

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

PEOPLE OF THE STATE OF NEW YORK, by
LETITIA JAMES, Attorney General of the State of New
York,

Petitioner,

-against-

THE TRUMP ORGANIZATION, INC.; DJT
HOLDINGS LLC; DJT HOLDINGS MANAGING
MEMBER LLC; SEVEN SPRINGS LLC; ERIC
TRUMP; CHARLES MARTABANO; MORGAN,
LEWIS & BOCKIUS, LLP; SHERI DILLON;
DONALD J. TRUMP; IVANKA TRUMP; AND
DONALD TRUMP, JR.,

Respondents.

Index No. 451685/20

Motion Seq. No.: ____

Oral Argument Requested

**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS/MOVING PARTIES
DONALD J. TRUMP, DONALD J. TRUMP, JR. AND IVANKA TRUMP'S MOTION TO
QUASH SUBPOENAS OR, IN THE ALTERNATIVE, TO STAY ENFORCEMENT OF
THE SUBPOENAS PENDING RESOLUTION OF THE CRIMINAL INVESTIGATION**

PRELIMINARY STATEMENT

This motion is brought because, in an unprecedented and unconstitutional maneuver, Letitia James, the Attorney General for the State of New York ("OAG" or "Attorney General"), has subpoenaed (the "Subpoenas") and seeks to take the depositions of Former President Donald J. Trump ("Mr. Trump"), his son, Donald J. Trump, Jr., and daughter, Ivanka Trump (hereinafter and for the purposes of this Motion collectively "Moving Parties"), as part of an ongoing, multi-year investigation into all aspects of the business dealings of Mr. Trump and his namesake company, The Trump Organization while, at the very same time, according to published reports,

conducting a much publicized and unified criminal investigation with the Manhattan District Attorney's Office ("DANY") concerning the same matters before a special grand jury.¹

The Court need only read the words of the Attorney General herself during a recent interview on *The View*, a nationally televised daytime talk show when, in response to a question from co-host, Joy Behar, concerning reports that the OAG was "trying to depose Trump under oath next month," Ms. James replied:

"We indicted the Chief Financial Officer of the Trump Organization and the Trump Organization itself. So, I have two parallel investigations, one civil, one criminal ... We indicted Mr. Weisselberg, the CFO, and the Trump Organization – that investigation is ongoing."

The View (ABC television Broadcast Dec. 14, 2021) (emphasis added) (**Exhibit D**).

Putting aside whether it was appropriate for *any* prosecutor – let alone the highest-ranking law enforcement official in the State of New York – to appear on a talk show to discuss what are supposed to be confidential investigations, the goal of the Subpoenas is all too clear: Attorney General James seeks to circumvent the entire grand jury process and nullify Moving Parties' most fundamental constitutional and statutory rights by requesting that they provide non-immunized testimony to the OAG – when the OAG/DANY is jointly conducting a grand jury investigation. The maneuver is thus a clear abrogation of, and endeavor to, circumvent the sacred grand jury rights afforded to our citizens in the New York State Constitution and governing criminal procedure rules.

¹ A copy of these subpoenas are annexed to the Affirmation of Alan S. Futerfas, dated January 3, 2022 as **Exhibits A, B and C**. All bold citations to exhibits herein refer to documents annexed to the Futerfas Affirmation (unless otherwise indicated).

As a result, Moving Parties are left with no alternative but to move to quash the Subpoenas or, in the alternative, stay enforcement of the Subpoenas pending completion of the criminal investigation.

STATEMENT OF FACTS

The Attorney General Promises to Take on Mr. Trump

The history of the Attorney General's long-standing targeting and threatened prosecution of Former President Trump and his business dealings has, at this point, been well chronicled.

Almost immediately upon announcing her candidacy in May of 2018, the Attorney General made "taking on Donald Trump" the focal point of her campaign. *See, e.g.*, @TishJames, TWITTER (June 27, 2018, 10:48 AM ET) ("Congrats [now-Congresswoman Alexandria Ocasio Cortez] on your victory. Looking forward to working with you to help Democrats take on Donald Trump.") (**Exhibit E**). Specifically, while campaigning for office (and without knowing anything about any of Former President Trump's businesses), the Attorney General very publicly: (i) accused Mr. Trump of having engaged in "public corruption," Letitia James's 2018 campaign website, *Fighting Corruption No Matter Where it Lies*, TISH JAMES 2018 CAMPAIGN (**Exhibit F**); (ii) stated that she had her "eyes on Trump Tower," @TishJames, TWITTER (Aug. 6, 2018, 3:47 PM ET) (**Exhibit G**); (iii) stated that Former President Trump should be "worried" about her, *id.*, and "scared" about her upcoming term, *id.*; @TishJames, TWITTER (Aug. 22, 2018, 9:09 AM ET) (**Exhibit H**); (iv) stated that Mr. Trump's "days of defrauding Americans are coming to an end," @TishJames, TWITTER (October 3, 2018, 1:44 PM ET) (**Exhibit I**); (v) stated that, if elected, she would "take on Donald Trump" @TishJames, TWITTER (July 1, 2018, 2:56 PM ET) (**Exhibit J**), and immediately investigate him and his "cronies," *id.*; @TishJames, TWITTER (Aug. 21, 2018, 1:01 PM ET) ("Just wait until I'm

