texas v. Kleinert*, 855 F.3d. 305, 312 (5th Cir. 2017) *citing Osborn v. Haley*, 549 U.S. 225, 251 (2007). This error is evident in the overly exacting examination of the contours of the internal areas of responsibility of the Civil Division of the Department of Justice, and the discounting of the declaration of former Attorney General Edwin Meese, and the authorities upon which he relied in describing the authorities of Assistant Attorney Generals like Mr. Clark.

The District Court also erred in finding that Mr. Clark failed to "definitively" prove that the President directed him to prepare the letter. Dkt. 55 at 25. Definitive proof is not required:

> The plaintiff in *Willingham* disputed that the defendant federal officials had acted under color of office. He alleged that they "had been acting on a frolic of their own which had no relevancy to their official duties as employees or officers of the United States." *Id*., at 407 (internal quotation marks omitted). The Court held that the officers "should have the opportunity to present their version of the facts to a federal, not a

state, court." *Id*., at 409 (emphasis added).

Osborn v. Haley, 549 U.S. 225, 249 (2007). The officers in *Willingham* were not required to definitively prove they had acted under the color of their office, and neither is Mr. Clark.

Here, the District Court resolved a merits question instead of a jurisdictional question by concluding that Mr. Clark had not proved he was acting within the color of his office. The pleaded facts in the Fulton County indictment and those that were the subject of removal briefing and the September 18 live hearing did not reveal Mr. Clark to be involved in anything that could remotely be characterized as a "frolic and detour." The Justice Department advises on legal questions. Mr. Clark was advising on legal questions related to the election. It is Fulton County that is on a frolic and detour—it has zero authority to second guess the internal organization of the U.S. Justice Department or the President's taskings of his Senate-confirmed appointees. Nor under separation of powers is it for an Article III court like the District Court below to second guess how the President assigned duties to Mr. Clark. It is enough that Assistant Attorney General duties are largely fungible and the President consulted with Mr. Clark (which is undisputed) and included him in a three-hour Oval Office debating session on January 3, 2021—a fact artful pleading in the indictment sought to avoid but which the State's own evidence at the hearing set out. Mr. Clark is thus entitled by the federal officer removal statute "to present

[his] version of the facts to a federal, not a state, court." *Osborn*, 549 U.S. at 249. The facts of the January 3, 2021 meeting as described in Messrs. Rosen and Donoghue's testimony (assuming it to be true, *arguendo*) are sufficient to carry Mr. Clark's burden on removal.

The District Court also did not address Mr. Rosen's testimony that while he initially opposed Mr. Clark having a briefing with the Director of National Intelligence, John Ratcliffe, he changed his mind "because he [Mr. Clark] was talking to the President." Rosen Depo., Dkt. 30-1 at 129-30. Mr. Rosen also testified that Mr. Clark could call the U.S. Attorney in Atlanta to discuss election investigations. *Id*. at 130. With these two decisions, Mr. Rosen himself (in addition to the President) put election topics on Mr. Clark's plate, "because he [Mr. Clark] was talking to the President." To the extent that authorization from the Acting Attorney General was required (beyond that of the President, the chief law enforcement officer under the Take Care Clause), there is sufficient evidence such authorization was given by the Acting Attorney General to clear the "quite low" bar under the second prong of the analysis.

Nor did the District Court address the email that Mark Meadows sent to Mr. Rosen asking that Mr. Clark look into signature anomalies on Fulton County absentee ballots. Clark Notice of Filing, Dkt. 43-2. In making that request, Mr. Meadows was obviously speaking for the President, as he described himself as the

President's assistant in all matters relating to the federal government. *E.g.*, Meadows. Tr. at 14-22. (Exhibit 1 filed herewith). Confirming the point, Mr. Meadows also testified that the President wanted DOJ to look into the signature matching issue in Fulton County. *Id*. at 52, 103, 107. As we demonstrated with Dkt. 43-17, in fact Fulton County accepted 146,092 absentee ballots but only rejected 6 for signature mismatch—effectively a ***total failure to do any signature matching at all***, in flagrant violation of Georgia law requiring signature verification on ***all absentee ballots***. O.C.G.A. § 21-2-386(a)(1)(B) & (C) (2020 version). The President was correct and within his authority to inquire about this issue, and Messrs. Rosen and Donoghue were dead wrong to mock the request.

The notion that DOJ cannot send letters to state or local election officials is preposterous. Just two years ago, Pamela Karlan, Principal Deputy Assistant Attorney General for the Civil Rights Division in the Biden Administration, wrote a letter to the President of the Arizona Senate, stating "The information of which we are aware raises concerns regarding at least two issues of potential non-compliance with federal laws enforced by the Department." https://www.justice.gov/crt/case-document/file/1424586/download (last visited Oct. 26, 2023).

This letter, which is on DOJ's website and is judicially noticeable (as well as part of the record below), refutes any contention that the Department of Justice cannot ever send letters to state officials expressing concern about election matters.

Indeed, DOJ sometimes sues local governments over election matters. Such communications are inherent in federal supremacy and the Department of Justice's responsibilities to protect civil rights in locally administered elections. Dkt. 43-13 through 43-18. DOJ also maintains an entire Office of Intergovernmental and Public Liaison, the purpose of which is to "coordinate the Attorney General's and other leadership officials' relationships with law enforcement officials, state and local government and the interest groups that represent them … and to advise and assist, as required, the White House on these same issues." https://www.justice.gov/archive/oipl/ (last visited Oct. 26, 2023).

