IN THE UNITED STATES COURT OF APPEALS
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

REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

CALDWELL, CARLSON, ELLIOTT & DELOACH, LLP

/s/ Harry W. MacDougald
Harry W. MacDougald
Ga. Bar No. 463076
Two Ravinia Drive, Suite 1600
Atlanta, GA 30346
(404) 843-1956
hmacdougald@ccedlaw.com
Attorneys for Jeffrey B. Clark

BERNARD & JOHNSON, LLC

/s/ Catherine S. Bernard
Catherine S. Bernard
Ga. Bar No. 505124
5 Dunwoody Park, Suite 100
Atlanta, Georgia 30338
Direct phone: 404.432.8410
catherine@justice.law

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 by virtue of their appearance in the underlying criminal matter in Fulton Suprerior Court:

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
11. Bondurant Mixson & Elmore LLP

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

31. Fried, Charles A., amicus below

32. Fulton County District Attorney's Office

33. Gerson, Stuart M., amicus below

34. Gillen, Craig A., attorney for David James Shafer

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

40. Hampton, Misty (a/k/a Emily Misty Hayes), Defendant in Georgia v. Trump

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

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

43. Hogue, Laura Diane, attorney for Jenna Lynn Ellis

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

56. McGuireWoods, LLP

57. Meyer, Joseph Michael, attorney for amici below

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

59. Morgan, John Thomas III, attorney for amici below

60. Morris, Bruce H., attorney for Ray Stallings Smith, III

61. Ney, Adam, Fulton County District Attorney's Office

62. Novay, Kristen Wright, attorney for Ray Stallings Smith, III

63. Palmer, Amanda, attorney for Ray Stallings Smith, III

64. Parker, Wilmer, attorney for John Charles Eastman

65. Pierson, Holly Anne, attorney for David James Shafer

66. Powell, Sidney Katherine, Defendant in Georgia v. Trump

67. Rafferty, Brian T., attorney for Sidney Katherine Powell

68. Ragas, Arnold M., attorney for Harrison William Prescott Floyd

69. Raul, Alan Charles, amicus below

70. Rice, Richard A., Jr., attorney for Robert David Cheeley

71. Roman, Michael A., Defendant in Georgia v. Trump

72. Rood, Grant H., Fulton County District Attorney's Office

73. Sadow, Steven H., attorney for Donald J. Trump

74. Saldana, Sarah R., amicus below

75. Samuel, Donald Franklin, attorney for Ray Stallings Smith, III

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

79. Terwilliger, George J., III, attorney for Mark R. Meadows

80. Trump, Donald J., Defendant in Georgia v. Trump

81. Twardy, Stanley A. Jr., amicus below

82. Volchok, Daniel, attorney for amici below

83. Wade, Nathan J., Fulton County District Attorney's Office

84. Wade & Campbell Firm

85. Wakeford, Francis McDonald IV, Fulton County District Attorney's Office

86. Waxman, Seth P., attorney for amici below

87. Weld, William F., amicus below

88. Wertheimer, Fred, attorney for amici below

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

90. Wilmer Cutler Pickering Hale and Dorr LLP

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

Respectfully submitted, this 13th day of November, 2023.

CALDWELL, CARLSON, ELLIOTT & DELOACH, LLP

/s/ Harry W. MacDougald
Harry W. MacDougald
Ga. Bar No. 463076
Two Ravinia Drive
Suite 1600
Atlanta, GA 30346
(404) 843-1956
hmacdougald@ccedlaw.com

BERNARD & JOHNSON, LLC

/s/ Catherine S. Bernard
Catherine S. Bernard
Ga. Bar No. 505124
5 Dunwoody Park, Suite 100
Atlanta, Georgia 30338
Direct phone: 404.432.8410
catherine@justice.law

Attorneys for Jeffrey B. Clark

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

THE STATE OF GEORGIA *Plaintiff-Appellee,* *versus* JEFFREY BOSSERT CLARK, *Defendant-Appellant*	Case No. 23-13368 On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division, No. 1:23-v-3721-SCJ

REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

Defendant-Appellant Jeffrey Clark hereby submits this Reply in support of his motion for a stay pending appeal.

1. The District Court Disobeyed Its Own Local Rules in Denying the Stay Pending Appeal. As Judge Jones noted in his stay decision issued on November 9, 2023, Northern District of Georgia Local Rule 7.1(B) provides that "[f]ailure to file a response shall indicate that there is no opposition to the motion." Order Denying Stay, Dkt. # 68 at 1 n.2 (Nov. 9, 2023). The use of the verb "shall" indicates that the District Court should have simply entered the stay pending appeal because of Fulton County's failure to file a timely opposition below. Nothing in Local Rule 7.1(B) provides discretion to the District Court below to ignore its own rules. *Matter of Adams*, 734 F.2d 1094, 1098–99 (5th Cir. 1984) ("local rules have the same force and effect as law, and are binding upon the parties and the court"). As applied to a

stay pending appeal, which simply freezes the *status quo*, Local Rule 7.1(B) was appropriately purely procedural.

