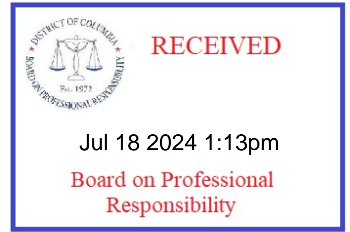

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY
HEARING COMMITTEE TWELVE

In the Matter of	
JEFFREY B. CLARK, ESQUIRE	**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	

BRIEF OF AMERICA FIRST LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTRODUCTION

Following the 2020 election, the nation was divided by allegations that election irregularities or fraud may have influenced the outcome. In his role as the Department of Justice's Acting Assistant Attorney General for the Civil Division, Jeffrey Clark took the position that irregularities or fraud merited further investigation and, potentially, the appointment or provisional appointment of a slate of pro-Trump electors for the State of Georgia. Now, he faces a disciplinary hearing before the Board on Professional Responsibility (the Board) that could leave him disbarred and unable to pursue his career after nearly three decades of honest, distinguished, and respected legal practice.

This proceeding should be discontinued because of its threat to our constitutional system's separation of powers.[1] Disciplinary Counsel's allegations relate exclusively to actions Mr. Clark performed in his official capacity as a senior officer of the Executive Branch at the President's direction and under the President's supervision. Mr. Clark is entitled to absolute immunity, and the Board should dismiss this proceeding.

INTEREST OF *AMICUS CURIAE*

America First Legal Foundation (AFL) is a nonprofit organization dedicated to promoting the rule of law in the United States by defending the Constitution,

[1] Among other valid reasons why this proceeding should be dismissed.

ensuring due process and equal protection for every American citizen, and encouraging understanding of the individual rights guaranteed under the Constitution and laws of the United States.

As a District-based public-interest legal organization, AFL has a substantial interest in this case because many of its lawyers routinely practice within the District of Columbia and are members of the D.C. Bar, by virtue of which they have a profound interest in how the D.C. Bar is regulated.

Further, AFL's core mission includes advancing the rule of law, which, in this matter, means defending the constitutional separation of powers.

Finally, as a public interest law firm, AFL's attorneys routinely litigate politically sensitive cases. This proceeding appears to target Mr. Clark inappropriately for his political beliefs, partisan affiliation, and connection to former President Donald Trump. Such abuse of Bar oversight chills zealous advocacy in politically sensitive matters and should never be permitted.

America First Legal Foundation is a non-profit corporation with no parent corporation. No publicly held corporation owns 10% or more of its stock. No counsel for any party authored any part of this brief. No one other than the *amicus curiae*, its members, or its counsel financed the preparation or submission of this brief.

ARGUMENT

This proceeding should be discontinued immediately because constitutional separation of powers principles render Mr. Clark immune to penalties (quasi-criminal or otherwise) for his work in the Executive Branch.

At the outset, it is undisputed that Disciplinary Counsel is not seeking to have Mr. Clark disbarred over any alleged dishonesty in a court filing—*nothing* was filed anywhere. Indeed, the proposed letter at the heart of this matter was never signed nor sent to anyone; it was, at most, a *draft* letter proposing a position to DOJ leadership. *See* Respondent's Post-Hearing Brief at 32, *In re Clark*, No. 2021-D193 (May 23, 2024) ("Once the President made his decision not to send the draft letter, that was the end of the matter. And, once the President decided, there is nothing in the record that would show that Mr. Clark did anything other than abide by the final decision of the President.") (internal citation omitted); *see also* Disciplinary Counsel's Reply Brief at 14, *In re Clark*, No. 2021-D193 (June 7, 2024) ("The first two sentences are admitted."). This proceeding is about a senior Executive Branch official proposing a departmental position to his leadership and an opinion to the President. Such actions are not subject to review by the Judiciary.