in the Attorney General's office.")(Exhibit K); (vi) that she was "*getting ready to ask [Trump] some questions — under oath,*" *id.*; @TishJames, TWITTER (Aug. 13, 2018, 11:37 AM ET) (emphasis added) (Exhibit L); and called upon "any agency with jurisdiction—from the IRS to the NY AG—to follow the facts wherever they may lead." @TishJames, TWITTER (October 3, 2018, 1:44 PM ET) (Exhibit I).

Indeed, though it appears to have since been removed, the Attorney General's campaign website at one time even contained a section entitled "*Investigate Trump's New York Business*" in which she promised to undertake "a review of Trump-related real estate transactions, especially those in which the Trump family suddenly started paying cash for properties after years of operating their businesses exclusively by borrowing money." PDF downloaded from Letitia James' 2018 campaign website (Exhibit M). Again, it bears repeating that at the time the Attorney General made these threats of prosecution, Ms. James had no personal knowledge about "Trump-related real estate transactions" and possessed no information or insight into Trump's business other than what she presumably had seen in the media.

On November 6, 2018, Letitia James was elected Attorney General of the State of New York. During her victory speech, she once again promised to "[shine] a bright light into every dark corner of [Trump's] real estate holdings", Jeffrey C. Mays, *Breaking Barriers, Letitia James is Elected New York Attorney General*, N.Y. TIMES, Nov. 6, 2018 (Exhibit N), and, in the days and weeks immediately thereafter, threatened that she was "definitely going to sue him", "be a real pain in the ass", that Former President Trump was "going to know [her] name personally," *id.*, and threatened to "use every area of the law to investigate President Trump and his businesses transactions and that of his family as well," Chris Mills Rodrigo, *Incoming New*

York AG: 'We Will Use Every Area of the Law to Investigate President Trump', THE HILL, Dec. 12, 2018 (**Exhibit O**), together with “anyone in [Trump’s] orbit.” *Id.*

The Attorney General’s Investigation

Less than six months after being elected, in March 2019, the Attorney General opened a civil investigation into virtually all aspects of Former President Trump’s business dealings as well as those of the Trump Organization. *See* Affidavit of Matthew Colangelo, dated August 21, 2020 at ¶ 23 (“Colangelo Aff.”) (**Exhibit P**).² The scope of the investigation – which has focused on the valuation of virtually all of Mr. Trump’s assets on various financial statements – has been unprecedented in both its breath and scope (*id.*), and includes the valuation of various conservation easements for properties all across the country – from Westchester to Southern California (*id.* at ¶¶ 26, 31-39), and the financing and refinancing of various properties in New York, Illinois, Washington, D.C., and Florida (*id.* at ¶¶ 40-44). Subsequent public filings and press reports show the Attorney General investigating these and numerous other matters.

The Attorney General Opens a Criminal Investigation

Prior to 2021, the OAG had consistently represented that it was only conducting a civil investigation. For example, in July 2020, the OAG represented that its investigation was not being conducted in coordination with a criminal investigation.

This Office does not currently have an open criminal investigation into these matters... we have not coordinated with another criminal law enforcement agency on matters related to this investigation [and] ...if at any point we become aware of information that prompts this Office to open a criminal investigation or referral, we will advise counsel and proceed accordingly.

² The OAG filed the Colangelo Aff. in support of a Motion to Compel, dated August 24, 2020 (ECF 11). A redacted copy of the Colangelo Aff. was publicly filed as ECF 10 and an unredacted copy was filed under seal as ECF 14. **Exhibit P** is the redacted copy (ECF 10).

Colangelo Aff. ¶ 109.

