Written Statement
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Chairman Jordan, Ranking Member Nadler, and members of the Committee, thank you for the opportunity to testify. 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 and civil procedure. I also serve Of Counsel with the Washington, D.C. office of BakerHostetler, LLP, where I practice constitutional and appellate law.

New York's prosecution of former President Trump had many potentially reversible errors that, if allowed to stand, set a dangerous precedent encouraging "lawfare" as a means of election interference. Many of the errors relate to evidentiary rulings and potential judicial or juror bias, which are difficult bases upon which to obtain appellate reversal due to the deference owed to the trial judge on such matters. As a constitutional and appellate lawyer, however, I am interested in the *constitutional* defects that occurred during Mr. Trump's trial. These defects are by definition questions of law, which means that appellate courts will review them *de novo*, owing no deference to the trial judge. The constitutional defects are more momentous, since adhering to constitutional principles is essential to preserving the rule of law for all Americans. These defects presumably will be remedied by the New York appellate courts or the Supreme Court, if necessary, though such reversal may come too late to prevent the conviction from being employed as a weapon of presidential election interference.

My *Wall Street Journal* op-ed, written with co-author and Baker colleague David Rivkin, identifies several fundamental errors of due process in Mr. Trump's New York trial. The Fourteenth Amendment's Due Process Clause, like the same clause applicable to the federal government in the Fifth Amendment, prohibits the deprivation of any individual's life, liberty, or property without due process of law. This phrase has made the American legal system the envy of the world. Without it, there is no rule of law, and trials are merely a facade that generate desired outcomes. Due process embodies the idea that "criminal prosecutions must comport with prevailing notions of fundamental fairness."[1] At a minimum, the Supreme Court has made clear

[1] *California v. Trombetta*, 467 U.S. 479, 485 (1984).

that due process requires both "notice of the specific charge" levied against the accused and a meaningful opportunity to be heard on "the issues raised by that charge . . . ." [2]

Moreover, due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[3] Thus, all elements of the offense, and the facts upon which they are based, must surpass this high evidentiary bar.[4] Requiring proof beyond a reasonable doubt of "every fact" needed to constitute the elements of the charged crime is "indispensable to command the respect and confidence of the community in applications of the criminal law" because it provides the very "moral force of the criminal law" by preventing "doubt [about] whether innocent men are being condemned."[5] It is, in short, "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[6]

Unfortunately, these three core due-process precepts—notice, meaningful opportunity to defend, and proof of all relevant facts beyond a reasonable doubt—were absent in Mr. Trump's New York trial. First, the issue of adequate notice. Mr. Trump was indicted on thirty-four counts of "falsifying business records" in violation of New York law.[7] To elevate this misdemeanor to a felony, the New York statute requires proof of an additional *mens rea* element, the "intent to commit another crime."[8] New York courts have held that the "intent to commit another crime" is an indispensable element of the felony falsification offense with which Mr. Trump was charged.[9]

The prosecution of Mr. Trump is a complicated Russian-nesting-doll theory of criminality: He was charged with first-degree falsification of business records, which hinged on the intent to commit another, unspecified crime. As elaborated below, it became clear what this other, predicate crime was (New York election law) only when, after all evidence had closed, the judge instructed the jury. That predicate crime, moreover, required *further proof* that Mr. Trump *actually committed* yet another offense—i.e., the "unlawful means" by which New York's election law was violated. At trial, there was no proof that this *second* predicate offense was actually committed, and indeed, it wasn't even clear what the second predicate was—like the first predicate—until the judge instructed the jury.

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[2] *Cole v. Arkansas*, 333 U.S. 196, 201 (1948). *See also Boddie v. Connecticut*, 401 U.S. 371, 377-78 (1971).

[3] *In re Winship*, 397 U.S. 358, 364 (1970).

[4] *Patterson v. N.Y.*, 432 U.S. 197, 210 (1977).

[5] *Id*.

[6] *Id.* at 208 (quoting *In re Winship*, 397 U.S. at 372 (Harlan, J., concurring)).

[7] N.Y. Penal Law §§ 175.05, 175.10. *See also* Indictment, *N.Y. v. Trump*, *available at* https://www.politico.com/f/?id=00000187-4d9a-dc00-a3d7-4d9f97b40000.

[88] *Id*. at § 175.10.

[9] *People v. Bloomfield*, 810 N.Y.S.2d 749, 752 (2006); *People v. Saxton*, 907 N.Y.S.2d 316, 320 (N.Y. App. Div. 2010).