Judge Jones nevertheless denied the stay because "Clark has not met his burden for the Court to enter a stay." Dkt. #68 at 2 n.2. We respond below that we did meet the burden, but Judge Jones misconstrues the burden, which is an exceedingly light one. A declaration by Mr. Clark and one by former Attorney General Meese, even if there were no other documents or facts in the record, satisfy the correctly construed removal burden for federal officers. See Exh. 1 and 2 attached hereto. But removal is supported by more than those declarations. Federal officer removal proceedings are not designed to lead to threshold mini-trials on removal. Mr. Clark is entitled to resist Fulton County's prosecution on the grounds of immunity, other legal defenses, and on the facts before a federal judge and a federal jury.

2. **Coinbase *Sets Out a Default Rule Applicable to Interlocutory Appeals, Which Has Not Been Set Aside by Any Federal "Non-Stay" Statute.*** The District Court below began its analysis with Appellant's argument for a discretionary stay under *Nken v. Holder*, 556 U.S. 418, 433 (2009). That was not Appellant's lead argument for a stay pending appeal. Instead, it was that *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 743 (2023), requires the grant of a stay on a mandatory basis in order to preserve scarce judicial resources and avoid the nonsensical situation (which the

Supreme Court said was "like a lock without a key, a bat without a ball, a computer without a keyboard") where adjudication continues in a forum that might prove to be the incorrect one during an interlocutory appeal focused solely on the venue of where the adjudication should take place. *Nken* does not provide the standard of review applicable to a *Coinbase* mandatory stay.

The District Court recognized that the argument for applying the general rule of *Coinbase* to grant an automatic stay is relatively strong. *See* Dkt. #68 at 6-7.

But the District Court ultimately rejected the *Coinbase* argument for an automatic stay because of 28 U.S.C. § 1455(b)(3). *See id.* at 7. But Section 1455(b)(3) provides only as follows: "The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded." But what Judge Jones overlooked is that Section 1455(b)(3) is silent on the context of 28 U.S.C. § 1447(d) interlocutory appeals. (Indeed, both Section 1455(b)(3) and Section 1455 as a whole are entirely silent on appeals.) Judge Jones held that in light of Section 1455(b)(3) it would be anomalous to order a stay pending appeal, overriding the general default rule of *Coinbase*: Dkt. # 68 at 7-8.

Beyond the silence of Section 1455(b)(3) on interlocutory appeals, making that provision entirely inapplicable to *Coinbase* interlocutory appeals like this one,

there are two further reasons why the District Court's ruling that Section 1455(b)(3) creates an anomaly that negates *Coinbase* is incorrect.

First, there is not a complete overlap between federal criminal cases that are removable and federal criminal cases where removability decisions are subject to interlocutory appeals as of right. This means that it is possible to give Section 1455(b)(3) effect in situations where criminal cases can be removed but where there is no interlocutory appeal right attaching to such criminal cases.

What is this category of removable criminal cases where remand decisions are subject only to ordinary post-final-judgment appeals and not to interlocutory appeals? The answer is cases involving members of the federal armed forces as criminal defendants. Such armed-forces defendants are afforded removal rights as to criminal cases in 28 U.S.C. § 1442a. But Section 1447(d) affords no interlocutory appeal as of right to such criminal defendants as it affords to federal officers like Mr. Clark. *See* 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.").

Section 1442a is not on the list of two exceptions that Section 1447(d) creates. *See Florida v. Simanonok*, 850 F.2d 1429 (11th Cir. 1988) (per curiam) (Section 1442a removal reviewable only via mandamus and only then in certain limited

circumstances); *see also Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223, 1225-26 (7th Cir. 1991) (similar).[1] Hence, only Section 1442 federal officer removals and Section 1443 civil rights cases grant/allow interlocutory appeals as of right. Section 1442a does not. This breaks the implicit identity the District Court assumed between Section 1455(b)(3) granting permission to state courts to continue adjudicating cases (shy of a judgment of conviction) based on district court notices of removal. That rule would have an effect all the way through the point in time just prior to a judgment of conviction as to armed-forces cases removed by criminal defendants. But the Section 1455(b)(3) rule has no application once a Section 1447(d) interlocutory appeal right is exercised by a federal officer or relevant civil-rights criminal defendant.

