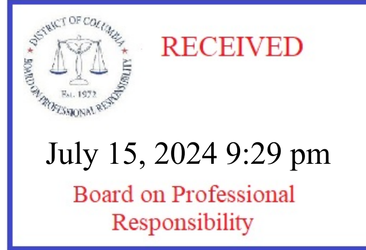
DISTRICT OF COLUMBIA COURT OF APPEALS

BOARD ON PROFESSIONAL RESPONSIBILITY

HEARING COMMITTEE TWELVE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Board on Professional Responsibility

In the Matter of	
JEFFREY B. CLARK	**Disciplinary Docket No.**
A Member of the Bar of the District of Columbia Court of Appeals	**2021-D193**
Bar No. 455315	
Date of Admission: July 7, 1997	

JEFFREY B. CLARK'S SUPPLEMENTAL BRIEF

From the inception of this case, we have argued (1) lack of jurisdiction under 28 U.S.C. § 530B;[1] (2) case is premature;[2] and (3) its entirety violates the separation of powers—or the rules of the D.C. Court of Appeals ("DCCA") do. This case should have been paused pending resolution of removal and appeals thereof. New case law greatly strengthens those arguments.[3]

After post-hearing briefing had ended, the Supreme Court issued decisions

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[1] The Supreme Court's termination of *Chevron* deference invalidates the argument for jurisdiction because it is only DOJ regulations that extend Section 530B to D.C. *See Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244 (2024). The finding of jurisdiction should be reconsidered.

[2] We will file an en banc petition with the D.C. Circuit because its decision conflicts with Supreme Court/DCCA precedent on the quasi-criminal nature of this case. This body should await that.

[3] We respectfully protest that the Board and this body are abusing their discretion by not allowing sufficient briefing on the new Supreme Court cases. President Trump was allowed to file a ***52-page, 16,000-word brief*** in Manhattan to cover *Trump*, whereas we also must cover *Jarkesy*. https://www.courthousenews.com/wp-content/uploads/2024/07/donald-trump-presidential-immunity-hush-money-motion.pdf (last visited 7/15/24).

that require this case be dismissed, or at least remanded for a new hearing: (1) *Trump v. U.S.*, 144 S.Ct. 2312 (2024), establishing absolute immunity for conduct within the President's "conclusive and preclusive" constitutional authority, with presumptive immunity for all other official conduct, while establishing evidentiary rules to protect the separation of powers; (2) *SEC v. Jarkesy*, 144 S.Ct. 2117 (2024), preventing use of administrative processes to strip defendants of common-law jury-trial rights.

I. *TRUMP* REQUIRES DISMISSAL OF THIS CASE.

Trump held that "the President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority." 144 S.Ct. at 2328. The allegations against President Trump relating to his discussions with DOJ officials about whether to send the draft letter to Georgia officials and whether to replace the Acting Attorney General with Mr. Clark "plainly implicate Trump's 'conclusive and preclusive' authority'" because the "Executive Branch has 'exclusive authority and absolute discretion' to decide which crimes to investigate and prosecute, ***including with respect to allegations of election crime***." *Id*. at 2334. (Emphasis added). Lest there be any confusion, the Court explained:

> The President may discuss potential investigations and prosecutions with his Attorney General ***and other Justice Department officials*** to carry out his constitutional duty to "take Care that the laws be faithfully executed." Art II, §3. And the Attorney General … acts as the President's "chief law enforcement officer" who "provides vital assistance to [him] in the performance of [his] constitutional duty to

"preserve, protect, and defend the constitution."

Id. at 2335 (emphasis added). Further, "Trump's threatened removal of the Acting Attorney General likewise implicates "conclusive and preclusive' Presidential authority." *Id*. Finally, "the indictment's allegations that the requested investigations were 'sham[s]' or proposed for an improper purpose do not divest the President of exclusive authority over the investigative and prosecutorial functions of the Justice Department and its officials." *Id*. "Trump is therefore absolutely immune from prosecution for the alleged conduct involving his discussions with Justice Department officials." *Id*.

