SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,	:	Index No. 71543-23
- against -	:	
DONALD J. TRUMP,	:	**AFFIRMATION OF SUSAN R. NECHELES IN SUPPORT OF PRESIDENT DONALD J. TRUMP'S REPLY MEMORANDUM OF LAW**
Defendant.	:	

Susan R. Necheles, a partner at the law firm NechelesLaw LLP, duly admitted to practice in the courts of the State of New York, hereby affirms the following to be true under penalties of perjury:

1. I represent President Donald J. Trump in this matter and submit this affirmation in support of his reply memorandum of law.

2. This Affirmation is submitted upon personal knowledge or upon information and belief, the source of my knowledge being conversations with the prosecutors, my review of court and other documents in the case file, my review of discovery, my involvement in the case *People v. Trump Corporation*, Ind. No. 1473/2021, and an independent investigation into the facts.

3. I incorporate by reference all factual statements made in the accompanying Memorandum of Law.

4. Exhibit A is a true and correct copy of a Proffer Agreement between and the Office of the District Attorney of New York County.

5. Exhibit B is a true and correct copy of an email between ADA Solomon Shinerock and John Harris.

Dated: November 21, 2023
New York, N.Y.

By: Susan Necheles /aws

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THE PEOPLE OF THE STATE OF NEW YORK,	:	Ind. No. 71543-23
- against -	:	
DONALD J. TRUMP Defendant.	:	

PRESIDENT DONALD J. TRUMP'S REPLY MEMORANDUM OF LAW

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November 21, 2023

President Donald J. Trump respectfully submit this Reply Memorandum of Law in further support of his Omnibus Motions.

I. THE COURT SHOULD GRANT A *SINGER* HEARING AND THEN DISMISS THE INDICTMENT

The People, in their opposition, admit that there was a lengthy delay in bringing this case. *See* Opp. 52 (conceding a delay "of approximately four and a half years"). Recognizing the problem this presents under *People v. Singer,* 44 N.Y.2d 241 (1978), the People offer four purported excuses for the delay: (1) litigation over the People's subpoena to Mazars for President Trump's personal tax returns[1]; (2) the fact that President Trump was president in 2019 and 2020; (3) a purported desire to avoid "triggering prejudicial pretrial publicity" during the Trump Corporation tax trial; and (4) a wide-ranging "holistic investigation" into President Trump and related entities. Opp 53–54. As the People would have it, they were diligently investigating this and related cases since 2018, never made any decision whether to bring it or not; instead simply waiting for all the supposed impediments to clear up, and then timely brought this case. But the facts show something different and there are, at the very least, significant factual disputes about exactly what occurred during the four and a half year "investigation." A *Singer* hearing is therefore necessary.

The People began presenting this very case to a grand jury in the fall of 2019, calling five witnesses, before abandoning it. This disproves the People's claim that they never intended to bring this case in either 2018 or 2019 due to both the Mazars litigation and the Trump presidency. The People, when not ignoring this inconvenient fact, *see* Opp. 52–57 (failing to acknowledge the existence of this grand jury), attempt to hand waive it away as a mere "investigative grand jury." Conroy Aff. ¶19.[2] In particular, they claim that in 2019, "the People made efforts to conduct

[1] In addition to the reasons discussed below, the People's focus on the Mazars litigation is a red herring, as President Trump's personal tax returns have no relevance to this case.

[2] It is unclear what the People mean when they refer to this as an "investigative grand jury," as New York law does not distinguish between grand juries used for investigatory purposes and those used to obtain an

voluntary interviews of certain Trump Organization witnesses" but "[t]hose individuals declined to cooperate voluntarily with the Office's investigation, and the People then issued a number of grand jury subpoenas *ad testificandum* to secure those witnesses' testimony before an investigative grand jury in November 2019 in an effort to gather relevant facts." *Id.* 19.

