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

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

DONALD J. TRUMP,

Defendant.

Index No. 71543-23

PRESIDENT DONALD J. TRUMP'S OPPOSITION TO THE PEOPLE'S MOTION TO REQUIRE NOTICE OF INTENT TO RELY ON AN ADVICE-OF-COUNSEL DEFENSE

President Donald J. Trump respectfully submits this memorandum of law in opposition to the People's December 15, 2023 Motion to Require Defendant to Provide Notice of Intent to Rely on an Advice-of-Counsel Defense (the "Motion").

INTRODUCTION

The People seek an order requiring President Trump to provide pretrial notice regarding any intent to assert an advice-of-counsel defense and to produce all discoverable communications related to that defense by February 12, 2024—six weeks before the potential start of trial.[1]

Recognizing that neither Criminal Procedure Law nor binding precedent require pretrial notice of a defendant's intent to assert an advice-of-counsel defense, the People urge this Court to nonetheless order President Trump, in its discretion and pursuant to its apparent "inherent authority," to provide pretrial notice six weeks before a potential start of trial. In support of their extraordinary request, the People suggest that President Trump has somehow informally announced his intention to assert an advice-of-counsel defense and seek to inappropriately force the First Department's recent decision in *People v. DePalo*, 187 A.D.3d 649 (1st Dep't 2020), onto the facts of this case.

Despite the People's suggestions to the contrary, President Trump has not indicated that he will assert an advice-of-counsel defense. In fact, although the roles of attorneys in the circumstances underlying this case—most notably, that of President Trump's disgraced former personal lawyer—are shrouded in neither secrecy nor surprise, any determination to assert the

[1] We note that Your Honor has indicated that he will consider at the February 15, 2024 scheduling conference whether it is necessary to adjourn the scheduled trial date. *See* 11/09/2023 Letter Denying Reconsideration of Trial Date ("By February 15, 2024, the parties and this Court will be in a better position to adequately assess whether the trial in Washington D.C. will commence on March 4, 2024, and if so, what the best adjourn date for this trial might be."). In light of the Court's statements, it appears that the People's request for pretrial notice three days earlier is a transparent effort to obtain disclosure even if the Court adjourns the trial date.

advice-of-counsel defense would be premature here, where this Court has yet to rule on President Trump's omnibus motions. Further, the First Department's recent decision in *People v. DePalo* does not even address, much less "affirm," a trial court's "inherent authority" to require the pretrial notice and disclosure the People have requested. Moreover, Your Honor, acting as the trial court in *Depalo*, did not grant the type of notice and disclosure requested in this case. As the People concede in a footnote, Your Honor "initially gave DePalo until the beginning of the trial . . . to decide whether to assert the defense" and subsequently "extended that deadline to the fourth day of trial."

President Trump should not be ordered to provide pretrial notice and disclosures concerning his intent to assert an advice-of-counsel defense. To require him to do so, particularly six weeks before the potential start of trial, would run afoul of the Fifth and Sixth Amendments, as well as the long-held protections afforded to the attorney-client privilege. For these reasons, as described in greater detail in this memorandum of law, we urge the Court to deny the People's Motion.

APPLICABLE LAW

CPL Article 250 requires a defendant to provide pretrial notice of three defenses: (1) lack of criminal responsibility by reason of mental disease or defect, (2) alibi defense, and (3) certain enumerated defenses available in offenses involving computers. CPL §§ 250.10-250.30 (Pre Trial Notices of Defenses). It does not require pretrial notice of an advice-of-counsel defense, and the People concede as much in their Motion.[2] *See* Mot. at 6-7.

[2] The fact that the CPL specifically requires pretrial notice of three specific defenses, but not of an advice-of-counsel defense, stands as strong evidence that the Legislature did not believe it appropriate to require a defendant to provide pretrial notice of the advice-of-counsel defense.