The allegations against Mr. Clark here are squarely within the scope of the President's absolute immunity. That immunity extends to Mr. Clark because it is "a functionally mandated incident" of the President's authority, *id*. at 2329, which protects ***the independence of the Executive Branch*** in carrying out the President's core constitutional authorities, particularly under the Take Care Clause through the Department of Justice. *Trump* repeatedly emphasizes that the purpose of immunity is to protect against the threat of intrusion on ***the authority and function of the Executive Branch***. *Id*. at 2330-31; 2331 ("Such an immunity is required to safeguard the independence and effective functioning of the Executive Branch, and to enable the President to carry out his constitutional duties without undue caution."); 2332 ("'[I]t [is] the nature of the function performed, not the identity of the actor who

perform[s] it, that inform[s] our immunity analysis.' *Forrester v. White*, 484 U.S. 219, 229 (1988)."). *See also id.* at 2333-35.

Moreover, the immunity is for the President's ***official*** acts—which are carried out through his subordinates like Mr. Clark. As a matter of clearly settled constitutional law, and as we have contended from the beginning, the D.C. Bar has no authority to intrude upon the internal deliberations of the President with DOJ over whether and how to carry out the President's core Article II authorities. "Congress cannot act on, ***and courts cannot examine***, the President's actions on subjects within his 'conclusive and preclusive' constitutional authority." *Id*. at 2328 (emphasis added). Therefore, all charges against Mr. Clark must be dismissed.

II. ODC's Evidence is Inadmissible.

A second decisive element of *Trump* is that no evidence may be introduced to prosecute non-immune conduct that would intrude upon the President's exercise of his core constitutional authorities. "If official conduct for which the President is immune may be scrutinized to help secure his conviction, even on charges that purport to be based only on his unofficial conduct, the 'intended effect' of immunity would be defeated." *Id*. at 31.[4] "What the prosecutor may not do, however, is admit ***testimony or private records*** of the President ***or his advisers*** probing the official act

[4] Similarly, absolute immunity must be extended to Mr. Clark to preserve its "intended effect" of protecting the core functions of the President and the Executive Branch.

itself." *Id*. at 2341 n.3 (emphasis added).

ODC's case in chief consisted exclusively of such prohibited evidence from Donoghue, Rosen, and Philbin. They testified to their conversations with the President (alone or with Mr. Clark), with each other, and with Mr. Clark. Such evidence unconstitutionally intrudes on the President's exercise of his core-constitutional authorities and is inadmissible. We filed two motions to exclude that evidence on precisely such grounds—now fully vindicated by *Trump*—but both were wrongly denied.[5] Excluding this evidence, the case against Mr. Clark fails for lack of evidence and should be dismissed.

A retrial would be futile because ODC cannot carry its burden of proof by clear-and-convincing evidence without the impermissible evidence (as it failed even with it), and so dismissal is appropriate. If the futile act is nevertheless required, it must be before a new Hearing Committee untainted by hearing such a large volume of inadmissible and prejudicial evidence.

III. THE DCCA'S ATTORNEY-DISCIPLINE SYSTEM VIOLATES *JARKESY*.

A third ground to end this process is rooted in *Jarkesy*. In *Jarkesy*, the Supreme Court invalidated Congress's attempt in Dodd-Frank to strip the targets of SEC civil enforcement actions of their right to an Article III court process including

[5] *Respondent's Motion in Limine to Exclude Evidence Within the Scope of Executive, Law Enforcement, Deliberative Process, and Attorney-Client Privileges* (November 21, 2023) and *Motion in Limine to Exclude Evidence and Argument That Would Intrude on the Take Care Clause and the Opinion Clause* (November 22, 2023).

a jury. Mr. Clark's Sixth and/or Seventh Amendment rights are thus violated by the D.C. attorney-discipline process.[6]

Historically, lawyer regulation was through common-law procedures in common-law courts. *See Ex Parte Secombe*, 60 U.S. (19 How.) 9, 13 (1856) ("[T]he relations between the court and the attorneys and counsellors who practise in it, and their respective rights and duties, are regulated by the common law."). "The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion …." *Id.* Mr. Clark is being stripped of his rights to a court resolution because the DCCA's rules assign a factfinding role not to an inferior court or to itself but to volunteer private citizens who appear to have taken no oath to the Constitution. This inherently violates the Oath Clause, which governs all judges wielding common law powers, whether state or federal. *See* U.S. Const., art. VI, cl. 3.