I. Mr. Clark is Entitled to Immunity

The Supreme Court's recent decision in *Trump v. United States* definitively established that the President is entitled to broad immunity from criminal

prosecution for official acts. *See* 144 S.Ct. 2312 (2024).[2] The Court held unequivocally "that the President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority." *Id.* at 2328. Further, the President is entitled to "at least a *presumptive* immunity from criminal prosecution" for acts "within the outer perimeter of his official responsibility." *Id.* at 2331 (declining to decide whether immunity within the outer perimeter of authority is absolute or presumptive).

Although the Supreme Court specifically addressed presidential immunity, the implications for senior executive officials are clear. The privilege of immunity is justified by the President's "unique position in the constitutional scheme." *Trump*, 144 S.Ct. at 2329. The president must be "fearless[ ]," able to ensure "the steady administration of the laws, the protection of property, and the security of liberty." *Id*. (quotations omitted).

In carrying out his duties, the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." U.S. Const. art. II § 2, cl. 2. This Constitutional prerogative to run the executive departments and solicit opinions

[2] It had long been clear that the president had immunity from civil damages for "official acts extending to the 'outer perimeter of his authority.'" *Clinton v. Jones*, 520 U.S. 681, 694 (1997).

necessarily requires that senior executive officers be empowered to offer opinions and carry out their duties without fear of retribution, much like the President.

Here, Disciplinary Counsel *explicitly* seeks to punish the President's official exercise of core powers—which the Supreme Court has unequivocally held to be an unconstitutional infringement on the powers of the Executive Branch—by going after a senior official who drafted a letter and offered an opinion. In Disciplinary Counsel's own words:

> Mr. Clark has emphasized that the letter was never sent, claiming that he engaged in nothing but a vigorous discussion of how to proceed and that he is being prosecuted for a "thought crime." But his conduct was much more than a debate about policy. This was an attempt to do the President's dirty work to undermine, with no basis, the integrity of a presidential election—to do what Mr. Rosen and Mr. Donoghue refused to do, just say the election was corrupt and leave the rest to President Trump.

Disciplinary Counsel's Proposed Findings of Fact and Conclusions of Law, *In re Clark*, No. 2021-D193 (Apr. 29, 2024). Disciplinary Counsel does not, at any point, imply that Mr. Clark struck out on his own; to the contrary, he is alleged to have acted at the President's behest. *See, e.g.*, *id.* at 26 (alleging Mr. Clark was "do[ing] the President's corrupt bidding"); *id*. at 36 ("Mr. Clark was following the direction of President Trump that Mr. Rosen and Mr. Donaghue refused . . . .").

There is no question that running the Department of Justice and ensuring "that the Laws be faithfully executed," U.S. Const. art. 2 § 3 cl. 4, is a core Presidential duty entitled to absolute immunity. As noted above, the Constitution explicitly

empowers the President to seek the counsel of his executive officers, treating "the principal Officer in each of the executive Departments" as a privileged source of counsel. Such empowerment must, logically, include the power to seek the counsel of other senior officials in the Executive Branch—with whom the President often engages throughout any administration. "In justifying absolute immunity for certain officials, both at common law and under 42 U.S.C. § 1983, courts have invariably rested their decisions on the proposition that such immunity is necessary to protect the decision-making process in which the official is engaged." *Imbler v. Pachtman*, 429 U.S. 409 (1976) (White, J. *concurring*).

Disciplinary Counsel makes no secret of his dislike for President Trump nor of his highly negative opinions of those, like Mr. Clark, who helped Mr. Trump carry out the core constitutional duties of his office. But political (and policy) disagreement is no excuse for discarding the separation of powers that allows the Executive Branch of our government to function. Mr. Clark exercised no power that did not derive directly from the President's core role as Chief Executive, and his actions were performed at the President's request. The President and his senior advisors are entitled to absolute immunity—both civil and criminal—in exercising core constitutional Executive powers.

Because assisting—really, *advising*—the President in exercising his core constitutional powers is all that Disciplinary Counsel alleges Mr. Clark did, Mr. Clark is entitled to immunity.