But this claim is contradicted by the facts. First, not all the witnesses in the 2019 grand jury were Trump Org. employees who "declined to cooperate voluntarily." The first witness in the 2019 grand jury was [redacted], an AMI employee, who met with the People before his testimony. *See* [redacted] Proffer Agreement, Ex. A.[3] Second, during [redacted] testimony, the People introduced multiple exhibits into evidence. If the only purpose of the 2019 grand jury was "to use compelled process before an investigative grand jury … to develop the facts," Conroy Aff. ¶19, presumably there would have been no need to admit exhibits into the grand jury. That was only necessary if the People contemplated seeking an indictment from that grand jury. Of course, the People ultimately abandoned the 2019 grand jury, but, as discussed below, that was due to legal infirmities in this case, not a desire to continue investigating.

As described by Mark Pomerantz, "[b]y October 2019, the DANY team knew the details of the hush money scheme." Inside Account at 39. But, at that time, the People "made a preliminary decision not to bring a criminal case against Donald Trump in connection with that payment," *id.* at 15, in part because of the "gnarly legal question" of whether a federal crime can be the object crime under 175.10." *Id.* at 41. Not only had "DANY lawyers… looked at it," but "they had commissioned an outside law firm to research the issue." *Id.* Ultimately, the People determined the "legal question was a 'toss up,' and no one could predict with certainty how an appellate court might eventually

indictment. Indeed, the primary purpose of the grand jury is to "hear and examine evidence concerning offenses . . . and to take action with respect to such evidence." C.P.L. § 190.05; *Accord* § 190.60.

[3] Relatedly, the People told [redacted] counsel that there were topics they would ask him about only in a proffer, not the grand jury, further undercutting any suggestion that the 2019 grand jury's purpose was investigatory, as opposed to one intended to return an indictment. *See* Shinerock email to John Harris, Ex. B.

rule." *Id.* And "the district attorney had decided toward the end of 2019 that no charges would then be brought against anyone in connection with the hush money paid to Stephanie Clifford[.]" *Id.*

For this reason, the People abandoned the 2019 grand jury. As described by Pomerantz, "[t]hat part of the Trump investigation was lying dormant, if not completely dead." *Id.* at 42.

Subsequently, after Pomerantz became a SADA in early 2021, he decided "to revisit that decision" and determine "whether the facts would support a felony prosecution for falsifying business records." *Id.* at 43. The People obtained a new "thorough outside review of the legal question that DANY had considered previously," and "[o]nce again, the analysis could not answer this question because there was simply no clear answer to be had." *Id.* at 43–44. The People then considered other possible object crimes, including the bizarre theory that President Trump had committed money laundering by giving in to Clifford's extortionate demands, before rejecting these additional theories as legally invalid. *See id.* at 44–62. The so-called "'zombie' case went back into the grave in March 2021." *Id.* at 61. Notably, the decision to inter this case occurred after the conclusion of the Trump presidency and after the People received President Trump's personal tax returns from Mazars. There was, in other words, nothing stopping the People at that time from bringing this case—except that the People thought it was legally dubious. *See id.* at 62 (the People could not "thread the needle of New York's antiquated Penal Law to find an appropriate felony charge").[5]

At this point, the People instead decided to indict a different case—the tax case against the Trump Corp. and Allen Weisselberg. This proves that, notwithstanding the supposed "holistic investigation," the People were fully capable of bringing individual cases while other aspects of the investigation were ongoing. *See id.* at 142–43 ("We could have waited to bring the [tax] charges until the end of the investigation, but there seemed to be point in doing that" as we "brought the case as

[5] The People apparently considered bringing this case a third time in early 2022, *see* Inside Account at 210, but once again decided against it.

soon as it was ready to bring"). But once the tax case had been initiated, the People claim that they "prioritize[ed] investigative steps that could be taken without triggering prejudicial pretrial publicity, potentially influencing the jury pool, or otherwise affecting the Trump Corporation trial." Opp. 54.

The People's claim, that they were unwilling to take any steps against President Trump during the pendency of the Trump Corporation tax case, is once again flatly contradicted by both the People's actions and Pomerantz's book. In fact, in late 2021, and while the Trump Corporation case was pending, the People began presenting to a new grand jury regarding President Trump's SOFC, called multiple witnesses, and then abandoned it. And this SOFC grand jury did result in "pretrial publicity." *See, e.g.,* Shayna Jacobs, Manhattan DA convenes new grand jury in Trump Org. case to weigh potential charges, Washington Post, Nov. 4, 2021.

