TROY E. NEHLS
22ND DISTRICT, TEXAS
NEHLS.HOUSE.GOV

WASHINGTON, D.C.
1104 LONGWORTH HOB
WASHINGTON, DC 20515
PHONE: (202) 225-5951

Congress of the United States
House of Representatives
Washington, DC 20515

May 23, 2024

The Honorable Juan Merchan
New York County Criminal Court Courtroom: Part 59
100 Centre Street, Room 1602
New York, NY 10007

Dear Judge Merchan:

Pending before your court are closing arguments concerning the prosecution of President Donald J. Trump by Manhattan District Attorney Alvin Bragg (Bragg case) for alleged unlawful federal political contributions and the subsequent concealment of those contributions.[1] This prosecution suffers from numerous fatal flaws, but most notably, it is premised upon the baseless contention that a formal final finding that a violation of federal law occurred, which the federal government has not affirmatively established within the contours of a final adjudication with proper procedural safeguards. This proves fatal to the case at hand.

As a member of the House Committee on the Judiciary of the U.S. House of Representatives (House Judiciary Committee), I write because the Federal Election Commission (FEC), not the Manhattan District Attorney, is charged by Congress with enforcing federal campaign laws and determining in the first instance whether those laws are being followed. The FEC has not established that a violation of federal law has occurred. The House Judiciary Committee has jurisdiction over administrative law and constitutional rights, and I write out of concern that a judgment in the Bragg case – for either side – raises the prospect that state and local prosecutors can take federal law into their own hands.[2]

Indeed, the gravamen of the indictment is the claim that former President Trump "falsif[ied] business records in order to conceal damaging information and unlawful activity from American voters before and after the 2016 election."[3] Notable legal experts, including a former Attorney General of the United States, have commented that the Bragg case faces problems concerning the applicable statute of limitations, the conversion of a misdemeanor into a felony, and difficulties proving an actual intent to commit fraud by the former president.[4] Former FEC Chairman Bradley

---

[1] Manhattan District Attorney's Office, Press Release, *District Attorney Bragg Announces 34-Count Felony Indictment of Former President Donald J. Trump*, (April 4, 2023), https://manhattanda.org/district-attorney-bragg-announces-34-count-felony-indictment-of-former-president-donald-j-trump (linking to Indictment and Statement of Facts).

[2] *See* 3 Kenneth Culp Davis, ADMINISTRATIVE LAW TREATISE 19.01 (1958); *accord. Armstrong v. Maple Leaf Apartments, Ltd*, 508 F.2d 518, 523 (10th Cir. 1974) (explained that the primary jurisdiction doctrine prevents state courts from exceeding their jurisdiction).

[3] *Id. See also The People of the State of New York v. Donald J. Trump*, "Statement of Facts" at 1, ¶ 1.

[4] Julia Shapero, *Barr blasts Trump indictment as 'abomination'*, THE HILL (April 1, 2023), https://thehill.com/regulation/court-battles/3929193-barr-blasts-trump-indictment-as-abomination.

A. Smith has opined that the former president did not commit the essential predicate crime required under New York Penal Law §175.10[5] (requiring that former President Trump concealed the commission of a crime, i.e., "hush money," as political contribution).[6] But most importantly, the FEC has not established in the form of a final agency adjudication that a violation of federal law has occurred. This is not just some small technicality, but rather, it is based upon a doctrine intertwined with respect between the vertical and horizontal separation of powers created by our Constitution, which serves to protect abuses of power by public officials.

I. The Federal Administrative Law Doctrine of "Primary Jurisdiction"

A vital United States Supreme Court doctrine exists to prevent the prosecutorial overreach apparent in the Bragg case. This rule, known as the "primary jurisdiction doctrine," states that a court should stay a case when it implicates issues that are within the special competence of a federal administrative agency.[7] In the Bragg case, federal campaign finance violations are indisputably within the special competence of the FEC, not the Manhattan District Attorney's Office.[8] The Supreme Court of the United States, in first articulating the primary jurisdiction doctrine in the context of state courts, expressed concern about state courts invading the authority of the federal government.[9] If a state court instructs a jury about a federal enforcement scheme that was never actually enforced, it undermines Congress's–and my Committee's–authority to exercise our constitutional function in deciding what laws are appropriate for the limited sphere of federal enforcement.[10]

II. The Important Constitutional Interests Served Through the Consideration of Primary Jurisdiction

It is vital that you ask the parties before you in this case to opine on whether you must stay the case before you and refer to the FEC the underlying fact question of whether former President Trump violated the Federal Election Campaign Act (FECA) by engaging in unlawful campaign

---

[5] N.Y. CONSOLIDATED LAWS, PENAL LAW – PEN § 175.10 (current as of January 1, 2021) ("A person is guilty of falsifying business records in the first degree when he commits the crime of falsifying business records in the second degree, and when his intent to defraud includes an intent to commit another crime or to aid or conceal the commission thereof").