Lacking authority in the CPL, the People urge this court to exercise its "inherent authority" to develop rules governing discovery. *Id*. (citing *People v. Atwood*, 101 Misc. 2d 291, 293 (Sup. Ct. N.Y. Cnty. 1979) (ordering defendant to submit to psychiatric examination after he voluntarily provided pretrial notice of his intent to assert an affirmative defense that he acted under the influence of extreme emotional disturbance and that he intended to rely on psychiatric testimony in support of the affirmative defense)). The People claim that "New York courts routinely invoke that inherent authority to issue orders relating to pretrial disclosures that are not explicitly contemplated by the CPL," *see* Mot. at 7, yet they only identify three cases over the last 45 years where they claim courts actually did so. Moreover, the only appellate decision the People cite for this proposition was not a "pretrial disclosure" case at all, but one where the court exercised its authority to require the defendant to be examined by the People's psychiatrist only after, "[a]t trial, before a jury, the defendant called two experts . . . to testify that he was suffering from an organic brain defect which impaired his memory." *People v. Segal*, 54 N.Y.2d 58, 63 (1981). Even assuming courts do have such inherent authority, a court's discretion is nonetheless "'circumscribed by' the defendant's constitutional right to present a defense." *People v. Deverow*, 38 N.Y.3d 157, 164 (2022) (quoting *People v. Carroll*, 95 NY2d 375, 385 (2000)). Criminal defendants must be afforded "a meaningful opportunity to present a complete defense." *Id.* (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)).

There do not appear to be any published cases in the history of New York jurisprudence deciding whether courts are specifically vested with inherent authority to impose pretrial notice and discovery requirements relating to an advice-of-counsel defense. Federal courts, however, have considered this issue and, in many cases, have declined to impose such requirements on,

among others, constitutional grounds.[3] *See, e.g.*, *United States v. Ra*y, No. 20-cr-110, 2021 WL 5493839, at *6 (S.D.N.Y. Nov. 22, 2021) (pretrial notice and discovery of advice-of-counsel defense would "impermissibly burden the attorney-client privilege"); *United States v. Alessa*, 561 F. Supp. 3d 1042, 1049 (D. Nev. 2021) (finding the rationale expressed in *United States v. Wilkerson* persuasive); *United States v. Wilkerson*, 388 F. Supp. 3d 969, 974-75 (E.D. Tenn. 2019) ("[C]ourts should not *ad hoc* invent new ways to coerce criminal defendants to assist the government in their prosecution—absent compelling reason to do so. . . . [I]t would be untenable—and, most likely, unconstitutional—to require Defendants to turn over potential evidence (most of which is currently privileged) to the Government or risk forfeiting a defense."); *United States v. Crinel*, No. 15-cr-61, 2016 WL 6441249, at *11 (E.D. La. Nov. 1, 2016) (noting that "the 'advice-of-counsel' defense is not one of the defenses, objections, or requests that must be raised before trial under Rule 12(b)(3) of the Federal Rules of Criminal Procedure"); *United States v. Faulkner*, No. 09-cr-249, 2011 WL 976769, at *3 (N.D. Tex. Mar. 21, 2011) (finding that Government's motion for pretrial notice "exceed[ed] what is required by law"); *United States v. Lacour*, No. 08-cr-118, 2008 WL 5191596, at *1 n.1 (M.D. Fla. Dec. 10, 2008) (stating that "[d]efendants are not obligated to put on *any* defense, and, except for certain [enumerated] defenses which must be disclosed prior to trial, Defendants are free to make that decision at trial"); *United States v. Afremov*, No. 06-cr-196, 2007 WL 2475972, at * 4 (D. Minn. Aug. 27, 2007) ("[T]he prosecution

[3] Like CPL Article 250, the Federal Rules of Criminal Procedure do not require or authorize pretrial notice of an advice-of-counsel defense. Rather, they explicitly provide for pretrial notice of three enumerated defenses: (1) alibi defense, (2) insanity defense, and (3) public authority defense. Fed. Rule Crim. Proc. 12.1-12.3; *see also Mathews v. United States*, 485 U.S. 58, 65 (1988) (noting that "[t]he only matters required to be specially pleaded by a [criminal] defendant" are those enumerated in the Federal Rules); *United States v. Mubayyid*, No. 05-cr-40026, 2007 WL 1826067, at *2 (D. Mass. June 22, 2007) ("Ordinarily, the listing of notice requirements in specific instances would strongly suggest that any other notice requirements were intended to be excluded.").

