Written Statement
of
Elizabeth Price Foley
Professor of Law, Florida International University College of Law
and
Of Counsel, BakerHostetler, LLP

"Legislative Reforms to End Lawfare by State and Local Prosecutors"

Subcommittee on the Constitution and Limited Government
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Chairman Roy, Ranking Member Scanlon, and members of the Subcommittee, thank you for the opportunity to testify on the need for legislation to end State lawfare against federal officials. By way of brief background, I am a tenured Professor of Law at Florida International University College of Law, a public law school located in Miami, where I teach constitutional law, separation of powers, and civil procedure. I also serve Of Counsel with the Washington, D.C. office of BakerHostetler, LLP, where I practice constitutional and appellate law.

I. The Purpose of the Federal Officer Removal Statute (28 U.S.C. § 1442)

The federal officer removal statute, 28 U.S.C. § 1442, allows any federal officer—in the executive, legislative, or judicial branches—to remove to federal court any State proceeding (civil or criminal) relating to an act undertaken "under color of" their federal office or in the performance of their official duties. Its purpose is to effectuate the Supremacy Clause of Article VI of the Constitution, which deems "[t]he Constitution, and laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the Authority of the United States . . . the supreme Law of the Land."

As the Supreme Court explained in *Tennessee v. Davis*,[1] Congress has authority under the Necessary and Proper Clause[2] to carry into execution the federal judicial power over federal questions.[3] When a State initiates civil or criminal proceedings against a federal officer, explained *Davis*, the case inherently threatens the ability of the federal government to "preserv[e] its own existence" because the federal government "can act only through its officers and agents,

[1] Tennessee v. Davis, 100 U.S. 257 (1879).

[2] U.S. Const. art. I, § 18, cl. 18.

[3] Article III, section 2 extends the federal judicial power to, *inter alia*, cases "arising under th[e] Constitution, the Laws of the United States, and Treaties Made . . . under their Authority . . . ."

and they must act within the States."[4] If federal "officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,--if their protection must be left to the action of the State court,--the operations of the general government may at any time be arrested at the will of one of its members."[5]

Davis observed that "legislation of a State may be unfriendly" to federal officials and State proceedings against them may "paralyze the operations of the [federal] government."[6] "[E]ven if," the Court noted, the State's final judgment against a federal official "can be brought into the United States court for review" by the Supreme Court, it would be too late, for the federal officer would be "withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested."[7] The Court concluded, "No State government can . . . obstruct [the federal government's] authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument [the Constitution] has committed to it."[8]

The federal officer removal statute thus protects federal supremacy—including immunity arising under federal statutory or constitutional law—by giving federal officials the right to have a federal forum adjudicate the charges levied against them. As the Supreme Court noted in *Willingham v. Morgan*, "one of the most important reasons for removal is to have the validity of the defense of official immunity tried in federal court."[9] The *Willingham* Court concluded that if a federal official is "on duty" when the relevant acts occurred (upon which an immunity defense is based), he is entitled to removal; if the prosecutor/plaintiff argues the official was "engaged in some sort of 'frolic on their own," . . . then they [federal officers] should have the opportunity to present their version of facts to a federal, not a state, court. This is exactly what the removal statute was designed to accomplish."[10]

It should also be noted that under *Davis*, the removal of a State criminal prosecution against a federal official is no different than the removal of a civil case: "There is no distinction in this respect between civil and criminal cases. Both are within [the federal judiciary's] scope. Nor is it any objection that questions are involved which are not at all of aa Federal character. If one of the latter exists, if there be a single ingredient in the mass, it is sufficient."[11] "It ought, therefore, be considered as settled that the constitutional powers of Congress to authorize removal of criminal cases for alleged offences against State laws from State courts to the [trial]

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[4] *Davis*, 100 U.S. at 262, 263.

[5] *Id*. at 263.

[6] *Id*.

[7] *Id*.

[8] *Id*.

[9] Willingham v. Morgan, 395 U.S. 402, 407 (1969).

[10] *Id*. at 409.