[6] Bradley Smith, *Stormy Weather for Campaign-Finance Laws*, WALL STREET J. (April 10, 2018), https://www.wsj.com/articles/stormy-weather-for-campaign-finance-laws-1523398987.

[7] Wehlage v. EmpRes Healthcare, Inc., 791 F. Supp. 2d 774, 786 (N.D. Cal. 2011) ("Under the primary jurisdiction doctrine, federal and state courts may exercise discretion to stay an action pending 'referral' of the issues to an administrative body. The doctrine applies 'when a claim is originally cognizable in the courts, but is also subject to a regulatory scheme that is enforced by an administrative body of special competence.'") (internal citations omitted).

[8] *See e.g., McKart v. U.S.*, 395 U.S. 185, 194 (1969) ("The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction.").

[9] A state court lacks authority to invade the jurisdiction of a federal agency. *Slocum v. Delaware, L. & W.R. Co.*, 339 U.S. 239, 244 (1950) ("Our ground for this holding was that the court 'should not have interpreted the contracts' but should have left this question for determination by the Adjustment Board, a congressionally designated agency peculiarly competent in this field. This reasoning equally supports a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act." (internal citations omitted).

[10] Palmer v. Amazon.com, Inc., 51 F.4th 491, 505 (2d Cir. 2022) ("The doctrine of primary jurisdiction 'applies where a claim is originally cognizable in the courts, but enforcement of the claim requires, or is materially aided by, the resolution of threshold issues, usually of a factual nature, which are placed within the special competence of the administrative body.'") (internal citations omitted).

contributions. Such a referral would neither disrupt the People of New York's authority to try alleged wrongdoers nor your Court's authority to adjudicate questions of New York law.[11]

In 2019, in response to a FEC complaint led by Common Cause alleging that Michael Cohen's payments to Stormy Daniels were improper political contributions, the FEC General Counsel determined that there was reason to believe a FECA violation occurred.[12] As relevant here, the General Counsel found that former President Trump violated 52 U.S.C. § 30116(f) and 52 U.S.C. § 30122 by knowingly accepting excessive contributions and 52 U.S.C. § 30118(a) by knowingly accepting prohibited corporate contributions in connection with the payment to Ms. Daniels.[13] Notwithstanding the General Counsel's report, the FEC exercised its prosecutorial discretion to not adjudicate allegations related to the complaint; however, that prosecutorial discretion was only applied to allegations against Mr. Cohen due to his criminal plea in the Southern District of New York.[14] The FEC did not adjudicate the General Counsel's conclusion that President Trump violated FECA. And, further, the Commission lacked the votes of the full board: there was one absence and one recusal leading only four commissioners to vote, split evenly between partisan membership and thus leading to a deadlock.[15]

If, upon full consideration today, the FEC decided that no federal campaign finance violation occurred, you would retain sole jurisdiction to decide whether an underlying crime existed, notwithstanding claims of concealment. If the FEC were to determine that the former president did commit campaign finance violations, then it would be up to the Department of Justice's (DOJ) Public Integrity Section to decide whether to indict him in federal court.[16] Only after exhausting the federal process would it be constitutionally appropriate for the Bragg case to proceed to a jury.

---

[11] The United States Supreme Court and other courts have explained that the doctrine of primary jurisdiction would not apply here if the FEC already acted or otherwise had been given an opportunity to determine matters within its special expertise or explicit jurisdiction prior to judicial review. *W. Pac. R.R. Co.*, 352 U.S. 59, 69 (1956) ("Certainly there would be no need to refer the matter ... to the Commission if that body, in prior releases or opinions, has already construed the particular tariff at issue or has clarified the factors underlying it."); *Coconino Cnty. v. Antco, Inc.*, 214 Ariz. 82, 89, 148 P.3d 1155, 1162 (Ct. App. 2006) (same).

[12] FEC, First General Counsel's Report (Sept. 20, 2019), https://www.fec.gov/files/legal/murs/7313/7313_19.pdf.

[13] *Id.* at 5-6.

[14] *See* FEC, *In The Matter of Michael Cohen, et al.,* Statement of Reasons of Commissioners Sean J. Cooksey and James E. "Trey" Trainor III, (Apr. 26, 2021), https://www.fec.gov/files/legal/murs/7313/7313_27.pdf; 2 See Trans. of Proceedings before Hon. William H. Pauley III at 27–28, No. 1:18-cr-00602-WHP, 18-CR602 (S.D.N.Y. Aug. 21, 2018), https://assets.documentcloud.org/documents/4780185/Cohen-CourtProceedingTranscript.pdf ("Cohen Plea Hearing") (pleading guilty to eight counts, including one count of making excessive contributions in violation of 52 U.S.C. § 30116(a)(1)(A) in relation to Clifford payment); see also Information ¶¶ 32–36, United States v. Cohen, No. 1:18-cr-00602-WHP, 18-CRIM-602 (S.D.N.Y. Aug. 21, 2018), https://www. justice.gov/usao-sdny/press-release/file/1088966/download.