The People again try to explain this away as a mere "investigative grand jury" at which "multiple Trump Organization employees" testified. Conroy Aff. ¶ 31. The witnesses at this SOFC grand jury, however, were not limited to Trump Org. employees, as, for example, [redacted] testified at length.[6] Moreover, the People introduced dozens of exhibits into evidence, a practice that is only explicable if the People were contemplating seeking an indictment from the grand jury. *See also* Inside Account at 194 (On "December 13, Carey sent an email to the team announcing that the decision had been made to go forward" with the SOFC case).

Ultimately, the People abandoned this grand jury also, but not for the reason the People now claim. Rather, they stopped presenting to this grand jury because, given the new D.A.'s concerns about the merits of the case, there was concern that continuing with the grand jury could result in a re-presentiment problem under *People v. Wilkins*, 68 N.Y.2d 269 (1986). *See* Inside Account 215.

[6] The People also called [redacted], who had not worked at the Trump Org. since 2015; [redacted], who had not worked at the Trump Org. for at least 3.5 years; and a reporter from Forbes magazine, whose testimony was "limited to matters he had already disclosed to the public." Inside Account at 195.

In sum. the People declined to bring this case in 2019, 2021, and 2022, not because they lacked evidence[7] but because they recognized the case as legally weak. And those legal vulnerabilities did not magically disappear in 2023; if anything, *People v. Witherspoon* only exacerbated them. *See* Trump Omnibus at 15–16. Rather, what appears to have changed is the People's willingness, whether for political reasons or due to bad press, to roll the dice on a weak legal case. That, of course, is not a legitimate "reason for the delay" under *Singer* and its progeny.[8]

Ultimately, the People's selective half-truths about this investigation only highlight the need for a *Singer* hearing, where the People's proffered excuses can be challenged and tested to determine whether they are "legitimate," and made in "good faith." *People v. Wiggins*, 31 N.Y.3d 1, 13 (2018).

II. THE RECORDS AT ISSUE ARE NOT BUSINESS RECORDS OF THE TRUMP ORGANIZATION AS DEFINED BY THE STATUTE

President Trump's moving papers argued that his personal ledger and associated records were not "business records" of the Trump Org. because the records did not "reflect[]" the "condition or activity" P.L. §175.00(2), of the Trump Org. In response, the People argue that the invoices sent by Cohen to [redacted] were business records of the Trump Org. because the records "evidence its condition—namely, its obligation to reimburse the payee as described in the invoice." Opp. 12; *see also id.* at 13 (the "signed checks and check stubs were likewise maintained in the Trump Org.'s files to reflect its 'condition or activity,' . . . that is, its satisfaction of its repayment obligations."). But a simple examination of the relevant invoices and checks, *see* GJE8, reveal that it was President

[7] The People claim that they obtained new evidence in 2023 from the testimony of [redacted] and [redacted]. But their testimony was not particularly significant and, any rate, the People could have subpoenaed this evidence back in 2019. And, as to [redacted], any relevance of her potential testimony was highlighted in 2019 both by publicly-available correspondence from the House Judiciary Committee, *see* https://shorturl.at/mJKXZ, and by AMI lawyers who told the People, as memorialized in an August 2019 memo produced in discovery, that [redacted] "would produce a 'mountain of material.'"

[8] The People, citing cases where court have upheld delays of over 15 years, also argue that the delay here "is shorter than other delays that courts have found constitutionally permissible." Opp. 56. But whether the delay was constitutionally permissible depends on weighing all five factors, not just the length of the delay itself, and when weighting those combined factors it matters significantly that, although the People never acknowledge it, each of the eight cases the People cite for this proposition were murder cases.

Trump, and not the Trump Org., that was obligated to, and did, make the payments at issue. In other words, the facts here are easily distinguishable from those underlying the Court's prior decision in *People v. The Trump Corporation*. There, the Court concluded that certain entries in President Trump's personal ledger reflected the Trump Org.'s payroll obligations to its CFO and therefore those specific entries constituted business records of the Trump Org.

