New York Supreme Court

Appellate Division—First Department

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

Appellate Case No.: 2025-00648

– against –

PRESIDENT DONALD J. TRUMP,

Defendant-Appellant.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* PROFESSOR SETH BARRETT TILLMAN AND LANDMARK LEGAL FOUNDATION IN SUPPORT OF DEFENDANT-APPELLANT PRESIDENT DONALD J. TRUMP

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New York County Indictment No. 71543/2023

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Case No. 2025-00648

Supreme Court of the State of New York
Appellate Division – First Department

PEOPLE OF THE STATE OF NEW YORK,
Respondent,
-against-
PRESIDENT DONALD J. TRUMP,
Defendant-Appellant.

New York County Indictment No. 71543/2023

NOTICE OF MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

PLEASE TAKE NOTICE that, upon the annexed affirmation of Robert W. Ray, Esq., dated October 29, 2025, and the accompanying proposed Brief of *Amici Curiae*, in Support of Defendant-Appellant President Donald J. Trump, the undersigned will move this Court upon these papers and without oral argument at the Supreme Court, Appellate Division, First Department, 27 Madison Avenue, New York, New York 10010, on **November 10, 2025**, or as soon thereafter as counsel may be heard, for an order granting leave to Professor Seth Barrett Tillman and Landmark Legal Foundation to file a brief as *amici curiae* in support of Defendant-Appellant Donald J. Trump. The motion is filed pursuant to CPLR § 2214 and 22 NYCRR §§ 1250.4 and 600.4.

A copy of the Affirmation of Robert W. Ray, Esq. in support of this motion is annexed hereto as Exhibit **A** and the proposed *Amici Curiae* Brief in Support of Defendant-Appellant President Donald J. Trump is annexed hereto as Exhibit **B**.

Dated: New York, New York
October 29, 2025

Respectfully submitted,

Robert W. Ray

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To:

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PROOF OF SERVICE

The foregoing document has been e-filed and, pursuant to Rule 1245.7(B), the foregoing document was served electronically on all counsel of record.

Dated: New York, New York
October 29, 2025

Robert W. Ray

Robert W. Ray
Counsel of Record

Exhibit A

Case No. 2025-00648

Supreme Court of the State of New York
Appellate Division – First Department

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

PRESIDENT DONALD J. TRUMP,

Defendant-Appellant.

New York County Indictment No. 71543/2023

AFFIRMATION OF ROBERT W. RAY, ESQ. IN SUPPORT OF MOTION FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF

ROBERT W. RAY, Esq., an attorney duly admitted to practice law before this Court, affirms the following under penalties of perjury pursuant to CPLR § 2106:

1. I am counsel for proposed *Amici curiae*, Professor Seth Barrett Tillman and Landmark Legal Foundation. I am familiar with the facts and circumstances set forth herein and submit this Affirmation in support of the Motion for Leave to File a Brief of *Amici Curiae* in Support of Defendant-Appellant President Donald J. Trump.

2. On January 29, 2025, Defendant-Appellant President Donald J. Trump ("President Trump" or "Defendant-Appellant") filed an appeal from a judgment of conviction following a jury trial rendered on January 10, 2025, by the New York Supreme Court, New York County, on all 34 counts under Indictment 71543/2023 charging falsification of business records in the first degree under P.L. § 175.10. On appeal, in part and among other things, Defendant-Appellant challenges the "By Unlawful Means" jury instruction as contrary to law and that his conviction, therefore, cannot be sustained and was unconstitutional.

3. Proposed *Amici* respectfully request this Court's permission to submit a Brief of *Amici Curiae* in order to assist this Court's review of President Trump's appellate claims by highlighting federal constitutional concerns and jury trial rights presented by the trial court's jury instructions.

4. Proposed *Amici* have researched and published in the area of U.S. constitutional law related to jury instructions and jury trial rights provided in the underlying case.

5. Professor Seth Barrett Tillman, an American national and U.S. constitutional law scholar, is a faculty member in the Maynooth University School of Law and Criminology, Ireland/Scoil an Dlí agus na Coireolaíochta Ollscoil Mhá Nuad. Professor Tillman has written widely on many aspects of constitutional law, including jury trial rights. He has regularly contributed *amicus* briefs in state and federal courts, in both civil and criminal matters, including previously on behalf of President Trump.

6. Landmark Legal Foundation is a national public interest legal organization dedicated to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the U.S. Constitution, and defending individual rights. Landmark has filed numerous briefs advocating for the separation of powers and individual rights in courts at all levels.

7. Accordingly, *Amici* are well-suited to address the concerns that this case raises regarding jury instructions and jury trial rights with respect to the rights of the accused to due process and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution. Furthermore, *Amici* identify law or arguments that might otherwise escape the court's consideration. Granting *Amici* status to file the proposed Brief of *Amici Curiae* will not in any way delay or prejudice this proceeding. Proposed *Amici* seek only to submit a brief in support of Defendant-Appellant's appeal, which is attached as Exhibit B to the Notice of Motion.