Second, the District Court ignored *Coinbase*'s discussion that when Congress wants to turn off what the Court called the "*Griggs* rule" but which we call the "*Coinbase* rule," since the latter is the more recent case, Congress says so explicitly in what the Supreme Court calls a "non-stay rule":

> At least absent contrary indications, the background *Griggs* principle already requires an automatic stay of district court proceedings that relate to any aspect of the case involved in the appeal. By contrast, when

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[1] These cases predate the creation of the interlocutory appeal right for federal officers and civil rights defendants in Section 1447(d), which occurred in 2011. We know that Section 1442a is more than 35 years old (indeed, it is about 67 years old tracing to 70A Stat. 626 (Aug. 10, 1956)). Had Congress wanted Section 1442a cases to be appealable on an interlocutory basis, it knew how to do so, but never did.

> Congress wants to authorize an interlocutory appeal, but not to automatically stay district court proceedings pending that appeal, Congress typically says so. Since the creation of the modern courts of appeals system in 1891, Congress has enacted multiple statutory "non-stay" provisions.

Coinbase, 599 U.S. at 744 (collecting cases in footnote 6). And what is most notable is that ***all*** the non-stay rule cases collected in footnote 6 a statute explicitly turns off stays pending appeal. Section 1455(b)(3) does not do so. Hence, it is fully subject to the default rule of *Griggs*/*Coinbase* and is not governed by a statutory non-stay rule.

Consider just a few examples of the provisions of federal law cited in footnote 6 of *Coinbase*:

> **(1) Federal Rule of Civil Procedure 23(f)** no automatic stay pending appeal of denials of class certification;
>
> **(2) The Judiciary Act of 1891**, § 7, 26 Stat. 828; Act of June 6, 1900, ch. 803, 31 Stat. 660–661 provides "the proceedings in other respects in the court below shall not be stayed, unless ordered by that court, or by the appellate court or a judge therefore, during the pendency of such appeal ….";
>
> **(3) Federal Courts Improvement Act of 1982**, 28 U.S.C. § 1292(d)(3) (no automatic stay of proceedings in the Court of International Trade or in the Court of Federal Claims, pending appeal); and
>
> **(4) Bankruptcy Abuse Prevention and Consumer Protection Act of 2005**, 28 U.S.C. § 158(d)(2)(D) (no automatic stay pending appeal.).

All of these provisions are designed to specifically and explicitly turn off the *Griggs/Coinbase* rule. By contrast, Section 1455(b)(3) ***is not such a non-stay provision***. And for that reason alone, the District Court below erred in ruling that

Section 1455(b)(3) defeats the application of the *Griggs/Coinbase* default rule automatically staying action in the competing courts before the appeal as to which of those competing courts can properly exercise merits jurisdiction is sorted out.

The District Court offered one last argument as to why the automatic *Griggs*/*Coinbase* stay pending appeal should be denied, namely that we cited no case to that court where *Coinbase* was applied to order a stay pending appeal in a federal officer removal. *See* Dkt. #68 at 8 n.3 ("Moreover, Clark has directed the Court to no authority applying the recent *Coinbase* decision to any context similar to his case."). With all due respect, that's just not how the *Coinbase* rule works. It is a default rule that applies when there is an interlocutory appeal and the sole issue in such an appeal is which among competing courts/tribunals can hear a case. In that situation, an automatic stay kicks in unless Congress has switched off the default rule by enacting a non-stay provision, which it did not do here and where Section 1455(b)(3), which does not even refer to appeals, does not operate as a non-stay rule. Or, as the Supreme Court put it:

> When Congress wants to authorize an interlocutory appeal and to automatically stay the district court proceedings during that appeal, Congress need not say anything about a stay. At least absent contrary indications, the background *Griggs* principle already requires an automatic stay of district court proceedings that relate to any aspect of the case involved in the appeal. By contrast, when Congress wants to authorize an interlocutory appeal, but *not* to automatically stay district court proceedings pending that appeal, Congress typically says so.

Coinbase, 599 U.S. at 743-44 (emphasis added).

In other words, by the specific directive of the Supreme Court, a statute need not specifically "say anything about a stay." *Id.* at 744. And if Congress need not say anything about it to trigger the *Griggs/Coinbase* rule, case law applying *Griggs/Coinbase* to particular situations also does not need to exist. Any other result would be contrary to *Coinbase*'s express holding, language, and logic. Nor is it surprising that there are not cases applying *Coinbase* to federal-officer removal interlocutory appeals under Section 1447(c). *Coinbase* was decided on June 23, 2023. In other words, the decision is barely four months old and federal officer removals of state court criminal prosecutions are not everyday events.