In sum, the District Court only honored in the breach the Supreme Court's repeated admonition that courts read the federal officer removal statute broadly. "The federal officer removal statute is ***not*** 'narrow' or 'limited.' *Colorado v. Symes*, 286 U.S. 510, 517 (1932). At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." *Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969). The purpose, of course is to protect federal supremacy. Mr. Clark was engaged in a quintessential lawyer function in connection with federal law enforcement—giving legal advice about how to conduct it and related compliance activity.

The District Court evaded in the September 29 Order whether Mr. Clark had presented a colorable legal defense. We submit that this issue—the third prong the

Eleventh Circuit requires us to meet to remove—is also clearly satisfied. Mr. Clark never did anything other than give confidential and privileged legal advice that no one in Georgia even knew about until after President Biden took office. This entitles him to immunity under federal law that is intended to shield federal officers like him from grandstanding local prosecutors like Fani Willis.[3] Mr. Clark is entitled at the very least to present these defenses in an Article III court even though that merits issue is not directly ripe in this appeal exclusively concerning removal jurisdiction.

The District Court interpreted Section 1442(a)(1) too narrowly, holding Mr. Clark to a standard of proof far above that required to demonstrate entitlement to removal, and did not address or consider evidence clearly sufficient to meet the "quite low" bar of showing that the prosecution is "for or relating to" his "act under color of [his] office." Accordingly, Mr. Clark has shown a strong likelihood of prevailing on the merits on appeal.

[3] It is plainly relevant to the jurisdictional analysis and this Motion that clear principles of federal supremacy and federalism prohibit the State from intruding into the most exclusive conclaves of the President of the United States while huddled with his senior legal advisors concerning how to exercise his core Article II law enforcement powers. U.S. Const., art. II, § 3 ("[H]e [the President] shall take Care that the Laws be faithfully executed").

2. DENYING MR. CLARK THE FEDERAL FORUM TO WHICH HE IS ENTITLED WOULD CAUSE IRREPARABLE HARM BY DEFEATING THE CONGRESSIONAL DIRECTIVE TO HOLD MERITS PROCEEDINGS ONLY IN AN ARTICLE III FORUM USING A FEDERAL JURY AND/OR FEDERAL JUDGE.

Permitting the prosecution of Mr. Clark to move forward during the pendency of this appeal would irreparably deprive him of his right to have his federal defenses adjudicated in an Article III forum by federal decisionmakers—*i.e.*, an Article III Judge for threshold legal defenses and a federal jury for any remaining factual disputes. If the Superior Court of Fulton County is permitted to proceed to the merits based on an assumption of hypothetical jurisdiction, the congressional intent of Section 1442 will be overthrown—not to mention the wasted time, trouble, judicial resources, and expense, should Mr. Clark prevail in removal after extensive pre-trial or trial proceedings in Fulton Superior Court. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) (rejecting a doctrine the federal courts of appeal had pioneered called "hypothetical jurisdiction").

If the prosecution in Fulton Superior Court is not stayed (on a mandatory or discretionary basis or both), then Mr. Clark will also be put through local litigation that will irreparably harm his reputation, as printed news stories, blog entries, TV spots, YouTube rants, and other forms of media are constantly attacking him. This is especially true because the Fulton Superior Court broadcasts its hearings and trials on YouTube. These many bells cannot be un-rung and they will simply mount up

more and more jury pool poisoning to Mr. Clark's detriment. Even beyond Mr. Clark's special rights as a federal officer to a federal forum in which to defend himself, stay is warranted to avoid that irreparable harm.

3. THERE WOULD BE NO PREJUDICE TO THE STATE FROM A STAY.

The State would not be prejudiced by a stay because it is inherent in the Supremacy Clause that States entered the Union knowing they would be subject to federal judicial forums and adjudications. Moreover, the State is so far outside of its lane here as to be a contestant in the Baja 500. It has no right to enforce state criminal law against a senior legal officer of the United States over a letter never sent, and therefore cannot suffer any prejudice from a stay.

4. THE PUBLIC INTEREST SUFFERS IF THE STAY IS NOT GRANTED.

Allowing appeal as of right is a relatively recent addition to the long history of the federal officer removal statutes. Pub. L. 112-239, 126 Stat. 1969, § 1087 (Jan. 2, 2013). By so providing, Congress has concluded that the public interest is served by preserving federal supremacy during the pendency of the appeal. A stay pending appeal in this case will vindicate federal supremacy by preventing a politically hostile local government from penetrating into and/or second-guessing discretionary discussions or decisions at the highest levels of the Executive Branch.

CONCLUSION

This Court should order a stay pending appeal for the entire duration of appellate proceedings. A mandatory stay should issue under *Coinbase* (*supra* Part I) and *BP*/Section 1446(d) (*supra* Part II). Finally, a discretionary stay under the traditional four-part test of equity would also justify granting a stay for the entire duration of appellate proceedings. *Supra* Part IV. We thus respectfully request that the Court either confirm a mandatory stay or grant a discretionary stay.

Respectfully submitted, this 26th day of October, 2023.

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CERTIFICATE OF COMPLIANCE

I certify under Fed. R. App. P. 5(c)(1) that this petition contains 5,198 words, excluding those parts exempted under Fed. R. App. P. 32(f). I further that certify this brief complies with type-volume limitations under Fed. R. App. P. 32(g) as it is written in proportionally-spaced, 14-point Times New Roman font using Microsoft Office Word.

This 26th day of October, 2023.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing ***Motion For Stay Pending Appeal*** was hereby filed on this 26th day of October 2023 with the Court's electronic filing system which causes service to be made upon all counsel of record.

This 26th day of October, 2023.

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