[15] Shane Goldmacher, *F.E.C. Drops Case Reviewing Trump Hust-Money Payments to Women*, N.Y. Times (May 6, 2021), https://archive.is/fm76M.

[16] The Federal Election Campaign Act authorizes the FEC to address violations of FECA through conciliation agreements (effectively settlements) and civil penalties pursuant to 52 U.S.C. § 30109. Under 52 U.S.C. § 30109(a)(5)(B), the FEC has primary authority over unlawful campaign contributions: "If the Commission believes that a knowing and willful violation of this Act . . . has been committed, a conciliation agreement entered into by the Commission . . . may require that the person involved in such conciliation agreement shall pay a civil penalty[.]". 52 U.S.C. § 30109(a)(5)(C) clarifies how DOJ receives referrals for election crimes: "If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this

III. Prudential Justifications Exist for Applying the Primary Jurisdiction Doctrine Here

The FEC is not a law enforcement agency, and its ability to function depends entirely upon complaints from the public to adjudicate FECA violations. Consider that on May 10, 2024, Noah Bookbinder, the President of Citizens for Responsibility and Ethics in Washington (CREW), filed a complaint before the FEC against the Make America Great Again Political Action Committee (PAC), alleging that the PAC "hid the source of funds used to pay settlements and related expenses" by "falsely reporting on statements filed with the FEC that conduct entities were the ultimate recipients of the funds."[17] CREW specifically requested that the FEC refer the matter to DOJ for prosecution.[18] Given the FEC's present adjudication of the CREW complaint, it would be inappropriate for a state prosecutor to rely on a theory of concealment to prosecute the PAC before the FEC–or, subsequently, DOJ–could adjudicate the matter.

Yet that is precisely what is occurring in the Bragg case. District Attorney Bragg could have filed a complaint before the FEC. He chose not to. And that choice is effectively an end-run around Congress's carefully crafted scheme for adjudicating federal election law violations. It also threatens the uniformity, consistency, and integrity of the regulatory scheme behind FECA–one that is traditionally enforced before campaign crimes are indicted. Initial adjudication by the FEC, the opportunity to enter a conciliation agreement, and the FEC majority vote to authorize a referral for criminal investigation[19] all act as procedural prerequisites designed to protect would-be FECA violators.[20] Your Court should, at a minimum, consider these contentions.

The fact that a state criminal trial is underway would not prevent a judicial stay to refer the matter to the FEC. The Supreme Court of the United States has recognized that the doctrine of primary jurisdiction can permit a stay of criminal proceedings for a relevant federal agency to determine whether an underlying issue violates a law Congress charged it to administer.[21] And

---

Act. . . has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States[.]"

[17] Complaint, In the matter of Make America Great Again PAC, (May 10, 2024) at 1, ¶ 2, https://www.citizensforethics.org/wp-content/uploads/2024/05/TrumpDelgadoComplaint5.10.24Final.pdf.

[18] *Id.* at 7, ¶ 19 (citing 52 U.S.C. §§ 30109(a)(5)(C), (d)(1)).

[19] 52 U.S.C. § 30109(a)(5)(B).

[20] The exhaustion of the FEC's authority before DOJ can bring a case is the norm for FECA prosecutions. Consider that the prosecution and sentencing of Gerald Lundergan for 52 U.S.C. § 30118 violations (through S.R. Holding Co, Inc.) arose from an FEC complaint filed by Steve Robertson, Chairman of the Republican Party of Kentucky. *See* Department of Justice, Office of Public Affairs, Kentucky Man Sentenced for Role in Concealing Hundreds of Thousands of Dollars in Corporate Contributions to U.S. Senate Campaign (July 16, 2020), https://www.justice.gov/opa/pr/kentucky-man-sentenced-role-concealing-hundreds-thousands-dollars-corporate-contributions-us; FEC, First General Counsel's Report, MUR 6863, *Steve Robertson v. Allison for Kentucky and Robert C Stilz III in his official capacity of treasurer, Allison Lundergan Grimes and S.R. Holding Co., Inc. d/b/a Signature Special Event Services*, https://www.fec.gov/files/legal/murs/6863/16044397468.pdf. In another case, three years before Bilal Shehu's guilty plea in 2016 for foreign contributions, a congressional chairman filed a request with the FEC to investigate the alleged unlawful contributions. *See* Department of Justice, Office of Public Affairs, Press Release, *New Jersey Man Pleads Guilty to Helping Disguise Foreign Contributions during 2012 Presidential Election*, https://www.justice.gov/opa/pr/new-jersey-man-pleads-guilty-helping-disguise-foreign-contributions-during-2012-presidential; Patrick Howley, *Congressman calls for investigation into Obama's secretly-planned meeting with Albanian socialist*, DAILY CALLER (June 18, 2013), https://dailycaller.com/2013/06/18/congressman-calls-for-investigation-into-obamas-secretly-planned-meeting-with-albanian-socialist/.