To be sure, *Griggs* was decided about 40 years ago. And while, as *Coinbase* explains, the Seventh Circuit is well aware of the rule and has applied it in several contexts that the Supreme Court received into nationwide case law, the Ninth Circuit was apparently unaware of or unwilling to enforce the rule, which is what led to reversal in *Coinbase*. It would most unfortunate if some of the most important and historically unprecedented litigation going on in the United States of America at this point in time involving former President Trump, former White House Chief of Staff Meadows, and former double Assistant Attorney General Clark went off for months or years of state court litigation that was all for naught because Mr. Clark's or Mr. Meadows' removals were entirely proper and yet state court litigation was not stayed as it should have been under *Coinbase*. That would be a monumental waste of time

and resources. And because the case for applying *Coinbase* here is not just strong but simple and syllogistic, basic prudence should dictate granting the stay pending appeal so that the special concern for accuracy in determining the proper venue for cases against federal officers be observed by pausing proceedings in state court pending this appeal.

3. The District Court Also Erred in Rejecting the Argument for an Automatic Stay Based on the* BP, plc v. Mayor and City Council of Baltimore *Decision. Many statements in the *BP* decision are inexplicable if the Supreme Court was contemplating that proceedings in state court would continue while BP's federal-officer removal interlocutory appeal under Section 1447(d) went forward. We set these forth in our opening stay motion and thus do not rehash them here. Once again, the District Court overreads Section 1455(b)(3) as if it answers all questions involving stays pending appeal. *See* Dkt. #68 at 10. It does no such thing because it does not address interlocutory appeals at all. It is limited to district court versus state court criminal case proceedings.

Our argument that a stay under *BP* is required here traces to 28 U.S.C. § 1446(d), which explicitly requires civil cases to be stayed automatically beginning at the district court stage as soon as a notice of removal is filed. We cited unrefuted Georgia authority holding that Special Purpose Grand Jury Proceedings ("SPGJ Proceedings") are civil in nature. *See Kenerly v. State*, 311 Ga. App. 190, 190 (2011);

State v. Bartel, 223 Ga. App. 696, 699 (1996). *Kenerly* and *Bartel* bind the Northern District of Georgia to construe SPGJ Proceedings as civil in nature.[2] Yet, the District Court decision below is silent on those cases.

From here, the District Court decision gets very strange. To reject the argument that the ongoing criminal case against Mr. Clark (and others) is unremovable and does not warrant an automatic stay under Section 1446(d), the District Court refers to its ruling that "that the requirements of federal officer removal had been met." Dkt. #68 at 8. But that assumes that the remand order will survive in this Court. That jurisdiction question is irrelevant to whether Section 1446(d) and *BP* require the grant of an automatic stay pending appeal. Automatic stays pending appeal work differently than discretionary stays, where the likelihood of prevailing on the merits is a factor to weigh under *Nken*. But as we pointed out above, *Nken* is not part of the analysis of automatic stays pending appeal. The District Court is wrongly conflating *Nken* discretionary stays with automatic/mandatory stays as acknowledged in *BP*.

Regarding the civil-criminal hybrid nature of the proceeding The District Court summarized our argument as follows:

> Clark maintains that (1) the SPGJ is ancillary to the criminal prosecution against him and is thus removable substantively under

[2] *See Bodiford v. State*, 328 Ga. App. 258, 263 (2014) ("A unanimous decision by a three-judge panel of this Court remains binding precedent until such time as it is modified or reversed by this Court en banc or our Supreme Court.").

> Section 1442(d)(1), (2) the SPGJ is a civil proceeding under Georgia law and hence is procedurally removable under Section 1446, and (3) the question of removing the SPGJ to federal court remains ripe given that there are a number of constitutional and legal defects with the proceeding.

Dkt. #68 at 8-9.

The District Court rejected this argument on the ground that the SPGJ proceeding is now ***complete*** but the criminal case is ***ongoing***. *See* Dkt. # 68 at 9. But that argument falters because it ignores the points Mr. Clark removed this case ***before*** the SPGJ Proceedings were complete and that this wrested control over the SPGJ Proceedings from the state court system and pulled them into the Northern District of Georgia. Moreover, it ignores our point that the SPGJ Proceedings fed into the ordinary grand jury indictment that was issued here. The criminal case that the District Court stresses is "ongoing" is thus the fruit of the poisonous tree of a civil investigative set of SPGJ Proceedings that Mr. Clark was entitled to remove under Section 1442(d)(1). The District Court held in essence that the two sets of proceedings (the civil SPGJ Proceedings) and the criminal case following in the wake of an indictment are distinct. But they are not distinct as a matter of fact. Nor can such an analysis stand as a matter of law because Section 1442(d)(1) expressly provides for removal of "ancillary" proceedings.