[does not] have a right to notice from the defense that it intends to assert an advice of counsel defense at trial.").

Even those courts finding discretion to impose such requirements have typically done so with pause and while emphasizing that they must exercise their authority "only to the extent necessary to ensure a fair and efficient trial given the burden placed on the defendant and on the attorney-client privilege." *United States v. Dallmann*, 433 F. Supp. 3d 804, 813 (E.D. Va. 2020); *see also Mubayyid*, 2007 WL 1826067, at *2 (cautioning that a court need not exercise its authority to the fullest extent, "particularly given the potential burden on the exercise of the attorney-client privilege," and indicating that "it may prove to be the case that such notice is unnecessary, . . . or that such notice need not be provided well in advance of the trial, or even at all"). In *Dallmann*, for example, which the People cite for the proposition that courts may "sensibly exercise[] their inherent authority to impose a pretrial notice and discovery requirement regarding the advice-of-counsel defense," *see* Mot. at 8, the district court rejected the prosecutors' request for four-weeks pretrial notice and ordered that the defendant need not provide notice until ten days prior to trial. *Dallmann*, 433 F. Supp. 3d at 813. Emphasizing the burden of pretrial notice on the defendant, the court ruled that "notice of the intent to assert the advice-of-counsel defense need not be provided until ten days prior to trial, and related discovery need not commence until notice has been provided." *Id*. The federal district courts in *United States v. Crowder* and *United States v. Cooper* similarly granted notice and discovery of a defendant's intent to assert an advice-of-counsel defense two weeks before trial. *See Crowder*, 325 F. Supp. 3d 131, 139 (D.D.C. 2018) (requiring notice and discovery two weeks before trial); *Cooper*, 283 F. Supp. 2d 1215, 1225 (D. Kan. 2003) (fourteen days).

Separate from the issue of pretrial notice, the People cite several cases in their memorandum of law regarding discovery of relevant materials *after* a defendant has expressly indicated his or her intention, *vel non*, to assert an advice-of-counsel defense. *See, e.g.*, Mot. at 7-9 (citing *People v. Depalo*, 187 A.D.3d 649 (1st Dep't 2020) (affirming defendant's conviction and sentence where, at trial, Your Honor precluded testimony implicating an advice-of-counsel defense on the basis that the defendant previously advised the Court that he would *not* assert one);[4] *United States v. Schulte*, No. 17-cr-548, 2020 WL 133620, at *6 (S.D.N.Y. Jan. 13, 2020) (requiring defendant to produce letters that he previously provided to the court *ex parte* regarding testimony the defendant intended to elicit at trial concerning the advice of counsel); *United States v. Scali*, No. 16-cr-466, 2018 WL 461441, at *8 (S.D.N.Y. Jan. 18, 2018) (requiring defendant to produce relevant materials where defendant "unequivocally" stated that he "intend[ed] to demonstrate that he is not guilty of tax evasion because, for the years in question, he followed counsel's advice")). The People's reliance on these cases is unavailing. Here, where the defense has *not* claimed it will raise an advice-of-counsel defense, it would be premature to require them to produce discovery (especially privileged material) as to a potential defense President Trump has not indicated he plans to raise at trial. "[A] mere indication of a claim or defense certainly is insufficient to place legal advice at issue" at this stage of the proceedings. *In re Cnty. of Erie*, 546 F.3d 222, 229 (2d Cir. 2008).