That changed. On May 18, 2021, Attorney General Letitia James formally announced that her Office had launched a criminal investigation. Samuel Chamberlain, *New York AG reveals Trump Organization probe is now “criminal,”* N.Y. POST, May 18, 2021 (**Exhibit Q**). During a press conference held on May 21, 2021, Attorney General James publicly stated that her office was not only conducting its own criminal investigation but was also actively working with the District Attorney in a joint criminal investigation, including cross-designating OAG staff attorneys as “Special ADAs” as part of the joint investigation:

Our civil investigation continues, but we are now actively investigating the Trump Organization in a criminal capacity and we are working alongside, cooperating with the Manhattan District Attorney, Cy Vance. As was mentioned in, I believe, some newspaper, two of our assistant attorneys general have been cross designated as district attorneys.

Michael Sisak, *New York AG has 2 lawyers working with DA on Trump probe*, ABC NEWS, May 21, 2021 (Emphasis added) (**Exhibit R**). See also Danny Hakim *et al.*, *New York’s Attorney General Joins Criminal Inquiry Into Trump Organization*, N.Y. TIMES, May 18, 2021 (**Exhibit S**).

Numerous press reports, including some in recent weeks, make clear that the joint OAG/DANY investigation is focused on valuations and appraisals of Mr. Trump’s properties as reflected in financial statements and as presented to taxing authorities and financial institutions – the very same subject matter as the Attorney General’s investigation.³ Press reports further

³ See, e.g., David A. Fahrenthold, *Trump’s longtime accountant testifies to N.Y. grand jury in criminal probe*, WASHINGTON POST, Dec. 14, 2021) (reporting that a longtime accountant for former President Trump, recently testified before the grand jury. And “Rosemary Vrablic, a former managing director at Deutsche Bank who arranged hundreds of millions of dollars in loans to Trump,” was recently interviewed by prosecutors. “The appearances by Bender and Vrablic suggest prosecutors are seeking information about Trump’s finances from a small circle

indicate that the joint OAG/DANY investigation has targeted the very same properties and transactions that are the subject of the Attorney General's investigation.⁴

of outside partners who handled details of Trump's taxes and real estate deals. . . Prosecutors are investigating whether Trump's company broke the law by giving widely different values for the same property at the same time. In some cases, for instance, the Trump Organization provided low valuations to property-tax officials, while telling lenders that the same property was worth much more.") (**Exhibit T**); William K. Rashbaum, Ben Protess and Jonah E. Bromwich, *Trump Fraud Inquiry's Focus: Did He Mislead His Own Accountants?*, N.Y. TIMES, Dec. 14, 2021 (reporting that "the prosecutors, working with the Office of the New York State attorney general, Letitia James, have examined the possibility that Mr. Trump and his deputies at the company cherry-picked favorable information — and ignored data that ran counter to it — to essentially mislead the accountants into presenting an overly rosy picture of his finances") (**Exhibit U**).

⁴ See *id.*; see also, e.g., Jonah E. Bromwich, Ben Protess and William K. Rashbaum, *New York A.G. to Subpoena Trump to Testify in Fraud Investigation*, N.Y. TIMES, Dec. 9, 2021 ("Ms. James's civil investigation into Mr. Trump, which has been underway since March 2019, is focused on some of the same strands as the criminal investigation being overseen by Mr. Vance, and has included scrutiny of similar properties, including Mr. Trump's Seven Springs Estate in Westchester County . . . Ms. James was examining . . . whether the Trump Organization had improperly valued the estate, allowing it a \$21 million tax deduction to which it should not have been entitled") (**Exhibit V**); David Enrich, Russ Buettner, Mike McIntire and Susanne Craig, *How Trump Maneuvered His Way Out of Trouble in Chicago*, N.Y. TIMES, Oct. 27, 2020 (Updated Oct. 8, 2021) (Initial financing for the Trump International Hotel and Tower Chicago came from Mr. Trump's longtime lender Deutsche Bank and Fortress Capital who provided a mezzanine loan to the project. "Ultimately, Mr. Trump's lenders forgave much of what he owed. Those forgiven debts are now part of a broader investigation of Mr. Trump's business by the New York Attorney General.") (**Exhibit W**); David A. Fahrenthold, Jonathan O'Connell, Josh Dawsey and Shayna Jacobs, *N.Y. prosecutors set sights on new Trump target: Widely different valuations on the same properties*, WASHINGTON POST, Nov. 22, 2021 ("Among the other properties under scrutiny: former president Donald Trump's California golf club, for which he valued the same parcel of land at \$900,000 and \$25 million depending on the intended audience, and an estate in suburban New York [Seven Springs], for which Trump's valuations ranged from \$56 million up to \$291 million. The valuations were all given in the five years before Trump won the presidency") (**Exhibit X**); Brad Dress and Harper Neidig, *New York attorney general seeking Trump deposition in fraud probe: report*, THE HILL, Dec. 9, 2021 ("James and the Manhattan District Attorney's Office are conducting a separate joint criminal probe into whether Trump lowered property values on his forms for tax agents but raised them to look better for financial lenders. In the probe, prosecutors are specifically examining a property in Manhattan located at 40 Wall Street. Trump told lenders in 2012 the building was worth \$527 million, but informed tax officials it was actually worth around \$16 million. The prosecution team is also looking at inflated valuations at a California golf club and an estate in New York.") (**Exhibit Y**).

