SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

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

PEOPLE'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S OMNIBUS MOTIONS

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INTRODUCTION

Defendant Donald J. Trump is charged with thirty-four felony counts of falsifying business records in the first degree as part of an expansive and corrupt criminal scheme to conceal damaging information from the voting public in advance of the 2016 presidential election.

From August 2015 to December 2017, defendant orchestrated—and then tried to conceal—a scheme with others to influence the 2016 presidential election by identifying and purchasing negative information about him to suppress its publication and benefit his electoral prospects. One component of this scheme was that, at defendant's request, Michael Cohen—a lawyer who then worked for the Trump Organization as Special Counsel to defendant—covertly paid $130,000 to an adult film actress just weeks before the presidential election to prevent her from publicizing a sexual encounter with defendant. This payment was illegal, and Cohen pleaded guilty to making an illegal campaign contribution and served time in prison.

After the election, and before details of the underlying scheme and payment became publicly known, defendant reimbursed Cohen for the illegal payment through a series of monthly checks that were each disguised as a payment for legal services rendered in a given month of 2017 pursuant to a retainer agreement. The payment records, kept and maintained by the Trump Organization, were false entries in the business records of a New York enterprise: there was no retainer agreement, and Cohen was not being paid for legal services rendered in 2017. Defendant caused his entities' business records to be falsified to disguise his and others' criminal conduct—which included violations of state and federal election law; the falsification of additional business records; and the mischaracterization, for tax purposes, of the true nature of the payments to Cohen.

Defendant's motions to dismiss the indictment and for other relief mischaracterize the factual record and disregard controlling law. As described below, the comprehensive record before the grand jury was sufficient to support the charges in the indictment, and the charges are legally

valid. *See* Point I. The charges are timely. *See* Point II. Defendant's claim of selective prosecution is meritless because the evidence shows both that he was not singled out and that this prosecution is based exclusively on the neutral application of the facts to the law. *See* Point III. And defendant has not met his heavy burden to justify an evidentiary hearing on his allegations of selective prosecution or grand jury secrecy violations. *See* Point III.C, IV. Defendant's remaining arguments fare no better: the counts in the indictment are not multiplicitous, *see* Point V; he is not entitled to yet more information in a bill of particulars, *see* Point VI; and his request to strike the certificates of compliance is frivolous, *see* Point VII.

We address one threshold argument at the outset. Defendant repeatedly suggests that because he is a current presidential candidate, the ordinary rules for criminal law and procedure should be applied differently here. DB: 1-2, 4, 6, 9, 42, 45. This argument is essentially an attempt to evade criminal responsibility because defendant is politically powerful. Courts have repeatedly rejected defendant's demands for special treatment and instead have adhered to the core principle that the rule of law applies equally to the powerful as to the powerless. "To create a special exception here would defy our Nation's foundational principle that our law applies 'to all, without regard to numbers, wealth, or rank.'" *Trump v. United States*, 54 F.4th 689, 701 (11th Cir. 2022) (quoting *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794)). The neutral application of the facts and the law demonstrates that there is no basis to dismiss this case. And like any other defendant whose arguments for dismissal are meritless, this defendant's motions should be denied, and this prosecution should proceed to trial.

STATEMENT OF THE CASE

Defendant was indicted by the grand jury on March 30, 2023 on thirty-four counts of falsifying business records in the first degree in violation of Penal Law § 175.10. The evidence before the grand jury established the following facts.

I. Defendant and others agreed to identify and purchase negative stories to prevent them from hurting his chances in the 2016 presidential election.

A. The 2015 Trump Tower meeting to develop the scheme.

In June 2015, defendant announced his candidacy for President of the United States. Soon after, in August 2015, defendant met in his Trump Tower office in New York County with Cohen and [redacted], who was then the Chairman and Chief Executive Officer of American Media Incorporated ("AMI"), a media company that owned and published supermarket tabloids. At the meeting, defendant, Cohen, and [redacted] agreed that [redacted] would help with defendant's presidential campaign by acting as "eyes and ears" for the campaign, looking out for negative stories about defendant and alerting Cohen so they could ensure that those stories would not be published. [redacted] also agreed to publish negative stories about defendant's competitors for the election. After the meeting, [redacted] communicated these agreements to [redacted], who was then AMI's Chief Content Officer and the editor-in-chief of the *National Enquirer*. Tr. 22, 31-38 ([redacted]); Tr. 815-818 ([redacted]).[1]

B. The [redacted] payoff.

Several months later, in October or November 2015, [redacted] learned that a former Trump Tower doorman, [redacted], was trying to sell information regarding an alleged out-of-wedlock child Trump had fathered with one of his housekeepers. Pursuant to the August 2015 agreement with defendant and Cohen, [redacted] contacted Cohen with this information, and Cohen then informed defendant, who asked Cohen to take care of it. After consulting with Cohen, [redacted] directed [redacted] to negotiate an agreement to pay $30,000 to [redacted] to acquire exclusive rights

[1] Citations to "Tr. __" are to the grand jury minutes. Citations to "GJ-__" are to the numbered exhibits presented to the grand jury. Citations to "PX-__" are to the exhibits accompanying the November 9, 2023 Affirmation of Christopher Conroy, filed with this opposition. Citations to "DB" are to the memorandum of law in support of defendant's omnibus motions.

to the story. AMI falsely characterized this payment in AMI's books and records—improperly recording it as a promotional expense in the AMI president's budget rather than a source payment in the editorial budget—to avoid approval requirements that would have applied had the payment been accurately recorded. The agreement was unusual for AMI because of the amount of money involved and because AMI purchased the rights to [redacted] story without fully investigating his claims, but [redacted] directed that the deal take place because he thought that public disclosure of this information would hurt Trump's campaign. When AMI later reached the view that the story was not true, [redacted] wanted to release [redacted] from the exclusive-rights agreement. However, Cohen instructed [redacted] not to release [redacted] until after the presidential election, and [redacted] complied with that instruction because of his agreement with defendant and Cohen at the Trump Tower meeting. Tr. 38-46, 1083-1088, 1092-1093 ([redacted]); Tr. 391-406 ([redacted]); Tr. 819-825 ([redacted]); GJ-25; GJ-26; GJ-27.

C. The [redacted] payoff.

About five months before the presidential election, in or about June 2016, [redacted] contacted Cohen about a woman, [redacted], who alleged she had a sexual relationship with defendant while he was married. At [redacted] direction, [redacted] flew to California to meet with [redacted] and her attorney, [redacted]. Before, during, and after that meeting, Cohen was in frequent and urgent contact with [redacted] and [redacted], and Cohen asked that AMI purchase the information quickly to prevent another outlet from publishing it. Defendant did not want this information to become public because he was concerned about the effect it could have on his candidacy. Thereafter, defendant, [redacted], and Cohen had a series of discussions about who should pay off [redacted] to secure her silence. Tr. 47-57 ([redacted]); Tr. 406-423 ([redacted]); Tr. 491-495 ([redacted]); Tr. 825-831 ([redacted]); GJ-28; GJ-29; GJ-30; GJ-33.

AMI ultimately paid $150,000 to [redacted] in exchange for the "limited life rights" to the story of the alleged affair, her agreement not to speak out about the alleged relationship, two magazine cover features of [redacted], and a series of articles that would be published under her byline. Although $150,000 was more than AMI would ordinarily pay for this type of story, [redacted] agreed to the deal after discussing it with both defendant and Cohen, and on the understanding from Cohen that defendant or the Trump Organization would reimburse AMI. AMI made the payment to [redacted] to ensure that she did not publicize damaging allegations about Trump before the 2016 presidential election and thereby influence that election. AMI falsely recorded this payment in AMI's books and records in the same way as the [redacted] payment. Tr. 47-57, 60-65, 1083-1088 ([redacted]); Tr. 423-429 ([redacted]); Tr. 495-500 ([redacted]); Tr. 828-831 ([redacted]); GJ-1; GJ-28; GJ-29; GJ-80; GJ-81.

In a recorded conversation in approximately September 2016, defendant and Cohen discussed how to obtain the rights to [redacted] account from AMI and how to reimburse AMI for its payment. Cohen told defendant he would open up a company for the transfer of [redacted] account and other information, and stated that he had spoken to [redacted], then the Chief Financial Officer for the Trump Organization, about "how to set the whole thing up." Defendant asked, "So what do we got to pay for this? One fifty?" and suggested paying by cash. When Cohen disagreed, defendant mentioned payment by check. After the conversation, Cohen created a shell company called Resolution Consultants LLC on or about September 30, 2016. Tr. 830-845 ([redacted]); Tr. 632 ([redacted]); GJ-52; GJ-71.

Less than two months before the election, on or about September 30, 2016, [redacted] and Cohen each signed an agreement in which AMI agreed to transfer its rights to [redacted] story to Cohen's shell company for $125,000. In consultation with Cohen, [redacted] caused false business

records to be created and maintained by AMI to accomplish the transfer of rights, by engaging a middleman to hide the fact that the money would be going from Cohen to AMI and then preparing a false invoice from the middleman describing the payment as "[redacted]" rather than reimbursement for the purchase of [redacted] story. After the assignment agreement was signed but before the reimbursement took place, [redacted] consulted with AMI's general counsel and then told Cohen that the deal to transfer the rights to Cohen's shell company was off. Tr. 65-69, 71, 1077-1083 ([redacted]); Tr. 830-846 ([redacted]); GJ-2; GJ-79.

D. The [redacted] payoff.

About one month before the election, on or about October 7, 2016, news broke that defendant had been caught on tape saying to the host of *Access Hollywood*: "I just start kissing them [women]. It's like a magnet. Just kiss. I don't even wait. And when you're a star, they let you do it. You can do anything. . . . Grab 'em by the pussy. You can do anything." Defendant and his campaign staff were concerned that the tape would harm his viability as a candidate and reduce his standing with female voters in particular. [redacted], the campaign press secretary, thought that the tape was "[redacted]" because, among other reasons, "[redacted]" Tr. 665-672 ([redacted]); Tr. 72 ([redacted]); Tr. 437-440, 443 ([redacted]); Tr. 512 ([redacted]); Tr. 849, 855 ([redacted]).

Shortly after the *Access Hollywood* tape became public, [redacted] contacted [redacted] about another woman, [redacted], who alleged she had a sexual encounter with defendant while he was married. [redacted] told [redacted] to notify Cohen, as [redacted] had agreed with defendant and Cohen at the August 2015 meeting that he would. On or about October 10, 2016, [redacted] connected Cohen with [redacted] attorney—[redacted], who had also been [redacted] attorney—regarding a "business opportunity." Cohen then negotiated a deal with [redacted] to purchase

[redacted] story in order to prevent further disclosure of the information before the presidential election. Under the deal, [redacted] agreed not to disclose the affair in exchange for $130,000. Defendant directed Cohen to delay making a payment as long as possible—while also preventing publication of the story—in the hope that they could delay until the election and then not pay at all. As with the [redacted] payoff, Cohen acted in coordination with defendant and at his direction, and for the principal purpose of influencing the election by paying to bury the story. Tr. 71-80 ([redacted]); Tr. 435-459 ([redacted]); Tr. 513-530 ([redacted]); Tr. 849-861 ([redacted]); GJ-4; GJ-28 to GJ-31; GJ-35 to GJ-39; GJ-73.

Ultimately, with pressure mounting and the election approaching, defendant agreed to the payoff and directed Cohen to proceed. Cohen discussed the deal with defendant and [redacted]. Defendant did not want to make the $130,000 payment himself, and asked Cohen and [redacted] to find a way to make the payment. After discussing various payment options with [redacted], Cohen agreed he would make the payment. Before making the payment, Cohen confirmed with defendant that defendant would pay him back. Tr. 78-80 ([redacted]); Tr. 449-459 ([redacted]); Tr. 530-532 ([redacted]); Tr. 861-870 ([redacted]); GJ-28; GJ-29; GJ-32; GJ-38 to GJ-43; GJ-73.

On or about October 26, shortly after speaking with defendant on the phone, Cohen opened a bank account in Manhattan in the name of Essential Consultants LLC, a new shell company he had created to effectuate the payment. Based on information Cohen provided to the bank, the shell company's business narrative in the mandatory [redacted] was falsely stated as "[redacted]" Cohen then transferred $131,000 from his personal home equity line of credit into that account. On or about October 27, Cohen wired $130,000 from his Essential Consultants LLC account to [redacted] to suppress [redacted] account. When Cohen directed the bank to wire this payment to [redacted], he

completed a wire transfer form that falsely described the purpose of the wire as "Retainer." Tr. 530-532 ([redacted]); Tr. 622-643 ([redacted]); Tr. 870-875 ([redacted]); GJ-52 to GJ-63; GJ-73.

E. Post-election communications between defendant and [redacted].

On November 8, 2016, defendant won the presidential election and became President-Elect. Thereafter, AMI released [redacted] and [redacted] from their non-disclosure agreements. Tr. 44-46, 81-83 ([redacted]); GJ-3.

After the election and before defendant was inaugurated, defendant met with [redacted] at Trump Tower. At that meeting, defendant thanked [redacted] for handling the [redacted] and [redacted] stories, and invited him to the inauguration. In the summer of 2017, defendant invited [redacted] to the White House for a dinner to thank him for his help during the campaign. Tr. 88-93 ([redacted]).

II. Defendant agreed to repay Cohen by falsely disguising the reimbursement as a legal expense.

A. The decision to conceal the [redacted] reimbursement as a legal expense.

In or around January 2017, [redacted] and Cohen met to discuss how Cohen would be reimbursed for the money he had paid to ensure [redacted] silence. [redacted] asked Cohen to bring a copy of a bank statement for the Essential Consultants account showing the $130,000 payment. [redacted] and Cohen agreed to a repayment amount of $420,000, a figure they reached by adding the $130,000 payoff amount to a separate $50,000 payment relating to tech services in connection with the campaign for which Cohen also claimed a reimbursement; doubling that amount to $360,000 so Cohen could characterize the payment as income on his tax returns, instead of having to disclose it as a reimbursement; and adding $60,000 as a supplemental year-end bonus. [redacted] memorialized these calculations in handwritten notes on the copy of the bank statement showing the $130,000 payment from Cohen's shell company, and later conveyed the details of this arrangement to [redacted] (then the Controller and Senior Vice President of the

Trump Organization) so [redacted] could handle the payments. Tr. 148-170 ([redacted]); Tr. 875-879, 882-888 ([redacted]); GJ-5; GJ-6.

Defendant, Cohen, and [redacted] then agreed that Cohen would be paid the $420,000 total through twelve monthly payments of $35,000 each over the course of 2017. Each month, Cohen was to send an invoice to defendant through Trump Organization employees, falsely requesting payment of $35,000 for legal services rendered in a given month of 2017 pursuant to a retainer agreement. In early February 2017, defendant and Cohen met at the White House and confirmed this repayment arrangement. At no point did Cohen have a retainer agreement with defendant or the Trump Organization. Tr. 149-150, 159-160 ([redacted]); Tr. 879-882, 888-908 ([redacted]); GJ-5; GJ-6.