8. Consistent with Rule 500.23(a)(4)(iii), no party's counsel has contributed to the content of the proposed Brief of *Amici Curiae* or participated in the preparation of the brief in any other manner; no party or party's counsel has contributed money that was intended to fund preparation or submission of the brief; and no person or entity, other than the movants or their counsel, has contributed money that was intended to fund preparation or submission of the brief.

9. For the reasons set forth herein, Professor Seth Barrett Tillman and Landmark Legal Foundation respectfully request an order granting leave to file a Brief of *Amici Curiae* in support of Defendant-Appellant President Donald J. Trump in this case on appeal.

Dated: New York, New York
October 29, 2025

Robert W. Ray

Robert W. Ray
Counsel of Record

Exhibit B

Case No. 2025-00648

Supreme Court of the State of New York
Appellate Division–First Department

PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

PRESIDENT DONALD J. TRUMP,
Defendant-Appellant.

New York County Indictment No. 71543/2023

Brief of Professor Seth Barrett Tillman and Landmark Legal Foundation
as *Amici Curiae* in Support of
DEFENDANT-APPELLANT
PRESIDENT DONALD J. TRUMP

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INTEREST OF *AMICI*

Amici, listed below, have researched and published in the area of constitutional law related to the jury instructions and jury trial rights provided in the underlying case. Professor Seth Barrett Tillman, an American national, is a faculty member in the Maynooth University School of Law and Criminology, Ireland / Scoil an Dlí agus na Coireolaíochta Ollscoil Mhá Nuad. (Tillman's academic affiliation is listed for identification purposes only.) Professor Tillman has written widely on many aspects of constitutional law, including jury trial rights. He has regularly contributed amicus briefs in state and federal courts, in both civil and criminal matters.

Landmark Legal Foundation is a national public interest legal organization dedicated to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution, and defending individual rights. Landmark has filed numerous briefs advocating for the separation of powers and individual rights in courts at all levels.

Amici are paying in whole for the preparation of this *Amici Curiae* brief which is prepared in whole by the undersigned counsel. No party's counsel authored this brief in whole or in part, and no person other than the *Amici* and their counsel—including any party or party's counsel—contributed money that was intended to fund the preparation or submission of this brief.

CORPORATE DISCLOSURE STATEMENT

Landmark Legal Foundation ("Landmark") submits this corporate disclosure statement. Landmark has no parent company or other identifiable related legal entities, and no trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case, including subsidiaries, conglomerates, affiliates, parent corporations or any publicly held corporation, has a ten percent or greater ownership interest in Landmark.

QUESTIONS PRESENTED

I. Whether the jury instruction permitting the jury to convict Donald J. Trump of N.Y. Election Law Section 17-152, without unanimously agreeing on the predicate "unlawful means," violated the unanimity requirement of the United States Constitution?

II. Whether the indictment's failure to include N.Y. Election Law Section 17-152 and the jury instruction permitting the jury to convict Donald J. Trump of Section 17-152, without unanimously agreeing on the predicate "unlawful means," violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny?

Suggested Answers: <u>Yes.</u>

SUMMARY OF ARGUMENT

The jury instruction provided herein concerning N.Y. Election Law Section 17-152, which permitted the jury to convict Donald J. Trump without unanimously determining the predicate "unlawful means" under that statute, was unconstitutional. In addition, New York's failure to include Section 17-152 in its indictment and the jury instruction not requiring a unanimous determination of the predicate "unlawful means" violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Erlinger v. United States*, 602 U.S. 821 (2024).

ARGUMENT

I. *The jury instruction permitting the jury to convict Donald J. Trump of N.Y. Election Law Section 17-152, without unanimously agreeing on the predicate "unlawful means," violated the unanimity requirement of the United States Constitution*.

President Donald J. Trump's constitutional right to a unanimous verdict was infringed by the Supreme Court, New York County's erroneous instruction.[1] Justice Juan Merchan issued a set of jury instructions—55 pages in length. The trial court permitted the jury to convict based on a violation of N.Y. Election Law Section 17-152. Conviction under Section 17-152 requires a predicate legal violation[2]: a violation of some *other* law as part of a conspiracy to promote the election of a candidate for public office. That is, Section 17-152 is satisfied only if the defendant has violated Section 17-152 "by unlawful means." However, according to Justice Merchan's instructions, the jurors did not need to reach a unanimous agreement as to what were the "unlawful means."

Justice Merchan's jury instructions stated in relevant part:

> Although you must conclude unanimously that the defendant conspired to promote or prevent the election of any person to a public office by unlawful means, *you need not be unanimous* as to what those unlawful means were.