The Indictment

On July 1, 2021, an indictment was filed against the Trump Organization, another corporate entity and the Trump Organization's Chief Financial Officer, Allen Weisselberg. *See* Indictment, *People v. The Trump Organization, et ano*, 1473/2021 (**Exhibit Z**). The indictment arose from the investigations that the DANY and the OAG had been pursuing since at least 2019, first in parallel, and then as a joint OAG/DANY criminal investigation.

Lest there be any doubt that the Attorney General and the New York District Attorney were working together, on the day of the indictment, Attorney General James and District Attorney Vance presented a united front to the public, arriving for the arraignment together, sitting next to each other in the front row of the courtroom and leaving the courthouse side by side. *See* Melissa Macaya, Melissa Mahtani, Maureen Chowdhury, Veronica Rocha and Fernando Alfonso III, *Trump Organization and its CFO Charged with Tax Crimes*, CNN, Jul. 1, 2021) at photo caption below 3:10 p.m. update, "New York attorney general says the 'investigation will continue'" ("Letitia James, Attorney General of New York, center, and Cyrus Vance Jr., New York County District Attorney, right, leave Manhattan criminal court, Thursday, July 1, in New York.") (**Exhibit AA**). At the arraignment, Mr. Vance announced that the investigation is still "ongoing." July 1, 2021 Arraignment, *People v. The Trump Organization, et ano*, 1473/2021 at Tr. at 6:17-21 (**Exhibit BB**). Similarly, Ms. James issued a Press Release announcing that "we" indicted the Trump Organization and Mr. Weisselberg, and that "we" will continue to conduct the investigation. *See* Press Release July 1, 2021 (emphasis added) (**Exhibit CC**). As the Attorney General stated:

... "Today is an important marker in the ongoing criminal investigation of the Trump Organization and its CFO, Allen Weisselberg. In the indictment, we allege, among other things, financial wrongdoing whereby the Trump

Organization engaged in a scheme with Mr. Weisselberg to avoid paying taxes on certain compensation. This investigation will continue, and we will follow the facts and the law wherever they may lead.”

The charges relate to the alleged failure by Weisselberg to pay New York state and federal income taxes on approximately \$1.7 million in compensation. This is part of an ongoing criminal investigation conducted by Attorney General James and Manhattan District Attorney Cyrus Vance Jr. . . .”

Statement from Attorney General James on Criminal Indictment of Trump Organization and CFO Weisselberg, Office of the N.Y. Attorney General Press Release, July 1, 2021 (**Exhibit CC**) (Emphasis added).

Clearly, some six months later, the OAG/DANY criminal investigation is still ongoing. On November 4, 2021, the empaneling of a second grand jury for a new six-month term was leaked, providing a clear indication that the OAG/DANY investigation will continue. *See Tom Winter, 2nd grand jury empaneled into Trump investigation, sources say*, CNBC NEWS, Nov. 4, 2021 (**Exhibit DD**). To erase all doubt that the Attorney General and the DANY are pursuing a unified OAG/DANY criminal investigation of the Trump Organization, Ms. James, appearing on “*The View*” talk show on December 14, 2021, stated the following in response to a question about reports that the OAG was “trying to depose Trump under oath next month”:

We indicted the Chief Financial Officer of the Trump Organization and the Trump Organization itself. So, I have two parallel investigations, one civil, one criminal ... We indicted Mr. Weisselberg, the CFO, and the Trump Organization – that investigation is ongoing.

The View (ABC television Broadcast Dec. 14, 2021) (emphasis added) (**Exhibit D**). Ms. James also stated that her ongoing investigation of the Trump Organization was chief among the “unfinished business” that influenced her decision to withdraw from the Governor’s race.⁵

The Subpoenas at Issue

On or about December 1, 2021, Respondents’ undersigned counsel were served with Subpoenas by the OAG requesting both testimony and documents from Former President Trump and testimony from Donald Trump, Jr. and Ivanka Trump. *See* Subpoenas issued by the Office of the New York State Attorney General served on Donald J. Trump (**Exhibit A**); Donald Trump, Jr. (**Exhibit B**); and Ivanka Trump (**Exhibit C**). Though the OAG had repeatedly assured counsel for Mr. Trump that the subpoena would remain confidential, its existence was leaked to the press.⁶ The subject areas identified by the document subpoena are all too familiar - they request information about valuations and appraisals of properties and assets of Former President Trump and the Trump Organization and representations about such assets. As shown above, these subject matters have long been the subject of the OAG/DANY’s criminal investigation and the OAG’s civil investigation back in 2019.