B. Defendant falsified Trump Organization business records to conceal and execute the repayment.

Pursuant to his reimbursement agreement with defendant, Cohen submitted invoices to executives of the Trump Organization each month from February 2017 to December 2017 requesting "payment for services rendered" pursuant to a "retainer agreement," although there was no such retainer agreement and Cohen was not being paid for services rendered in any month of 2017. In total, Cohen submitted eleven invoices by e-mail to the Trump Organization (one combined invoice for January and February 2017, and subsequent monthly invoices for each remaining month that year). Each invoice was addressed to [redacted] c/o Trump at Trump Tower. [redacted] forwarded each invoice to [redacted], the accounts payable supervisor at the Trump Organization. [redacted] printed each invoice; stamped it with an accounts payable stamp; and assigned general ledger code "51505" (for legal expenses). [redacted] then recorded each reimbursement payment in the Trump Organization's electronic general ledger as a legal expense,

with a description of a retainer. Tr. 180-213 ([redacted]); Tr. 297-353 ([redacted]); Tr. 891-908 ([redacted]); GJ-7; GJ-20; GJ-21; GJ-73.

[redacted] also prepared checks with two attached check stubs that each included the description "retainer" with a date range, which she stapled to the invoices, for approval and signature of the checks. The first check (January and February 2017) was paid from the Donald J. Trump Revocable Trust and signed by [redacted] and [redacted]; the second check (for March 2017) was paid from the Trust and signed by [redacted] and [redacted] The remaining nine checks covered the remaining nine months of 2017 and were paid from defendant's personal bank account and signed by defendant personally. Once signed, the checks were each returned to [redacted], still stapled together with both check stubs and the invoice. The signed checks, check stubs, and invoices were then scanned and maintained in the Trump Organization's data system before the checks themselves were mailed to Cohen for payment. The monthly payments stopped after the December 2017 payment, which completed the $420,000 reimbursement. Tr. 212 ([redacted]); Tr. 297-361 ([redacted]; Tr. 891-908 ([redacted]); GJ-22; GJ-23; GJ-73.

POINT I

THERE WAS SUFFICIENT EVIDENCE BEFORE THE GRAND JURY TO SUPPORT THE CHARGES AGAINST DEFENDANT, AND THE INDICTMENT IS LEGALLY VALID (Answering Defendant's Brief, Point II).

Defendant moves to dismiss on the ground that "the charges are legally defective," raising a variety of factual and legal arguments in support. DB: 9-24. The motion to dismiss on this basis should be denied.

The Court may grant a motion to dismiss the indictment for lack of sufficient evidence only where "[t]he evidence before the grand jury was not legally sufficient to establish the offense charged or any lesser included offense." CPL § 210.20(1)(b). Defendant bears the burden to make a clear

showing of legal insufficiency, and the Court must examine the evidence in the light most favorable to the People. *People v. Guzman*, 180 A.D.2d 469, 471 (1st Dep't 1992).

"Legally sufficient evidence" is defined as "competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof." CPL § 70.10(1). In the grand jury context, "legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt." *People v. Bello*, 92 N.Y.2d 523, 526 (1998) (citing *People v. Mayo*, 36 N.Y.2d 1002, 1004 (1975)). The standard for the Court's review is therefore "'whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes,' and whether 'the Grand Jury could rationally have drawn the guilty inference.'" *Id.* (quoting *People v. Deegan*, 69 N.Y.2d 976, 979 (1987)). Because it is exclusively the grand jury's role to determine the adequacy of the proof to establish reasonable cause to believe that defendant committed the charged offenses, CPL § 190.65(1)(b), all questions "as to the quality or weight of the proof should be deferred." *People v. Hyde*, 302 A.D.2d 101, 104 (1st Dep't 2003) (quoting *People v. Jennings*, 69 N.Y.2d 103, 115 (1986)).

In this case, defendant was charged with thirty-four counts of falsifying business records in the first degree, in violation of Penal Law § 175.10. As relevant here, a person is guilty of that offense when, "with intent to defraud," he "makes or causes a false entry in the business records of an enterprise," PL § 175.05(1), and when his intent to defraud "includes an intent to commit another crime or to aid or conceal the commission thereof," PL § 175.10.

Defendant makes four discrete arguments about the sufficiency of the indictment. He asserts that: (a) the falsified records are not business records of an enterprise; (b) defendant did not act with intent to defraud; (c) defendant did not act with intent to commit or conceal other crimes; and (d) defendant is entitled to review the complete grand jury minutes. Each of these arguments

lacks merit. The evidence before the grand jury more than supports a *prima facie* showing of each element of the offense, and there are no legal defects in the charges.

A. The falsified records here are business records of an enterprise.

Defendant argues that the records he is charged with falsifying are not business records of an enterprise, because they "do not relate to the condition or activity of the Trump Organization" and are "effectively his personal checkbook." DB: 10, 13. This claim fails. The evidence before the grand jury established that the records defendant is charged with falsifying are all "business records" under Article 175.

Article 175 defines "business record" to mean "any writing or article, including computer data or a computer program, kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity." PL § 175.00(2). This Court previously held that documents held and maintained by the Trump Organization were "business record[s]" under the statute because they reflected the enterprise's "obligations *vis a vis*" others. *People v. The Trump Corporation*, Ind. No. 1473/2021, Decision & Order on Omnibus Motion 4 (Sup. Ct. N.Y. Cnty. Sept. 6, 2022) (hereinafter "*Trump Corporation*").

The same conclusion is warranted here: the falsified invoices, Detail General Ledger entries, and checks with corresponding check stubs are "business records" under Article 175. The record establishes that the invoices, addressed to [redacted] (then the Trump Organization's Chief Financial Officer), were "kept or maintained" by an enterprise, and that they evidence its "condition"—namely, its obligation to reimburse the payee as described in the invoice. Tr. 184-213 ([redacted]); Tr. 292-295, 317-319, 361-364 ([redacted]); Tr. 891-908 ([redacted]); GJ-20; *see People v. Kisina*, 14 N.Y.3d 153, 159-60 (2010); *see also People v. Dove*, 85 A.D.3d 547, 548 (1st Dep't 2011). The same is true of the Detail General Ledger entries recording the Cohen repayments, which the Trump Organization maintained as records that a payment had been made

to Cohen for a retainer for a particular month or months in 2017. Tr. 363-364 ([redacted]); GJ-21; *see Trump Corporation* 4; *Kisina*, 14 N.Y.3d at 159-60. And the signed checks and check stubs were likewise maintained in the Trump Organization's files to reflect its "condition or activity," PL § 175.00(2)—that is, its satisfaction of its repayment obligations. Tr. 261-262, 295, 319-323, 363-364 ([redacted]); GJ-22; *see Kisina*, 14 N.Y.3d at 159-60.

Defendant appears to concede that these records were prepared, maintained, and updated by the Trump Organization, DB: 12, but argues that they are not "business records" because the Trump Organization maintained them as defendant's personal records, and not to reflect the Trump Organization's condition or activity.[2] DB: 10, 14. This argument assumes that there is a sharp distinction between the Trump Organization's business records and defendant's personal records, but that assumption is inconsistent with the grand jury record. To the contrary, the evidence shows that part of Cohen's job at the Trump Organization was to handle personal matters for defendant, Tr. 807 ([redacted]); that defendant's so-called personal accounts were at times used for Trump Organization business, including to reallocate cash between entities or to advance funds for an entity's bills, Tr. 126-131 ([redacted]); and that defendant owned the Trump Organization entities as the sole beneficiary of the Donald J. Trump Revocable Trust. Tr. 119-120 ([redacted]).

Indeed, the payments here exemplify the intermingling of the Trump Organization's business records and defendant's purportedly personal expenses. As noted above, $60,000 of the $420,000 repayment to Cohen was a supplemental year-end bonus for 2016, reflecting his work

[2] Defendant also asserts in a footnote that the Trump Organization is not an enterprise, apparently on the ground that the Trump Organization is "500 separate entities." DB: 13 n.4. But the statute makes clear that an entity consisting of multiple corporate "persons" can constitute an enterprise. PL § 175.00(1) (defining "Enterprise" to include "any entity of one *or more* persons, corporate or otherwise" (emphasis added)). Indeed, this Court has already held that both the Trump Organization and defendant himself are "enterprises" under Article 175. *Trump Corporation* 4.

on behalf of the Trump Organization. Tr. 148-170 ([redacted]); GJ-5. Because the falsified records thus relate in part to Cohen's employment with the Trump Organization, defendant's attempt to distinguish this Court's holding in *Trump Corporation* (DB: 14) fails. Here, just as in *Trump Corporation*, the records reflect the Trump Organization's business activity and obligations *vis a vis* Cohen's salary. *Trump Corporation* 4. Moreover, the balance of the $420,000 was a grossed-up reimbursement of monies Cohen laid out for defendant—the owner of the Trump Organization—while Cohen was employed by the Trump Organization to handle personal matters for defendant. Thus, the records falsified to disguise the reimbursement payments to Cohen also related to Cohen's prior employment with the Trump Organization, reflecting the Trump Organization's condition or activity.

Finally, even if the records did not reflect the Trump Organization's condition or activity—which they do—the grand jury could still reasonably conclude that they were business records of an enterprise under the Penal Law, because they were also the records of the Trust and defendant himself. The evidence is sufficient to establish that both the Trust and defendant himself are each an enterprise. Tr. 108, 110, 118-131, 146-148, 196 ([redacted]); Tr. 230, 235, 239-241, 287-297 ([redacted]); *see Trump Corporation* 4.

The cases defendant cites, DB: 12-14, are all fundamentally distinct. Each case involved an outside party submitting a false record to a completely separate entity, which then merely possessed that record but made no actual use of it. *See People v. Golb*, 23 N.Y.3d 455, 459, 462-63, 469 (2014) (fictitious emails to university did not reflect university's condition or activity); *People v. Papatonis*, 243 A.D.2d 898, 901 (3d Dep't 1997) (false answers on employment application did not reflect prospective employer's condition or activity); *People v. Banks*, 150 Misc. 2d 14, 17-18 (Sup. Ct. Kings Cnty. 1991) (fictitious audit of a charity submitted to two other

entities did not reflect the condition or activity of those entities). Those are not the facts here. *See Trump Corporation* 4 (finding *Papatonis* and *Banks* "clearly distinguishable"). And *People v. Bel Air Equipment Corp.*, 46 A.D.2d 773 (2d Dep't 1974), simply held that "duplicates of a bill prepared at the request of the customer" were not made to "reflect the corporate defendant's condition or activity." *Id.* at 774. There is nothing in the grand jury record to suggest that the falsified records are simply duplicates that have nothing to do with Trump Organization activity.

Finally, defendant asserts in passing—without seeking dismissal on this basis—that the payments to Cohen were, in fact, part of a retainer for legal services. DB: 4. Even if the Court were to construe this reference as a challenge to the sufficiency of the evidence, it would fail: there was no retainer agreement; Cohen was not paid for services rendered during any month of 2017; defendant authorized the repayment scheme knowing it was a reimbursement and not a legal retainer; and the monthly checks—most of which defendant personally signed—were not a legal expense but instead were reimbursements for the [redacted] payoff. As the U.S. District Court for the Southern District of New York held in rejecting defendant's attempt to remove this prosecution to federal court, "[t]he People have put forth evidence strongly supporting their allegations that the money paid to Cohen was reimbursement for a hush money payment." *New York v. Trump*, No. 23 Civ. 3773 (AKH), 2023 WL 4614689, at *6 (S.D.N.Y. July 19, 2023).

B. Defendant acted with intent to defraud.

Defendant argues that the grand jury was not presented with evidence of intent to defraud. DB: 22-24. The Court should reject this argument.

Intent to defraud "refers only to a defendant's state of mind in acting with a conscious aim and objective to defraud." *People v. Taylor*, 14 N.Y.3d 727, 729 (2010). "[T]he law is clear that the statutory element of intent to defraud does not require an intent to defraud any particular person; a general intent to defraud any person suffices." *People v. Dallas*, 46 A.D.3d 489, 491 (1st

Dep't 2007); *People v. Coe*, 131 Misc. 2d 807, 813 (Sup. Ct. N.Y. Cnty. 1986) (same), *aff'd*, 126 A.D.2d 436 (1st Dep't 1987), *aff'd*, 71 N.Y.2d 852 (1988); *Trump Corporation* 5 (same).

Moreover, "[b]ecause intent is an invisible operation of the mind, direct evidence is rarely available (in the absence of an admission) and is unnecessary where there is legally sufficient circumstantial evidence of intent." *People v. Rodriguez*, 17 N.Y.3d 486, 489 (2011) (quotation marks and citations omitted). Such circumstances can include "defendant's knowledge of the misleading or deceptive nature of the particular business practices employed," *People v. Monteiro*, 93 A.D.3d 898, 899 (3d Dep't 2012); defendant's understanding of the "inevitable consequences" of a particular fraudulent or deceptive act, *Dallas*, 46 A.D.3d at 491; and defendant's efforts to "conceal [his] unlawful activity," *United States v. Davis*, 490 F.3d 541, 549 (6th Cir. 2007) (quotation marks omitted); *see also Trump Corporation* 6 (evidence that the defendant "intended to conceal the alleged compensation scheme" sufficed to show intent to defraud).

Here, the evidence before the grand jury was sufficient to permit an inference that defendant acted with the requisite intent. First, as explained in Point I.C below, defendant intended to conceal criminal activity, and thus engaged in a broad-ranging scheme to ensure that the nature and purpose of the $130,000 payoff to an adult film actress would not become publicly known. Moreover, defendant knew that the business records at issue here contained false statements: there was no retainer; Cohen was not paid for services rendered in 2017; and defendant made and authorized the payments knowing that they were a reimbursement. That knowledge, *see Monteiro*, 93 A.D.3d at 899, coupled with defendant's "elaborate efforts at concealment," *United States v. Dial*, 757 F.2d 163, 170 (7th Cir. 1985), supports the inference that he acted with "a general intent to defraud any person." *Dallas*, 46 A.D.3d at 491; *see also Trump Corporation* 5-6 (grand jury

evidence supported intent to defraud where "[a] finder of fact could determine that the alleged conduct was misleading and intended to deceive").

Second, in the electoral context, the Court of Appeals has recognized that the concept of fraud can encompass any "deliberate deception (to be committed upon the electorate)" or any "corrupt act to prevent a free and open election." *People v. Lang*, 36 N.Y.2d 366, 371 (1975). Here, the grand jury evidence established that defendant sought to purchase and suppress information that could have affected his presidential campaign, and made false entries in the relevant business records in order to prevent public disclosure of both the scheme and the underlying information. Tr. 31-37, 83-85, 88-93 ([redacted]); Tr. 297-361 ([redacted]); Tr. 668, 681-687, 704-707, 709-711 ([redacted]); Tr. 577-590 ([redacted]); Tr. 854-857, 865-871, 875, 888-891 ([redacted]).