[4] The First Department noted that the defendant's challenge to Your Honor's rulings concerning whether a prospective defense witness's fact testimony would have implicated an advice-of-counsel defense, although "unavailing," was moot because witness invoked his Fifth Amendment right not to testify at trial. *Depalo*, 187 A.D.3d at 650.

DISCUSSION

I. The People's Demand For Pretrial Notice and Disclosure Is Inconsistent With Constitutional Constraints.

Criminal defendants must be afforded "a meaningful opportunity to present a complete defense." *Deverow*, 38 N.Y.3d at 164. This fundamental right is guaranteed by the Due Process Clause of the Fourteenth Amendment as well as by the Compulsory Process and Confrontation Clauses of the Sixth Amendment, and a court's discretion is accordingly circumscribed by the defendant's constitutional right to present a defense. *Id*. (citing *Carroll*, 95 N.Y.2d at 385). Moreover, this fundamental right cannot be subjected to judicial whim. *See Brooks v. Tennessee*, 406 U.S. 605, 608 (1972) ("[T]he cause of justice and a fair trial cannot be subjected to such a whimsicality of criminal procedure.").

Due Process specifically "forbids" compelling a criminal defendant to disclose anything to the government without the imposition of so-called "reciprocal discovery rights." *Wilkerson*, 388 F. Supp. 3d at 973 (quoting *Wardius v. Oregon*, 412 U.S. 470, 472 (1973)). Absent reciprocity, an order mandating a defendant's disclosure would run afoul of the Constitution. *Id*. at 973-74; *see also Wardius*, 412 U.S. at 476 ("It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State."); *Williams v. Fla.*, 399 U.S. 78, 80 (1970) (noting that, in exchange for the defendant's pretrial disclosure of the witnesses he proposed to use to establish his alibi defense, the State of Florida was required under its rules of criminal procedure to in turn notify the defendant of any witnesses it proposed to offer in rebuttal to that defense); *Alessa*, 561 F. Supp. 3d at 1049 ("[F]orcing the defense to disclose anything to the government without the imposition of reciprocal discovery rights is foreign to the rules of criminal procedure and our Constitutional system.").

While it is true, as the People note, that they are subject to discovery obligations under CPL Article 245, *see* Mot. at 10, their continuing discovery obligations do not remedy the constitutional infirmities of the relief they currently seek. That is because "general reciprocal discovery in criminal cases [is] not the linchpin." *United States v. Booker*, No. 11-cr-00255, 2012 WL 1458009, at *3 (N.D. Ga. Mar. 12, 2012), report and recommendation adopted, No. 11-cr-255, 2013 WL 2491370 (N.D. Ga. June 10, 2013). "[T]he focus of the inquiry is whether the [notice mandated] requires the defendant to specifically disclose information without imposing a reciprocal duty on the government." *Id*. Here, the CPL does not impose any reciprocal discovery on the People regarding an advice-of-counsel defense. *Compare*, *e.g.*, CPL § 250.20(2) (in exchange for defendant's pretrial notice of alibi defense, the People must provide the defense "a list of the witnesses the people propose to offer in rebuttal to discredit the defendant's alibi at the trial"), *with* CPL § 245.20(1) (requiring the People to provide the defendant with automatic discovery prior to the defendant's reciprocal discovery obligations).[5] And neither the People nor the Court can magically create some additional rule of discovery to remedy their otherwise unconstitutional demand. *See Wilkerson*, 388 F. Supp. 3d at 974 ("What the Government has requested here, however, contains no hint of reciprocity, and it is not the Court's role to assist the Government in conjuring up some reciprocal arrangement to make an otherwise unconstitutional demand constitutional . . . ."). Finally, it is not a sufficient justification for the People to allege that requiring pretrial notice pursuant to the court's authority would be more efficient. "'[J]ealously guard[ed]' constitutional principles are not casually tossed aside for the sake of expediency, much

[5] Notably, a defendant's discovery obligations are expressly "subject to constitutional limitations" and limited to those obligations specifically enumerated. CPL § 245.20(4)(a).

less for the mere potential that there may be some future inconvenience." *Id.* at 975 (quoting *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996)).