* * *

⁵ Attorney General James stated: “It was a difficult decision, and I recognize the historical significance of this race. However, I’ve got unfinished business. I made a – I put my hand on the Bible almost three and a half years ago and I made a commitment to New Yorkers that I would serve them as Attorney General to the best of my ability. And when you have outstanding cases; investigations into the Trump Organization . . .” *The View* (ABC television Broadcast Dec. 14, 2021) (emphasis added) (**Exhibit D**).

⁶ On or before December 1, 2021, members of the OAG had assured counsel for Mr. Trump that the subpoena was non-public, would not become so, and was protected even from FOIA requests. On December 9, 2021, its existence was leaked to the media. To their credit, OAG attorneys on this matter apologized to counsel for Mr. Trump. The leak was clearly made from the administration of the OAG.

Given these unambiguous circumstances, a deposition of Moving Parties by the OAG is effectively the same as a deposition by the DANY, but without providing the constitutional protections afforded every witness through the grand jury process. There is no question that there is an OAG/DANY investigation and that the OAG has taken credit for indicting the Trump companies and its CFO, and has publicly stated that its criminal investigation “is ongoing.” Indeed, even if the OAG and DANY were not in a joint investigation, the OAG would still have to provide DANY, by operation of law, the depositions of Moving Parties and any other evidence it obtains related to the criminal investigation. Recently enacted section 245.20(2) of the Criminal Procedure Law provides that:

“For purposes of subdivision one of this section, all items and information related to the prosecution of a charge in the possession of any New York state or local police or law enforcement agency shall be deemed to be in the possession of the prosecution.”

CPL § 245.20(2).

For these reasons, it is simply indisputable that any testimony obtained pursuant to the Subpoenas will be immediately available to that very same office – the OAG – and *a fortiori* and by operation of law, to the OAG/DANY criminal investigation.

POINT I**THE SUBPOENAS SHOULD BE QUASHED
TO AVOID CIRCUMVENTING MOVING PARTIES'
CONSTITUTIONAL AND STATUTORY RIGHTS**

The Subpoenas should be quashed because they seek to compel testimony in furtherance of the OAG/DANY investigation and thereby deprive Moving Parties of the constitutional and statutory protections available to witnesses compelled to testify in a pending criminal case. The OAG's claimed "administrative" Subpoenas, generally referred to as an "office subpoena," may be challenged by a motion to quash. *Matter of Condon v. Inter-Religious Found. For Community Org., Inc.*, 18 Misc.3d 874, 882, 85 N.Y.S. 841 (N.Y. Co 2008), citing *Virag v. Hynes*, 54 N.Y.2d 437 (1981); see CPLR § 2304; *Matter of Brunswick Hosp. Ctr. V. Hynes*, 152 N.Y.2d 333, 339, 438 N.Y.S.2d 253 (1981) (motion to quash or vacate is proper and exclusive vehicle to challenge validity of subpoena or jurisdiction of issuing authority).

We recognize that, ordinarily, the OAG has the authority to conduct a civil investigation into whether any person has engaged in "repeated fraudulent illegal acts or otherwise demonstrate[d] persistent fraud or illegality in the carrying on, conducting or transaction of business." McKinney's Executive Law § 63(12). In the usual course, "the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules. Such authorization shall not abate or terminate by reason of any action or proceeding brought by the attorney general under this section." *Id.* See *Matter of Harlem Teams for Self-Help v. Department of Investigation of City of N.Y.*, 122 Misc.2d 1066, 1074, 472 N.Y.S.2d 967 (N.Y. Co. 1984).