Here, by contrast, the Trump Org. had no obligation to make the payments at issue. The Trump Org. had already paid Cohen a discretionary bonus, and Cohen was no longer an employee of the Trump Org. Whatever obligation existed to reimburse Cohen for either the Red Finch or [redacted] payments belonged to President Trump personally.

Finally, in an effort to salvage their case, the People purport to offer an alternative rationale why these records constitute business records: that the relevant records are "business records" of either President Trump or the Trust. Opp. 14. But this is not the theory the People presented in the grand jury or charged in the Indictment, which explicitly identifies the Trump Org. as the relevant enterprise. Thus, any attempt to convict President Trump on this basis would constitute a prohibited constructive amendment of the Indictment. *See, e.g., People v. Charles*, 61 N.Y.2d 321, 328 (N.Y. 1984) (holding that a constructive amendment occurs in cases "in which the jury is charged in a manner that changes the theory of the prosecution from that in the indictment").

III. THE GRAND JURY EVIDENCE DID NOT SUPPORT THE "INTENT TO DEFRAUD" ELEMENT

The People's opposition argues banally that an "intent to defraud" means a defendant's conscious aim or objective to "defraud" any person. Opp. 15-16. Then, without addressing the definition of "defraud" itself, the People make three unpersuasive arguments why the grand jury evidence was sufficient to establish President Trump's alleged "intent to defraud."

First, the People argue that the evidence demonstrated that President Trump intended to "conceal criminal activity," which when combined with knowledge that the records contained false

statements, supports a "general intent to defraud any person." Opp. 16. For the reasons articulated in our moving papers, however, the evidence did not establish "an intent to … conceal" another "crime." *See* Trump Omnibus at 14–22. In any event, the statutory language makes clear that an "intent to conceal" is not coextensive with an "intent to defraud." *See* P.L. §175.10 (falsifying business records is a felony where a defendant "commits the crime of falsifying business records in the second degree, and when his intent to defraud includes an intent to commit another crime").

The People's second argument, that President Trump sought to deceive the voting public, Opp. 17, fares no better. Recognizing the obvious temporal flaw in its theory—that the records were allegedly falsified well after the 2016 election—the People claim it was all part of an ongoing scheme. But the 34 counts are each charged as discrete offenses occurring at specified times, not as parts of a scheme to defraud or a conspiracy. Thus, as to each count, President Trump had to have acted with a contemporaneous intent to defraud, which the People cannot show. In the alternative, the People argue that President Trump "could–and did–intend to continue his cover-up after his inauguration as well" as a "first-time president" who intended to seek re-election. Opp. 18. But there was no evidence of this motivation presented to the grand jury—in fact the evidence was to the contrary. *See* GJT 856 ([redacted] testifying that [redacted]). At any rate, other than their mis-reliance on *People v. Lang*, 36 N.Y.2d 366 (1975), discussed below, the People offer no authority to support their theory that concealing information about a candidate's personal life constitutes a fraud on the electorate.

The People cite *Lang* for the proposition that "fraud can encompass any 'deliberate deception (to be committed upon the electorate)' or any 'corrupt act to prevent a free and open election.'" Opp 17. But this language both misstates the holding of *Lang* and ignores the quoted language's broader context. The defendant in *Lang*, who had bribed a potential candidate with offers

of government jobs and cash to get him to drop out of a primary race, was prosecuted for the Election Law offense of attempting to "fraudulently or wrongfully d[o] an act tending to affect the result of any election." *Lang*, at 367. The *Lang* Court rejected the claim that the statute was unconstitutionally vague, as the defendant's acts "were both fraudulent and wrong, and any person of ordinary intelligence would perceive them to be such." *Id.* at 370. It was in that context that the Court noted that the word "fraudulent," as used in the Election Law provision, "obviously connotes the idea of a deliberate deception (to be committed upon the electorate) *and* a corrupt act to prevent a free and open election." *Id.* (emphasis added).