Unpacking the nesting dolls reveals layers upon layers of due process defects inhering in these bizarre, unprecedented charges. As an initial matter, Mr. Trump's indictment didn't specify the "other crime" he allegedly intended to commit.[10] When Mr. Trump's lawyers requested a "bill of particulars" to determine it, the New York prosecutors responded that the "Defendant is not entitled to the information requested" because "the People need not prove intent to commit or conceal a particular crime . . . ."[11] The prosecution then declared that "without limiting the People's theory at trial," the crimes that Mr. Trump "intended to commit . . . *may include* violations of New York Election Law § 17-152, New York Tax Law §§ 1801(a)(3) and 1802, New York Penal Law §§ 175.05 and 175.10; or violations of the Federal Election Campaign Act, 52 U.S.C. § 30101 *et seq*.."[12]

The prosecutors' response is wholly inadequate to satisfy due process. It includes an astonishing array of other crimes, both state and federal, ranging from misdemeanors to felonies. Mr. Trump might have, for example, intended to violate Section 17-152 of New York's election law, which makes it a misdemeanor to engage in a conspiracy "to promote or prevent the election of any person to a public office by unlawful means." Or he could have intended to commit some kind of state tax fraud, N.Y. Penal Law §§ 1801, 1802, ranging from failing to file a return, filing a return with materially false or fraudulent information, or failing to remit or collect state tax. It could have been an intent to submit some other, falsified business records (other than those with which he was charged). Or it could have even been that Mr. Trump intended to violate some unspecified portion of the Federal Election Campaign Act (FECA), which has hundreds of pages of provisions ranging from maintenance of reports, solicitation of contributions, limitations on contributions and use of contributed amounts.

The prosecution's response, in short, did not provide adequate notice to Mr. Trump. The other crime he intended to commit was crucial to the New York prosecution because it was *the key element* that elevated falsifying business records from a misdemeanor to a felony. Because the intent to commit another crime was an element of the felony charge, due process required that Mr. Trump receive notice about which specific, other crime satisfied this element and a meaningful opportunity to be heard on that other crime.[13] Neither the indictment nor the prosecution's response to a requested bill of particulars notified Mr. Trump of the other crime upon which his felony falsification charges hinged.

It was not until all evidence was closed that the New York trial judge, Judge Juan Merchan, finally revealed, in his jury instructions, that the other crime Trump intended to commit was Section 17-152 of New York election law. Moreover, he instructed the jury: "Although you must conclude unanimously that the defendant conspired to promote or prevent the election of any

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[10] *See* Indictment, *N.Y. v. Trump*, *available at* https://www.politico.com/f/?id=00000187-4d9a-dc00-a3d7-4d9f97b40000.

[11] People's Response to Def. Donald J. Trump's Apr. 27 Request for a Bill of Particulars, *N.Y. v. Trump*, Ind. No. 71543-23, at p. 5, *available at* https://www.justsecurity.org/wp-content/uploads/2023/05/manhattan-da-trump-case-clearinghouse-bragg-response-to-bill-of-particulars-may-16-2023.pdf.

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

[13] *Cole v. Arkansas*, 333 U.S. 196, 201 (1948). *See also Boddie v. Connecticut*, 401 U.S. 371, 377-78 (1971).

person to a public office by unlawful means, you need not be unanimous as to what those unlawful means were." Judge Merchan then hand-selected three laws that he told the jury "you may consider" as the "unlawful means" by which state election law was violated: (1) federal election law (FECA); (2) falsification of "other" business records; and (3) "violation of tax laws," whether local, state, or federal. These instructions violated due process in several critical ways.

Due process demands that felony verdicts be unanimous.[14] In *Schad v. Arizona*,[15] however, the Supreme Court held that there need not be unanimity regarding the *means* by which a crime is committed. The plurality opinion cautioned that if the available means of committing a crime are so capacious that the accused is not "in a position to understand with some specificity the legal basis of the charge against him," due process will be violated.[16] The plurality stated, "Nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction."[17] The plurality further observed that when a State classifies either an act or means as an *element* of the offense, the Court should defer to that determination, thus requiring juror unanimity as to all elements.[18] Thus, under an Arizona statute that defined first-degree murder as "murder which is . . . willful, deliberate or premeditated . . . or which is committed . . . in the perpetration of, or attempt to perpetrate, . . . robbery," the plurality concluded that "neither premeditation nor the commission of a felony is formally an independent element of first-degree murder; they are treated as mere means of satisfying a *mens rea* element of high culpability."[19] Thus, because they were not independent elements of the crime charged, unanimity regarding was not required.