But as the Court of Appeals detailed in *Virag v. Hynes*, there is a "fundamental distinction between a nonjudicial, office subpoena and a Grand Jury subpoena." *Virag v Hynes*,

54 N.Y.2d at 441. “An office subpoena is executed and the witness examined pursuant to it without direct judicial supervision.” *Id.* Further, the civil office subpoena poses risks to any witness deciding between disclosing evidence in the civil investigation or invoking his or her constitutional right not to testify. Where a witness chooses not to testify in response to a civil subpoena, an adverse inference may be drawn in the civil action. *Kuriansky v. Bed-Stuy Health Care Corp.*, 135 A.D.2d 160, 178-79, 525 N.Y.S.2d 22 (2d Dep’t 1988)(“In New York, unlike the rule in a criminal case, a party’s invocation of the privilege against self-incrimination in a civil case may be considered by the finder of the facts in assessing the strength of the evidence offered by the opposing party on the issue which the witness was in a position to controvert”), citing *Marine Midland Bank v. Russo Produce Co.*, 50 N.Y.2d 31, 427 N.Y.S.2d 961 (1980); see *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 97-98 (2d Cir. 2012), quoting *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551 (1976); *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir.1995); *United States v. 4003–4005 5th Ave.*, 55 F.3d 78, 83 (2d Cir.1995); *LiButti v. United States*, 178 F.3d 114, 120 (2d Cir.1999)

But where the very same agency issuing the supposed “office” subpoena is also conducting a criminal investigation, the office subpoena is unavailable. “The law does not confer upon a prosecutor the power to employ a subpoena solely to conduct an investigation or to subpoena witnesses to attend his office or any other place where a grand jury or court is not convened.” *Rodrigues v. City of New York*, 193 A.D.2d 79, 602 N.Y.S.2d 337, 342 (1st Dep’t 1993). “It has long been recognized that District Attorneys may not issue subpoenas except through the process of the court, and they exercise the power to compel witnesses to produce physical evidence only before a Grand Jury or a court where a proceeding is pending.” *People v. Natal*, 75 N.Y.2d 379, 385 N.Y.S.2d 650 (1993); see CPL § 610.20 (“a district attorney, or other

prosecutor where appropriate, as an officer of a criminal court . . . may issue a subpoena...for the attendance in such court or a grand jury thereof of any witness whom the people are entitled to call in such action or proceeding.”)

By law, rather than having to risk an adverse inference, any witness compelled to testify in response to a grand jury subpoena receives transactional immunity for his or her testimony. McKinney’s CPL § 190.40 (“A witness who gives evidence in a grand jury proceeding receives immunity ...”) Thus, because transactional immunity is automatic, prosecutors are loath to use subpoena power to compel grand jury testimony from an individual whom it wishes to target in its investigation. *Matter of Gammarano v. Gold*, 51 A.D.2d 1012-1013 (2d Dep’t 1976)(it is “factually impossible” for a grand jury witness to be a target of the District Attorney’s investigation since grand jury subpoenas grant “automatic transactional immunity for his testimony”), *citing* CPL § 190.40. The exception to the automatic grant of immunity occurs only when a target in a criminal case requests to appear before the grand jury voluntarily; in that event, the target receives no immunity. *See* CPL § 190.50(5).

Here, DANY and the OAG are conducting a unified criminal investigation. The Attorney General herself acknowledged that OAG lawyers are part of the joint criminal investigative effort. While the OAG may also have tasked attorneys to a civil investigation, the very agency itself – the OAG – is front and center in the criminal investigation, so much so that Attorney General James boasted on national television that “we” indicted Mr. Weisselberg and two Trump companies. And there is no question that testimony provided to the OAG will be immediately available to that very same Office - the OAG – in its OAG/DANY investigation. Under these unprecedented circumstances, where the OAG is part and parcel of the criminal grand jury investigation, it cannot circumvent the rules and protections embodied in Grand Jury practice.

The fact is that the OAG is one, singular agency running a criminal investigation. It may claim to split itself into two to avoid complying with grand jury practice, but this it cannot do. In more distant but analogous circumstances, courts have not permitted illusory and fanciful distinctions between different agencies, much less amongst a single agency. “Where the investigation has been converted from its original lawful purpose...to one of another purpose, i.e., to conduct an investigation to find criminal acts, the abuse of process would be sufficiently clear to warrant quashing these subpoenas.” *Matter of Harlem Teams for Self-Help v. Department of Investigation of City of N.Y.*, 122 Misc.2d 1066, 472 N.Y.S.2d 967 (N.Y.Co. 1984). “Where there is evidence that the relevance of the materials sought [in an office subpoena] is not to an administrative investigation, but, ‘in preparation or in aid of a criminal prosecution, not within the purview of [the agency's] jurisdictional powers, the subpoena will be quashed.’” *Id.*, quoting *Matter of Temporary State Comm. on Living Costs & Economy v Bergman*, 80 Misc 2d 448, 453, 363 N.Y.S.2d 977 (N.Y. Co. 1975), citing *Matter of Grand Jury Proceedings*, 485 F.2d 85 (3d Cir. 1973). See also *People v. Rutter*, 202 A.D.2d 123, 131, 616 N.Y.S.2d 598 (1st Dep’t 1994) (granting habeas relief on ineffective assistance grounds where prosecution had not timely disclosed exculpatory polygraph transcript in possession of Philadelphia police). See *United States v. Ferguson*, 478 F. Supp.2d 220, 238 (D. Conn. 2007) (prosecutor’s duty to turn over *Brady* material in the possession of other agencies “is triggered by any joint investigation conducted between federal, state, and local agencies or across different federal agencies”).