In a footnote the District Court said that it did not resolve the issue of removability below. *See* Dkt. #68 at 9 n.4. The Court characterizes this as judicial

restraint, but to us, it is shirking the task of deciding whether the case is removable. It should not take multiple cycles of appeals and remands back to the District Court to resolve whether the SPGJ Proceedings and the follow-on, ancillary criminal case are removable. There should be due respect for the policy of the federal officer removal statute.[3]

***4. A Discretionary Stay Should Also Be Granted Under* Nken.** There is more than enough evidence and legal argumentation in the record for a standard, four-factor equitable stay to be granted under *Nken v. Holder*, 556 U.S. 418 (2009) as well.

a. There Is a Strong Likelihood of Reversal on Removal

[3] We sought a stay in the District Court on October 9, 2023 on the additional mandatory ground that the Federal Rule of Civil Procedure 62 imposed an automatic stay of a limited duration, set to expire on October 30, 2023. The District Court did not act on that stay request until about a week after its October 30, 2023 expiration. But that does not mean that it was not error for the District Court to delay acting on the motion for stay pending appeal until after the Rule 62 automatic stay expired.

The District Court apparently faults us for not having filed for an emergency stay (even though it recognizes that that we made the correct decision, *see* Dkt. #68 at 5). Like its decision overriding its mandatory Local Rule 7.1(B), the way in which the District Court delayed deciding the stay motion until after the Rule 62 period expired is questionable and designed to deprive Mr. Clark of even a temporary reprieve as to the progress of state court proceedings. This was error because during the relevant 30-day period, actions by the Fulton County Superior Court on Mr. Clark's case should have been ordered halted. Unless District Courts in this Circuit are instructed that Rule 62's mandatory stay means what it says, District Judges in this Circuit will be incentivized to effectively ignore stay requests for 30-plus days and therefore render the 30-day Rule 62 automatic stay a nullity.

Jurisdiction. The District Court dismisses this first factor, saying that we are just rehashing what we will say in our Eleventh Circuit briefing. *See* Dkt. #68 at 11-12. But that will ***always*** be the case. What would the merits factor in *Nken* if it not serve as a shorter preview of the merits arguments in the appeal? More importantly, the District Court sidestepped the argument in our stay motion that it had applied the wrong legal standard to the removal analysis. *See* Opening Stay Motion at 12.

b. Mr. Clark Suffers Irreparable Harm. Congress established federal officer removal in recognition of the fact that such officers were at risk of being "hometowned" by state courts that would not show appropriate deference to federal authorities, which need their own sphere of operation or else the constitutional order in which federal law takes precedence under the Supremacy Clause could be inverted, making the States the masters of federal officers.[4]

Additionally, just this evening leaks (which may poison the local jury pool)

[4] *See* H. Rep. 112-17(1) at 3 (2011) ("Federal officers or agents, including Members of Congress, should not be forced to answer for conduct asserted within their Federal duties in a state forum that invites 'local interests or prejudice' to color outcomes. In the absence of this constitutionally based statutory protection, Federal officers, including Members of Congress, could be subject to political harassment, and Federal operations generally would be needlessly hampered.'"). This prosecution implicates all of these interests—being subjected to potential local prejudices, political harassment, and harassment of federal operations. No lawyer like Mr. Clark, sitting in his office at Main Justice in Washington, D.C., drafting legal advice and a policy option for the President to consider would think he could possibly be subjected to Georgia criminal law for doing so. At the very least, application of state law to federal operations in giving and receiving legal advice should not be interfered with lightly. Removal vindicates that policy concern.

went to the press about the guilty plea proffers of Sidney Powell, Jenna Ellis, Kenneth Chesebro, and Scott Hall. *See* Amy Gardner & Holly Bailey, *Ex Trump Allies Detail Efforts to Overturn Election in Georgia Plea Videos*, WASH. POST (Nov. 13, 2023). Coincidentally, this comes as District Attorney Willis is hosting a fundraiser at a law firm in Washington, D.C. that happens to be at the same address as the *Washington Post*. *See* Alana Goodman, *Trump Prosecutor Fani Willis Hosts High-Dollar DC Fundraiser*, WASH. FREE BEACON (Nov. 13, 2023); https://washingtondccoc.weblinkconnect.com/newspapers/the-washington-post-105 (listing the Post's address as 1301 K St., N.W. 20071). This is precisely the sort of public reputational risk that Congress sought to minimize by allowing removal to a more neutral federal forum where the Judges have Article III lifetime tenure and are not subject to the winds of politics.

Once more, the District Court adverts to Section 1455(b)(3)." *See* Dkt. #68 at 12-13. But Section 1455(b)(3) cannot answer all questions and it cannot answer any question about stays (automatic or discretionary) pending appeal because Section 1455(b)(3) does not even use the word "appeal."

c. There Is No Prejudice to Fulton County. The District Attorney and her prosecution team would no doubt prefer to be in Fulton County Superior Court (including for the prosaic reason that they know its procedures and are repeat-player litigators there). But losing that "edge" is not a form of irreparable harm to

Fulton County to be weighed against the harms of losing a federal forum that Mr. Clark would experience. To rebut these points, the District Court relies on the Anti-Injunction Act. *See* Dkt. #68 at 13 n.5. But as we explained to the District Court before, the Anti-Injunction Act has no applicability here. We did not file an independent action seeking to enjoin the Fulton County prosecution here; we ***removed*** the case on Mr. Clark's behalf to federal court. We also explained how *Younger* abstention is irrelevant. Removal does not interfere with state criminal prosecutions; it simply shifts the venue to federal district court.