[11] *Davis*, 100 U.S. at 270.

courts of the United States . . . is as ample as its power to authorize the removal of a civil case."[12] When a state case is removed to federal court, the law of the State continues to apply where relevant: In removed cases, federal courts "adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and so long as they keep within the jurisdiction assigned to them, their [the federal courts'] general powers are adequate to the trial of any case."[13] It is therefore to be expected that "even in cases of criminal prosecutions for alleged offenses against a state, in which arises a defence under United States law, the general government should take cognizance of the case and try it in its own courts, according to its own forms of proceeding."[14]

II. State Lawfare and Attempts at Removal

After President Trump left office in January 2021, his political opponents began a litigation campaign—"lawfare"—to prevent him from running for President again and to both punish and deter other individuals (e.g., attorneys and advisors) for/from working with him. Four major criminal cases were launched after Trump lost reelection in 2020, all of which implicated acts undertaken by federal official.

Two criminal cases were filed in federal court against President Trump by Special Counsel Jack Smith, and the other two were filed in State court by Fulton County, Georgia District Attorney Fani Willis[15] and New York County District Attorney Alvin Bragg.[16] In addition, one civil suit alleging business-related fraud (overvaluation of real estate) was brought in New York by New York Attorney General Letitia James, which covered conduct occurring before, during and after Trump's first term as President.[17]

The two State criminal cases are most relevant here because defendants in those cases sought removal but were unsuccessful for different reasons, discussed below. The inability to remove these State prosecutions suggests that amendments to Section 1442 are needed to effectuate the purpose of removal. Indeed, in the Georgia litigation, two of the three judges on

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[12] *Id*. at 271.

[13] *Id*. at 271-72.

[14] *Id*. at 272.

[15] The Georgia prosecution was brought against nineteen defendants, including President Trump, his Chief of Staff Mark Meadows, and several nationally prominent attorneys including Prof. John Eastman, Rudy Guiliani, Jeffrey Clark, and Jenna Ellis. It was based principally on violation of the Georgia RICO statute. *See* Indictment No. 23SC188947, Fulton Cty. Super. Ct, Aug. 14, 2023, *available at* https://d3i6fh83elv35t.cloudfront.net/static/2023/08/CRIMINAL-INDICTMENT-Trump-Fulton-County-GA.pdf.

[16] The New York prosecution was brought only against President Trump, and it was based on New York's law against falsification of business records. See Indictment, People v. Trump, N.Y. Sup. Ct., *available at* https://manhattanda.org/wp-content/uploads/2023/04/Donald-J.-Trump-Indictment.pdf.

[17] The relevant conduct occurred from 2011-2021. People v. Trump, No, 452564/2022, available at https://ag.ny.gov/sites/default/files/decisions/trump-decision.pdf (bench trial judgment of over $450 million against Trump and his company). No removal was attempted in this civil case, so it will not be discussed here.

the U.S. Court of Appeals for the Eleventh Circuit—one appointed by President Obama and the other by President Biden—implored Congress to amend Section 1442.

A. The Georgia Criminal Litigation

In the Georgia prosecution, the U.S. Court of Appeals for the Eleventh Circuit held that removal was improper for two reasons: (1) Section 1442 did not apply to *former* federal officials such as plaintiff Mark Meadows, the Chief of Staff for President Trump; and (2) the acts that formed the basis of the indictment (conspiracy under Georgia's RICO statute) were not undertaken "under color of" Meadows' federal role.[18]

1. Section 1442 does not apply to former officials

The Eleventh Circuit held that Section 1442 removal is not available to *former* federal officials based upon the text and structure of the statute.[19] It acknowledged that "no court has ruled that former officers are excluded from removal" and that "former officers have removed actions in other circuits," but differentiated those decisions by stating that they "did not discuss the text of section 1442 at all."[20] Meadows argued that that the *purpose* of Section 1442--i.e., protective jurisdiction—suggests that removal should be permitted by former officials whose acts were undertaken *while in office*, but the Eleventh Circuit disagreed, concluding that "state prosecution of a *former* officer does not interfere with ongoing federal functions—case-in-point, no one suggests that Georgia's prosecution of Meadows has hindered the current [Biden] administration."[21]

The Eleventh Circuit's reasoning is deeply flawed. The purpose of the federal officer removal statute, as recognized by the *Davis* Court, is to protect the federal government's supremacy, including immunities provided by federal statutory and constitutional law.[22] Removal is necessary, explained the Court, for three independent reasons: (1) "for the preservation of the acknowledged powers of the [federal] government"; (2) to provide "a uniform and consistent administration of national laws"; and (3) "for the preservation of that supremacy which the Constitution gives to the federal government . . . ."[23] These three rationales apply equally to proceedings against *former* federal officials relating to acts undertaken *while serving as federal officials*.