II. President Trump Has Not Indicated That He Will Assert An Advice-Of-Counsel Defense And Should Not Be Required To Make A Determination or Disclosure Six Weeks In Advance Of Trial.

In an effort to sidestep the constraints of the CPL and the Constitution, the People suggest that pretrial notice and disclosure concerning President Trump's intent to assert an advice-of-counsel defense is warranted here because he has, the People allege, publicly indicated that he may assert the defense at trial. *See, e.g.*, Mot. at 2, 6, 12. That allegation is simply not true. President Trump has not indicated that he will assert an advice-of-counsel defense at trial.

As an initial matter, statements cherry picked from President Trump's social media do not demonstrate that he has indicated that he will rely on an advice-of-counsel defense at trial. Most obviously, two social media posts, both made before this case was even brought (one five years ago), are not evidence of an intent to raise a specific defense at trial. Moreover, the fact that Michael Cohen served as President Trump's personal attorney during the relevant period and was involved in virtually every aspect of the alleged circumstances underlying the People's case has been widely reported. *See, e.g.*, Dan Mangan, *Former Trump lawyer Michael Cohen testifies to grand jury for three hours, will return Wednesday*, CNBC (Mar. 13, 2023), https://www.cnbc.com/2023/03/13/former-trump-lawyer-michael-cohen-arrives-for-grand-jury-.html; Kara Scannell, *Michael Cohen meets with NY prosecutors looking into Trump Org. and Stormy Daniels payments*, CNN (Jan. 17, 2023), https://www.cnn.com/2023/01/17/politics/michael-cohen-trump-stormy-daniels-new-york/index.html; Maggie Haberman, *Michael D. Cohen, Trump's Longtime Lawyer, Says He Paid Stormy Daniels Out of His Own Pocket*, THE NEW YORK TIMES (Feb. 13, 2018), https://www.nytimes.com/2018/02/13/us/politics/stormy-daniels-michael-cohen-trump.html.

Thus, President Trump's social media posts—one in 2018 and one earlier this year—about a matter of public concern do not confirm that he intends to assert a defense at trial that he relied on the advice of Mr. Cohen as his attorney.[6]

Similarly, President Trump cannot be said to have invoked an advice-of-counsel defense in his reply memorandum filed on November 21, 2023, simply by noting that he retained and relied upon experienced election counsel in preparing and filing his campaign finance forms in 2018. Put into proper context:

> [T]he 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 Clifford 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.

Reply Mem. at 8. This statement, made in support of President Trump's omnibus motions, does not amount to notice of an advice-of-counsel defense. In fact, it would be premature at this point for President Trump to assert one. As the People and the Court are well aware, President Trump has filed omnibus motions, seeking various forms of relief. *See, e.g.*, Omnibus Mot. at 9-26. This Court has not yet ruled on the President Trump's motions, and depending on the Court's ruling, including whether Your Honor limits the theories the People may introduce at trial, President Trump *may* consider an advice-of-counsel defense at that time. But a "mere indication" of a

[6] *Even if* President Trump asserted an advice-of-counsel defense based upon his reliance on the counsel of Mr. Cohen, the People could hardly argue that they were subjected to "secrecy" or "surprise" absent their desired six-weeks pretrial notice. The People have long identified Mr. Cohen as their trial witness, he testified in the grand jury, and he has, according to his own statements, met with the People dozens of times since 2017.

potential defense is insufficient to assert the advice-of-counsel defense at this point in the proceedings. *See In re Cnty. of Erie*, 546 F.3d at 229.