Defendant counters that intent to defraud cannot be shown through evidence that he intended to defraud the electorate prior to the 2016 presidential election because he allegedly falsified the relevant business records here in 2017, after the election. DB: 24 n.11. This argument wrongly considers defendant's 2017 conduct in isolation, rather than as the intended continuation of a scheme that was hatched and implemented starting in 2015. As explained earlier, defendant conspired with others—beginning in August 2015—to identify, purchase, and bury negative stories to prevent publication of those stories from harming his electoral prospects in 2016. An essential part of the scheme was to disguise the true nature of the payments made to purchase the silence of individuals like [redacted]. And defendant's intent to shield from public scrutiny the actual purpose of these payments necessarily extended to his actions in 2017 to reimburse Cohen for making the [redacted] payoff. The grand jury could reasonably conclude from this evidence that defendant's 2017 actions to complete the execution of the scheme were done with the same intent to defraud that was the animating purpose of the scheme from its inception.

Moreover, defendant is wrong to suggest that, as a matter of law, he could not have acted with intent to defraud the electorate after his 2016 election. The relevant question is whether he had the intent to defraud—not, as defendant characterizes it, whether he had an intent to influence the 2016 election. DB: 24 n.11. Having already concealed damaging information from the public before the election, defendant could—and did—intend to continue his cover-up after his inauguration as well. And there were concrete reasons that defendant would have wished to continue to conceal the true nature of the 2016 payoff and 2017 reimbursements. The grand jury heard evidence that public opinion influences the president's popular mandate and ability to focus on policy priorities. Tr. 731-736 ( ) (testimony from [redacted]). And defendant was a first-term president who officially registered his intention to seek reelection on January 20, 2017. *See* PX-33. His own electoral ambitions confirm that there would have been reason for him to continue to be concerned about public perception even after his inauguration. Other evidence confirms that defendant did not want the truth about the [redacted] or [redacted] payoffs to be disclosed even after the election—[redacted], Tr. 87-88 ( ); and [redacted]. Tr. 913-917 ( ). The grand jury could reasonably conclude from this evidence that defendant continued to be concerned about public perception even after his inauguration.

Third, the grand jury evidence supports the conclusion that defendant concealed information with the intent to defraud "the government." *Morgenthau v. Khalil*, 73 A.D.3d 509, 510 (1st Dep't 2010). For one thing, the grand jury could infer that defendant intended to conceal

relevant information from election regulators, based on (a) [redacted]; (b) [redacted]; and (c) [redacted]. *See* Tr. 838-839, 843-845, 871-872 ([redacted]); GJ-45; GJ-46; GJ-47; GJ-48; GJ-71. This evidence supports a reasonable inference that defendant intended to defraud the government by undermining—and avoiding liability for violating—campaign contribution limits and disclosure requirements imposed by federal and state laws.[3] *See People v. Pymm*, 151 A.D.2d 133, 135, 141 (2d Dep't 1989) (intent to defraud established where corporation concealed existence of mercury reclamation project with the intent of preventing federal inspectors from learning of the project), *aff'd*, 76 N.Y.2d 511 (1990); *see also People v. Kase*, 76 A.D.2d 532, 537-38 (1st Dep't 1980) ("There are few responsibilities of government more important than the obligation faithfully to carry out its own law."), *aff'd*, 53 N.Y.2d 989 (1981).

And it was not necessary for defendant to have the specific intent to defraud any particular government entity; rather, intent to defraud can be established if it was "reasonably foreseeable" that the business records at issue could be relevant to a government actor. *People v. Barto*, 144 A.D.3d 1641, 1643 (4th Dep't 2016); *see also People v. Park*, 163 A.D.3d 1060, 1063 (3d Dep't

[3] The prospect of governmental scrutiny on this front was not hypothetical at the time defendant allegedly falsified the business records at issue; indeed, the grand jury could conclude that defendant was concerned about precisely that exposure, given that his initial public denials of the truth when the federal criminal investigation became public in early 2018 emphasized (falsely) that Cohen's payoff to [redacted] was not an illegal campaign contribution. GJ 48; *see also* GJ-46 ([redacted]); GJ-47 (same).

2018) (the defendant's knowledge of inaccuracy of payroll information "support[ed] the logical inference that defendant acted with the intent to defraud the state of unemployment insurance contributions").

Defendant's remaining arguments are meritless. Defendant's argument that intent to defraud requires an intent to cause pecuniary harm (DB: 22-23) has been squarely rejected by the First Department. *See People v. Sosa-Campana*, 167 A.D.3d 464, 464 (1st Dep't 2018) ("In order to prove intent to defraud, the People did not need to make a showing of an intent to cause financial harm."), *leave denied*, 33 N.Y.3d 981 (2019); *Khalil*, 73 A.D.3d at 510 (rejecting the defendant's argument that intent to defraud required "intent to defraud a particular person or business entity . . . out of money, property, or something of pecuniary value"); *see also People v. Kase*, 53 N.Y.2d 989, 991 (1981), *aff'g for the reasons stated at* 76 A.D.2d 532 (1st Dep't 1980). Other courts and commentators universally agree with the First Department's approach.[4]

Given this squarely applicable precedent, defendant misplaces his reliance on the 1979 print version of the Criminal Jury Instructions ("CJI"). DB: 23. Courts have pointed out that the 1979 definition's focus on deprivation of property is inconsistent with the law. *See People v. Schrag*, 147 Misc. 2d 517, 518-19 (Rockland Cnty. Ct. 1990). And the current CJI codification no longer mentions deprivation of property, instead defining the intent element as follows: "INTENT means conscious objective or purpose. Thus a person acts with intent to defraud when his or her

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[4] *See, e.g.*, *People v. Sinclair*, 208 A.D.2d 573, 573 (2d Dep't 1994), *leave denied*, 84 N.Y.2d 1016 (1994); *People v. Mahan*, 195 A.D.2d 881, 882 (3d Dep't 1993); *People v. Ramirez*, 168 A.D.2d 908, 909 (4th Dep't 1990), *leave denied*, 77 N.Y.2d 965 (1991); *People v. Headley*, 37 Misc. 3d 815, 829-30 (Sup. Ct. Kings Cnty. 2012); *People v. Elliassen*, 20 Misc. 3d 1143(A), at *2-3 (Sup. Ct. Richmond Cnty. 2008); *People v. D.H. Blair & Co.*, 2002 N.Y. Slip Op. 50152(U), *61-64 (Sup. Ct. N.Y. Cnty. 2002); *Schrag*, 147 Misc. 2d at 518-19; *Coe*, 131 Misc. 2d at 813; *see also* Donnino, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 39, Penal Law § 15.00 ("While an 'intent to defraud' is often directed at gaining property or a pecuniary benefit, it need not be so limited." (citing cases)).

conscious objective or purpose is to do so." CJI 2d [NY] Penal Law § 175.05, "Falsifying Business Records 2," https://nycourts.gov/judges/cji/2-PenalLaw/175/175.05.pdf. Defendant cites a commentator's footnote for the proposition that the elimination of the 1979 language he cites "was apparently not intended to be substantive," DB: 23 n.10; but the Unified Court System has made clear that "all current instructions are set forth in the instant web site." N.Y. State Unified Court System, *History of Criminal Jury Instructions & Model Colloquies*, https://nycourts.gov/judges/cji/0-TitlePage/2-History.shtml.

Defendant also errs in contending (DB: 23) that the trial court's decision in *People v. Keller*, 176 Misc. 2d 466 (Sup. Ct. N.Y. Cnty. 1998), stands for a different rule. The language cited by defendant was merely describing the facts of other cases, not suggesting that those facts established the minimum standard for proving intent to defraud. And the holding of *Keller* is not as defendant describes. The defendant in that case was an escort service that characterized its business as "limousine service" on charge slips to American Express. *Id.* at 469. The court found no intent to defraud because "defendants did not intend for American Express to be deceived by the writing" and because "[t]hey knew and expected that the particular falsity of this writing would be of no moment to American Express." *Id.* Thus, intent to defraud was absent, not because there was no financial injury, but because the falsehood was so immaterial that the court concluded that the defendants did not intend to deceive at all. *See id.* Nothing like those facts is present here.

The grand jury record is sufficient to show defendant's intent to defraud, and the Court should reject defendant's motion to dismiss on this basis.

C. Defendant's intent to defraud included the intent to commit or conceal other crimes.

First-degree falsifying business records requires that defendant's intent to defraud include "an intent to commit another crime or to aid or conceal the commission thereof." PL § 175.10.

Defendant argues that the People cannot establish this element for factual and legal reasons. DB: 14-22. As described below, the factual record supports the grand jury's conclusion that defendant intended to commit or conceal another crime, and defendant's legal arguments are without merit.

1. The first-degree intent element applies where a defendant has the general intent to commit or conceal any crime, whether by himself or by someone else, and whether or not any crime was actually committed.

"[F]alsifying business records in the second degree is elevated to a first-degree offense on the basis of an enhanced intent requirement . . . not any additional actus reus element." *People v. Taveras*, 12 N.Y.3d 21, 27 (2009); *see also People v. Houghtaling*, 79 A.D.3d 1155, 1157-58 (3d Dep't 2010); *see also* Donnino, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 39, Penal Law § 175.05. Thus, establishing that a defendant intended to commit or conceal another crime does not require proof that the crime was in fact committed or resulted in a conviction. *See People v. Thompson*, 124 A.D.3d 448, 449 (1st Dep't 2015); *People v. McCumiskey*, 12 A.D.3d 1145, 1145 (4th Dep't 2004).

Indeed, courts have upheld convictions under Penal Law § 175.10 even when the defendant was acquitted of the crimes that he intended to commit or conceal, so long as the evidence showed that, notwithstanding the acquittal, defendant falsified business records with the requisite general intent. *See, e.g.*, *People v. Holley*, 198 A.D.3d 1351, 1351-52 (4th Dep't 2021); *Houghtaling*, 79 A.D.3d at 1157-58; *McCumiskey*, 12 A.D.3d at 1145-46. Nor is there any requirement that a defendant intend to conceal the commission of *his own* crime; instead, "a person can commit First Degree Falsifying Business Records by falsifying records with the intent to cover up a crime committed by somebody else." *People v. Dove*, 15 Misc. 3d 1134(A), at *6 n.6 (Sup. Ct. Bronx Cnty. 2007) (citing *People v. Smithtown Gen. Hosp.*, 93 Misc. 2d 736, 736 (Sup. Ct. Suffolk Cnty. 1978)). Thus, "Trump can be convicted of a felony even if he did not commit any crime beyond

the falsification, so long as he intended to do so or to conceal such a crime." *Trump*, 2023 WL 4614689, at *10 (citing cases).

In addition, there is "no requirement that the People allege or establish what particular crime was intended." *People v. Mahboubian*, 74 N.Y.2d 174, 193 (1989). Rather, the People need only establish "general intent to commit [or conceal] a crime . . . not [defendant's] intent to commit [or conceal] a specific crime." *People v. Thompson*, 206 A.D.3d 1708, 1708 (4th Dep't 2022); *see also People v. Mackey*, 49 N.Y.2d 274, 279 (1980).

Here, the evidence before the grand jury showed that defendant falsified the business records at issue to conceal his affair with an adult film actress, the resulting $130,000 payout, and the many actions taken by himself and others to ensure that these facts would not become publicly known before or after the 2016 election. In light of the legal principles just outlined, the relevant question for this Court is whether, in seeking to shield this election fraud scheme from public scrutiny, defendant intended to commit or conceal criminal activity or instead solely noncriminal activity. For the reasons explained below, there was sufficient evidence before the grand jury to support a *prima facie* showing that defendant had the general intent to commit or conceal a crime.[5]

2. Defendant intended to commit or conceal election law crimes.

a. Defendant falsified business records to conceal violations of the Federal Election Campaign Act and Election Law § 17-152.

The Federal Election Campaign Act ("FECA") regulates campaign contributions to candidates for federal office. *See* 52 U.S.C. §§ 30109, 30116, 30118. New York Election Law

[5] The People's response to defendant's request for a Bill of Particulars stated that the identification of particular crimes that defendant may have intended to commit or conceal was "expressly without limiting the People's theory at trial." People's Resp. to Def.'s Req. for a Bill of Particulars 5 (May 12, 2023) (citing *People v. Barnes*, 50 N.Y.2d 375, 379 n.3 (1980)). The People adhere to this express reservation of rights here.

provides that "[a]ny two or more persons who conspire to promote or prevent the election of any person to a public office by unlawful means and which conspiracy is acted upon by one or more of the parties thereto, shall be guilty of a misdemeanor." Elec. Law § 17-152. Whether relying on FECA or the Election Law crime, the evidence before the grand jury was sufficient to establish that defendant intended to commit or conceal criminal violations of state or federal election law.

As set out in the Statement of the Case above, the grand jury evidence showed that, shortly after announcing his candidacy for President, defendant conspired with others—including Cohen and [redacted]—to promote his election through a series of transactions that involved purchasing damaging information about defendant in order to suppress publication of that information. As relevant to this case, those transactions violated federal election laws because the payoffs to both [redacted] and [redacted] violated FECA's restrictions on corporate and individual contributions. Contrary to defendant's conclusory assertion in a footnote that this conduct did not violate FECA (DB: 15 n.5), both a federal court and the Federal Election Commission ("FEC") have examined these facts and found actual violations of FECA. Cohen pleaded guilty to FECA violations in connection with both the [redacted] and [redacted] payoffs and served time in prison. Tr. 937-938 ([redacted]); *see* Judgment of Conviction, *United States v. Cohen*, No. 18-cr-602 (S.D.N.Y. Dec. 12, 2018) (PX-34). And the FEC—which has exclusive civil enforcement authority for FECA violations, *see* 52 U.S.C. § 30107(e)—found that AMI and Pecker knowingly and willfully violated FECA by making a prohibited corporate in-kind contribution when they purchased McDougal's story to help defendant's presidential campaign.[6] Tr. 1089-1090 ([redacted]); *see* Factual

[6] The FEC's enforcement authority is civil, not criminal. *See* 52 U.S.C. §§ 30107(a)(6), (e). But a person who "knowingly and willfully" violates FECA's contribution limits is subject to criminal prosecution, 52 U.S.C. § 30109(d)(1)(A); and the FEC found reason to believe that both AMI and Pecker knowingly and willfully violated that statute. *See* Factual & Legal Analysis 2, 10-16, *In re*

& Legal Analysis 2, 10-16, *In re A360 Media, LLC f/k/a American Media, Inc., & David J. Pecker*, Federal Election Comm'n Matter Under Review 7324, 7332, & 7366 (Apr. 13, 2021) ("*In re A360 Media*") (PX-35).