While the Eleventh Circuit may be correct that denying removal to former officials like Mr. Meadows would not have "hindered the current [Biden] administration,"[24] removal was nonetheless "essential . . . to a uniform and consistent administration of national laws" relating to

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[18] Georgia v. Meadows, 88 F.4th 1331 (11th Cir. 2023).

[19] *Id*. at 1138-1343.

[20] *Id*. at 1342.

[21] *Id*. at 1343 (italics in original).

[22] *Davis,* 100 U.S. at 263.

[23] *Id*. at 265-66.

[24] *Meadows*, 88 F.4th at 1343 (italics in original).

immunity and was "required for the preservation of that supremacy which the Constitution gives to the federal government . . . ."[25] These interests exist separate and apart from any *current* presidential administration. Immunities granted by federal law to federal officials *protect the interests of the federal government generally*, not the *current* occupants of any one branch.

Even if the Eleventh Circuit's construction of Section 1442 is correct—i.e., it does not allow removal by *former* federal officials—it only emphasizes the need for Congress to amend the statute to permit such removals. Notably, two of the three Eleventh Circuit judges in *Meadows*—judges Rosenbaum and Abudu (Obama and Biden appointees, respectively)—penned a concurrence beseeching Congress to amend Section 1442 to allow former officials to remove. An amendment was necessary to prevent lawfare: "[F]oreclosing removal when states prosecute former federal officers simply for performing their official duties can allow a *rogue state's weaponization of the prosecution power to go unchecked and fester*."[26]

Judges Rosenbaum and Abudu acknowledged that disallowing former officials to remove has "consequences . . . that are profound" because it will encourage further divisive lawfare.[27] They did not mince words about the failure to amend the statute:

> [P]rosecutions of former federal employees for undertaking locally unpopular actions—but actions that are still within the bounds of their official duties—can cause a crisis of faith in our government and our courts. Not only that, but these types of actions can cripple government operations, discourage federal officers from faithfully performing their duties, and dissuade talented people from entering public service. After all, who needs the aggravation and financial burden from being criminally prosecuted (even in one state) just for carrying out official responsibilities? And federal officers who are reluctant to do their duty, or a dearth of talented and enthusiastic people willing to serve in public office, could paralyze our democratic-republic system of government.
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> This nightmare scenario keeps me up at night. In my view, not extending the federal-officer removal statute to former officers for prosecutions based on their official actions during their tenure is bad policy, and it represents a potential threat to our republic's stability.[28]

The "nightmare scenario" keeping Judges Rosenbaum and Abudu up at night is the continuation of lawfare that has divided this country and deeply wounded trust in government. The incentive to engage in lawfare can be reduced substantially by amending Section 1442 to apply to former officials. Doing so will not cause a sea-change in Section 1442 removal but instead align its text with the statute's long-understood purposes. As Judges Rosenbaum and Abudu put it:

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[25] *Davis*, 100 U.S. at 265-66.

[26] *Meadows*, 88 F. 4th at 1350 (Rosenbaum, J., concurring).

[27] *Id*. (Rosenbaum, J., concurring).

[28] *Id.* at 1350-51 (Rosenbaum, J., concurring).

> Congress created federal-officer removal statutes because it recognized that the risks to our federal government are just too great if a state court isn't capable—for whatever reason—of quickly, correctly, and fairly adjudicating federal defenses when a federal officer has been indicted for carrying out his official federal responsibilities. . . .
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> [S]tate prosecutions of former federal officers for doing their official duties can also cripple the federal government, just like prosecutions of current federal officers can. Consider an ongoing federal policy or operation. If a state prosecutes a former federal officer for his official role in that, current federal officers who are responsible for continuing to carry out that policy or operation may well be chilled from doing so out of concern that they, too, will be prosecuted by the state when they leave their positions.
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> Or if states start indicting high-profile former federal officers, upon stepping down, for their official actions while in office, our national leaders may cease taking any significant action for the country in an effort to avoid later state prosecution. After all, it's hard to think of any federal policy that's not unpopular somewhere in the country. If undertaking meaningful action within the scope of official authority becomes too risky for a federal officer because she will have to pay the state piper later, why bother even entering public service in the first place? But without talented and enthusiastic people willing to serve our country, the future would be bleak.
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> And I haven't even started to discuss the undermining effect that constant and repeated state prosecutions of former federal officers for doing their official duties would have on the perceived legitimacy of our system of government. . . .
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> These harms are serious. Fortunately, though, they can also be easily addressed if Congress amends the federal-officer removal statute to expressly include former federal officers.[29]

Congress should heed the advice of Judges Rosenbaum and Abudu and amend Section 1442 to allow removal by former federal officials.