The People also attempt to recast President Trump's recent disclosure that [redacted] is a *potential* defense witness as a statement of his intent to assert an advice-of-counsel defense. Once again, the People make too much of this preliminary disclosure. President Trump's preliminary disclosure does not reflect an unequivocal statement of his intent to call [redacted] as a witness at trial, much less of an intent to assert an advice-of-counsel defense and waive privilege over confidential attorney-client communications with [redacted]. *See* Mot. Ex. 5 at 1 (identifying this as President Trump's "current[]" intention); *see also* Mot. Ex. 3 at 1 ("As the Court has not yet granted any pretrial hearings, the list includes only potential trial witnesses."). Indeed, the People have similarly disclaimed that their witness list is preliminary and subject to change. *See* Attach. to Mot. Ex. 6 (Sept. 22, 2023 Supp. Addendum to Automatic Discovery Form identifying individuals who "May Be Called as a Witness"). Moreover, the People are wrong to assume that the only reason [redacted] could be called as a witness is to support an advice-of-counsel defense.

To require President Trump to announce the contours of a potential advice-of-counsel defense and waive privilege because the People cherry-picked a few statements is unsupported by the law and the facts and would impermissibly burden the attorney-client privilege. *See, e.g.*, *Dallmann*, 433 F. Supp. 3d at 813 (emphasizing the burden pretrial notice places on the defendant and on the attorney-client privilege); *Ray*, 2021 WL 5493839, at *6 (noting the same with respect to pretrial disclosure of privileged communications); *Mubayyid*, 2007 WL 1826067, at *2 ("[t]he fact that the Court appears to have the power to order such notice does not . . . necessarily require that it be exercised to the fullest extent, particularly given the potential burden on the exercise of the attorney-client privilege"); *In re Parmalat Sec. Litig.*, No. 04-md-1653, 2006 WL 3592936, at *4

(S.D.N.Y. Dec. 1, 2006) ("The attorney-client privilege must be jealously guarded by the holder of the privilege lest it be waived.").

III. The First Department's Affirmation Of The Conviction And Sentence In *People v. DePalo* Does Not Support The People's Request For Pretrial Notice And Disclosure.

The First Department's recent decision in *DePalo* did not, as the People suggest, affirm Your Honor's exercise of this Court's authority to require advance disclosure of an advice-of-counsel defense, and is, at any rate, wholly distinguishable from this case.

First, the facts in *DePalo* were very different than what the People are requesting in this case. The record available in *DePalo* indicates that the defendant advised the People and the Court approximately one month prior to trial that he would *not* raise an advice-of-counsel defense.[7] Mot. Ex. 8 at 59-60. Based on his representations, this Court cautioned the defendant that it would entertain a motion for preclusion of the advice-of-counsel defense if he later "opene[ed] the door at trial." *Id*. at 60. Nonetheless, during voir dire, the People observed that the defendant named several attorneys and a law firm on his final witness list and requested an offer of proof to test whether their anticipated testimony would require a privilege waiver. *Id*. Based on defense counsel's description, Your Honor found that the testimony of the witness would put the advice-of-counsel defense at issue and advised the defendant that the Court would "probably" preclude the witness's testimony if raised in the middle of trial. *Id*. at 60-61. Notably, your Honor ultimately gave the defendant until the fourth day of trial to decide whether he would assert an advice-of-counsel defense. *Id*. at 61.

[7] The People provided copies of the briefs submitted to the First Department by the defendant and the People. *See* Mot. Exs. 7-9. Copies of the filings submitted to Your Honor and Your Honor's rulings in that case were not made available.

Thus, Your Honor's ruling in *DePalo*, where the defendant affirmatively advised the Court in the weeks leading into trial that he would *not* raise an advice-of-counsel defense, provides no support for the People's request that President Trump be required to provide notice and thereby waive privilege *six weeks* before trial. *See id.* at 62 ("[D]efendant is wrong to assert that the court required him to waive the attorney-client privilege 'before trial'. Rather, the judge gave defendant until the end of the day on May 8, 2018—the fourth day of trial—to decide whether he would assert an advice-of-counsel defense." (internal citations omitted)).