Moreover, Congress made the relevant policy choices here and those policy choices favor removal. If federalism were the overriding concern, Congress would not have enacted Section 1442 at all. That ship sailed more than 100 years ago.

d. The Public Interest Also Favors a Stay. The District Court's arguments for holding that the public-interest factor does not favor the grant of a discretionary stay rehash the overreliance on Section 1455(b)(3) as the answer to all problems. Section 1455(b)(3) does not purport to balance the interests of the public in whether to grant a stay pending appeal. We humbly suggest that granting a stay to allow the Court to consider the first removal of a state criminal case ever brought against a President of the United States and two of his senior government officials in a matter involving the 2020 election implicates weighty federal interests. And the federal government's interests are a superior indicator of what protects the interests

of the people of the entire Nation as compared to the interests of a grandstanding county prosecutor or even of a single State in the Union. This is why "a State lacks standing as *parens patriae* to bring an action against the federal government." *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923). The federal government's claim to represent the people is the superseding and superior claim.

CONCLUSION

The stay pending appeal should be granted on either mandatory or discretionary grounds. The *status quo* in this historically unique case should be frozen while this Court mulls the weighty appeals of Messrs. Clark and Meadows.

Respectfully submitted, this 13th day of November, 2023.

CALDWELL, CARLSON, ELLIOTT & DELOACH, LLP

/s/ Harry W. MacDougald
Harry W. MacDougald
Ga. Bar No. 463076
Two Ravinia Drive
Suite 1600
Atlanta, GA 30346
(404) 843-1956
hmacdougald@ccedlaw.com

BERNARD & JOHNSON, LLC

/s/ Catherine S. Bernard
Catherine S. Bernard
Ga. Bar No. 505124
5 Dunwoody Park, Suite 100
Atlanta, Georgia 30338
Direct phone: 404.432.8410
catherine@justice.law

Attorneys for Jeffrey B. Clark

CERTIFICATE OF COMPLIANCE

I certify under Fed. R. App. P. 5(c)(1) that filing contains 4,086 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 13th day of November, 2023.

/s/ Harry W. MacDougald
Georgia Bar No. 463076
Attorney for Jeffrey B. Clark

CALDWELL, CARLSON, ELLIOTT & DELOACH LLP
Two Ravinia Drive, Suite 1600
Atlanta, Georgia 30346
(404) 843-1956
hmacdougald@ccedlaw.com

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing ***Reply in Support of Stay Pending Appeal*** was hereby filed on this 13th day of November 2023 with the Court's electronic filing system which causes service to be made upon all counsel of record.

This 13th day of November, 2023.

/s/ Harry W. MacDougald
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

STATE OF GEORGIA, v. JEFFREY BOSSERT CLARK, DEFENDANT.	Case No. 1:23-cv-3721 (Related to: Case Nos. 1:23-cv-03621-SCJ 1:23-cv-03720-SCJ 1:23-cv-03792-SCJ 1:23-cv-03803-SCJ Judge Steve C. Jones On Removal from the Fulton County Superior Court

DECLARATION OF JEFFREY BOSSERT CLARK

1. My name is Jeffrey Bossert Clark. I am of sound mind and have personal knowledge of the following:

2. During the George W. Bush Administration, I was appointed by Attorney General John Ashcroft, in conjunction with the Presidential Personnel Office, as a Deputy Assistant Attorney General in 2001 and served until 2005. I am thus well-acquainted with the regulations of, policies of, and day-to-day operations of the U.S. Justice Department and have had that level of familiarity for decades. I served for those four years at "Main Justice" in Washington, D.C., and a cadre of career lawyers and Senior Executive Service lawyer managers reported to me over

that span of time. While there I won two awards—one from the Pentagon for defending U.S. military readiness in the courts and one from the Department of Commerce.

3. Before and after my service in the Bush Administration, I was employed by Kirkland & Ellis LLC, one of the most prestigious law firms in the country. Upon returning from the Justice Department in 2005, I was named a partner and served in that capacity until I departed to take my Commission in the Trump Administration.

4. Based in part on my prior service at the Department, I was nominated by the President in June 2017 to serve as an Assistant Attorney General at the U.S. Department of Justice. I was confirmed by the Senate with bipartisan support on October 11, 2018. I took the oath of office and assumed my duties as an Assistant Attorney General at the U.S. Justice Department on November 1, 2018. Starting on November 1, 2018, I began directing the activities of the Environment & Natural Resources Division.