2. The "Color of Office" Test of Section 1442 Was Not Satisfied

The Eleventh Circuit alternatively held that "even if Meadows were an 'officer,' [under Section 1442], his participation in an alleged conspiracy to overturn a presidential election was not related to his official duties."[30] To reach this conclusion, the Eleventh Circuit reasoned that Georgia's prosecution of Mr. Meadows did not "relate to" his official duties as Chief of Staff to the President because the prosecution was for the "inchoate crime of conspiracy" which is "not defined by any single *actus reus* in furtherance" of the conspiracy but merely by agreeing to join the it and undertaking "conduct in the aggregate furthered the alleged enterprise to overturn the election."[31] In other words, "[B]ecause Meadows [conspiracy] culpability does not depend on

[29] *Id.* at 1354-55 (Rosenbaum, J., concurring).

[30] *Id*. at 1338.

[31] *Id*. at 1344, 1345.

nay discrete act, he cannot remove by proving that one act was undertaken in his official capacity."[32]

This was error. The *Willingham* Court made clear that if an official, such as Mr. Meadows, is "on duty" when the relevant acts occurred (upon which an immunity defense is based), he is entitled to removal.[33] As explained in *Maryland v. Soper*, the "color of office" test for Section 1442 removal requires a "causal connection between what the officer has done under asserted official authority and the state prosecution."[34] Thus, if the officer "*assert[s]* official authority" to do X and X is causally connected to the state prosecution, the "color of office" test is satisfied. In other words, if the prosecution relies upon *any asserted official acts*, the "color of office" test is satisfied. As *Sope*r further explained, "the [removal] statute does *not require that the prosecution must be for the very acts which the officer admits to have been done by him under federal authority*. It is enough that his acts or his presence at the place . . . constitute the basis, though mistaken or false, of the state prosecution."[35] Thus, Georgia's prosecution did not have to be, as the Eleventh Circuit believed, "for the very acts [Meadows] admits to have been done by him under federal authority"; it was "enough that [Meadows'] acts . . . constitute the basis . . . of [Georgia's] prosecution" of him. It clearly did.

Whether Mr. Meadows *was or was not actually acting in an official capacity* as Chief of Staff is not relevant to the issue of *removal* under Section 1442. It is relevant to the *merits* of his defense of federal immunity. And the merits of a federal immunity defense should be decided by a federal court, once the case is removed. This distinction—between the "color of office" test for removal versus the merits of federal immunity—was clearly recognized by the Supreme Court in *Jefferson County v. Acker*.[36] There, the court recognized that federal officer removal exists "if the defense depends on federal law."[37] The federal defense (such as immunity) must be "colorable" and must show a nexus "between the charged conduct and asserted official authority."[38] The removal statute must be liberally construed because ""one of the most important reasons for removal is to have the validity of the defense of official immunity tried in federal court."[39]

In *Acker*, federal district court judges sought removal of state court proceedings against them, claiming federal immunity under the intergovernmental tax immunity doctrine. The State argued that despite the federal immunity defense, the case was not removable because *the State charges levied* against them—non-payment of a county tax—related to the federal officials' *personal* obligations rather than their *official* judicial duties. The Supreme Court disagreed,

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[32] *Id*. at 1345.

[33] *Willingham*, 395 U.S. at 409.

[34] Maryland v. Soper, 270 U.S. 9, 33 (1926))

[35] *Id*. (emphasis added).

[36] Jefferson Cty. v. Acker, 527 U.S. 423 (1999).

[37] *Id*. at 431.

[38] *Id*.

[39] *Id*. (quoting *Willingham*, 395 U.S. at 409).

stating that determining whether the state charges implicated the federal judges' official duties went to "the merits of th[e] case"—i.e., the validity of the immunity defense--not the judges' entitlement to removal.[40] Importantly, *Acker* stated that, "The *circumstances that gave rise to* the [state charges] . . . constitute the basis for the [] lawsuits at issue."[41] In other words, the *facts/actions giving rise to the state charges*—not the charges themselves—create the nexus required to satisfy the "color of office" test under Section 1442.