These actions also violated Election Law § 17-152. The grand jury evidence is sufficient to support the conclusion that defendant and others "conspire[d] to promote" the "election of any person to a public office" by entering into this scheme specifically for purposes of influencing the 2016 presidential election; and that they did so "by unlawful means"—including by violating FECA through the unlawful individual and corporate contributions by Cohen, [redacted], and AMI; and (as noted in Points I.C.3 and I.C.4 below) by falsifying the records of other New York enterprises and mischaracterizing the nature of the repayment for tax purposes.

Moreover, the facts show that defendant intended to "conceal the commission" of these Election Law or FECA offenses, *see* PL § 175.10. The falsified invoices, general ledger entries, and checks here were created to reimburse Cohen for the $130,000 payout that was the basis of one of Cohen's criminal convictions under FECA. And by hiding the fact that defendant was making payments related to the underlying election fraud scheme, the falsified business records concealed the fact that defendant, Cohen, and others had conspired through unlawful means to prevent true information from being released to the public. Thus, the grand jury record included ample evidence that defendant's intent to defraud included the intent to commit or conceal election law crimes.

A360 Media (PX-35). The FEC's finding thus establishes that the facts cleared the threshold for FECA criminal culpability by AMI and Pecker.

b. A federal offense is a valid object crime that supports charges of first-degree falsifying business records.

Targeting FECA, defendant argues that he cannot be charged with first-degree falsifying business records if the crime he intended to commit or conceal is a federal crime. *See* DB: 15-17. As an initial matter, this argument provides no basis for dismissal because the evidence supports numerous state-law object crimes that defendant intended to commit, aid, or conceal. If the Court nonetheless reaches this question, the Court should reject defendant's argument because it is inconsistent with both the text and purpose of the Penal Law.

Defendant's argument relies on the definition of "crime" in Penal Law § 10.00(6). According to defendant, "crime" is defined as "a misdemeanor or felony," *id.*; both of these types of crimes are deemed to be "an offense," *id.* § 10.00(5), (6); and an "offense," as defined in § 10.00(1), must involve conduct punishable under state law. DB: 15. But defendant's textual argument is incomplete. Here, the relevant definition of "offense" includes not just "conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state"—language that would appear to be limited to state-law violations—but also conduct that can result in a fine or imprisonment pursuant to "any order, rule or regulation of *any* governmental instrumentality authorized by law to adopt the same." PL § 10.00(1) (emphasis added). The absence of any limitation of a "governmental instrumentality" to state bodies is significant, because the Penal Law includes a long list of other references to "governmental instrumentality of the state" or "within the state"—including in other definitions in Article 10—making clear that the Legislature knew how to limit the term to a state instrumentality when it wanted. *See* PL §§ 10.00(15), 156.00, 175.35, 195.20, 496.02, 496.03, 496.04, 496.05, 496.06. In turn, the definition of an "instrumentality" can include "a branch of a governing body," Black's Law Dictionary (11th ed. 2019)—thereby encompassing either Congress, which enacted FECA; or the

FEC, whose implementing regulations carry out and enforce FECA's contribution limits and prohibitions. *Compare* 11 C.F.R. §§ 110.1, 114.2(a) *with* 52 U.S.C. §§ 30116(a)(1)(A), 30118(a).[7]

Reading Penal Law § 175.10 to allow reliance on a federal object crime is also consistent with the purposes of the statute and the Court of Appeals's direction to avoid "hypertechnical or strained interpretations" of the Penal Law. *People v. Ditta*, 52 N.Y.2d 657, 660 (1981). In creating two levels of offenses, the Legislature sought to draw a "distinction in penalty" based on a "difference in *mens rea*," imposing stiffer penalties on persons committing the act with an intent to "commit another crime or to aid or conceal the commission thereof." PL § 175.10 (Commission Staff Notes); *see, e.g.*, *Dove*, 15 Misc. 3d 1134(A), at *6 n.6 (the statute's "evident purpose" is "to maintain the integrity of business records and prevent business-related crime"). But defendant's position would treat those who intend to commit or conceal federal crimes *the same* as those whose intent does not cross any criminal line whatsoever, despite a clear difference in their *mens rea*. Moreover, the threat to the accuracy of business records in New York is no different whether the person falsifying those records intends to commit or conceal a federal or a state crime. And because the object-crime enhancement punishes a criminal intent, not a criminal act, *see Taveras*, 12 N.Y.3d at 27, and the object crime need not be proven at trial or even completed, *see id.*, it makes sense for New York to deter falsification of business records to conceal or commit any crimes, regardless of whether New York specifically punishes the object crime at issue.

By contrast, applying the statute to punish only a subset of this conduct would fail to give full effect to the Legislature's intent to protect the integrity of business records in New York and

[7] Because the FEC's regulations plainly qualify as an "order, rule or regulation" under Penal Law § 10.00(1), defendant's footnote assertion that a federal statute cannot qualify is irrelevant. DB: 15 (citing *People v. C.W.*, 72 Misc. 3d 1082, 1084 n.2 (Sup. Ct. Nassau Cnty. 2021), *rev'd on other grounds*, *People v. Witherspoon*, 211 A.D.3d 108 (2d Dep't 2022)).

to enhance the penalties for those who act with the intent to commit or conceal another crime. Both the Legislature and the Court of Appeals have warned against interpretations of the Penal Law that would undercut its purposes. The Penal Law expressly provides that "[t]he general rule that a penal statute is to be strictly construed does not apply to this chapter," and instead "the provisions herein must be construed according to the fair import of their terms to promote justice and effect the objects of the law." PL § 5.00. The Court of Appeals has likewise explained that Penal Law § 5.00 "authorize[s] a court to dispense with hypertechnical or strained interpretations of [a] statute," such that "conduct that falls within the plain, natural meaning of the language of a Penal Law provision may be punished as criminal." *Ditta*, 52 N.Y.2d at 660. Defendant's reading of Penal Law § 175.10 is exactly the type of "strained interpretation" that the Court of Appeals disclaimed in *Ditta*.

Case law also supports interpreting Penal Law § 175.10 to include federal crimes as well as state crimes. In interpreting the meaning of the word "crime" in other sections of the Penal Law, appellate courts have agreed that the term can fairly encompass offenses in a foreign jurisdiction. In *People v. Kulakov*, 278 A.D.2d 519, 521 (3rd Dep't 2000), for example, the Third Department held that an out-of-state misdemeanor can qualify as the predicate crime supporting a conviction for third-degree criminal possession of a weapon, which requires that a person be "previously convicted of any crime," Penal Law § 265.02. This result followed from the plain text of the statute, since Penal Law § 265.02—like § 175.10—referred "only to a previous conviction of *any crime* not imposing the additional requirement that defendant's previous conviction arise in this State." 278 A.D.2d at 521; *see also People v. Cornish*, 104 Misc. 2d 72, 75 (Sup. Ct. Kings Cnty. 1980) (concluding that the term "any crime" included out-of-state crimes for purposes of criminal possession of a weapon in the third degree, because "[t]he phrase 'any crime' means any crime no matter where, when or how committed, and needs no judicial interpretation").

The U.S. Court of Appeals for the Second Circuit has also held that a "crime" under the Penal Law can include federal crimes, rejecting an argument remarkably similar to defendant's crabbed reading of the definitions in Article 10 of the Penal Law. In *United States v. Swarovski*, 557 F.2d 40 (2d Cir. 1977), the defendant was arrested by federal customs agents. He challenged the agents' authority to make an arrest under a federal law that, at the time, said that the authority to make a warrantless arrest derived from state law. The relevant New York law, CPL § 140.30, authorizes a warrantless arrest for a felony, or for "any offense when the latter has in fact committed such offense in his presence." The defendant cited the definition of an "offense" in Penal Law § 10.00(1) to assert that arrests were permissible "only to those felonies provided for under New York state law and to exclude from the exercise of such authority, felonies under federal law." *Swarovski*, 557 F.2d at 47. The Second Circuit rejected this argument, explaining: "We are entirely unpersuaded that the Legislature of the State of New York, in recodifying the criminal procedure law and the penal law of the State, either intended to or did in fact, dissolve all participation by the executive and judicial branches of the State government in dealing with federal criminal offenses, occurring within the boundaries of the State." *Id.* at 47; *see also People v. DeMarco*, 168 A.D.3d 31, 44 (2d Dep't 2018) ("New York state and local police officers may also make warrantless arrests for federal offenses." (citing *Swarovski*, 557 F.2d at 47)).

Although these appellate cases do not interpret Penal Law § 175.10, multiple trial courts in New York County have acknowledged that a federal object crime can support culpability for first-degree falsifying business records. In *People v. Goldstein*, for example, the court accepted a plea from a defendant who pleaded guilty to one count of falsifying business records in the first degree and allocuted that he "falsified the business records of the company, with the intent to not report filing currency transaction reports as required by the banking laws and regulations of the

U.S. of America and the State of New York." Hearing Tr. 5-6, 8, *People v. Goldstein*, Ind. No. 03765/2009 (Apr. 6, 2010) (PX-21). And in *People v. Marshall*, the court charged the jury on a Penal Law § 175.10 count that "[w]ith respect to the other crimes you may consider, . . . it is a crime for any person to willfully attempt in any manner to evade or defeat any tax imposed by the Federal Internal Revenue Code." Tr. 17,197-98, *People v. Marshall*, Ind. No. 6044/07 (Sept. 22, 2009) (PX-22); *see* Conroy Aff. ¶ 64. Although the defendant in *People v. Marshall* was acquitted on that count, this jury instruction reflects the court's conclusion that an intent to commit a federal crime suffices to establish the necessary intent under Penal Law § 175.10.

Against these precedents, defendant's only rejoinder is the Second Department's decision in *People v. Witherspoon*, 211 A.D.3d 108 (2d Dep't 2022). DB: 15-16 & n.6. But that case did not involve an interpretation of Penal Law § 175.10, and the Second Department took pains to emphasize that its holding was "limited to the construction of 'any crime'" in the statute at issue, CPL § 160.59(3)(f), and expressly stated that it was "not decid[ing] the construction of the phrase 'any crime' as presented in other statutes." *Witherspoon*, 211 A.D.3d at 120. The court noted that the statute in question expressly cross-referenced the definitions in Penal Law § 10.00, while other statutes (including Penal Law § 175.10) do not. *Id.* And the court further noted that other Penal Law and CPL references to "crime" may warrant a different interpretation because they arise "as part of different statutory language, different statutory contexts and structures, and different statutory purposes." *Id.* Indeed, the result in *Witherspoon* appears to have been driven by the statute in that case, which does not define conduct that "may be punished as criminal," *Ditta*, 52 N.Y.2d at 660, but instead identifies the circumstances under which a court could summarily deny a

defendant's motion to seal an eligible offense. This Court should therefore heed the Second Department's directive not to extend its reasoning beyond the distinct circumstances of that case.[8]

Finally, the conclusion that a federal offense can be a valid object crime is supported by this Office's longstanding practice of charging first-degree falsifying business records where the defendant intended to commit or conceal a federal crime. *See* Conroy Aff. ¶¶ 59-75. In at least six other recent instances, this Office has charged violations of Penal Law § 175.10 based on the intent to commit or conceal a federal crime. *See People v. UniCredit Bank AG*, SCI No. 1237/2019 (intent to commit or conceal violations of the International Emergency Economic Powers Act); *People v. Ahmed*, SCI No. 4066/2017 (same); *People v. BNP Paribas S.A.*, SCI No. 2925/2014 (same); *People v. Khalil*, Ind. No. 03765/09 (intent to commit violations of the Bank Secrecy Act); *People v. Goldstein*, Ind. No. 03765/09 (same); *People v. Marshall*, Ind. No. 6044/07 (intent to commit violations of federal tax law); *see* Conroy Aff. ¶¶ 60-64.[9] And this Office entered into ten deferred prosecution agreements with nine financial institutions between 2009 and 2019—resulting in combined forfeiture and penalty amounts of nearly $3.2 billion—where the Office determined that it could institute criminal prosecutions against each financial institution pursuant to Penal Law

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[8] Reading *Witherspoon* to require that *all* references to "crime" anywhere in the Penal Law be limited to state crime would lead to absurd results. For example, a person is guilty of third-degree coercion if he "compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in . . . by means of instilling in him or her a fear that, if the demand is not complied with, the actor" will "[a]ccuse some person of a crime or cause criminal charges to be instituted against him or her." PL § 135.60(4); *see also* PL §§ 135.35(3)(d) (labor trafficking); 155.05(2)(e)(iv) (larceny by extortion); 230.34(5)(d) (sex trafficking). It would undermine the obvious rationale for these statutes if federal crimes were excluded from the reference to "crime," because the threat of a federal crime is just as likely to have the effect of compelling or inducing a victim to act.

[9] *UniCredit Bank AG* and *BNP Paribas S.A.* were resolved by guilty plea and total forfeiture amounts of $861.9 million and $2.24 billion respectively. *Ahmed*, *Khalil*, and *Goldstein* were also resolved by guilty pleas. In *Marshall*, the defendant was acquitted at trial on the Penal Law § 175.10 charge. *See* Conroy Aff. ¶¶ 60-64.

§ 175.10, with only the International Emergency Economic Powers Act as the object crime. *See* Conroy Aff. ¶¶ 65-75.

Thus, the plain text and purpose of Penal Law § 175.10, persuasive precedent, and longstanding practice all support an interpretation that would allow a federal crime to be the object for a charge of falsifying business records in the first degree.[10]

c. Election Law § 17-152 is a valid object crime.

Defendant claims that Election Law § 17-152 cannot serve as an object offense under Penal Law § 175.10 because the statute applies only to state office or is preempted by federal law. DB: 17-19. These arguments are meritless.[11]

First, defendant argues that Election Law § 17-152 "does not cover elections relating to federal positions" because the statute's reference to "a public office" should be interpreted to mean only state or local offices, not federal offices. DB: 17-18. But the Legislature has explicitly provided that the Election Law "shall govern the conduct of all elections," including "any federal" election, unless "a specific provision of law" says otherwise. Election Law § 1-102. And here, § 17-152's plain text "makes no distinction between state and federal elections." *Trump*, 2023 WL 4614689, at *11.

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[10] Defendant's suggestion (DB: 32) that the rule of lenity requires a different interpretation is meritless. As the Court of Appeals has made clear, the mere possibility of a narrower construction does not trigger the rule of lenity; rather, a statue must be so ambiguous that a court can hazard "no more than a guess" about a criminal provision's intended meaning. *People v. Badji*, 36 N.Y.3d 393, 405 (2021) (quoting *Muscarello v. United States*, 524 U.S. 125, 138-139 (1998)). Here, the multiple interpretive channels explained in the text preclude application of the rule of lenity.

[11] Defendant also notes that "campaign finance violations are addressed under Article 14 rather than Article 17 of the Election Law." DB: 17. This argument is difficult to understand, and defendant does not explain it. To the extent defendant intends to suggest that the existence of state campaign-finance laws exempts a person from the anti-conspiracy provisions in Election Law § 17-152, defendant does not identify any basis for such a limitation and none is apparent.