---

[1] Part I is based on: Seth Barrett Tillman, *The Right to a Unanimous Verdict and the Jury Instructions in* People v. Trump, Just Security (June 10, 2024), https://ssrn.com/abstract=4850079, https://www.justsecurity.org/96654/trump-unanimous-verdict/.

[2] As outlined *infra* at pages 14–15, the predicate legal violation is of particular constitutional significance because it transforms what otherwise would be a misdemeanor offense into a felony offense.

> In determining whether the defendant conspired to promote or prevent the election of any person to a public office by unlawful means, you may consider the following unlawful means: (1) violations of the Federal Election Campaign Act otherwise known as FECA; (2) the falsification of other business records; or (3) violation of tax laws.
>
> (emphasis added).

In short, in order to convict, the jury must unanimously agree that a predicate legal violation occurred: (1) or (2) or (3), as listed above. But the jury, according to the court's instructions, need not unanimously agree on *any one* such predicate violation. The jury theoretically could divide 4-to-4-to-4, so long as each juror agreed that President Trump committed one of the three predicate legal violations, but there is no unanimity required in regard to any one or more of them.

The trial court's jury instructions are flawed because they violate President Trump's constitutional right to a unanimous verdict. To support that position, one looks to other similar statutes where the same unanimity issue has been adjudicated by a court of record. Indeed, Section 17-152 is not the only statute making use of predicate acts, where the predicate acts are themselves legal violations. For example, the Racketeer Influenced and Corrupt Organizations ("RICO") Act, a federal statute, also makes use of predicate legal violations. And it is not uncommon for federal indictments to allege many such predicate violations in support of a single RICO charge. So RICO and Section 17-152 involve the same unanimity issue. In the RICO context, the United States Court of Appeals for the Second Circuit explained: "[T]he jury [in a RICO case]

must be unanimous not only that at least two [predicate] acts were proved, but *must be unanimous as to each of two predicate acts*." *United States v. Gotti*, 451 F.3d 133, 137 (2d Cir. 2006) (emphasis added); *see also Haynes v. United States*, 936 F.3d 683, 691 (7th Cir. 2019) (same) (citing *Gotti*, 451 F.3d at 137); *United States v. Carr*, 424 F.3d 213, 224 (2d Cir. 2005) ("[T]he jury must find that the prosecution proved each one of those two … specifically alleged predicate acts beyond a reasonable doubt.").

State courts examining similar state statutes have reached the same result. For example, the Connecticut Appellate Court stated:

> The defendant claims that this situation required the [trial] court specifically to instruct the jurors that they had to agree unanimously on which, if either, of the [predicate] acts was committed by the defendant. … **Such a charge is required if** (1) *a jury is instructed that the commission of any one of several alternative actions would subject the defendant to criminal liability*, (2) the actions are conceptually different and (3) the state has presented evidence on each of the alternatives.

State v. Edwards, 524 A.2d 648, 653 (Conn. App. 1987) (footnote omitted) (bold added) (italics added); *see also United States v. Lujan*, No. CR 05-0924 RB, 2011 WL 13210661 (D.N.M. Aug. 10, 2011) (applying federal criminal law) (same); *Stevenson v. State*, 709 A.2d 619 (Del. 1998) (applying Delaware law) (same); *State v. Benite*, 507 A.2d 478 (Conn. App. 1986) (applying Connecticut law) (same).

In other words, where statutory criminal predicates are merely alternative *acts*, jury instructions, in *some* circumstances, may be disjunctive and use "or" between different predicates. As long as each juror determines that the defendant's conduct

satisfied at least one such *act*, then jury unanimity is met. However, where statutory criminal predicates are not merely alternative *acts*, but different *legal violations*, then a substantially different unanimity rule applies.

Where statutory criminal predicates are themselves *legal violations*, and if charged, *would subject the defendant to criminal liability*, then the jury must be unanimous in regard to any such predicate. That is what Justice Merchan's jury instructions failed to do. There is nothing surprising about this result. It flows from the most basic conceptions of traditional American jury rights and due process. Where a statute adopts other criminal law or legal violations as a predicate, for that predicate to be established, the jury must be unanimous in regard to that separate predicate and each of *its* constituent elements—even if the defendant has not actually been separately charged with that statutory criminal predicate or otherwise held liable under it.

Recently, in 2023, the North Carolina Court of Appeals, in a discussion about jury instructions, explained:

> Defendant maintains that the trial court erred in its conspiracy instruction because the "instruction allowed the jury to convict [Defendant] of conspiracy based on one of two different victims, in violation of the unanimity requirement" for jury verdicts. This argument is also inapt.
>
> Our State Constitution provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court[.]" N.C. Const. art. I, § 24. "To convict a defendant, the jurors must unanimously agree that the State has proven beyond a reasonable doubt each and every essential element of the crime charged." *State v. Jordan*, 305 N.C. 274, 279, 287 S.E.2d 827, 831 (1982). A "disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of **two underlying**

> **acts**, *either of which is in itself a separate offense*, is **fatally ambiguous** because it is impossible to determine whether the jury unanimously found that the defendant committed [any] one particular offense." *State v. Lyons*, 330 N.C. 298, 302–03, 412 S.E.2d 308, 312 (1991). However, "if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied." *Id*. at 303, 412 S.E.2d at 312.