Here, we needn’t pause to even question whether the OAG and DANY are running a joint investigation. See *Ferguson*, 478 F. Supp.2d at 238, citing *United States v. Risha*, 445 F.3d 298, 304 (3d Cir. 2006). The Attorney General has made crystal clear in myriad public statements and

actions that the OAG is a co-equal in the prosecutions to date and in the ongoing criminal grand jury investigation.

The OAG is engaged in a criminal investigation that has an active Grand Jury. It cannot issue subpoenas for testimony under the guise of a civil investigation that will immediately become available – to its own OAG/DANY criminal investigation. New York State’s statutory and constitutional protections were not designed to be so easily avoided. The subpoenas are an obvious improper end-run around the rules.

Given the seemingly unprecedented nature of the OAG’s actions, significant public policy concerns are at play. For this reason, the OAG cannot be permitted to co-mingle its criminal and civil investigations in such a way that will deprive Moving Parties of their constitutional rights. Doing so would set a truly dangerous precedent. Not only would it significantly erode the protections afforded to our citizens by the New York Constitution and related CPL rules, but it would also greatly expand the government’s ability to investigate criminal defendants under the guise of a civil investigation. The Supreme Court has already expressed concern that “[p]rosecutors have available a terrible array of coercive methods to obtain information,” such as “police investigation and interrogation, warrants, informers and agents whose activities are immunized, authorized wiretapping, civil investigatory demands, [and] enhanced subpoena power” and that the “misuse of those methods would unfairly harass citizens, give unfair advantage to [the prosecutor’s personal interests], and impair public willingness to accept the legitimate use of those powers.” *Young v. U.S. ex re. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987). Thus, it is vital that the public “have assurance that those who would wield this [prosecutorial] power will be guided solely by their sense of public responsibility for the attainment of justice.” *Id.* at 814.

These public policy considerations are all the more significant in the instant matter where the target of the government speech and action is a political figure, a former President of the United States, and the government actor is a state Attorney General who vehemently opposes him. Given the significant public attention that the subject investigation has received, and will continue to receive, there is a substantial risk that permitting the OAG to so clearly circumvent grand jury protections and otherwise exceed the bounds of its investigatory authority would “create an appearance of impropriety” which could ultimately “diminish faith in the fairness of the criminal justice system in general.” *Id.* at 812.

Based on the foregoing, the subpoena must be quashed.

POINT II

ALTERNATIVELY, THE COURT SHOULD STAY ENFORCEMENT OF THE SUBPOENAS PENDING THE CONCLUSION OF THE CRIMINAL CASE

A court may, in its discretion, grant a stay of civil proceedings “in a proper case, upon such terms as may be just.” CPLR 2201. For example, courts will commonly grant a stay of a civil proceeding when it overlaps with a pending criminal proceeding. Indeed, “although the pendency of a criminal proceeding does not give rise to an absolute right under the United States or New York State Constitutions to a stay of a related civil proceeding . . . there is no question that the court may exercise its discretion to stay proceedings in a civil action until a related criminal dispute is resolved.” *Matter of Astor*, 62 A.D.3d 867, 868-869, 879 N.Y.S.2d 560 (2d Dep’t 2009).⁷

Whether to grant a stay pending resolution of a related criminal action “is directed to the

⁷ The Court in the criminal case, the Hon. Juan M. Merchan, has stated that the trial will be held in late July or August 2022. Thus, the stay contemplated by this motion is of limited and finite duration.

sound discretion of the trial court.” *Britt v. Intl. Bus Services, Inc.*, 255 A.D.2d 143, 144 (1st Dep’t 1998)(quotations omitted); *see also Securities and Exchange Com’n v. Dresser Industries, Inc.*, 628 F.2d 1372, 1375 (D.C. Cir. 1980)(“a court may decide in its discretion to stay civil proceedings ... ‘when the interests of justice seem[] to require such action’”) (*quoting U.S. v. Kordel*, 397 U.S. at 12, n. 27, 90 S. Ct. at 770, n. 27); *Kashi v. Gratsos*, 790 F.2d 1050, 1057 (2d Cir.1986) (“[A] court *may* decide in its discretion to stay civil proceedings when the interests of justice seem to require such action”)(emphasis in original). Where a stay is sought due to a pending criminal matter, the invocation of the Fifth Amendment privilege is a critical factor:

Factors to consider include avoiding the risk of inconsistent adjudications, [duplication] of proof and potential waste of judicial resources. A compelling factor is a situation where a defendant will invoke his or her constitutional right against self-incrimination.