Nor does the "ordinary and commonly understood meaning" of the term support defendant's constrictive interpretation. *People v. Andujar*, 30 N.Y.3d 160, 163 (2017) (cleaned up). Dictionary definitions of "public office" are not limited to state or local offices. *See* Black's Law Dictionary 1235 (rev. 4th ed. 1968); Webster's Third New International Dictionary 1567 (Philip Babcock Gove ed. 1969). And authorities have long construed the phrase to mean any position in any "governmental system." 18A N.Y. Jurisprudence 2d – Civil Servants § 1; *see also Van Ingen v. Star Co.*, 1 A.D. 429, 431 (1st Dep't 1896) (applying statute prohibiting "bribery at any election" to presidential election), *aff'd on op. below*, 157 N.Y. 695 (1898).

Contrary to defendant's contention (DB: 17), this reading of Election Law § 17-152 is reinforced rather than undermined by the statutory definition of "public officer" as a "person who holds an elective or appointive office of the state, separate authority or any political subdivision of the state." Elec. Law § 17-100(4). That separate definition—which is distinct from the definition for "public office"—shows that where the Legislature intended to limit the definition to state office, it did so expressly. *See also* Pub. Off. Law § 2 (defining "state office" and "local office"). But the Legislature did not include a similarly restrictive definition of "public office" in the Election Law or otherwise indicate any intention to limit that facially broad term to state and local offices.[12] To the contrary, the Election Law uses the term "public office" repeatedly, including in provisions that indisputably govern both federal and state elections. *See* Elec. Law § 6-100 (establishing rules governing the nomination of candidates for "public office"); *see also, e.g., Queens Cnty. Republican Comm. v. N.Y. State Bd. of Elections*, 222 F. Supp. 2d 341, 346

[12] For the same reason, defendant is not aided (DB: 18) by the Penal Law provisions relating to "public servants," *e.g.*, Penal Law § 195.05—which, unlike in Election Law § 17-152, is expressly limited to "any public officer or employee of the state or of any political subdivision thereof or of any governmental instrumentality within the state," Penal Law § 10.00(15).

(E.D.N.Y. 2002) (recognizing that all congressional candidates must comply with Election Law article 6).

In any event, defendant's argument based on "public office" would fail even if that term were limited to state offices. Unlike other federal candidates, the president is not elected directly, but rather through the appointment of state electors who are chosen by voters. U.S. Const. art. II, § 1. Controlling precedent squarely holds that "the office of [presidential] elector is a public office and, as such, is subject to the provisions of the Election Law governing the election of candidates for public office." *Mahoney v. Lomenzo*, 43 Misc. 2d 1094, 1096 (Sup. Ct. Albany Cnty.), *aff'd*, 21 A.D.2d 971 (3d Dep't), *aff'd*, 14 N.Y.2d 952 (1964).

Second, defendant argues that Election Law § 17-152 is preempted "to the extent" it targets "conspiracies to violate FECA." DB: 18. As a threshold matter, this preemption argument provides no basis to dismiss the actual charges against defendant, for several reasons. As noted in Point I.C.2 above, the People's argument under Election Law § 17-152 is not limited to "conspiracies to violate FECA," and instead encompasses other "unlawful means" under other state and federal laws. In addition, the charges here are under Penal Law § 175.10, not Election Law § 17-152. As defendant does not contest, federal law does not preempt Penal Law § 175.10 itself. *See Trump*, 2023 WL 4614689, at *11. And, as already discussed, a conviction under Penal Law § 175.10 requires only proof of general intent to commit or conceal a crime, not proof that a specific crime actually occurred—whether under Election Law § 17-152 or otherwise. Thus, even assuming that federal law would preempt any effort to *directly* prosecute defendant for violations of Election Law § 17-152, that would be immaterial because preemption would not preclude the People from establishing, as a matter of fact, defendant's general intent to commit or conceal those crimes (as well as others). Defendant cites no authority for his novel theory that he can obtain dismissal of

the charges against him based on federal preemption of a hypothetical prosecution for a crime that is not an element of those charges. The federal court that rejected his removal petition rejected his preemption argument on precisely this ground. *Trump*, 2023 WL 4614689, at *10.

This Court can disregard preemption on this basis alone. But even assuming that this Court were to consider whether a hypothetical prosecution under Election Law § 17-152 would itself be preempted, it should reject defendant's arguments. As defendant acknowledges (DB: 19 n.8), the federal court that denied his removal petition squarely held that Election Law § 17-152 "does not fit into any of the three categories of state law that FECA preempts." *Trump*, 2023 WL 4614689, at *11. That conclusion was correct, and defendant has provided no reason for this Court to disagree with the federal court's careful reasoning.

The "three categories of state law" referenced in the federal decision derive from FEC regulations limiting FECA's preemptive scope. Those regulations describe preemption in only three specific subject areas: "[o]rganization and registration of political committees supporting federal candidates," "[d]isclosure of receipts and expenditures by Federal candidates and political committees," and "[l]imitation on contributions and expenditures regarding Federal candidates and political committees." 11 C.F.R. § 108.7(b); *see WinRed, Inc. v. Ellison*, 59 F.4th 934, 942 (8th Cir. 2023) (collecting cases recognizing that FEC regulations are "definitive evidence" of the scope of FECA preemption). Given these narrow categories of preemption, courts have recognized a "strong presumption against [FECA] preemption," *e.g.*, *Weber v. Heaney*, 995 F.2d 872, 875 (8th Cir. 1993), and applied preemption narrowly to reach only state laws governing "the regulation of the conduct and financing of campaigns for Federal elective office," *Matter of Holtzman v. Oliensis*, 91 N.Y.2d 488, 495 (1998); *see Stern v. Gen. Elec. Co.*, 924 F.2d 472, 475 n.3 (2d Cir. 1991) ("[C]ourts have given [FECA] a narrow preemptive effect in light of its

legislative history."). Indeed, courts routinely reject FECA preemption challenges to general state laws that are applicable to a federal election. *See WinRed*, 59 F.4th at 942-44 (state consumer-deception law); *Dewald v. Wriggelsworth*, 748 F.3d 295, 302-03 (6th Cir. 2014) (state laws prohibiting fraud); *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 200-01 (5th Cir. 2013) (state fraudulent-transfer claim); *Stern*, 924 F.2d at 474-75 (state corporate-waste laws).

So too here. As the federal district court correctly concluded, the Election Law's general prohibition against conspiring to promote or prevent an election by unlawful means is not "a specific regulation of conduct covered by FECA" that triggers federal preemption. *Trump*, 2023 WL 4614689, at *12.[13] Election Law § 17-152 does not "*directly* target campaign contributions and expenditures" like other provisions of the Election Law that courts have found were preempted by FECA. *Trump*, 2023 WL 4614689, at *11 (emphasis added). Rather, Election Law § 17-152 targets conspiracies to promote or prevent elections—and conspiracies to pursue a substantive offense are a distinct crime from the substantive offense itself. *See Iannelli v. United States*, 420 U.S. 770, 777 (1975); *People v. Arroyo*, 93 N.Y.2d 990, 992 (1999).

FEC regulations support this conclusion. A "savings clause" in those regulations expressly exempts state laws from preemption that prohibit "false registration, voting fraud, theft of ballots, *and similar offenses*." 11 C.F.R. § 108.7(c)(4) (emphasis added). Courts have construed this clause "broadly" to save, for example, state "anti-deceptive-practices laws," *WinRed*, 59 F.4th at 943, and state laws prohibiting "obtaining money under false pretenses, common-law fraud, and larceny by

[13] Defendant's contention that the federal district court "acknowledged" that federal law would preempt Election Law § 17-152 in some cases (DB: 19 n.8) is impossible to square with the court's unqualified conclusion that Election Law § 17-152 is "not preempted by FECA" in *this* case. *Trump*, 2023 WL 4614689 at *11.

conversion," *Dewald*, 748 F.3d at 303, even as applied to federal campaigns. Here, the Election Law's anti-conspiracy provision fits comfortably within the broad category of "similar offense[s]" that FECA preemption expressly does not reach.

In short, there is no legal barrier to concluding that defendant falsified business records to conceal an Election Law conspiracy in violation of Election Law § 17-152.

3. Defendant intended to commit or conceal tax crimes.

The grand jury evidence also establishes that defendant's intent to defraud included an intent to commit or conceal tax crimes. The evidence showed that defendant and others were aware of the tax consequences of the reimbursement to Cohen; that they sought to manipulate those consequences by altering the amount and manner in which he was paid and by falsely characterizing the nature of the payments; and that the business records at issue here perpetuated these falsifications and thus concealed the nature of the underlying scheme.

Specifically, defendant reimbursed Cohen twice the amount he was owed for the [redacted] payoff so Cohen could characterize the payments as income on his tax returns and still be left whole after paying approximately 50% in income taxes. It was important that Cohen have the ability to (falsely) characterize the payments as income on tax returns rather than (truthfully) treating them as reimbursements for Cohen's $130,000 payment to an adult film actress, which would have resulted in different tax consequences. This agreement to structure the payments specifically in response to potential tax consequences was reflected in [redacted] handwritten notes on the Essential Consultants bank statement noting that the debt to Cohen would be "[redacted]" to twice the amount owed; [redacted]; and testimony from both [redacted] and [redacted] explaining that [redacted]. GJ-5; GJ-6; Tr. 149-170 ([redacted]); Tr. 887-890 ([redacted]).

That is, despite knowing that the payments to Cohen were not in fact income for legal services—and were instead an expense reimbursement for the [redacted] payoff—defendant paid Cohen double the amount he was owed in order to account for the tax consequences of that deception. And the whole point of grossing up the reimbursement at the time was so Cohen could falsely report it as income; pay taxes on it; and thereby disguise the true nature of the repayment. This was an unusual decision—[redacted] Tr. 167 ([redacted]).

Falsely characterizing the nature of a payment to tax authorities has criminal consequences under state and local tax laws, as well as federal law. Under New York law, "willfully engaging in an act or acts or willfully causing another to engage in an act or acts pursuant to which a person . . . knowingly supplies or submits materially false or fraudulent information in connection with any return, audit, investigation, or proceeding" is criminal tax fraud in the fifth degree. Tax Law §§ 1801(a)(3), 1802; *see also* N.Y.C. Admin. Code §§ 11-4002(a)(3), 11-4003 (City criminal tax fraud in the fifth degree). Under federal law, it is a felony for a person who "[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter." 26 U.S.C. § 7206(1); *see United States v. LaSpina*, 299 F.3d 165, 179 (2d Cir. 2002). It is also a felony for any person who "[w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter." 26 U.S.C. § 7206(2); *see United States v. Foley*, 73 F.3d 484, 493 (2d Cir. 1996); *United States v. Aracri*, 968 F.2d 1512, 1523-24 (2d

Cir. 1992). The pervasiveness of regulations at every level reinforcing the importance of honest disclosures to tax authorities supports an inference that defendant was aware that misrepresentations in this area could give rise to criminal liability. The grand jury could thus conclude that defendant decided to falsify business records to disguise the true nature of payments for this "grossed up" reimbursement with the intent to conceal conduct—namely, the false characterization of defendant's payments as legal fees rather than an expense reimbursement—that could constitute tax crimes.

Defendant argues that because the result of this scheme would be the overstatement of Cohen's income—and thus the imposition of higher tax liability than if the payments had been honestly treated as reimbursement—there is no evidence that any information submitted to the government would be "materially false or fraudulent." DB: 20. This argument is legally flawed. Under New York law, criminal tax fraud in the fifth degree does not require financial injury to the state. *See* Tax Law §§ 1801(c), 1802; *see also* N.Y.C. Admin. Code §§ 11-4002(a)(3), 11-4003. Federal tax law also imposes criminal liability in instances that do not involve underpayment of taxes. *See, e.g.*, *United States v. Greenberg*, 735 F.2d 29, 31 (2d Cir. 1984) (citing cases); *United States v. Goldman*, 439 F. Supp. 337, 344 (S.D.N.Y. 1977); *see also generally* Stanley Veliotis, *Fictitiously Overstating Taxable Income*, 55 U.S.F. L. Rev. 205, 228-35 (2021) (citing cases involving federal tax crimes related to overstating taxable income). There is no basis for defendant's assertion that materiality is satisfied solely by potential underpayment; rather, false statements can be material if they do nothing more than "hinder [tax authorities] in carrying out such functions as the verification of the accuracy of that return." *Greenberg*, 735 F.2d at 31.

Defendant also argues that the grand jury record does not contain proof that a tax crime was ultimately completed, pointing to the absence of Cohen's tax returns in the grand jury record.

DB: 20. That argument is legally irrelevant for the reasons described above—the relevant question is whether defendant had the necessary *intent* to commit or conceal another crime; it is not necessary that the separate crime actually be committed, and proof of such a crime is not an element of the offense. *See Taveras*, 12 N.Y.3d at 27; *Holley*, 198 A.D.3d at 1352; *Houghtaling*, 79 A.D.3d at 1157-58.

Defendant finally argues that there was insufficient evidence that he knew of the "grossing up" scheme. DB: 20. But the grand jury could reasonably conclude that defendant intended to commit or conceal tax crimes from the simple fact that he knew he was disguising an expense reimbursement as income in the form of legal fees. Tr. 888-890 ([redacted]). The evidence further shows that defendant specifically agreed to repay Cohen the $130,000 [redacted] payoff and a supplemental $60,000 bonus, and that Cohen and [redacted] discussed directly with defendant that Cohen would be repaid a total amount of $420,000 to be broken into twelve payments as a retainer for legal fees. Tr. 870, 887-890 ([redacted]). The grand jury could readily infer that defendant knew the total reimbursement of more than double the amount owed included money to account for the tax consequences of characterizing the reimbursement as income—particularly given the evidence that [redacted] documented the "grossing up" agreement, GJ-5; that defendant himself approved his personal bills, Tr. 138 ([redacted]); and that defendant was "[redacted]" and a "[redacted]," Tr. 27-29, 56 ([redacted]), who was therefore unlikely to overlook a doubled-up expense reimbursement of a type that [redacted] said he had never seen the Trump Organization pay before, Tr. 167 ([redacted]). Finally, in light of the evidence of defendant's extensive business experience and the extremely close attention he paid to business details, the grand jury could infer that defendant was aware that an expense reimbursement to an employee is not generally taxable, but income is. Tr. 27-29 ([redacted]); Tr. 142-43 ([redacted]).

The factual evidence is therefore legally sufficient to support the conclusion that defendant's intent to defraud included the intent to commit, aid, or conceal tax crimes.

4. Defendant intended to commit or conceal the falsification of other business records.

In the course of carrying out defendant's scheme, several of the participants made and caused false entries in the business records of multiple entities in New York. The evidence before the grand jury supported the inference that defendant falsified the business records at issue here with the intent to conceal these earlier falsifications of other business records.