The People are also wrong to claim that the First Department "affirmed" a court's "inherent authority to require advance disclosure of a defendant's intent to assert an advice-of-counsel defense." Mot. at 7. The People's misleading summary of *DePalo* aside, *see id.* at 8, the issue addressed by the First Department was "whether a prospective defense witness's fact testimony would have implicated an advice-of-counsel defense, thereby waiving defendant's attorney-client privilege," not whether the defendant should have been required to provide pretrial notice of an advice-of counsel defense. *DePalo*, 187 A.D.3d at 650. At any rate, the First Department held that the defendant's challenge was "moot because the witness invoked his Fifth Amendment right not to testify at trial." *Id*. Taken together, it is clear that the People's attempt to refashion the rulings of this Court and the First Department in *People v. DePalo* is unavailing and must fail.

IV. Any Pretrial Notice Should Not Precede The Court's Rulings On President Trump's Omnibus Motions And Motions *In Limine*

Additionally, an order requiring President Trump to provide pretrial notice and disclosures concerning his intent to assert an advice-of-counsel defense *six weeks* in advance of the potential start of trial is inappropriate given the lack of clarity at this point regarding what the People's case at a trial will look like.

First, the significance of this Court's rulings on President Trump's omnibus motions cannot be overstated. President Trump has moved the Court for various forms of relief, including the dismissal of the Indictment and to limit what legal theories the People may present at trial (*e.g.*, the People's stretched theories that the alleged object crime was either a federal or New York election law criminal violation). This Court has not yet ruled on the omnibus motions and has indicated that it will rule on them on February 15, 2024—notably, the same time at which it will consider whether it is necessary to adjourn the scheduled trial. *See* 11/29/2023 Order at 2; 11/09/2023 Letter Denying Reconsideration of Trial Date. President Trump should not be required, as the People request, to provide notice and waive attorney-client privilege when this Court has not yet even ruled whether this case may proceed to trial. Moreover, depending on the Court's rulings on the various legal disagreements between the Parties about the elements of the charged crimes, President Trump may consider pursuing an advice-of-counsel defense. But he should not be required to make any such determination before knowing the Court's ruling on these crucial issues. *See, e.g.*, *Wilkerson*, 388 F. Supp. 3d at 975 ("The Defendants here, for example, could wait and decide what defenses to raise once they see what evidence the Government presents at trial."); *Lacour*, 2008 WL 5191596, at * 1 n.1 ("Defendants are not obligated to put on any defense, and, except for certain [enumerated] defenses which must be disclosed prior to trial, Defendants are free to make that decision at trial."). In no way should the Court entertain the People's demand for notice and discovery of a defense by February 12, 2024—three days before its rulings on the omnibus motions and the potential start of trial.

Second, Your Honor recently ordered on December 21, 2023, that all motions *in limine* shall be filed no later than February 22, 2024, and that all replies shall be filed no later than February 29, 2024. 12/21/2023 Order at 1. Assuming that Your Honor decides the respective

motions on or around March 4, 2024, President Trump could be in a position to provide notice of his intent to assert an advice-of-counsel defense approximately two weeks before a potential start of trial. This timing is consistent with the decisions of other courts that have ordered pretrial notice and disclosure requirements about an advice-of-counsel defense. *See, e.g.*, *Dallmann*, 433 F. Supp. 3d at 813 (imposing deadline of ten days before trial); *Crowder*, 325 F. Supp. 3d at 139 (two weeks); 283 F. Supp. 2d at 1225 (fourteen days). Accordingly, the Court should also decline to impose any deadline for notice and disclosure before Your Honor's rulings on the motions *in limine*, approximately two to three weeks prior to the potential start of trial.

CONCLUSION

For the foregoing reasons, President Trump respectfully submits that the Court should deny the People's Motion in its entirety. In the alternative, and at minimum, the Court should decline to impose non-statutory pretrial notice or discovery obligations on President Trump before it has issued its rulings on President Trump's omnibus motions and motions *in limine*.

Dated: December 29, 2023
New York, New York

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