DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE NUMBER TWELVE

In the Matter of	**Board Docket No. 22-BD-039**
JEFFREY B. CLARK, ESQUIRE	**Disciplinary Docket No. 2021-D193**
Respondent,	
A Member of the Bar of the District of Columbia Court of Appeals	
Bar Number: 455315	
Date of Admission: July 7, 1997	

DISCIPLINARY COUNSEL'S RESPONSE TO RESPONDENT'S SUPPLEMENTAL POST-HEARING BRIEF

The Supreme Court's decision in *Trump v. United States,* 603 U.S. ___, 144 S.Ct. 2312 (2024), poses no barrier to the imposition of discipline on Respondent Jeffrey B. Clark. Mr. Clark relies on two holdings in *Trump.* The first is that a former President is absolutely immune from criminal prosecution for the exercise of his core constitutional powers, specifically including conduct involving his discussions with Justice Department officials. *Id.* at 2329-2230. Mr. Clark suggests that the President's immunity encompasses him because he was one of those Justice Department officials.

At no place does *Trump* state or in any way suggest that Justice Department officials or other Executive Branch employees are also immune from prosecution,

much less from the consequences of disciplinary violations arising from their interactions with the President. The rationale of *Trump* is based on the unique position that the President occupies in the constitutional scheme as "the only person who alone composes a branch of government." *Id.* at 2329 (internal citation omitted). Mr. Clark and other subordinate Executive Branch officials do not occupy that unique position. It is well established that Presidential aides who engage in criminal conduct, even at the President's direction, are subject to criminal prosecution. *See United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977).

Former President Trump's lawyer admitted this in his argument to the Supreme Court:

> JUSTICE GORSUCH: If the president gives an unlawful order, call in the troops, all the examples we've heard, every subordinate beneath him faces criminal prosecution, don't they?
>
> MR. SAUER: That is what Gouverneur Morris said explicitly at the Constitutional Convention, that his co-agitators could be prosecuted. There is an important caveat because, of course, there would have to be a – a statute that would govern that for them to be prosecuted to that extent.
>
> JUSTICE GORSUCH: Oh, we've got lots of statutes, The criminal law books are – are replete. But, I mean, do you agree, is that one check that's available?
>
> MR. SAUER: Absolutely. And again, the only caveat that I was making is, if that statute was doing what Marbury says you can't do, which is going after the subordinates to restrict, for example, a core executive

> function, the Franklin clear statement rule might be triggered, and you might not be able to go after that president.

Transcript of Oral Argument at 48-49, *Trump v. United States* (No. 23-939), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23-939_f2qg.pdf.

Trump did not change that established law. The opinion relies heavily on the rationale of *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), in which the Court determined that a former President was absolutely immune from civil suit for actions taken in his official capacity while in office. *Nixon v. Fitzgerald* did not hold that Presidential subordinates were entitled to the same absolute immunity when they assisted the President in the alleged improper conduct. To the contrary, in a companion case, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court held that they were not so entitled. It specifically rejected the subordinates' claim "that they are entitled to a blanket protection of absolute immunity as an incident of their offices as Presidential aides." *Id.* at 808-809. The President is thus uniquely entitled to absolute immunity for both civil and criminal liability arising from his official acts. Subordinate officers are not, and nothing in *Trump* addresses or even suggests that they would be immune from sanctions for disciplinary violations.

Mr. Clark cites to a second aspect of *Trump*: the holding that evidence of official acts may not be admitted into evidence against a former President to prove an element of a crime arising from his unofficial acts. *Trump*, 144 S.Ct. at 2340-

2341. Here again, the ruling is limited to a prosecution of a former President. The holding was "that the Constitution limits the introduction of protected conduct as *evidence* in **a criminal prosecution of a President** . . . ." *Id.* at 2354 (Barrett, J., concurring in part) (italics original; boldface added). The Court's concern was not about information being protected from disclosure generally, but rather of the President's judgment being affected indirectly by fear of prosecution, even for unofficial conduct. The Court believed that the use of such evidence to prosecute a former President "threatens to eviscerate the immunity we have recognized. It would permit a prosecutor to do indirectly what he cannot do directly—invite the jury to examine acts for which a President is immune from prosecution **to nonetheless prove his liability on any charge**." *Id.* at 2340-2341 (emphasis added). It goes on, "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 official conduct, the intended effect of immunity would be defeated. *Id.* at 2341 (emphasis added).

In fact, *Trump* acknowledges a long history of compelling Presidents to produce evidence relating to the criminal prosecution of subordinate officials. *Id.* at 2330. In *United States v. Nixon*, 418 U.S. 683 (1974), the Court required President Nixon to produce for the district court's inspection subpoenaed tape recordings of confidential Oval Office conversations to consider their use in the criminal

prosecution of the President's closest aides. They were so used, and the aides were convicted and sentenced to prison. *Haldeman*, 559 F.2d at 105-112. Therefore, nothing in *Trump* prevents use of the former President's communications to establish a disciplinary violation by a subordinate of the President.