Justice Antonin Scalia concurred in part, observing that unanimity regarding the "mode of commission" of a crime need not be unanimous because what matters is that the elements of the crime be proven beyond a reasonable doubt, and that can be accomplished when differing means may satisfy those elements. For example, he observed, "When a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her."[20] Justice Scalia cautioned, however, that "one can conceive of novel 'umbrella' crimes (a felony consisting of either robbery or failure to file a tax return) where permitting a 6-to-6 verdict would seem contrary to due process."[21] He suggested that the

[14] *Ramos v. Louisiana*, 590 U.S. 83, 93 (2020).

[15] *Schad v. Arizona*, 501 U.S. 624 (1991) (plurality opinion).

[16] *Id*. at 632-33 (plurality opinion).

[17] *Id*. at 633 (plurality opinion).

[18] *Id*. at 636 (plurality opinion).

[19] *Id*. at 639 (plurality opinion).

[20] Id. at 649-50 (Scalia, J., concurring in part and concurring in the judgment).

[21] *Id*. at 650 (Scalia, J., concurring in part and concurring in the judgment).

"historical practice" of deeming premeditated and felony murder as "moral[ly] equivalen[t]"—and thus not separate elements or offenses—satisfied the notion of due process.[22]

The four dissenting Justices in *Schad* argued that the Court's due process precedent requires unanimity regarding all elements of a crime, including the means by which it is committed. They believed that premeditated murder and felony murder were "alternative courses of conduct by which the crime of first-degree murder may be established."[23] They based this conclusion on the fact that premeditated murder and felony murder contain "separate elements of conduct . . . ."[24] They observed, "In the case of burglary, for example, the manner of entering is not an element of the crime; thus, *Winship* would not require proof beyond a reasonable doubt of such factual details as whether a defendant pried open a window with a screwdriver or a crowbar. It would, however, require the jury to find beyond a reasonable doubt that the defendant in fact broke and entered, because those are the "fact[s] necessary to constitute the crime."[25]

Five Justices in *Schad,* therefore, believed unanimity is required to convict when the means by which a crime can be committed are so broad that the accused does not receive fair notice of the basis of the charge. The other four dissenting Justices believed unanimity is required for all elements of a crime. As a post-*Schad* Court opinion put it, "[T]his Court has indicated that the Constitution itself limits a State's power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition."[26]

However one slices it, therefore, unanimity was required to determine the basis upon which the predicate crime Mr. Trump allegedly intended to commit—New York's election law—was based. New York election law was the "other crime" that elevated Mr. Trump's falsification of business records to a felony offense. It was an element of that felony offense with which Mr. Trump was charged, so under the *Schad* dissenters' logic, unanimity was required. Moreover, under the logic of the *Schad* plurality and Justice Scalia's concurrence, New York's election law—which requires that the violation occur "by unlawful means"—is too capacious to provide proper notice. Any "unlawful" act—including, in Scalia's example, either robbery or failure to file a tax return—can qualify. Judge Merchan's instruction that the jury "need not be unanimous as to what those unlawful means were" was therefore unconstitutional under both the logic of the *Schad* plurality and Justice Scalia—a majority of the Court.

As for the three laws hand-selected by Judge Merchan as the "unlawful means" by which New York's election law was violated, Mr. Trump also received woefully inadequate notice. Recall that the prosecutor's response to Mr. Trump's demand for a bill of particulars was that "the crimes defendant intended to commit . . . may include" a violation of New York election law,

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[22] *Id*. at 651-52 (Scalia, J., concurring in part and concurring in the judgment).

[23] *Id*. at 652 (White, J., dissenting).

[24] *Id*. at 654 (White, J., dissenting).

[25] *Id*. at 656-57 (White, J., dissenting).

[26] *Richardson v. United States*, 526 U.S. 813, 820 (1999).

New York tax law, falsification of business records, or violations of the FECA.[27] So as previously discussed,[28] the prosecutor's brief mention of this broad array of possible other crimes Mr. Trump "intended to commit was far too broad for purposes of due process notice. But more to the point for present purposes, this broad array of other crimes was listed by the prosecutor as the basis for *elevation* of the falsification of business records charges from a misdemeanor to a felony; they were *not* mentioned as a basis by which *New York election law* itself was violated.

The prosecutor's response to Mr. Trump's request for a bill of particulars was an exercise in hiding the ball. It coyly stated that elevation of the falsification charge, which hinged upon Mr. Trump's intent to commit another crime, "may include" violations of a broad array of state and federal crimes, including the FECA. It was unclear to Mr. Trump and his lawyers, however, whether FECA would be the predicate upon which his felony falsification charges hinged until Judge Merchan's jury instructions, after the evidence had closed. Once Judge Merchan gave this instruction, he simultaneously resurrected some of these offenses—FECA, falsification of business records, and "tax laws"—as the "unlawful means" by which the now-identified New York election predicate law was violated.