State v. Purcell, 884 S.E.2d 181, 2023 WL 2577540, *9–10 (N.C. App. 2023) (bold added) (italics in the original) (noting applicability of Rule 30(e)(3) of N.C.R.A.P.).

The settled practice of American courts, federal and state, adjudicating predicate acts used in a criminal charge is consistent with *Gotti*, *Edwards*, and *Purcell*, discussed above. *See Baker v. Indiana*, 948 N.E.2d 1169, 1175 (Ind. 2011) (explaining that "a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two or more underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense") (emphasis added)); *see also* 75A Am. Jur. 2d Trial § 1149: *Instruction on unanimous verdict—Separate acts or theories* (2025) ("[A]n instruction that the jurors must unanimously agree on a single theory is required when any one of several alternative actions would subject the defendant to criminal liability, the actions are conceptually different, and the prosecution has presented evidence on each alternative."). *See generally* discussion *infra* pp. 17–18 regarding NY CPL 310.50 (4) and *People v. Kleyman*, 2007 NY Slip Op 33829[U], 2007 WL 4241903 [Sup Ct, Suffolk County Nov. 19, 2007]. Where a

mere *act* is a predicate for a legal violation, the statute can—in *some* circumstances—allow for several such acts to be charged disjunctively, and jury unanimity is preserved as long as each juror agrees to at least one such act (that is, where only one such predicate act is sufficient for conviction). In other words, the 4-to-4-to-4 example above would be fine in such a case. But where each alleged statutory criminal predicate (even if uncharged) *is itself a legal violation*, then every juror must agree that that specific predicate (or legal violation) was violated as if it had been separately charged. Why? Because any separately charged legal violation would require unanimity in regard to that separate offense and in regard to every element of that separate offense. *See generally Mathis v. United States*, 579 U.S. 500 (2016) (discussing and contrasting means from elements); *Richardson v. United States*, 526 U.S. 813, 817 (1999) (same); *Schad v. Ariz*., 501 U.S. 624 (1991) (same); Jessica A. Roth, *Alternative Elements*, 59 UCLA L. Rev. 170 (2011); Rebecca Sharpless, *Finally, a True Elements Test*, 82 Brooklyn L. Rev. 1275 (2017); David B. Rivkin & Elizabeth Price Foley, *Trump's Trial Violated Due Process*, Wall Street Journal, June 5, 2024, at A17[3].

In New York, there does not appear to be any positive law, case law, or model jury instructions that are on-point and explain the application of state and federal jury-unanimity constitutional requirements for a Section 17-152 violation. In the trial court, the District Attorney's brief addressed this issue. The District Attorney cited three New

[3] Also available at https://tinyurl.com/4b466ufu.

York appellate cases: *People v. Mackey*, 49 NY2d 274, 279, 425 NYS2d 288, 290–91, 401 NE2d 391, 401 [1980], *People v. Mateo*, 2 NY3d 383, 407, 779 NYS2d 399, 412, 811 NE2d 1053, 1066 [2004], and *People v. Watson*, 284 AD2d 212, 213, 728 NYS2d 9, 10 [1st Dept. 2001]. None of these cases addressed Section 17-152 or anything closely analogous.

Mackey was a decision of the New York State Court of Appeals. Mackey challenged the sufficiency of the indictment, but neither the word "unanimity," nor any of its variants, appear anywhere in the decision. It is instead a ruling on the sufficiency of an indictment, and not about the federal or state constitutional right to a unanimous verdict.

Mateo, also a New York State Court of Appeals decision, was a challenge relating to the jury's unanimity instruction in a first-degree murder case. *See* N.Y. Penal Law Section 125.27(1)(a)(vii). There, the Court refused to reverse a conviction notwithstanding that the jury charge permitted two predicate conditions to be charged disjunctively. In supporting its holding, the Court of Appeals looked to the particular structure, language, and history of the state's murder statute, its statutory predecessor, and long-established New York case law interpreting that specific statute. We have nothing like this for Section 17-152. More importantly, the Court of Appeals characterized each predicate in the specific murder statute as "essentially a preliminary

fact," as opposed to free-standing legal violations (even if uncharged). The Court of Appeals explained:

> Defendant certainly kidnapped the victim—that is undisputed. He took on the mental state required: it was his decision to execute Matos [the victim]. Thus, whether he personally pointed the gun at the victim's head and pulled the trigger, or whether, handing the gun to Monica [an accomplice], he gave her an order and stood near as she carried it out, the two choices for the jury were not so different that they amounted to any more than alternatives to a common end.