Use of such confidential communications requires balancing Presidential privilege against competing interests, but that is unnecessary in this matter since the privilege has been waived, as this Hearing Committee has already determined. *See* Order (Feb. 27, 2024).

Finally, the Supreme Court would undoubtedly be surprised to learn that its decision in *SEC v. Jarkesy*, 144 S.Ct. 2117 (2024), requires it to litigate disciplinary matters against members of the Supreme Court Bar before a jury. Mr. Clark contends that disciplinary proceedings are civil actions under the common law and therefore the Seventh Amendment guarantees respondents the right to a jury trial. There is no authority for this position.

The Seventh Amendment preserves the right to a jury trial in "Suits at common law, where the value in controversy shall exceed twenty dollars." U.S. Const. Amnd. VII. In *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989), the Court explained its analysis: "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and

equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature."

There is no authority for the proposition that attorney discipline matters were considered "Suits at common law" in the 18th century; Mr. Clark's citation to *Ex Parte Secombe*, 60 U.S. 9 (1856), does not show otherwise. To the contrary, while the Court in *Secombe* recognized that the relationship between courts and the attorneys who practice before them were "regulated by the common law," the Court found it was "well settled"—even in 1856—that "it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed." *Id.* at 13. A court's exercise of that power is a matter of "sound and just judicial discretion." *Id.* There is no "remedy sought" in the traditional sense of suit at common law—Disciplinary Counsel is not damaged by an attorney's ethical violations and has no right to any particular remedy. Rather, disciplinary matters are conducted under procedures created by the Court of Appeals as an aid to the exercise of its inherent authority over members of its bar. Moreover, even if an attorney-discipline case could somehow be analogized to a suit at common law, the Seventh Amendment would still be inapplicable because there is no amount in controversy to satisfy the twenty-dollar threshold.

In any case, disciplinary proceedings are not civil actions. *See In re Clark,* 678 F. Supp. 3d 112, 122-123 (D.D.C. 2023). *Jarkesy* held that when the SEC sues a defendant seeking to impose civil penalties for securities fraud, the case is analogous to a suit for fraud at common law. Accordingly, defendants in such actions have a right under the Seventh Amendment to a jury trial. It ruled unconstitutional an administrative process that would "concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch." 144 S.Ct. at 2139.

Jarkesy is irrelevant to disciplinary proceedings which are not civil suits but rather are judicial proceedings emanating from the Court of Appeals' authority to regulate the membership of its bar. All the participants are officers of the court; there is no Executive (or Legislative) Branch participation as there would be in a criminal case or SEC enforcement action. Hence, the separation of powers issue that concerned the Court in *Jarkesy* does not exist. *See Clark*, 678 F. Supp. 3d at 115-116.

There is no case law, and Mr. Clark cites to none, that stands for the proposition that the judicial proceedings to regulate members of its bar constitutes a civil action and that the Seventh Amendment gives respondents the right to a jury trial. Rather, "[i]t is almost universally held that in the absence of a statute so providing, procedural due process does not require that an attorney have a jury trial in a disciplinary or disbarment proceeding." *In re Northwestern Bonding Co., Inc.*,

192 S.E.2d 33, 36 (N.C. 1972) (citing 7 Am.Jur.2d Attorneys at Law, § 104); *see also* *In re Jacobs*, 44 F.3d 84, 89 (2d Cir. 1994) (rejecting claim that Sixth and Seventh Amendments applied to underlying state disciplinary action against attorney).

Respectfully submitted,

s/ Hamilton P. Fox, 999

HAMILTON P. FOX, III
Disciplinary Counsel

THEODORE (JACK) METZLER
Senior Assistant Disciplinary Counsel

JASON R. HORRELL
Assistant Disciplinary Counsel

OFFICE OF DISCIPLINARY COUNSEL
515 5th Street, N.W.
Building A, Room 117
Washington, D.C. 20001
202-638-1501

CERTIFICATE OF COMPLIANCE

This document complies with the length and format requirements of Board Rule 19.8(c) because it contains **1849** words, double-spaced, with one-inch margins, on 8 ½ by 11-inch paper. I am relying on the word-count function in Microsoft Word in making this representation.

CERTIFICATE OF SERVICE

I hereby certify that on July 17th, 2024, I caused a copy of the foregoing *Disciplinary Counsel's Response to Respondent's Supplemental Post-Hearing Brief* to be filed electronically with the Board on Professional Responsibility by email to CaseManager@dcbpr.org, and to be served on Mr. Clark's counsel by email to:

Harry W. MacDougald, Esquire, hmacdougald@CCEDlaw.com;

Charles Burnham, Esquire, charles@burnhamgorokhov.com; and

Robert A. Destro, Esquire, Robert.destro@protonmail.com.

s/ *Hamilton P. Fox, 999*
HAMILTON P. FOX, III
Disciplinary Counsel