5. A true and correct copy of my Commission to that office (in the form of a photograph) is attached hereto as Exhibit 1. The text of the commission reads as follows:

> Donald J Trump, President of the United States of America, to all who shall see these presents, greeting: Know Ye: that reposing special trust and confidence in the Wisdom, Uprightness and Learning of Jeffrey Bossert Clark, of Virginia, I have nominated and by and with the

> advice and consent of the Senate do appoint him an Assistant Attorney General and do authorize and empower him to execute and fulfill the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining unto Him, the said Jeffrey Bossert Clark during the pleasure of the President.
>
> In testimony hereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be here onto affixed. (Seal)
>
> Done at the City of Washington this 12th day of October, in the year of our Lord 2018 and of the Independence of the United States of America the 243rd. By the President: /s/ Donald J. Trump. Attorney General /s/ Jeffrey B. Sessions.

6. Attached hereto as Exhibit 2 is a true and correct copy of a Press Release from the U.S. Department of Justice announcing my additional formal assignment to simultaneously serve as Acting Assistant Attorney General for the Civil Division on September 1, 2020 by Attorney General William P. Barr, who praised me for my service running the Environment and Natural Resources Division. Indeed, I was the only Assistant Attorney General who ran two litigating Divisions at the same time during the Trump Administration.

7. I did not begin directing the work of the Civil Division until circa September 8, 2020, so as not to begin undertaking that portfolio of work when many career lawyers were out of the office on vacation on and around Labor Day 2020.

8. My duties in the Trump Administration as a Senate-confirmed officer of the United States from 2018-2021 were fluid and included duties at the White House. One of the parts of the Executive Office of the President is the Council on Environmental Quality ("CEQ"). CEQ's website is https://www.whitehouse.gov/ceq/ (last visited Sept. 14, 2023). I wrote significant portions of the regulations and explanatory preamble issued by CEQ in 2020 that embodied the first significant reform in many decades of CEQ's directives under the National Environmental Policy Act. I also personally defended those regulations and was successful in convincing two federal Judges to refuse to grant preliminary injunctions that were sought against the regulations.

9. At the time of the allegations regarding my conduct in the underlying Indictment in *State of Georgia v. Trump, et al.*, Fulton Superior Court Case No. 23SC188947, I was both the Assistant Attorney General for the Environment and Natural Resources Division and the Acting Assistant Attorney General for the Civil Division. The Justice Department has seven litigating Divisions in all and I was running two of them from September 8, 2020 until January 14, 2021, when I voluntarily resigned my position in anticipation of the inauguration of President Biden on January 20, 2021, clearing the way for President Biden to name my successors.

10. Attached hereto as Exhibit 3 is a true and correct copy of my letter of resignation from the Department of Justice dated January 14, 2021.

11. Attached hereto as Exhibit 4 is a news article by Amanda Carpenter, *Mike Pence's Day-By-Day Account of Trump's Pressure Campaign Against Him*, published in THE BULWARK on November 22, 2022, *available at* https://www.thebulwark.com/mike-pences-day-by-day-account-of-trumps-pressure-campaign-against-him/ (last visited Sep. 14, 2023), which states as follows, and includes a verbatim quotation from former Vice President Pence, taken from his memoir (*So Help Me God*) of his years as Vice President:

> Rep. Louie Gohmert and other Republicans file a lawsuit asking a Trump-appointed federal judge in Texas "to declare that I had 'exclusive authority and sole discretion' to decide which electoral votes should be counted." Pence directs his staff to request that Department of Justice lawyers represent him in the case, "which the department lawyers did without hesitation—to the consternation of the president, I would later learn."

12. Attached hereto as Exhibit 5 is a true and correct copy of the docket sheet for the case of *Gohmert v. Pence*, filed in the U.S. District Court in the Eastern District of Texas, which is the 2020 presidential election litigation Vice President Pence referred to in the preceding paragraph. Also attached hereto is Exhibit 6, the response the Civil Division that I was leading at the time prepared under my framing instructions to oppose the Plaintiff's Emergency Motion for Expedited Declaratory Judgment and Emergency

Injunctive Relief as filed on December 31, 2020. During this same period in late December 2020 and prior to filing the brief, I also spoke personally with the then-General Counsel of the U.S. House of Representatives, Douglas Letter, to hear out his recommendations to the Executive Branch concerning what that brief should say. Mr. Letter had been a longtime career official in the Civil Division. The Court dismissed the *Gohmert* case on January 1, 2021. I was in charge of the defense of this 2020 presidential election case and my name is the first one on the filings defending the Vice President. This litigation is illustrative of 2020 election-related litigation that I handled during my tenure in office.

13. Attached hereto as Exhibit 7 is a true and correct copy of a letter I received from Doug Collins as attorney for former President Trump, dated August 2, 2021, asserting and instructing me to assert executive privilege with respect to the House Oversight and Senate Judiciary Committee investigations, respectively.