[redacted] testified, for example, [redacted]. Tr. 1077-1088, 1092-1093 ([redacted]); GJ-79; GJ-80; GJ-81. Both the [redacted] and the [redacted] source contracts were falsely recorded in numerous AMI business records as promotional expenses to be paid from [redacted] budget as president of the company because the contract amounts exceeded the budget authority of the editorial department, where the expenses should have been classified. Tr. 1083-1088, 1092-1093 ([redacted]); GJ-80; GJ-81. And when [redacted] took steps to have the Trump Organization reimburse AMI for the [redacted] payoff by purchasing the "limited life rights" portion of the AMI-[redacted] contract, [redacted] had a [redacted] prepared and maintained in AMI's records that falsely described the payment as "[redacted]."[14] Tr. 1077-1083 ([redacted]); GJ-79.

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[14] Defendant incorrectly argues that the [redacted] (GJ-79) was not properly admitted into evidence. DB: 21 n.9. The [redacted] was admitted through a witness who had personal knowledge of its purpose and who testified that the exhibit was a fair and accurate copy of the [redacted] he had seen before. Tr. 1077-1078 ([redacted]). The exhibit was entered to show that the [redacted] had been created, not for the truth of the matters asserted therein; in fact, it was entered specifically to show that its contents were false. Tr. 1081 ([redacted]). Because the document was offered for a nonhearsay purpose and not for its truth, the People did not have to establish that it qualified as a business record. *See People v. Patterson*, 28 N.Y.3d 544, 550-51 (2016). Defendant's misdescription of the [redacted] as a "draft" is also unpersuasive; nothing about the document or [redacted] testimony indicates it was a draft. GJ-79; Tr. 1077-1083 ([redacted]). That the Trump Organization did not

In addition to the AMI records—which are the sole focus of defendant's motion (DB: 21-22)—other New York business records were falsified in connection with Cohen's execution of the [redacted] payoff. As noted earlier, Cohen formed a company called Essential Consultants LLC as a conduit for the [redacted] payment. When he opened a bank account in the LLC's name, its business purpose was falsely described in the bank's [redacted] as "[redacted]" based on information [redacted] provided to the bank, when in fact Cohen created the LLC as a shell company to launder the [redacted] transaction. GJ-57. And when Cohen directed the bank to wire the $130,000 payment to [redacted] to purchase [redacted] silence, he completed a wire transfer form that falsely described the purpose of the wire as "Retainer." GJ-61: *see also* Information ¶ 34, *United States v. Cohen*, No. 18-cr-602 (S.D.N.Y. Aug. 21, 2018) ("On the bank form to complete the wire, COHEN falsely indicated that the 'purpose of wire being sent' was 'retainer.'") (the "*Cohen* Information") (PX-1).

Thus, the participants in defendant's election fraud scheme also caused the falsification of other New York business records to help defendant execute and conceal the scheme. And the false business records charged in this prosecution helped to conceal this earlier wrongdoing by disguising the fact that the payments being made by defendant to Cohen were directly related to this underlying scheme.

Defendant argues that the grand jury could not conclude that he intended to conceal this conduct because "there was no evidence" that defendant was aware of these earlier false business records offenses. DB: 22. The grand jury record rebuts this assertion. Among other evidence, the

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ultimately reimburse AMI for the [redacted] payoff is immaterial to whether the [redacted] was "kept or maintained" to reflect AMI's "condition or activity," PL § 175.00(2), which [redacted]. Tr. 1077-1083 ([redacted]).

grand jury could infer defendant's awareness from (a) [redacted]; (b) [redacted]; (c) [redacted]; and (d) [redacted].

Tr. 56, 1081-1082 ([redacted]); Tr. 838-839, 843-845, 871-872 ([redacted]); GJ-71.

More broadly, even if defendant did not know the specific actions [redacted] and Cohen would undertake to falsify New York business records, the grand jury could nonetheless infer his general awareness that crimes of this nature were reasonably likely to occur. After all, the overriding purpose of defendant's election fraud scheme was to suppress negative information and shield the scheme from public disclosure. It would have been utterly incompatible with that purpose for the participants in this scheme to honestly describe the scheme's objective and operation. And it is reasonable to infer that defendant knew that in carrying out the scheme, the participants would have needed to disguise the true nature of the payments in New York business records, since Cohen had to make the $130,000 payment through a bank and a newly invented shell company, and [redacted] intended to make similar payments through AMI, a New York enterprise. Thus, examining the evidence in the light most favorable to the People, the grand jury could conclude that these facts, and the inferences that logically flow from the facts, establish defendant's intent to conceal the books-and-records crimes that reasonably flowed from his instruction to shield the [redacted] and [redacted] payoffs from disclosure. *See People v. Mikuszewski*, 73 N.Y.2d 407, 414-15 (1989); *Park*, 163 A.D.3d at 1063; *Monteiro*, 93 A.D.3d at 899-900.

In addition, the grand jury could separately conclude that once Cohen submitted the first of the fraudulent invoices to the Trump Organization in February 2017—falsely requesting "payment for services rendered" "[p]ursuant to the retainer agreement," GJ-20—every one of the falsified business records that followed demonstrates defendant's intent to conceal the first, and each subsequent, false business records crime. In other words, because defendant set in motion a repayment scheme that relied on mischaracterizing the reimbursement to Cohen as a retainer for legal services, every one of the false business records that followed Cohen's first invoice was a necessary part of carrying out that concealment. These serial falsifications were inherently linked because they all involved partial payments to Cohen to satisfy an overall "grossed up" reimbursement whose true nature defendant intended to conceal. And every subsequent false record was intended to conceal the earlier ones, since if the falsity of any one of these entries had come to light, that disclosure would have unraveled the entire scheme and confirmed the false nature of the representations in all of the business records at issue here. The grand jury could thus conclude that for every count of the indictment except the first, defendant's intent to defraud included an intent to conceal the falsified business records crimes that defendant was serially committing throughout all of 2017.

D. Defendant is not entitled to the complete grand jury minutes, and the grand jury proceedings were properly conducted.

Defendant seeks to compel disclosure of the complete grand jury minutes. DB: 24-26. Because defendant has not met the statutory standard for disclosure, this request should be denied.

CPL § 245.20(1)(b) requires the People to disclose "[a]ll transcripts of the testimony of a person who has testified before a grand jury, including but not limited to the defendant or a co-defendant." *Id.* The required disclosure is limited to testimony, and does not include other portions of the grand jury minutes (including, for example, the prosecutor's instructions on the law). *See, e.g.*,

People v. Askin, 68 Misc. 3d 372, 382 (Nassau Cnty. Ct. 2020); Donnino, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 11A, CPL § 245.10; *see also Trump Corporation* 2. On May 23, 2023, the People produced to defendant all transcripts that contained testimony as required by CPL § 245.20(1)(b), withholding only those pages of the grand jury minutes that did not contain testimony. The People applied limited redactions to the discoverable grand jury minutes solely to shield the names and identifying information of certain personnel of this Office, as permitted by the Court's May 8, 2023 Protective Order.

Disclosure of the non-discoverable portions of the grand jury minutes is permitted if the Court, "after examining the minutes, finds that release of the minutes, or certain portions thereof, to the parties is necessary to assist the Court in making its determination on the motion." CPL § 210.30(3). In those circumstances, the Court "may" authorize release of the minutes to defendant. *Id.* This determination is committed to the Court's discretion and can be made only after the party seeking disclosure establishes "a compelling and particularized need" for the grand jury minutes. *People v. Robinson*, 98 N.Y.2d 755, 756 (2002). Defendant has not made this showing.

Defendant does not even argue that disclosure to defendant of the complete grand jury minutes is "necessary" to assist the Court's review, CPL § 210.30(3), and his request should be denied on that basis alone. Nor does his motion sufficiently articulate a compelling and particularized need for the complete grand jury minutes. Defendant first surmises that the People's charge to the grand jury on the intent element of first-degree falsifying business records may not have identified any object offense that defendant intended to commit or conceal, and that such an omission may render the indictment invalid under *People v. Martinez*, 83 N.Y.2d 26 (1993). DB: 25. But as an initial matter, the Court of Appeals has already held, in interpreting the burglary statute, that where "intent to commit a crime" is an element of an offense, the indictment need not specify, and the

People need not establish, any particular object crime. *See Mackey*, 49 N.Y.2d at 279. Defendant elsewhere disputes *Mackey*'s applicability here (DB: 40-42), but as explained in Point VI below, these arguments are meritless. Thus, even if defendant's surmise were correct, there would be no error in grand jury instructions that omitted any specification of the crimes that defendant intended to commit or conceal here. And if the instructions here did specify some object crime, then defendant's challenge would be academic.

Moreover, *Martinez* provides no basis for disclosing the minutes. *Martinez* held that a guilty verdict from the petit jury "must be set aside where the jurors in reaching their verdict may have relied on an illegal ground or on an alternative legal ground and there is no way of knowing which ground they chose." 83 N.Y.2d at 32. But there is no basis for finding that the grand jury here relied on *any* illegal ground in finding that defendant falsified business records here with the intent to conceal or commit another crime. And more fundamentally, the People are not aware of any case applying *Martinez* to the grand jury; and the distinct principles that apply to reviewing grand jury proceedings weigh heavily against transplanting *Martinez*'s petit jury holding into this distinctive context. "Dismissal of an indictment for impairment of the integrity of a Grand Jury proceeding is an extraordinary remedy which requires meeting [the] very high and precise standard" of establishing that the integrity of the grand jury has been impaired. *People v. Jones*, 239 A.D.2d 234, 235 (1st Dep't 1997). In light of this high standard, the Court of Appeals has made clear "that a Grand Jury need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law." *People v. Calbud, Inc.*, 49 N.Y.2d 389, 394 (1980). "In the ordinary case," it is enough to "read[] to the Grand Jury from the appropriate sections of the Penal Law." *Id.* at 395 n.3. When measured against this more lenient standard, the Court's review of the record will show that the grand jury was properly instructed on the law.

Defendant next argues that [redacted] was "extraneous information" that "is not competent evidence" as to defendant. DB: 25-26. Even assuming [redacted] was extraneous or inadmissible—which it was not[15]—it is a non sequitur to argue that non-discoverable portions of the grand jury minutes should be disclosed as a result. As noted above, defendant has already received all of the grand jury testimony of every witness, as required by CPL § 245.20(1)(b), and has also received every exhibit presented to the grand jury. *See* Conroy Aff. ¶ 48. To the extent defendant has any basis to contend that the grand jury considered inadmissible testimony or evidence, he already received in discovery everything from the proceedings that could possibly relate to such an argument—all testimony, and all exhibits. Defendant's vague reference to possible evidentiary errors does not constitute a "compelling and particularized need" for disclosure of non-discoverable portions of the grand jury minutes that would not bear on his claimed concerns regarding inadmissible evidence in any event. *Robinson*, 98 N.Y.2d 755, 756 (2002).

Defendant also speculates that the People's grand jury presentation somehow capitalized on the "venal and sordid nature" of defendant's conduct, DB: 26, but the Court's own review of the grand jury minutes will confirm that nothing remotely of the sort occurred. Because defendant has not met his burden of demonstrating a compelling and particularized need for the minutes, and

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[15] Cooperators are of course permitted to testify against their co-conspirators, and when they do, eliciting testimony about any inducements made to such witnesses only serves to *lessen* the risk of prejudice to the defendant. *See People v. Hunte*, 168 Misc. 2d 466, 473 (Sup. Ct. N.Y. Cnty. 1995) (at trial, defendant should be permitted to question cooperating witness about the benefits of his plea agreement). Here, as defendant himself notes, the People elicited that [redacted]. DB: 25-26; Tr. 1090-1092 ([redacted]; *see* Letter from Robert Khuzami, Acting United States Attorney for the Southern District of New York, to American Media, Inc. (Sept. 20, 2018) (PX-36). In addition, the People elicited testimony regarding [redacted]. Tr. 19 ([redacted]). Thus, the grand jury was on notice that [redacted] and AMI had received benefits in connection with [redacted] testimony and AMI's statement of admitted facts.

because defendant's assistance is not necessary for the Court's review, his request should be denied. *Robinson*, 98 N.Y.2d at 756.

POINT II

THE CHARGES ARE TIMELY (Answering Defendant's Brief, Points I and IV).

Defendant claims that the People waited too long to secure this indictment, violating the applicable statute of limitations (DB: 32-35) and constitutional prohibitions on excessive and unjustified preindictment delay (DB: 7-9). These claims are meritless. The charges are timely both because the Governor's COVID-19 Executive Orders extended the statute of limitations for these criminal charges, and because defendant was continuously outside the state after commission of the charged crimes. And the People's good-faith investigation falls comfortably within the "significant amount of discretion" that the Constitution affords prosecutors in deciding when to bring charges. *People v. Decker*, 13 N.Y.3d 12, 15 (2009).

A. The prosecution was commenced within the statutory deadline.

The statute of limitations for first-degree falsifying business records is five years from the date the offense was committed. *See* CPL § 30.10(2)(b). The charges in the indictment were brought six years and 44 days after the date the earliest offenses were committed,[16] meaning that they are timely if the five-year period is tolled for one year and 44 days (that is, 409 days) or more. That amount of tolling is easily satisfied here, for two independent reasons.

[16] The first offenses charged in the indictment were committed, at the earliest, on February 14, 2017, *see* Indictment (Counts 1 to 4); GJ-9, and the People filed the indictment on March 30, 2023. PX-8. (Defendant incorrectly states that the indictment was filed on April 4, 2023. DB: 33.)

1. The Governor's Executive Orders tolled the statute of limitations.

On March 20, 2020, Governor Cuomo issued Executive Order 202.8, which ordered that "any specific time limit for the commencement, filing, or service of any legal action, . . . including but not limited to the criminal procedure law, . . . is hereby tolled." 9 N.Y.C.R.R. 8.202.8 (Mar. 20, 2020); *see also* 9 N.Y.C.R.R. 8.202.101 (Apr. 6, 2021). That toll continued until the Governor issued Executive Order 202.106 on May 6, 2021, which "rescinded," with exceptions not relevant here, "[a]ny and all suspensions and modifications of the Criminal Procedure Law presently in effect." 9 N.Y.C.R.R. 8.202.106 (May 6, 2021). As this Court has already recognized, the statute of limitations was thereby tolled for one year and 47 days (or 412 days)—the period from March 20, 2020 to May 6, 2021. *See Trump Corporation* 6. Applying that tolling period here renders the charges timely.

Defendant argues that the Governor's COVID-19 Executive Orders suspended, rather than tolled, the limitations period. DB: 33-34. The First Department has squarely rejected this contention. *See People v. Trump*, 217 A.D.3d 609, 611 (1st Dep't 2023) (citing *Murphy v. Harris*, 210 A.D.3d 410, 411 (1st Dep't 2022)); *see also Brash v. Richards*, 195 A.D.3d 582, 584-85 (2d Dep't 2021); *People v. Inciardi*, Ind. No. 72426-22, Decision & Order on Defendant's Omnibus Motion 1 (Sup. Ct. N.Y. Cnty. Jan. 13, 2023). Defendant's contention that the March 2020 Executive Order "used the word 'toll' once" (DB: 34) counters his own argument, because the single use of the word "toll" appears in the operative paragraph actually modifying the limitations periods in the CPL (and other statutes). *See* 9 N.Y.C.R.R. 8.202.8.