In short, *Lang* established a conjunctive test—a "deliberate deception" on "the electorate" *and* "a corrupt act to prevent a free and open election"—and a requirement that the "corrupt act" be something that a "person of ordinary intelligence" would perceive to be "fraudulent and wrongful." *Id.* Yet the People, while applying *Lang* to an entirely different statute, wrongly claim that it established a disjunctive test (a deliberate deception *or* a corrupt act) and argue that it applies to concealing an alleged affair, conduct that is far afield from bribing a candidate not to run for office.

Finally, the People contend that the evidence supports an inference that President Trump intended to defraud the government by "undermining—and ultimately avoiding liability for violating—campaign contribution limits and disclosure requirements." Opp 19. This argument fails for two reasons. First, the payments to [redacted] did not violate campaign finance laws, *see* Trump Omnibus 15, n. 5, so there could not have been any intent to defraud on this basis. Second, the People presented no evidence that President Trump, who relied on experienced election counsel, believed that the records at issue would ever be subject to scrutiny or review by election regulators.

IV. FEDERAL CRIMES CANNOT BE THE OBJECT CRIME UNDER SECTION 175.10

President Trump's omnibus argued that a federal crime cannot be the object crime under §175.10 because §10.00 requires a crime to be an "offense," and an "offense" is defined as a

violation of state law. In response, the People argue that while the first two clauses of the definition of "offense" are limited to state laws, the third clause, *i.e.,* "any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same," is not explicitly limited to state rules or regulations and thus can refer to "regulations" of other "instrumentalities," which the People argue can include foreign legislative bodies such as Congress. Opp. 26. The Court should reject this strained reading.

First, the People's interpretation would render the first two clauses of the "offense" definition entirely superfluous, as both "any law of this state" and "any law, local law or ordinance of a political subdivision of this state," §10.00(1), are necessarily also an "order, rule or regulation of any governmental instrumentality" under the People's approach. Moreover, the People's approach was necessarily rejected by the Second Department in *Witherspoon,* which held that the word "crime," as used in C.P.L. §160.59, does not include a violation of Virginia law under the definition provided in §10.00(1). If, as the People argue, a violation of a Congressional statute qualifies as a violation of an "order, rule or regulation of any governmental instrumentality," Opp. 26, then the same should be true of a violation of Virginia law, and thus *Witherspoon* should have come out the other way.[9]

For these reasons, the Court should reject the People's proposed approach and instead adopt the common-sense reading that the third clause of the "offense" definition refers simply to administrative rules or regulations adopted by a state administrative agency.[10]

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[9] The People also argue that, even if a federal statute cannot constitute an "order, rule or regulation," a violation of a federal regulation could, and thus while a violation of FECA itself cannot be the object crime, a violation of FEC regulations can. Opp. 27, n. 7. This argument—that a violation of a federal or other-state statute cannot be the object crime under §175.10 but a violation of a federal or other-state regulation can—borders on the absurd and the People offer no explanation why the Legislature would have adopted such a perverse rule.

[10] The People cite several NY cases where the court assumed that "any crime," as used in different Penal Law provisions, included non-NY crimes. But it does not appear that the defendant raised in any of those cases whether "offense" is definitionally limited to NY crimes, and so they are of little precedential value, especially as to an entirely different Penal Law provision. Finally, the fact the DANY has in the past taken the same position it does here, Opp. 31, says nothing about the correct meaning of "another crime" in §175.10.

The People also question why the Legislature would have wanted to distinguish between those who intend to commit or conceal NY crimes and crimes of other jurisdictions. Opp. 27. Even assuming the Court should ignore the plain language of §10.00(1) because of a policy question, the answer is obvious: As §175.10 turns only on the "intent to commit another crime or to aid or conceal [its] commission," and not on whether anyone was actually convicted of the other crime, the issue of whether another jurisdiction's crime can be the object crime *only* matters when NY had not criminalized the other conduct at issue. That is because in the vast majority of mine-run cases, the conduct will be illegal in New York; so whether the conduct is also illegal in some other jurisdiction is academic. And in those rare cases where the object crime is not illegal in New York, it makes eminent sense that the Legislature would not have intended to increase a defendant's punishment based on conduct NY does not criminalize. *See Witherspoon*, 211 A.D.3d at 120 (noting the concern with whether "the laws of another state would have been a crime under New York law, or, importantly, whether criminalizing such conduct would be contrary to New York public policy.").