Mateo, 2 NY3d at 408, 779 NYS2d at 413, 811 NE2d at 1067.

Mateo's murder charge is significantly different from Section 17-152. The mental states for the predicate violations in President Trump's case are not the same. How could they be? They are entirely different free-standing crimes taking place at different times with different elements. To the extent that concrete "victims" could be discovered—victims of an election-related "conspiracy" or "fraud"—there is no reason to believe that the victims were identical or even significantly overlap with one another. *Indeed, it has been said that the predicates involve allegations about different presidential elections!* In *Mateo*, there was one victim—it was only a question of which one of two closely related acts was used in regard to that singular victim.

Watson was decided by the New York State Appellate Division, First Department. This Court explained:

> Where the grand larceny count of the indictment did not specify a theory of larceny, and the court instructed the jury as to the theories of larceny by *false promise* and *false pretense*, the court properly determined that there was no basis for submission of a special verdict sheet distinguishing

> between these two theories. A conviction of larceny, whether by false promise or false pretense, constitutes only one offense. Thus, juror unanimity is not required as to the particular method by which the larceny was committed. Accordingly, there was no basis upon which to submit a special verdict sheet. Defendant's claims that submission of a verdict sheet that failed to require unanimity as to a specific theory of larceny violated his constitutional due process rights and the statutory prohibition of duplicitous counts are unpreserved and we decline to review them in the interest of justice.

Watson, 284 AD2d at 213, 728 NYS2d at 10 (internal citations omitted) (emphasis added); *accord United States v. Concepcion*, 139 F.4th 242, 252 (2d Cir. 2025) (requirement of special verdict interrogatories reserved for particularly complex criminal cases, especially RICO).

Under New York law, larceny is a crime, codified at Penal Law Sections 155.00 to 155.45. This Court permitted the conviction to be upheld because the jury unanimously held that the defendant committed at least one of two predicate acts: engaged in a false pretense or engaged in a false promise, with both charged disjunctively. However, neither of those two predicates acts, *i.e.*, false pretenses and false promises, *is a free-standing legal violation*. Indeed, although the larceny statute establishes these two predicates—neither false pretenses nor false promises is cross-listed to other New York penal code provisions as a free-standing crime. In short, *Watson* did not and does not establish that Justice Merchan's jury instructions were correct or in accord with the settled practice.

Here, in the instant Section 17-152 prosecution, the statutory predicates include three different legal violations. Moreover, the legal violations are conceptually different from one another, and the prosecutors presented different evidence for each such predicate. *See, e.g.*, *Edwards*, 524 A.2d at 653. In these circumstances, the constitutional minimum for jury unanimity has not been met. *See United States v. Gipson*, 553 F.2d 453, 458–59 (5th Cir. 1977) ("[U]nder the [trial court's jury] instruction, the jury was permitted to convict Gipson even though there may have been significant disagreement among the jurors as to what he did. The instruction was therefore violative of Gipson's right to a unanimous jury verdict.").

If Justice Merchan's jury instructions had followed the settled practice, then, in order to convict, the jury instructions were required to mandate unanimity at least in regard to one such predicate. Here, there was no such charge. Justice Merchan's jury instructions squarely departed from settled practice.

II. The indictment's failure to include N.Y. Election Law Section 17-152 and the jury instruction permitting the jury to convict Donald J. Trump of Section 17-152, without unanimously agreeing on the predicate "unlawful means," violated Apprendi v. New Jersey, *530 U.S. 466 (2000) and its progeny.*

President Trump's jury trial rights were violated under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny.[4] In *Apprendi*, the United States Supreme Court

[4] Part II is based on: J. Andrew Salemme, *Is there an* Apprendi *problem with the Trump conviction? Recent Supreme Court decision in* Erlinger v. United States *Suggests the answer is yes*, JD Supra (June 25, 2024), https://tinyurl.com/4msxfv97.

held that the Sixth Amendment jury trial right requires any fact (other than a prior conviction) that increases the penalty to which a defendant is exposed must be unanimously decided by a jury beyond a reasonable doubt. *Id.* at 490.[5] In addition, *Apprendi* and its progeny require that the prosecution include the elements of an offense in its indictment or criminal charging documents. *See Erlinger v. United States*, 602 U.S. 821, 831 (2024).

Because the falsifying business records crime charged is ordinarily a misdemeanor offense with a two-year statute of limitations period, to avoid the statute of limitations, the People needed to elevate the charges to felony offenses by asserting that President Trump had the "intent to commit another crime or to aid or conceal the commission thereof." To do so, the People relied at trial on a separate misdemeanor criminal charge that never has been used similarly: Section 17-152 of the New York Election Law. The prosecution however did not include Section 17-152 in its indictment and the jury in this case did not unanimously determine a fact that increased the potential penalty President Trump faced for the charges of falsifying business records.