Defendant is also wrong to suggest that a different interpretation of the Executive Order is warranted for criminal matters. DB: 34. The plain text of the Executive Order forecloses this argument: it identifies time limitations in a broad range of civil and criminal statutes and declares that all of them are "hereby tolled." 9 N.Y.C.R.R. 8.202.8. And the clarity of this language

precludes application of the rule of lenity (DB: 34), which is triggered only as a last resort when there is some "grievous ambiguity or uncertainty" in a criminal statute. *Badji*, 36 N.Y.3d at 404-05 (quoting *Muscarello*, 524 U.S. at 138-39). Even assuming the rule of lenity has any application to an Executive Order regarding state-law limitations periods,[17] it is inapplicable here, where the First Department and other courts have already concluded that the Executive Order unambiguously tolled state-law statutes of limitations. *See id.*

2. The statute of limitations was also tolled because defendant was continuously outside the state.

In the alternative, the Court could hold that the statute of limitations was tolled because defendant was "continuously outside this state" while serving as President and since his departure from that office. CPL § 30.10(4)(a)(i).

The CPL provides that "[i]n calculating the time limitation applicable to commencement of a criminal action, the following periods shall not be included: (a) Any period following the commission of the offense during which (i) the defendant was continuously outside this state." *Id.* Under this doctrine, "all periods of a day or more that a nonresident defendant is out-of-State should be totaled and toll the Statute of Limitations." *People v. Knobel*, 94 N.Y.2d 226, 230 (1999); *see also People v. Weinstein*, 207 A.D.3d 33, 51-52 (1st Dep't 2022). Here, New York State Police records indicate that defendant was outside of New York for well more than the 409 days needed to render these charges timely. Conroy Aff. ¶ 80. According to those records, defendant was

[17] *But see United States v. McPherson*, 81 M.J. 372, 382 n.3 (C.A.A.F. 2021) ("We doubt that the rule of lenity applies to the interpretation of statutes of limitations."); *Sash v. Zenk*, 439 F.3d 61, 66 (2d Cir. 2006) ("We have found no case in which the rule of lenity was applied to matters 'outside the sentence.'").

present in New York on only approximately 28 days between February 14, 2017 and January 20, 2021, meaning that he was outside of the state for approximately 1408 days.[18] *Id.*

Defendant argues that he "returned frequently to" New York after the date the charged offenses were allegedly committed. DB: 35. That conclusory claim is wholly inadequate to establish untimeliness because "[i]t is defendant's burden . . . to show the dates on which he was in this State during the relevant period, in order to stop the toll." *Knobel*, 94 N.Y.2d at 299; *see also People v. Chase*, 299 A.D.2d 597, 598-99 (3d Dep't 2002). Moreover, to the extent that defendant is suggesting that his "frequent[]" returns to New York preclude a finding that he was "continuously outside this state" under CPL § 30.10(4)(a)(1), the Court of Appeals has already rejected such an argument, holding that the statute of limitations is tolled for "all periods of a day or more" where a defendant is outside of the state, and that there "need not be a single uninterrupted period of time" to trigger the toll, *Knobel*, 94 N.Y.2d at 230.

Defendant's contention that he "was not—and could not be—difficult to apprehend" during the limitations period because his whereabouts were well known during his presidency (DB: 35) is both inconsistent with his prior litigation position and legally irrelevant. Defendant argued to the United States Supreme Court during litigation over the enforceability of grand jury subpoenas that he was immune from arrest while serving as President. Brief for Petitioner at 29, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19-635). A defendant who by his own assertion could not be apprehended for nearly four years of the limitations period (from February 2017 to January 2021) is plainly subject to CPL § 30.10(4)(a)(i) tolling. More fundamentally, the difficulty of identifying

[18] A separate review of a public compilation of defendant's calendar from official sources during his presidency confirms that he was outside of New York for at least 1326 days from February 14, 2017 to January 20, 2021 (not counting 49 days during that time period for which no public records are available). PX-38. Whether defendant was outside the state for 1408 days or 1326 days during his presidency, these charges are timely under CPL § 30.10(4)(a)(i) by almost one thousand days.

and apprehending out-of-state defendants is the justification for the tolling rule, *see People v. Seda*, 93 N.Y.2d 307, 312 (1999), but nothing in the statute requires that an out-of-state defendant actually be difficult to identify or apprehend. Defendant's argument confuses the statute's rationale with its operation.

B. The People did not unconstitutionally delay bringing charges against defendant.

In addition to his statutory claim, defendant also argues that the People unconstitutionally delayed charging him. DB: 7-9. Because the period of approximately four and a half years from the date the investigation was opened to the date of defendant's indictment is justified, within the People's discretion, and caused no prejudice, the preindictment-delay claim fails.

Under the New York Constitution,[19] the People have a "significant amount of discretion" in deciding when to bring criminal charges. *Decker*, 13 N.Y.3d at 15. When, as here, delay occurs before rather than after the indictment, the People "necessarily have wider discretion to delay commencement of prosecution for good faith, legitimate reasons." *People v. Wiggins*, 31 N.Y.3d 1, 13 (2018). In that posture, "a determination made in good faith to defer commencement of the prosecution for further investigation or for other sufficient reasons, will not deprive the defendant of due process of law even though the delay may cause some prejudice to the defense." *People v. Singer*, 44 N.Y.2d 241, 254 (1978); *see People v. Johnson*, 39 N.Y.3d 92, 97 (2022); *Wiggins*, 31 N.Y.3d at 13; *People v. Vernace*, 96 N.Y.2d 886, 888 (2001).

Courts analyzing delay claims consider five factors: (1) the reason for the delay, (2) the extent of the delay, (3) the nature of the underlying charges, (4) the length of pre-trial incarceration, and (5) whether there is any indication that the defense has been impaired. *People v. Taranovich*,

[19] Defendant makes no claim under the federal constitution. *See* DB: 6 (invoking only the "New York guarantees" of the "right to a prompt prosecution").

37 N.Y.2d 442, 444 (1975); *see People v. Regan*, 39 N.Y.3d 459, 465 (2023); *Johnson*, 39 N.Y.3d at 96. All five factors favor the People here.

Most important, there were compelling reasons that the People did not bring charges earlier. Defendant wholly ignores the significant obstacles—many imposed by him—that impeded the People's investigation of this matter and reasonably delayed their ability to pursue charges.

The People first opened this investigation in August 2018 after Cohen pleaded guilty to federal campaign finance violations in connection with the [redacted] and [redacted] payoffs. Conroy Aff. ¶¶ 6-9. Shortly afterward, however, the People paused the investigation because the same conduct was the subject of an active and ongoing federal investigation, which the People did not want to undermine by conducting a concurrent state investigation. *Id.* ¶¶ 10-11. When the federal investigation ended ten months later, in July 2019, the People recommenced the investigation, *id.* ¶¶ 13-15, only to be sued by Trump in September 2019 to enjoin enforcement of a subpoena for tax and financial records that the People had issued to Trump's accounting firm. *Id.* ¶ 17. That civil litigation—which required an extraordinary commitment of resources by the investigative team on this matter—did not conclude until more than seventeen months later, in February 2021, delaying by nearly one and a half years the accounting firm's compliance with the subpoena. *Id.* ¶¶ 18, 23. And in addition to these obstacles, defendant was the sitting President for the first two years and five months of this investigation—from August 2018 until the end of his term in January 2021—and the People reasonably deferred pursuing any indictment during that period because of open constitutional questions regarding whether a sitting President can be subject to indictment and criminal prosecution. *Id.* ¶ 24. These are all "good faith, legitimate reasons" for the People's timing during this period. *Wiggins*, 31 N.Y.3d at 13.

In addition, the People legitimately deferred charging defendant while engaged in "further investigation." *Singer*, 44 N.Y.2d at 254. The People's initial investigative efforts, as well as public reporting, had identified other instances of possible criminal conduct occurring in New York County by entities and individuals associated with defendant and the Trump Organization. Conroy Aff. ¶¶ 12, 14-15. It is not uncommon in significant white-collar investigations for the People to conduct a holistic investigation into numerous allegations of potential fraud by multiple individuals and affiliated corporate entities, particularly where—as here—public reporting and initial investigative steps identify wide-ranging allegations of potential criminal conduct. *Id.* ¶ 16. In this instance, that conduct included allegations that corporate entities affiliated with defendant paid unreported non-cash compensation to Allen Weisselberg, the Trump Organization's former CFO (and a participant in the conduct charged in this indictment). *Id.* ¶¶ 21-22. That branch of the investigation led to a June 2021 indictment against Weisselberg, the Trump Corporation, and the Trump Payroll Corp. on numerous felony charges. *Id.* ¶ 27; *see People v. The Trump Corporation*, Ind. No. 1473/2021. In that prosecution, Weisselberg pleaded guilty in August 2022 to fifteen felony counts; and in December 2022, the corporate defendants were convicted at trial of seventeen felony counts. Conroy Aff. ¶¶ 28-29.

The investigation into the conduct that led to the indictment here remained open during the *Trump Corporation* prosecution, with the People prioritizing investigative steps that could be taken without triggering prejudicial pretrial publicity, potentially influencing the jury pool, or otherwise affecting the *Trump Corporation* trial. *Id.* ¶¶ 30-32. Consistent with that legitimate objective, the People began taking steps to impanel a grand jury for this particular aspect of the investigation in October 2022, and began taking overt steps to prepare for the grand jury presentation in December 2022, after the guilty verdict in the *Trump Corporation* prosecution. *Id.* ¶¶ 33-36. The decision to

focus investigative and prosecutorial resources on various other aspects of a holistic investigation involving overlapping witnesses and financial records, and then to stage the grand jury presentations and prosecutions arising from that investigation in a manner that minimized the risk of prejudicing those prosecutions, is a reasonable and valid explanation for the timing of the charges in this case.

Defendant is simply wrong to assert (DB: 8) that the People uncovered no new evidence of his guilt after 2019. For example, 2023 testimony from campaign insiders [redacted] and [redacted] established that [redacted]. Tr. 665-672 ([redacted]); Tr. 577-586 ([redacted]). This testimony provided additional powerful evidence of defendant's criminal intent, both at the time he and his confederates executed the election fraud scheme and later when he sought to conceal that criminal scheme by falsifying business records.

But even if defendant were correct that no new evidence was generated after 2019, that argument would be legally irrelevant. Courts have excused preindictment delays even in cases where "no new evidence was discovered to add to the prosecution's case during the period of delay." *People v. Quince*, 119 A.D.2d 981, 982 (4th Dep't 1986) (22 month delay). Indeed, courts have permitted preindictment delays where the available evidence remained static and the only change was in the prosecutors' views of the strength of that evidence. *See People v. Denis*, 276 A.D.2d 237, 248 (3d Dep't 2000) (excusing six-year preindictment delay where "the newly elected District Attorney, after reviewing the evidence and assessing the witnesses' credibility, decided to pursue an indictment of defendant on the basis of evidence which was largely available years

earlier"). Defendant's claim that the evidence presented to the grand jury was available in 2019 is thus as irrelevant as it is false.

The remaining *Taranovich* factors favor the People. The period of delay—roughly four and a half years here—is shorter than other delays that courts have found constitutionally permissible. *See Vernace*, 96 N.Y.2d at 886 (17 years); *Decker*, 13 N.Y.3d at 12 (15 years).[20] And that period is considerably shorter considering that it includes significant periods of delay that were beyond the People's control, as mentioned above. *See* Conroy Aff. ¶¶ 10-11, 13, 17-18, 23-24.

Defendant also cannot articulate any prejudice he experienced as a result of the delay in charging him, let alone the compelling showing of prejudice that is required in cases like this one. Given that the People provided a valid explanation for the timing of these charges and complied with the applicable statute of limitations, defendant must establish that "special circumstances exist impairing his right to a fair trial." *People v. Velez*, 22 N.Y.3d 970, 972 (2013). Far from satisfying that standard, defendant offers only conclusory claims of prejudice, asserting without elaboration or support that the People's delay "interfer[ed] with his presidential campaign" and "eroded the memory of numerous witnesses." DB: 9. The claim of any campaign impairment is undermined by defendant's frequent public pronouncements that the indictment has strengthened his candidacy, PX-39, which this Court may consider against him as a party admission. *See People v. Chico*, 90 N.Y.2d 585, 589 (1997). As to the claimed dissipation of evidence, defendant himself asserts that "virtually all of the evidence" required to charge this case was secured as of 2019 (DB: 8), which means the People's investigation has only resulted in the *preservation* of evidence, thus

[20] *See also People v. Wald*, 215 A.D.3d 497, 497-98 (1st Dep't 2023) (21 years); *People v. Pilmar*, 193 A.D.3d 467, 467 (1st Dep't 2021) (21 years); *People v. Innab*, 182 A.D.3d 142, 145-46 (2d Dep't 2020) (28 years); *People v. Gaston*, 104 A.D.3d 1206, 1206-07 (4th Dep't 2013) (17 years); *People v. Nazario*, 85 A.D.3d 577, 577 (1st Dep't 2011) (almost 12 years); *People v. Tsang*, 284 A.D.2d 218, 218-19 (1st Dep't 2001) (20 years).

protecting defendant's ability to defend himself in this prosecution. Defendant's "'conclusory assertions of prejudice are insufficient' to demonstrate that [defendant's] 'defense was impaired by reason of the delay.'" *People v. Stefanovich*, 207 A.D.3d 1047, 1050 (4th Dep't 2022) (quoting *People v. Johnson*, 134 A.D.3d 1388, 1390 (4th Dep't 2015)).

Finally, the nature of the crimes he is accused of committing also favors the People. The "nature" of the crime can refer both to its "severity" and "the complexity and challenges of investigating the crime and gathering evidence to support a prosecution." *Johnson*, 39 N.Y.3d at 97. Defendant stands accused of felony falsification of business records with the intent to conceal (among other crimes) a scheme to suppress information from voters during a presidential election. Courts have repeatedly recognized that such a corrupt election fraud scheme qualifies as a serious offense. *See, e.g.*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978) ("Preserving the integrity of the electoral process, preventing corruption, and sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government are interests of the highest importance." (cleaned up)). Indeed, a federal court has already described the very election-fraud scheme at issue here as "a matter of national importance" with "weighty public ramifications." Mem. & Order Granting Unsealing Requests 2-3, *United States v. Cohen*, No. 18 Cr. 602 (S.D.N.Y. July 17, 2019) (PX-40).[21]

[21] Defendant's request for a *Singer* hearing should be denied because the People's reasons for deferring charges, established by the Conroy Affirmation, are not in dispute. *See People v. Brown*, 209 A.D.2d 233, 233 (1st Dep't 1994); *see also People v. Albert*, 171 A.D.3d 1519, 1520 (4th Dep't 2019); *People v. Black*, 128 A.D.2d 715, 715 (2d Dep't 1987).