It was exactly such concerns that led the Legislature to limit the application of out-of-state convictions to conduct that would have also been illegal in New York. *See* Trump Omnibus at 16 (citing statutes). In fact, in a CPL provision enacted just last week, the Legislature expressly limited the applicability of out-of-state convictions to those not "related to reproductive or gender affirming care or the possession of cannabis which would not constitute a felony in New York." C.P.L. §160.57(1)(b)(ix). Yet, under the People's proposed rule, a corporation that mis-books payments to conceal the payment of "reproductive or gender affirming care" in a jurisdiction where such care was illegal would be guilty of a felony. The Court should decline to adopt such an atextual rule.

CONCLUSION

For these reasons, as well as those in President Trump's moving papers, the Court should grant the requested relief.

Dated: November 21, 2023
New York, NY

Respectfully submitted,

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Attorneys for President Donald J. Trump

EXHIBIT A

PROFFER AGREEMENT

With respect to the meeting of Christopher Conroy, James Graham, Solomon Shinerock, Sarah Walsh, and Allen Vickey, Assistant District Attorneys in the Office of the District Attorney of New York County (the "Office") with [redacted] ("Client") and his attorney, John Harris, Esq., (the "Meeting") to be held on November 6, 2019, the following understandings exist:

(1) This is not a cooperation agreement. Client has agreed to provide the Office with information, and to respond to questions, so that the Office may evaluate Client's information and responses in making prosecutorial decisions. The Office makes no representation about the likelihood that any agreement will be reached in connection with this meeting, and this agreement is not a grant of immunity from prosecution.

(2) Should any prosecutions be brought against Client by this Office, this Office will not offer as evidence in its case-in-chief at trial or before the grand jury any statement made by Client at the Meeting, except in a prosecution for false statements or perjury.

(3) Notwithstanding paragraph two, (a) the Office may use information derived directly or indirectly from Client's statements at the Meeting for the purpose of obtaining leads to other evidence, and if any such evidence is developed, it may be used at any stage of a criminal prosecution of Client; and (b) should any prosecution of Client be undertaken, the Office may use statements made by Client at the Meeting and all evidence obtained directly or indirectly from such statements to cross-examine Client, should Client testify, or as substantive evidence to rebut, directly or indirectly, any evidence offered or elicited, or factual assertions made, by or on behalf of Client at any stage of a criminal prosecution of Client. In the event that Client's statements are used under the provisions of this paragraph, Client agrees not to assert any claim under the United States or New York State Constitutions, or any rule of evidence, that such statements should be suppressed or precluded.

(4) This agreement is limited to the statements made by Client at the Meeting, held on November 6, 2019, and does not apply to any oral, written or recorded statements made by Client at any other time. No understandings, promises, agreements, or conditions have been entered into with respect to the Meeting other than those set forth in this agreement, and none will be entered into unless in writing and signed by all parties.

DATED: New York, New York
November 6, 2019

CYRUS R. VANCE, JR.
District Attorney
New York County

By: _____
Assistant District Attorney

_____
Client

_____
Attorney for Client

EXHIBIT B

Howard

From: "Shinerock, Solomon" <[redacted]gov>
To: "Harris, John B." <[redacted]>
Cc: "Walsh, Sarah" <[redacted]>, "Graham, James" <[redacted]>, "Conroy, Christopher" <[redacted]>
Date: Wed, 06 Nov 2019 11:28:25 -0500

Hi John,
We don't need to bottom out on this today, but we will want to ask (in the proffer session, not in the grand jury) about the alleged AMI repository of files on Trump, referred to in Ronan Farrow's recent book, and [redacted] involvement, if any, in maintaining and/or disposing of those files.
See you soon,
Solomon Shinerock
Assistant District Attorney
Major Economic Crimes Bureau
New York County District Attorney's Office
[redacted]