---

[5] The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. 6. The Sixth Amendment has been held applicable to the States under the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

As noted above, the Election Law in question makes it unlawful to conspire to promote a candidate's election by "unlawful means." Since President Trump's charges were elevated from misdemeanors to felonies by the requirement that the prosecution prove "another crime," the *Apprendi* decision and its progeny was clearly implicated.

Notably, in addition to the prosecution's not providing President Trump notice in the indictment about the Election Law statute being the crime that it would utilize to elevate the charges to felonies, the prosecution also did not provide notice to President Trump on what the alleged "unlawful means" of violating that law was in its indictment.[6] However, during trial, the prosecution asserted three possible theories, that is three predicate crimes: (1) Michael Cohen's initial payment of $130,000 to Stormy Daniels equated to an excessive campaign contribution violating the Federal Election Campaign Act ("FECA") and President Trump solicited that contribution; (2) President Trump helped facilitate New York criminal tax fraud by permitting Cohen to falsely report President Trump's reimbursement to Cohen as income (even though that *increased* Cohen's tax liability); and (3) President Trump's alleged falsification was designed to aid or conceal falsification of different business records.

Here too, the trial judge's unique jury instructions ran afoul of *Apprendi* and its progeny. The judge instructed the jury that while they had to find unanimously that

[6] This alone constitutes a violation of the United States Constitution under both the Sixth Amendment's notice provision and Fifth Amendment's due process principles.

President Trump employed "unlawful means" to promote his election (or prevent Secretary Hillary Clinton's), he expressly instructed that they did **not** have to agree unanimously on what those "unlawful means" were.

This jury instruction (discussed above) was contrary to *Apprendi* and its progeny because the "unlawful means" were necessary to elevate the falsifying crimes into a felony and any fact that increases the potential punishment must be proven unanimously beyond a reasonable doubt. That is, proof of what exactly the "unlawful means" was needed to have been proven unanimously.

Under the trial judge's instruction and theory of the law, if a person were only charged with an Election Law violation under 17-152, the jury would not need to agree unanimously as to what the specific "unlawful means" was used. But some illustrations based on other New York crimes that involve proof of other crimes to establish guilt of the underlying crime demonstrate that such a theory is inconsistent with how New York (and frankly other state) juries are instructed.

New York's felony murder statute and enterprise corruption law are illustrative of this concept—as both of those crimes require proof of other unlawful activity. New York's standard jury instruction for felony murder requires the government to specify what the underlying felony (*i.e.*, burglary, robbery, etc.) that was committed by the accused is, and to prove that other crime beyond a reasonable doubt. In this respect, the jury instruction reads, in part:

> In order for you to find the defendant guilty of this crime, the People are required to prove, from all of the evidence in the case, beyond a reasonable doubt, the following: that on or about [***date***], in the county of [***insert***], the defendant committed *or* attempted to commit [***name of felony***].

CJI2d[NY] Penal Law § 125.25 (3).

While the prosecution in this case did not need to prove President Trump committed the Election Law crime and only intended to commit it, that is a distinction without a difference as it relates to *Apprendi* because the "unlawful means" is an element of the Election Law violation, which in turn was also an "element" of the felony falsifying charges.

New York's enterprise corruption law is perhaps even more instructive on this front. To be guilty of enterprise corruption (essentially New York State's form of a federal RICO violation), the defendant must have engaged in a pattern of criminal activity. To engage in a pattern of criminal activity requires three other criminal acts. The jury is instructed on whatever those other criminal acts are alleged to be and must render a unanimous guilty verdict for each of those crimes. *See* NY CPL 310.50 (4) (mandating use of "special verdicts" for every predicate offense); *id*. (directing that "[i]n the absence of a unanimous special verdict of guilty with regard to each of at least three [predicate] criminal acts . . . the court must order that the verdict on the count charging enterprise corruption be recorded as an acquittal"); *see also Kleyman*, 2007 WL 4241903, at *3 (noting that NY CPL 310.50 (4) requires unanimous guilty verdict for

each of three other criminal acts before jury can return guilty verdict as to enterprise corruption offense). The pattern instruction accordingly reads, in part:

> In this case, the People allege that the defendant engaged in conduct constituting [***specify number***] pattern criminal acts, namely, the crimes of [***specify the pattern criminal acts listed in CPL 460.10[1] and submitted to the jury as either as separate counts in the indictment or as lesser included offenses of those counts***].
> ….
>
> If, after your deliberations on those counts, you do not find the defendant guilty of [***at least three of those***] [***those three***] counts, you will not consider this count of Enterprise Corruption ….

CJI2d[NY] Penal Law § 460.20 (1) (b) (bracketed language in original).

These instructions illustrate that when *other crimes* are an element of a New York offense they *must be proven unanimously* beyond a reasonable doubt. The jury in this case should have been instructed that they had to unanimously agree on what the "unlawful means" President Trump used in intending to violate the New York Election Law. *See, e.g*., *Gotti*, 451 F.3d at 137. It was not enough that the jury unanimously agreed that President Trump intended an Election Law violation if it did not unanimously agree on the "unlawful means" element of that violation.