Britt v. Intl. Bus Services, Inc., 255 A.D.2d 143, 144 (1st Dep’t 1998); *see Zonghetti v Jeromack*, 150 A.D.2d 561, 563 (2d Dep’t 1989); *DeSiervi v Liverzani*, 136 A.D.2d 527, 528 (2d Dep’t 1988); *Puiatti v Panos*, 39 Misc.3d 1211(A), 2013 Slip. Op. 50566(U) at *4 (Duchess Co. 2013) (granting stay upon finding invocation of the Fifth Amendment right against self-incrimination to be a “compelling factor”).

The Supreme Court has acknowledged that a stay or postponement of civil discovery pending the outcome of criminal proceedings is justified when the government brings a civil action “solely to obtain evidence for its criminal prosecution,” *United States v. Kordel*, 397 U.S. 1, 11-12, 90 S.Ct. 763, 769-770 (1970), or where other circumstances suggest that parallel proceedings are unconstitutional or improper. *Id.* In this context, a stay is “most likely to be granted where the civil and criminal actions involve the same subject matter ... and is even more appropriate when both actions are brought by the government.” *Brock v Tolkow*, 109 F.R.D. 116, 119 (E.D.N.Y

1985). In such a scenario, a stay is warranted to guard against the “special danger that the government can effectively undermine rights that would exist in a criminal investigation by conducting a de facto criminal investigation using nominally civil means,” *Sterling Bank v. A-I Hotels Int’s Inc.*, 175 F.Supp.2d 573, 579 (S.D.N.Y. 2001), a maneuver which “undercuts” a defendant’s constitutional rights. *Id.* at 120.

Turning to the instant matter, the OAG is intimately involved in a criminal investigation dealing with precisely the same subject matter as the Subpoenas. The OAG’s role is highly prejudicial since it is in a position to use its civil investigation to improperly advance its criminal investigation. Indeed, since the OAG boasts about its criminal investigation, there is no question that testimony obtained by the OAG, will be used – by the OAG. Thus, the potential for abuse here is unique, both in the fact the OAG is deeply enmeshed in the criminal case, and because of Attorney General James’s unusual and well-documented threats, noted above, including her self-proclaimed mission to “take on” the Trump family, deploy the law as a “sword” in discussing Mr. Trump, who she called “illegitimate” in 2018 (*see Exhibit EE*), and to make use of “*every area of the law* to investigate [him] ... his businesses transactions ... his family ... [and] anyone in his orbit.”

Thus, a stay is warranted here for all of the reasons previously discussed. It is not appropriate for an agency of the state government, particularly its highest law enforcement agency, to endeavor to circumvent Grand Jury rules used to protect our citizenry. Indeed, this is a rather transparent gambit. By attempting to play both sides, Ms. James is in a position to cherry pick her investigatory methods – civil or criminal – in a calculated manner to, for example, leverage a Fifth Amendment assertion and obtain an adverse inference. *See A-I Hotels Int’s Inc.*, 175 F.Supp.2d at

579. It is not appropriate for any state actor – let alone the highest-ranking law enforcement official in the state – to endeavor to circumvent the grand jury procedural safeguards of our judicial system.

Were there no criminal case, the Moving Parties might well be inclined to testify. But there is a criminal investigation into the very same matters at issue in the Subpoenas being conducted by the very same office. Attorneys may well instruct witnesses to invoke Fifth Amendment rights solely because rights under CPL 190.40 have been circumvented. An adverse inference under these circumstances would be grossly unfair when this stratagem can easily be avoided by a stay pending completion of the criminal investigation.

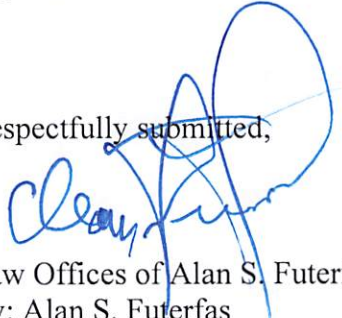
Therefore, a stay is warranted here for all of the reasons set forth herein.

CONCLUSION

For the forgoing reasons, it is respectfully requested that the Court quash the Subpoenas or, in the alternative, stay enforcement of the Subpoenas until the conclusion of the pending criminal case. Oral argument is respectfully requested.

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Respectfully submitted,



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