Eleventh Circuit clearly misunderstood Supreme Court precedent and thought it had power to second-guess an official's claim of federal immunity for purposes of *removal.* It denied removal because it refused to "blindly accept an expansive proclamation of executive power relying on no source of positive law. Instead, our judicial duty demands an independent assessment of the limits of Meadow's office." This inquiry—the extent of executive power and the immunity granted to a federal official pursuant to the Supremacy Clause—cannot, under *Soper* and *Acker*, be decided at the *removal* stage. As *Willingham* put it, if the prosecutor/plaintiff argues the federal official was "engaged in some sort of 'frolic on their own," . . . then they [federal officers] should have the opportunity to present their version of facts *to a federal, not a state, court*. This is exactly what the removal statute was designed to accomplish."[42]

In d, whether a federal immunity defense is valid goes to the *merits* of the State's case, not to the *removability* of the State case. Under the federal officer removal statute (Section 1442), the assertion of a recognized federal immunity creates a right to removal. The case cannot be remanded to state court; the federal immunity defense must be decided on the merits by the federal district court. Federal courts cannot remand the case because the State charges levied do not directly involve acts claimed to be official. Instead, a broader construction of Section 1442 is required: If the "*circumstances that gave rise to* the [state charges]"[43] involve the asserted use of official federal authority, the "color of office" test is satisfied. This broader construction ensures that the protective goal of removal jurisdiction—especially immunity grounded in federal law—is achieved.

Because of the Eleventh Circuit's inappropriately narrow construction of the "color of office" requirement of Section 1442, an amendment clarifying that the phrase is satisfied if the State proceeding involves evidence of any act alleged to be official (even if such acts are not part of the elements of the charged offense) is needed to effectuate the purpose of the statute.

B. The New York Criminal Litigation

President Trump attempted to remove New York's prosecution of him based on felony falsification of business records. Like the Georgia litigation, however, the federal court

[40] *Id*. at 432.

[41] *Id*. at 433.

[42] *Willingham*, 395 U.S. at 409 (emphasis added).

[43] *Acker*, 527 U.S. at 433.

concluded that removal under Section 1442 was improper and remanded the case back to State court.[44] Specifically, Judge Alvin Hellerstein of the Southern District of New York concluded that removal was improper because the "color of office" test was not satisfied, and Trump had not articulated a "colorable defense" based on federal law.

1. Section 1442 Does Apply to Former Officials

Interestingly, unlike the Eleventh Circuit in the Georgia litigation, Judge Hellerstein held that Section 1442 *does* apply to former federal officials. Specifically, he concluded "that Trump, although not presently a federal officer, can remove a case otherwise qualified for removal" because "it would make little sense if thus were not the rule, for the very purpose of the Removal Statute is to allow federal courts to adjudicate challenges to acts done under color of federal authority."[45]

Judge Hellerstein acknowledged, however, that there is a "difficult question" as to whether the President is an "officer . . . of the United States" within the meaning of Section 1442.[46] Without extensive discussion, the judge acknowledged that the federal Circuit Courts of Appeal in the Fifth, Ninth and D.C. Circuits had previously allowed removal for the President and Members of Congress,[47] even though none are appointed as "officers" under the Appointments Clause of Article II, section two of the Constitution. The Supreme Court has not addressed this question as to whether the President (or Vice President) qualify as "officers" under Section 1442(a) and given that Judge Hellerstein characterized it as a "difficult question," an amendment to expressly add the President (and Vice President) to the federal officer removal statute would be important to effectuate the purpose of the constitutionally-based "official acts" immunity provided to the President pursuant to *Nixon v. Fitzgerald*[48] (civil cases) and *Trump v. United States*[49] (criminal cases).

2. The "Color of Office" Test of Section 1442 Was Not Satisfied

President Trump asserted that he hired attorney Michael Cohen "as a direct result of [his] role as President . . . in order to separate his business affairs from his public duties."[50] More fundamentally, "Trump conceded in his Notice [of removal] that he hired Cohen to attend to this private matters" and Judge Hellerstein concluded, "Even if I accept Trump's allegations . . . that the payments to Cohen were compensation for his services as Trump's personal attorney, the requirement that the removing party demonstrate a relationship to an official act is not

[44] New York v. Trump, 683 F. Supp.3d 334 (S.D.N.Y. 2023).

[45] *Id*. at 343.

[46] *Id.*

[47] *Id*.

[48] Nixon v. Fitzgerald, 457 U.S. 731 (1982).

[49] Trump v. United States, 603 U.S. 593 (2024).