The United States Supreme Court recently reiterated the vitality of *Apprendi* and the jury trial right (and due process) in *Erlinger*, 602 U.S. at 831. Justice Gorsuch, writing for the majority, citing *Apprendi*, opined that the Fifth and Sixth Amendments, "were understood to require the government to include in its criminal charge, all the facts and circumstances which constitute the offense." *Id*. He added, "the 'truth of every

accusation' against a defendant had to be 'confirmed by the unanimous suffrage of twelve of [his] equals and neighbors.'" *Id*. (quoting *Apprendi*, 530 U.S. at 477).

Justice Gorsuch highlighted: "By requiring the Executive Branch to prove its charges to a unanimous jury beyond a reasonable doubt, the Fifth and Sixth Amendments seek to mitigate the risk of prosecutorial overreach and misconduct, including the pursuit of 'pretended offenses' and 'arbitrary convictions.'" *Erlinger*, 602 U.S. at 832. Additionally, "[b]y requiring a unanimous jury to find every fact essential to an offender's punishment, those amendments similarly seek to constrain the Judicial Branch[.]" *Id*. In short, "[v]irtually 'any fact' that 'increase[s] the prescribed range of penalties to which a criminal defendant is exposed' must be resolved by a unanimous jury beyond a reasonable doubt (or freely admitted in a guilty plea)." *Id*. at 834 (quoting *Apprendi*, 530 U.S. at 490).

Even the dissenting justices in *Erlinger* noted that, "Early state constitutions required the government to include the elements of an offense in an indictment." *Erlinger*, 602 U.S. at 864 (Kavanaugh, J., dissenting). And "the prosecution also had to prove elements of the offense beyond a reasonable doubt, as the requirements for an indictment and a jury trial went hand in hand." *Id*. Justice Jackson, who also dissented in *Erlinger*, and although she called for overturning *Apprendi*, still recognized that, "Our Constitution '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.'" *Id*. at 873 (Jackson, J., dissenting) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)).

Finally, it is accepted constitutional doctrine, at least since *Ramos v. Louisiana*, 590 U.S. 83 (2020), that the accused enjoys a fundamental right under the due process clauses and the Sixth Amendment[7] to a unanimous jury verdict on all essential elements of the charged offense. What is less clear is whether the failure to require unanimity as to any of those elements constitutes structural rather than procedural (or trial) error. The latter is generally subject to review for harmless error even when it is a constitutional error[8]; the former is not. A structural error is one so fundamental that it undermines the integrity of the entire trial process, rendering the proceeding unfair to the point of requiring a new trial regardless of whether the error impacted the outcome. *See Arizona v. Fulminante*, 499 U.S. 279, 307–10 (1991). One related and recognized example of structural error is a defective reasonable doubt jury instruction. Such a defective jury instruction is considered structural because it fundamentally places into question the validity and fairness of any verdict of conviction resulting therefrom. *See Sullivan v. Louisiana*, 508 U.S. 275, 281–82 (1993). In that event, automatic reversal is warranted and required.

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[7] U.S. Const. amends. V, VI, XIV.

[8] *See People v. Gomez*, 236 AD3d 603, 605, 230 NYS3d 247, 250 [1st Dept 2025], *lv denied*, 43 NY3d 1045, 236 NYS3d 622, 263 NE3d 879 (Table) [2025] ("[E]ven if defendant had established a constitutional violation premised on [*Apprendi*], such violation would be subject to harmless error review." (citing *People v. Kozlowski*, 11 NY3d 223, 250, 869 NYS2d 848, 898 NE2d 891 [2008], *cert denied* 556 U.S. 1282 [2009])).

On the other hand, the U.S. Supreme Court in *Neder v. United States*, 527 U.S. 1 (1999), has also recognized that even the omission of an element of the charged offense in a jury instruction is sometimes subject to harmless error review on appeal and does not necessarily result in reversal.[9] The reviewing court in that event must ask "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Id.* at 19. But that result would appear to be limited to those cases "where an omitted element is supported by *uncontroverted* evidence." *Id.* at 3 (emphasis added). In *Neder*, the defendant was charged with various federal fraud offenses including mail and wire fraud, bank fraud and tax fraud, in connection with fraudulently obtained bank loans. The jury instructions omitted the element of materiality as to the tax fraud offenses (and false statements made relative to those offenses) contrary to *United States v. Gaudin*, 515 U.S. 506, 510–11 (1995). *See Neder*, 527 U.S. at 16 (proof required to sustain conviction on tax offense necessarily included that defendant filed tax return that he knew was untrue as to material matter; thus, "no jury could reasonably find that Neder's failure to report substantial amounts of income" was immaterial, and absence of jury instruction on materiality element accordingly was harmless beyond reasonable doubt). The Supreme Court had little trouble in