[21] United States v. Pac. & A R & Nav Co, 228 U.S. 87, 100–01 (1913) ("[t]he district court said that it was 'without jurisdiction to entertain or determine the questions involved in the first five counts of the indictment in either

lower courts have recognized the doctrine to authorize *federal* agency referrals during *state* criminal cases.[22] Several federal cases support this proposition.[23] In *United States v. Alaska Steamship Co.*, the court ruled that "[a]ll the arguments in favor of letting an experienced administrative board exercise its primary jurisdiction applies with equal force in a criminal case as in a civil case."[24] In another case, Sprint Corporation, the former telecommunications business, was under criminal investigation by former Alabama Attorney General Jimmy Evans for violating a state anti-obscenity statute but used the primary jurisdiction doctrine to argue that a threatened criminal indictment should be stayed until the relevant agency, the Federal Communications Commission, could review whether federal communications laws preempt state laws and were violated by Sprint.[25]

And therefore, under the primary jurisdiction doctrine combined with fundamental fairness and due process considerations, this case cannot move forward without a final agency adjudication or referral. The Supreme Court has held in other contexts in criminal cases that sentence enhancements cannot be applied to defendants without proper safeguards to establish that the past crimes in fact qualified.[26] Those cases were all premised upon Sixth Amendment considerations. Here, the underlying alleged federal offense was not established with proper procedural safeguards, and it would be improper for a criminal case to proceed and for the former president's Sixth Amendment rights to be violated based on some novel application of federal law by a state prosecutor or judge.

The Bragg case presents a substantial risk to the Constitution's balance between federal and state authority. Failure to consider the propriety of a stay in this case means that any individual, let alone a former president, could be convicted for an underlying federal crime without the FEC or DOJ having exercised prosecutorial review. This threatens due process by allowing state prosecutors to enforce federal law without the procedural protections afforded by the federal government. Without appropriate consideration of the primary jurisdiction doctrine, the case before you could mean that Congress's legislative process is nullified, for our laws can be enforced by state prosecutors without federal oversight.

Whether the New York County Supreme Court stays Bragg's criminal proceeding and refers the allegations to the FEC is within your discretion. But failing to consider the question and allowing

---

a criminal or civil proceeding,' until the matters of discrimination between carriers or shippers, or the giving or refusing of joint traffic arrangements, 'have been submitted to and passed on by the Interstate Commerce Commission.'").

[22] United States v. Gen. Dynamics Corp., 828 F.2d 1356, 1362 (9th Cir. 1987) ("The doctrine applies when 'protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.' Thus, it is the extent to which Congress, in enacting a regulatory scheme, intends an administrative body to have the first word on issues arising in judicial proceedings that determines the scope of the primary jurisdiction doctrine.'") (internal citations omitted).

[23] United States v. Yellow Freight Sys., Inc., 762 F.2d 737 (9th Cir.1985); *U.S. v. Alaska S.S.*, 110 F. Supp. 104 (W.D.Wash.1952); *see also Gen. Dynamics*, 644 F. Supp. 1497, 1503 (C.D.Cal.1986) (collecting cases), rev'd, 828 F.2d 1356; *United States v. Am. Union Transp.*, Inc., 232 F. Supp. 700, 702 (D.N.J.1964) (collecting cases); *cf. Sprint Corp. v. Evans*, 846 F. Supp. 1497, 1507–09 (M.D.Ala.1994) (referring issues to the FCC in an attempt by a telecommunications corporation to enjoin criminal prosecution under a state anti-obscenity statute).

[24] Alaska S.S., 110 F. Supp., *supra* at 104–05.

[25] Sprint Corp. v. Evans, 846 F. Supp. 1497, 1501 (M.D. Ala. 1994).

[26] Mathis v. United States, 136 S. Ct. 2242 (2016); Taylor v. United States, 495 U.S. 575 (1990).

a verdict and judgment to become final risks abrogating the discretion of my Committee and the United States Congress as a whole.

Thank you for your attention to this important matter.

Sincerely,

Troy E. Nehls
Member of Congress