Prior to D.C. Home Rule, District common law was inherited from Maryland under an 1801 congressional statute. *See Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 614 (1838). *See id.* at 577-78. The 1776 Maryland Constitution applied in 1801. https://avalon.law.yale.edu/17th_century/ma02.asp (visited 7/15/24). Article

[6] Whether the Sixth or the Seventh Amendment confers the jury trial right applicable here depends on whether attorney-discipline matters are characterized as civil, criminal, or both. That issue is still live in the D.C. Circuit, and provides further grounds to put this first-of-its-kind case on hold. *See supra* n.2.

III, therein, provided: "That the inhabitants of Maryland are entitled to the common law of England, and the trial by Jury, according to that law, and to the benefit of such of the English statutes, as existed at the time of their first emigration …." Article XIX similarly provided that in criminal matters, defendants were entitled to trial by jury. These civil and criminal provisions locked in jury-trial rights as the baseline for the law of the District in 1801, and no Maryland constitutional provision denied those rights to attorneys-at-law. (Post-1801 developments in Maryland regulating attorneys are irrelevant.) ***Congress could readily establish D.C. home rule, but what it could not do—or delegate to D.C.'s courts to do—was abrogate Sixth and Seventh Amendment jury-trial rights.*** *In re Ruffalo*, 390 U.S. 544, 551 (1968) ("These [disciplinary proceedings] are adversary proceedings of a quasi-criminal nature."); *In re Williams*, 464 A.2d 115, 118-19 (1983) (following *In re Ruffalo* as to D.C. lawyer regulation).

"Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer." *In re Ruffalo*, 390 U.S. at 550. *Jarkesy* specifically holds that the presence of punishment triggers jury-trial rights. *See Jarkesy*, 144 S.Ct. at 2129. Indeed, in *Jarkesy*, the Supreme Court held (with the Seventh Amendment jury trial right in focus) that defendants' rights to an Article III court, using federal procedures (*i.e.*, here the Federal Rules of Civil and/or Criminal Procedure), and jury

trial rights could not be abrogated.[7] The disciplinary process here is an agency-like procedure but worse because the actors are purely private and the DCCA defers for factfinding not to a jury, but to non-officers. *See id.* (flagging that judicial review was available, by statute, of SEC adjudications "[b]ut such review is deferential," and ultimately concluding that this did not provide the requisite "neutral adjudicator" that the Constitution requires, *id.* at 2139). Executive Branch powers cannot be encroached on by Congress concentrating power in an Article I court that in turn allows private actors to pile on against the Executive Branch. *Compare id.* (scolding Congress for concentrating power of prosecutor, judge, and jury in the SEC).

Moreover, *Jarkesy* establishes that when remedies go beyond restoring the *status quo*, jury-trial rights attach. *See id.* Here, the remedies necessarily go beyond the *status quo* because the entire case centers on a draft letter ***that was never sent***, leaving the *status quo* unaffected. The letter is only known as a result of media leaks. Neither were Georgia processes nor federal processes prejudiced. Hence, before punishment can be imposed, a jury trial right must be provided.

Finally, *Jarkesy* includes an extensive rebuttal of the public-rights exception in *Atlas Roofing v. OSHA*, 430 U.S. 442 (1977). Jury-trial rights did not attach to OSHA agency proceedings because Congress had created regulations without any

[7] We could develop this argument at much greater length, analyzing and applying each of the subsections of *Jarkesy*, but the Board Chair's ruling and this body's Chair ruling preclude us from doing so. Hence, we will file or lodge a reply brief as we cannot be expected to anticipate ODC's responses, especially with so few words to work with.

analogue at common law, essentially establishing a building code. *Jarkesy*, 144 S.Ct. at 2137. That is not the case as to the rights of lawyers to defend their property interest in practicing, a subject well-known to centuries-old common law.

Respectfully submitted this 15th day of July, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day served counsel for the opposing party with a copy of the foregoing filing by email addressed to:

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This this 15th day of July, 2024.

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