[9] The Supreme Court in a series of other cases has held that certain instructional errors are procedural rather than structural and thus subject to harmless error review instead of resulting in automatic reversal. *See, e.g.*, *Pope v. Illinois*, 481 U.S. 497 (1987) (misstated element of offense); *Rose v. Clark*, 478 U.S. 570 (1986) (erroneous burden shifting as to essential element of offense).

concluding—in a case "where [the] defendant did not, and apparently could not," contest the omitted element of materiality—that allowing a determination on appeal "whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee." *Id*. at 18–19. *See generally* Benjamin E. Rosenberg, *Appellate Review of Structural Errors in Criminal Trials*, 242 N.Y.L.J., No. 20 (July 29, 2009), https://tinyurl.com/ya6e4t2h.

In this case by contrast, whether viewed as structural or procedural error, the defect in the jury instructions as to jury unanimity and the evidence in support of the predicate offenses was very much a contested issue at trial.[10] Moreover, as to the predicate offenses themselves, this case involves a contested general jury verdict following instructions on alternative theories of guilt not requiring unanimity, at least one of which may well have been insufficient as a matter of law or fact. While the U.S. Supreme Court has held that a general verdict rendered by an otherwise properly instructed jury on alternative theories of guilt, one of which was later found invalid,

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[10] Although beyond the scope of this *Amicus* brief and reserved to the arguments of the parties so as not to be repetitive here, we simply note that Defendant-Appellant variously and vigorously has challenged the legal and factual sufficiency of the New York State law and FECA federal law predicate offenses. Those challenges include that FECA—a federal crime—cannot serve as a predicate offense to a state crime under New York law; that the purported state tax law violation happened, if at all, after the November 2016 election and thus could not have constituted "unlawful means" to promote or prevent the election of a person to office (*i.e.*, the charged offense under P.L. §175.10 and E.L. §17-152); and that similarly, the tax paperwork, including allegedly false "1099-MISC" forms issued to Michael Cohen by the Trump Organization, as well as the required FECA filings to be submitted to the Federal Election Commission ("FEC"), could not have been concealed "by unlawful means" because those disclosures would not have issued or been made public, in the ordinary course, until after the election. Lastly, President Trump also has challenged as non-harmless evidentiary error the trial court's adverse decision to exclude testimony by Defendant-Appellant's FEC defense expert.

may still be found harmless, that result—whether considered of constitutional magnitude or otherwise—is reserved for those cases where the errors at trial cannot be said to have had a "substantial and injurious effect or influence in determining the jury's verdict." *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (internal quotation omitted). *See generally* Note, *Searching for a Harmless Alternative: Applying the Harmless Error Standard to Alternative Theory Jury Instructions*, 83 Fordham L. Rev. 295 (2014), https://ir.lawnet.fordham.edu/flr/vol83/iss1/9/.

Not so here. The essential question presented by this appeal is whether at the end of day President Trump received the benefit of his constitutional right to a fundamentally fair trial. The combination of errors in the court below says no. The indictment in this case was defective. The trial court's instruction—that the jury need not be unanimous in determining what specific "unlawful means" President Trump allegedly employed—was fatally flawed, and thus this instruction constituted a violation of *Apprendi* and its progeny. That instructional error—whether viewed as structural or procedural—was of substantial constitutional magnitude in prejudicing the resulting verdict and was not, in any event, harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967); *cf. People v. Mairena*, 34 NY3d 473, 482–89, 121 NYS3d 731, 736–41, 144 NE3d 340, 345–50 [2019] (affirming non-structural jury instruction error as harmless without deciding whether such error was of constitutional dimension, thus leaving for another day application to non-overwhelming

trial record of *Chapman* rule that error of material effect must be deemed harmless beyond reasonable doubt in order to sustain conviction); *accord People v. Goldstein*, 6 NY3d 119, 129, 810 NYS2d 100, 107–08, 843 NE2d 727, 734 [2005] (holding that a Sixth Amendment Confrontation Clause error requires application of constitutional test for harmlessness beyond reasonable doubt and results in reversal of conviction where evidence of guilt was not overwhelming); *People v. Crimmins*, 36 NY2d 230, 241, 367 NYS2d 213, 222, 326 NE2d 787, 793–94 [1975] (whether evaluated as constitutional or nonconstitutional error, "in either instance, of course, unless the proof of the defendant's guilt, without reference to the error, is overwhelming, there is no occasion for consideration of any doctrine of harmless error," otherwise defendant is denied fundamental right to fair trial).

CONCLUSION

For all the reasons discussed above, this Court should reverse the trial court's judgment.

Dated: New York, New York
October 29, 2025

Respectfully submitted,

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PROOF OF SERVICE

The foregoing document has been e-filed and, pursuant to Rule 1245.7(B), the foregoing document was served electronically on all counsel of record.

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October 29, 2025

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