[50] New York v. Trump, 683 F.Supp.3d at 345.

satisfied."[51] Cohen's invoices were maintained in the Trump Organization's records, and "Trump paid Cohen from private funds, and the payments did not depend on any Presidential power for their authorization."[52] Trump accordingly failed to satisfy the court that the criminal prosecution by New York State was "for or relat[es] to" acts he undertook "under color of" his presidential office.[53]

3. There Was No "Colorable" Federal Preemption Defense

Finally, Judge Hellerstein concluded that Trump had failed to raise a colorable federal defense, as necessary under Section 1442.[54] Trump asserted two federal defenses: (1) Supremacy Clause-based immunity[55]; and (2) preemption. The court concluded that the Supremacy Clause immunity was not "colorable" because he did "not explain[] how hiring and making payments to a personal attorney to handle personal affairs carries out a constitutional duty."[56] [57]

Judge Hellerstein also concluded that Trump's preemption defense was not "colorable," but this conclusion lacks analytical rigor. Specifically, Trump argued that the New York prosecution was preempted by the Federal Election Campaign Act ("FECA") because New York's prosecution for felony falsification of business records was *predicated* on Section 17-152 of New York Election Law. Judge Hellerstein concluded that this was not a "colorable" preemption defense because Section 17-152 of New York Election Law did not "directly target campaign contributions and expenditures . . . ."[58] However, as I have previously pointed out:

> FECA declares that its provisions "supersede and preempt any provision of state law *with respect to* election to Federal office." The 1974 congressional conference committee report accompanying enactment of FECA's pre-emption language states: "It is clear that the Federal law occupies the field with respect to reporting and disclosure of political contributions and expenditures by Federal candidates." Federal Election Commission regulations likewise declare that FECA "supersedes State law" concerning the "disclosure of receipts and expenditures by Federal candidates" and "limitation on contributions and expenditures regarding Federal candidates."[59]

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[51] *Id*.

[52] *Id*.

[53] *Id*. at 345-46.

[54] *Id*. at 346.

[55] Oddly, Trump "expressly wived any argument premised on a theory of absolute presidential immunity." *Id*. Later, in the summer of 2024, the Supreme Court recognized an absolute presidential immunity against criminal prosecution predicated on a President's official acts. Trump v. United States, 603 U.S. 593 (2024).

[56] New York v. Trump, 683 F.Supp.3d at 346-47.

[57] *Id*. at 347.

[58] *Id*. at 350.

[59] David B. Rivkin, Jr. & Elizabeth Price Foley, *Why Trump's Conviction Can't Stand*, Wall Street Journal, Sept. 8, 2024.

New York used its election law to brand Mr. Trump a felon based on how he *reported expenditures* with respect to his 2016 presidential campaign—a *federal* campaign governed by FECA. The use of New York election law as the predicate to justify charges against Trump thus subverted FECA's goal of providing predictable, uniform national rules for disclosure of federal campaign contributions and expenses. For these reasons, Mr. Trump's FECA preemption defense was more than "colorable" and Judge Hellerstein's conclusion to the contrary is inexplicable. As was the case with the Eleventh Circuit's inappropriately narrow construction of the "color of office" requirement of Section 1442, an amendment clarifying that the phrase is satisfied if the State proceeding involves any act alleged to be official (even if such acts are not part of the elements of the charged offense) is needed to effectuate the purpose of the statute.

III. Conclusion

In sum, based upon the recent experience with attempting to remove to federal court the State cases (in Georgia in New York) brought against federal officials, it has become clear that amendments to the federal officer removal statute, 28 U.S.C. § 1442, are required to effectuate the protective purpose of the statute and discourage continued lawfare against federal officials. Specifically:

(1) The statute should expressly permit removal by *former* federal officials;

(2) Since there is ongoing debate as to whether the President (and Vice President) are "officers" within the meaning of the statute, an amendment should clarify that they *are* entitled to remove to effectuate the immunity articulated by the Supreme Court in *Nixon v. Fitzgerald* (civil immunity for official presidential acts) and Trump v. United States (criminal immunity for official presidential acts).

(3) To prevent inappropriately narrow construction and effectuate the protective purpose of the statute, an amendment should clarify that the phrase "color of such office" is satisfied if the State proceeding involves evidence of any act alleged to be official, even if such acts are not part of the elements of the charged offense.

(4) All amendments should be effective for any pending suits (at the time of enactment) or future suits. To effectuate any amendments' application to *pending* suits, however, the 30-day timeline for removal of civil actions (specified in 28 U.S.C. § 1446(b)) and for criminal actions (specified in 28 U.S.C. § 1455(b)) should be modified to specify that post-enactment, a *new 30-day removal clock begins* for all pending state actions.