II. Disciplinary Counsel's Counterarguments Are Meritless

Disciplinary Counsel argues that Mr. Clark is not entitled to official immunity because the McDade Amendment allegedly precludes such immunity. *See* Disciplinary Counsel's Reply Brief at 32–33 (citing 28 U.S.C. 503(B)). However, the McDade Amendment, as an act of Congress, cannot restrict the core constitutional functions of the Executive Branch, nor can it subject Executive Branch officials to judicial oversight or penalties.

As the Supreme Court recently explained, "Congress cannot act on, and courts cannot examine, the President's actions on subjects within his 'conclusive and preclusive' constitutional authority." *Trump*, 144 S.Ct. at 2328. Further, "an Act of Congress . . . may not criminalize the President's actions within his exclusive constitutional power." *Id*. In other words, Congress *is not empowered* to impair the President's oversight of the Department of Justice or his explicit constitutional mandate to seek advice from senior officers.

Moreover, the Department of Justice's regulations implementing the McDade Amendment make clear that—even though subjecting attorneys to generally applicable rules as non-Department attorneys—they do "not, however, purport to

eliminate or otherwise alter … rules and federal court rules that expressly exclude some or all government attorneys from particular limitations or prohibitions." 22 C.F.R. § 77.2(k). Such exclusions *must* encompass constitutionally-recognized privileges and powers, such as providing advice and counsel to the President.

Disciplinary Counsel may seek to evade constitutional limitations on his power to punish political opponents by trying to thread this proceeding somewhere between civil liability—for which longstanding, black-letter law confers immunity on Mr. Clark—and criminal liability, which the Supreme Court recently clarified is subject to immunity as well. But that does not work.

The District of Columbia Court of Appeals has long recognized the quasi-criminal nature of disciplinary proceedings. *In re Williams*, 464 A.2d 115, 118–19 (D.C. 1983) (*Williams I*) ("It is well settled that disciplinary proceedings are quasi-criminal in nature and that an attorney who is the subject of such proceedings is entitled to procedural due process safeguards."). To be sure, an attorney is not entitled to *every* protection that might be afforded to a criminal defendant. But disciplinary proceedings undoubtedly subject a respondent-attorney to potentially grave personal and professional consequences, including loss of career and public infamy, that require immunity to ensure the functioning of the Executive Branch. *See In re Williams*, 513 A.2d 793, 796 (D.C. 1986) (*Williams II*) ("The accusatorial

quality of attorney discipline proceedings, coupled with their grave consequences, demand the provision of due process safeguards.”).

Like a criminal prosecution, a quasi-criminal proceeding that subjects a respondent to scrutiny and potentially “grave consequences,” *id.*, is likely to “significantly undermine[ ]” “the independence of the Executive Branch,” *Trump*, 144 S.Ct. at 2331; *a fortiori* it is more likely to impede an Executive Branch official than a civil proceeding, from which Mr. Clark is similarly immune. *Clinton*, 520 U.S. at 694. Regardless of how it is characterized, this proceeding is improper because Mr. Clark enjoys immunity for his advice and counsel for the President of the United States. As such, it violates the constitutional separation of powers and must be dismissed.

CONCLUSION

The Board should immediately dismiss the disciplinary proceeding against Jeffrey Clark because, based upon the conduct alleged, the separation of powers around which our Constitution is built entitles him to immunity from such a proceeding. At most, Mr. Clark provided an opinion—a *draft work product*—to his superiors in the Department of Justice and to the President at the President’s request. He was a senior officer of the Executive Branch performing a core Executive Branch function. AFL respectfully requests that the Board put an end to this unconstitutional proceeding.

July 18, 2024

Respectfully submitted,

s/ Gene P. Hamilton

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CERTIFICATE OF COMPLIANCE

This document complies with the length and format requirements of Board Rule 19.8(c) because it contains 1,999 words, double-spaced, with one-inch margins, on 8½ by 11-inch paper. I am relying on the word-count function in Microsoft Word in making this representation.

July 18, 2024

Respectfully submitted,

s/ Gene P. Hamilton

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