14. Based on my own study, analysis, research, and decades of legal experience both inside and outside the Justice Department, I do not believe that President Biden's purported waiver of President Trump's executive privilege is lawful. As many courts and commentators have observed, if a current President could at will and without regard to the passage of time waive

a former President's executive privilege, the privilege would be shredded, and the essential purposes that it serves in the functioning of the presidency and Executive Branch would be defeated. Officials serving in Administrations of either political party would begin their periods of service knowing that any advice they provided would automatically become subject to release whenever the political party of the President changed. This would chill the giving of candid advice. As a result, the presidency as a whole would be weakened and the country harmed. This is especially true where, as here, President Biden and President Trump are the chief rivals in the 2024 presidential election (as was foreseeable even back in 2021), and where President Biden is a seemingly implacable foe of President Trump and *vice versa*.

15. Attached hereto as Exhibit 8 is a true and correct copy of the U.S. Supreme Court's decision on application for a stay of mandate and injunction pending review in *Trump v. Thompson,* No. 21A272, along with the Statement of Justice Kavanaugh respecting denial of application. I adhere to Justice Kavanaugh's views that the D.C. Circuit's *dicta* in that case that President Biden could waive President Trump's executive privilege was erroneous. Note as well that Justice Thomas would have granted the application. The decision and Statement of Justice Kavanaugh were released to the public on

January 19, 2022 as the Supreme Court's docketing website notes. https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-932.html (last visited Sept. 14, 2023).

16. Attached hereto as Exhibit 9 is a true and correct copy of a news story containing a statement by U.S. Congressman (and retired U.S. Army National Guard Brigadier General) Scott Perry. The article is written by Susan Shapiro of WGAL News 8 and is entitled *US Rep. Scott Perry responds to New York Times report he played role in President Trump contesting election* (Jan. 25, 2021). Representative Perry is the current Chair of the House Freedom Caucus. In the article, he is quoted as follows:

> Throughout the past four years, I worked with Assistant Attorney General Clark on various legislative matters. When President Trump asked if I would make an introduction, I obliged.
>
> My conversations with the President or the Assistant Attorney General, as they have been with all whom I've engaged following the election, were a reiteration of the many concerns about the integrity of our elections, and that those allegations should at least be investigated to ease the minds of the voters that they had, indeed, participated in a free and fair election.

17. As is implicit in his statement, I had met Representative Perry before I took office at the Justice Department in the Trump Administration and thus long before any controversies about the 2020 election first arose. After the introduction to President Trump that Representative Perry referred to, and as Representative Perry indicated, discussions with former President Trump

ensued between the three of us and between President Trump and myself. The content of those conversations is privileged in multiple respects. Despite being placed under enormous pressure to do so by the House Select Committee to Investigate the January 6th Attack on the United States Capitol, I did not disclose to the Committee's Members or its staff the content of those conversations, in order to protect the separation of powers, which was my duty as a high-ranking officer in the Executive Branch, and in order to satisfy my duties of confidentiality as an attorney giving advice to the President in his capacity as the head of the Article II Branch of the federal government. At no point did that Committee go to court to attempt to overcome my assertion of executive privilege in accord with the Collins letter I received, as referred to above. *See also* Exhibit 6 attached.

18. At no time did I participate in any campaign events related to President Trump's reelection.

19. At all times from late 2020 into mid-January 2021, my involvement with any 2020 election-related litigation occurred in my official capacity as an officer of the United States. I was not acting in this regard in my personal capacity.

20. At no time (whether in my period of service in 2001-2005 or from 2018-2021) did I ever take knowingly false positions while at the Justice

Department (or, to my knowledge, take false positions unknowingly, either). As I told the *New York Times* after anonymous leakers attacked me (but while maintaining confidentiality as to the details of the relevant discussions):

> My practice is to rely on sworn testimony to assess disputed factual claims," Mr. Clark said. "There was a candid discussion of options and pros and cons with the president. It is unfortunate that those who were part of a privileged legal conversation would comment in public about such internal deliberations, while also distorting any discussions."

Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, NEW YORK TIMES (Jan. 22, 2021).

21. My references to the Carpenter, Shapiro, and Benner news articles above are not intended to endorse the interlaced opinion commentary of those authors in those three articles.

22. Beyond minor parking and speeding tickets, I have never been accused of a crime before.

* * *

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on 14th day of September, 2023.

Jeffrey Bossert Clark

CERTIFICATE OF COMPLIANCE WITH L.R. 5.1

The undersigned hereby certifies that this filing was prepared in the Times New Roman size 14 font in compliance with L.R. 5.1.

This this 14 day of September 2023.

/s/ Harry W. MacDougald
Georgia Bar No. 463076
Attorney for Defendant

CALDWELL, CARLSON, ELLIOTT & DELOACH LLP
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