In short, then, Mr. Trump: (1) never knew for sure what "other law" the prosecution thought he intended to commit that elevated his falsification of business records charges to felonies, until the judge instructed the jury that it was New York's election law; and (2) never knew what "unlawful means" by which he allegedly intended to violate New York's election law (as required by that statute), until Judge Merchan instructed the jury that it could be FECA, falsification of other business records, or violation of local, state or federal tax laws.

Given that Mr. Trump suspected, from the prosecutor's response to the requested bill of particulars, that federal election law was one of several possible predicates on the prosecution's radar, he tried to call former Federal Election Commission Chairman Brad Smith to explain why this law wasn't violated, but Judge Merchan ruled that Mr. Smith could not "testify or offer an opinion as to whether the alleged conduct in this case does nor does not constitute a violation of federal election law."[29] This denied Mr. Trump a meaningful opportunity to be heard on the FECA accusation. Judge Merchan's second "unlawful" means, falsification of other business records, is circular: A misdemeanor becomes a felony if one falsifies business records by falsifying business records. Moreover, the judge further instructed the jury that, in considering this possible second-layer predicate, it could consider Michael Cohen's paperwork creating accounts and wiring money relating to making "hush money" payments, as well as the Trump Organization's 1099-MISC (miscellaneous income) forms it issued to Mr. Cohen. These records indicated that Mr. Cohen was being paid for "legal expenses," and the only testimony to the

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[27] People's Response to Def. Donald J. Trump's Apr. 27 Request for a Bill of Particulars, *N.Y. v. Trump*, Ind. No. 71543-23, at p. 5, *available at* https://www.justsecurity.org/wp-content/uploads/2023/05/manhattan-da-trump-case-clearinghouse-bragg-response-to-bill-of-particulars-may-16-2023.pdf.

[28] *See supra* notes 10-11 and accompanying text.

[29] Decision and Order on People's Motions in Limine, *N.Y. v. Trump*, Ind. No. 71543/2023, at p. 3 (N.Y. Sup. Ct. Mar. 18, 2024), *available at* https://www.nycourts.gov/LegacyPDFS/press/pdfs/Dec%20on%20People's%20MIL.pdf.

contrary was that of Mr. Cohen himself, a convicted serial perjurer, who testified that they were not for legal expenses. The prosecutors likewise neither alleged nor offered evidence that Mr. Trump violated tax laws, Judge Merchan's third predicate. Indeed, Judge Merchan instructed the jury that Mr. Trump could have violated any local, state, or federal tax laws, even though the prosecutor never even hinted that local or federal tax laws were violated, not even in the response to the requested bill of particulars. The two state tax laws that the prosecutors briefly mentioned in this response, N.Y. Tax Law §§ 1801(a)(3) and 1802, are generic, broad misdemeanor prohibitions against "tax fraud acts," which consist of multiple different offenses, each with their own elements. Judge Merchan instructed the jury vaguely that under local, state, and federal tax law, the submission of materially false or fraudulent information is a crime, even if it does not result in underpayment of taxes. Like the other secondary predicates identified by Judge Merchan, however, the jury instructions didn't tell the jury it needed to find all elements of these secondary predicates beyond a reasonable doubt.

The New York prosecution of Mr. Trump, in short, made a mockery of due process of law. He was not given adequate notice of the basic elements of his felony falsification charges. When he pushed for a bill of particulars, the prosecutors blithely declared that they "need not provide intent to commit or conceal a particular crime," even though it is an element of the felony falsification charges. They then provided a broad list of federal and state crimes that could form the basis of felony falsification, leaving Mr. Trump and his lawyers to speculate—through the trial itself—as to which predicate formed the basis of his prosecution. The judge compounded these fundamental due process errors by providing clear notice of the predicate offense only during jury instructions, after all evidence had closed. This predicate, New York election law, itself requires proof that the election offense was committed by "unlawful means"—i.e., proof beyond a reasonable doubt of the *actual commission of yet another crime*. Making matters worse, the judge instructed the jury that it need not be unanimous regarding these "unlawful means," even though those means could include any local, state, and federal offenses—literally tens of thousands of misdemeanors and felonies.

The trial was an embarrassment to a country long envied for its commitment to due process. Given the obvious constitutional defects, the New York appellate courts presumably will reverse Mr. Trump's verdict, eventually. The prosecutors and judge responsible for these due process violations, however, have irreparably harmed a leading presidential candidate, which likely cannot be remedied via the normal appellate process prior to the election. This sad reality only fuels suspicion that this prosecution wasn't about enforcing the law but election interference.

Attachment (Trump trial flowchart)