POINT III

DEFENDANT'S CLAIM OF SELECTIVE PROSECUTION IS MERITLESS, AND HE IS NOT ENTITLED TO AN EVIDENTIARY HEARING OR DISCOVERY (Answering Defendant's Brief, Point III).

Defendant argues that the indictment should be dismissed because he was impermissibly selected for prosecution, and seeks discovery and a hearing on this claim. DB: 26-32. Defendant fails to meet his heavy burden of establishing selective prosecution and is not entitled to discovery or an evidentiary hearing.

A district attorney is forbidden from "applying or enforcing an admittedly valid law 'with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances.'" *Matter of 303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 693 (1979) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886)). "The burden of proving a claim of discriminatory enforcement is a weighty one," and "[t]he presumption is that the enforcement of laws is undertaken in good faith and without discrimination." *Id.* at 694. The standard to prove selective prosecution is "demanding" for good reason: "[a] selective-prosecution claim asks a court to exercise judicial power over a 'special province' of the Executive," and "courts are 'properly hesitant to examine the decision whether to prosecute.'" *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (quoting *United States v. Wayte*, 470 U.S. 598, 608 (1985)). Indeed, "'judicial authority is . . . at its most limited' when reviewing the Executive's charging determinations, because the judiciary is generally 'not competent to undertake' such an assessment." *United States v. Stone*, 394 F. Supp. 3d 1, 30 (D.D.C. 2019) (quoting *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016)).

To overcome the presumption of regularity that supports prosecutorial decisions, defendant must prove "both the 'unequal hand' and the 'evil eye' requirements"—that is, "there must be not

only a showing that the law was not applied to others similarly situated but also that the selective application of the law was deliberately based upon an impermissible standard such as race, religion or some other arbitrary classification." *Klein*, 46 N.Y.2d at 693; *see also People v. Blount*, 90 N.Y.2d 998, 999 (1997). Neither showing exists here. The offenses defendant is charged with committing are routinely prosecuted by this Office, and this prosecution is based on defendant's conduct, not on any impermissible considerations. Indeed, defendant has consistently raised meritless claims of selective prosecution against plaintiffs and prosecutors—including against this Office—and courts have uniformly rejected those arguments. This Court should do the same.

A. Defendant has presented no evidence of unequal enforcement.

As an initial matter, defendant has not shown any evidence of an "unequal hand." Defendant does not identify any similarly situated individuals who were treated differently than him, and the People routinely charge Penal Law § 175.10 offenses where a defendant falsifies business records to commit or conceal the commission of a broad range of other crimes.

1. Defendant does not identify a single individual who engaged in similar conduct but was treated differently.

Just like every other defendant, even "controversial public figure[s]" in "highly visible cases" must establish "that others similarly situated have not been prosecuted." *United States v. Moon*, 718 F.2d 1210, 1230 (2d Cir. 1983); *see also Klein*, 46 N.Y.2d at 693. Defendant fails to meet this very first step: his "claims are devoid of any evidence that the law was not applied to other similarly situated individuals." *Trump Corporation* 7. Defendant has not shown—or even asserted—that the People declined to investigate or prosecute any other person who was publicly implicated by a co-conspirator's guilty plea to an accusatory instrument that on its face disclosed the falsification of New York business records to conceal a criminal scheme to undermine the integrity of a presidential election. *See Cohen* Information ¶¶ 24-44 (PX-1).

Defendant's one attempt to identify a comparative case falls well short of the evidentiary showing needed to trigger an inquiry into selective prosecution. DB: 29-30. Defendant references a February 2022 FEC conciliation agreement with the 2016 Clinton presidential campaign committee regarding whether the campaign committee complied with federal disclosure requirements when it listed payments to a law firm as "legal services" instead of "opposition research" conducted by a third party that the law firm retained. *See* Conciliation Agreement, *In re Hillary for America & Elizabeth Jones*, Federal Election Comm'n Matter Under Review 7291 & 7449 (Feb. 22, 2022) ("*In re HFA*"), https://eqs.fec.gov/eqsdocsMUR/7291_53.pdf.[22] Defendant argues selectivity where "DANY declined to investigate, much less charge, Clinton," based on the FEC conciliation agreement. DB: 30. But this example is not remotely similar to the facts here, and no "prudent person, looking objectively at the incidents, would think them roughly equivalent." *Bower Assocs. v. Town of Pleasant Valley*, 2 N.Y.3d 617, 632 (2004); *see also Stone*, 394 F. Supp. 3d at 31-32.

Among other clear distinctions, no co-conspirator was convicted of any criminal offense; the FEC did not find a knowing and willful violation by any co-conspirator; Clinton herself was not even mentioned in the FEC investigation; the conciliation agreement does not contain any facts indicating that Clinton herself "made or caused" any falsifications; there is no indication in the conciliation agreement that any error in describing the purpose of the disbursements was made with intent to defraud (by Clinton or anyone else); and there is likewise no indication that Clinton (or anyone who actually was a respondent in that investigation) had any intent to commit or conceal

[22] Defendant incorrectly describes the FEC as having found that the committee "improperly booked campaign expenses as legal expenses." DB: 30. Instead, the question was—in light of a requirement that political committees describe the purpose for any disbursement over $200—whether a political committee's payments to a law firm that retained a research firm should be disclosed as legal services or research.

other crimes. *See* Conciliation Agreement, *In re HFA*. By contrast, and as described in more detail in Point III.B below, Michael Cohen pleaded guilty to two counts of making unlawful campaign contributions "in coordination with, and at the direction of" defendant "for the principal purpose of influencing the election," and in pleading guilty disclosed that defendant had reimbursed Cohen for one of the unlawful campaign contributions through a series of monthly payments that were falsely accounted for in New York business records as legal expenses. *See Cohen* Information ¶¶ 24-44 (PX-1); Hearing Tr. 23-24, 27-28, *United States v. Cohen*, No. 18-cr-602 (S.D.N.Y. Aug. 21, 2018) (the "*Cohen* Hearing Tr.") (PX-2). These facts were simply not present in the example that defendant cites.

2. The People regularly prosecute first-degree falsifying business records.

The People's consistent history of charging first-degree falsifying business records, based on a wide variety of object crimes, also defeats the argument that defendant was singled out. The People regularly prosecute Penal Law § 175.10 violations where a defendant falsifies business records with the intent to commit or conceal the commission of another crime: in the ten years preceding defendant's indictment in this case, this Office brought approximately 437 cases charging violations of Penal Law § 175.10. *See* Conroy Aff. ¶¶ 56-58. To put it differently, this Office has charged defendants with first-degree falsifying business records at an average rate of just under once a week for the last decade straight. Given the regularity with which this offense is charged in New York County, defendant cannot meet his "heavy burden of showing" that the People have "consciously practiced" discriminatory enforcement. *People v. Goodman*, 31 N.Y.2d 262, 269 (1972).

Defendant claims that it is "extraordinary and unprecedented" to charge falsifying business records for "allegedly mis-booking payments to his personal attorney from his personal accounts." DB: 29. This argument mischaracterizes the People's theory of the case. As the grand jury record

establishes, defendant is not charged with mis-booked payments, but instead with lying in the business records of New York enterprises to conceal criminal conduct arising from an unlawful scheme to pay off an adult film actress in order to advance his candidacy for President of the United States. Defendant cannot base a selective-prosecution claim on his own self-serving and unsupported view of the facts. And to the extent that defendant is claiming selectivity because the facts of this case are unique, that argument is both incorrect and irrelevant. Neither this Office nor other district attorneys have limited prosecutions of first-degree falsifying business records to particular facts or types of object crimes; to the contrary, a cursory review of the case law reveals a wide variety of circumstances and underlying criminal activity that have supported such a charge.[23]

At base, this case is proceeding on the same prosecution theory as hundreds of others: defendant allegedly lied in corporate records to cover up other criminal activity. Defendant therefore cannot show selective enforcement. *See, e.g.*, *Trump Corporation* 7.

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[23] *See, e.g.*, *Taveras*, 12 N.Y.3d at 23-24 (defendant doctored records putting young boys on the payroll of a summer program to induce them into sexual activity); *Sosa-Campana*, 167 A.D.3d at 464 (defendant used a fraudulent driver's license in order to cause a traffic summons to be issued to someone else, and to conceal the fact that he was engaged in unlicensed driving); *Thompson*, 124 A.D.3d at 448-49 (defendant falsely filled out a firearm disposal form to disguise his unlawful possession of the firearm); *People v. Myles*, 58 A.D.3d 889, 892 (3d Dep't 2009) (defendant falsified the business records of a utility company by applying jumper cables to a meter box in order to make the meter record less electricity than he was actually using); *People v. Visone*, Ind. No. 02389/2009 (defendant failed to file shop steward reports to conceal wage theft scheme); *People v. Levin*, Ind. No. 04743/2008 (defendant obtained a fraudulent transcript from Touro College falsely stating he had graduated).

B. This prosecution is based solely on defendant's unlawful conduct and not on any impermissible considerations.

Because defendant has not presented any evidence of an "unequal hand," the Court should reject his selective prosecution argument on that basis alone. But defendant also fails to show any impermissible motivation in this prosecution.

This investigation was initiated after widely publicized evidence of potential state law criminal conduct in New York. *See* Conroy Aff. ¶¶ 6-9. In August 2018, Michael Cohen pleaded guilty in federal court to, among other crimes, two counts of making unlawful campaign contributions "in coordination with, and at the direction of" defendant "for the principal purpose of influencing the election." *See Cohen* Information ¶¶ 24-44 (PX-1); *Cohen* Hearing Tr. 23-24, 27-28 (PX-2). The federal government's Information further alleged that Cohen made one of the unlawful payments through a shell corporation funded with his personal funds; that Cohen sent Invoices for reimbursement to defendant through executives of the Trump Organization; and that defendant reimbursed Cohen a total of $420,000 through a series of monthly payments that were falsely accounted for in various business records created and maintained at the Trump Organization's New York offices. *See Cohen* Information ¶¶ 32-35, 37-40, 43-44 (PX-1). These facts clearly indicated the possibility that defendant or others may have violated New York's criminal prohibition on falsifying business records, and the District Attorney opened an investigation in response. Conroy Aff. ¶¶ 6-9.

The District Attorney's decision to follow up on publicly reported evidence hardly suggests an impermissible motivation; to the contrary, for the District Attorney "not to have investigated" in light of these facts "would have been a blatant dereliction of duty." *People v. The Trump Org., Inc.*, No. 451685/2020, 2022 WL 489625, at *5 (Sup. Ct. N.Y. Cnty. Feb. 17, 2022), *aff'd*, 205 A.D.3d 625, 626-27 (1st Dep't 2022), *appeal dismissed*, 38 N.Y.3d 1053 (2022). Courts routinely

reject claims of impermissible motivation where an investigation is based on public evidence of misconduct. *See, e.g.*, *Trump Org., Inc.*, 205 A.D.3d at 626-27 (1st Dep't 2022) (rejecting selective prosecution claim where investigation was initiated "after testimony before Congress by Michael Cohen" regarding Trump Organization's "fraudulent financial statements"); *Trump Corporation* 7 (rejecting selective prosecution claim where "the New York County District Attorney's Office affirms that it commenced its investigation and prosecution following public reporting"); *People by James v. Nat'l Rifle Ass'n of Am., Inc.*, 75 Misc. 3d 1000, 1002, 1005, 1007-09 (Sup. Ct. N.Y. Cnty. 2022) (rejecting selective prosecution claim where "[t]he investigation followed reports of serious misconduct").

Defendant's arguments to the contrary lack merit. As an initial matter, defendant fails to even clearly *identify* an impermissible consideration that supposedly formed the true basis for this investigation and prosecution. DB: 29-31. Defendant alludes vaguely to "motivations . . . which were impermissible," *id.* at 29; and refers to unspecified "political pressure," *id.* at 31; but imprecise innuendo is not evidence the Court can assess. *See United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.").

Even construing defendant's brief as liberally as possible, his arguments about an impermissible motivation do not meet his "heavy burden" of showing "conscious, intentional discrimination." *Goodman*, 31 N.Y.2d at 268-69. Defendant alleges that the District Attorney "campaigned on pursuing" defendant. DB: 30. This claim grossly distorts the public record. During the campaign, the District Attorney highlighted that his history of public service included a management role in litigation challenging federal executive action in 2017 and 2018 while defendant was President. *See* DB: 30. But representing the State in unrelated civil litigation

challenging federal executive action says nothing about the reasons the People charged this case, and does not plausibly reflect unconstitutional discrimination against defendant.

Defendant's reference to the District Attorney's comments about past litigation involving the Trump Foundation is no more probative. *See id.* Candidates for elected office of course tout their experience, and there is no evidence of bias in a successful civil enforcement action that dissolved a New York non-profit and secured a $2 million penalty for breach of fiduciary duty and waste. *People by James v. Trump*, 66 Misc. 3d 200, 201-02, 204 (Sup. Ct. N.Y. Cnty. 2019). The court in fact rejected the selective prosecution argument that Trump raised in that lawsuit. *People by Underwood v. Trump*, 62 Misc. 3d 500, 508-09 (Sup. Ct. N.Y. Cnty. 2018).

The District Attorney's public promise that "I know how to follow the facts and hold people in power accountable," DB: 30, is the very opposite of an impermissible motivation. Such a promise to enforce the law evenhandedly against powerful individuals is "standard fare" that is "neither partisan (in the political sense) nor personal, in marked and refreshing contrast to the stream of personal invective flowing from one of the movants." Order on Mot. to Quash, Preclude, & Recuse 7-8, *In re 2 May 2022 Special Purpose Grand Jury*, No. 2022 EX-000024 (Super. Ct. of Fulton Cnty., Ga., July 31, 2023) (rejecting Trump's argument that comments by Fulton County District Attorney about "pursuing the evidence where it leads us" and "holding everyone accountable" reflected improper bias) (PX-41).

Further, and while there is absolutely no support for defendant's conclusory assertions that the District Attorney's comments reflect any personal or political antipathy, defendant's argument is in any event legally meritless because "animus or ill-will between the parties does not, by itself, constitute retaliation. Indeed, no prosecutor looks favorably upon lawbreakers." *Phelps v. Hamilton*, 59 F.3d 1058, 1067 (10th Cir. 1995); *see also Trump Org.*, 2022 WL 489625, at *5.

And "'political' opposition . . . is not the equivalent of the 'evil eye and an unequal hand' for constitutional equal protection purposes." *Bower Assocs.*, 2 N.Y.3d at 632; *see also Gleason v. McBride*, 869 F.2d 688, 695 (2d Cir. 1989) (allegation that plaintiff "was a political opponent" of local officials could not sustain federal equal protection conspiracy claim). Any other rule would permit former elected officials like defendant to immunize themselves from accountability for unlawful conduct by alleging political animus. The law does not require that result.

Finally, defendant's suggestion that a book published in February 2023 created pressure to indict this case is fanciful. DB: 31. The case was already being presented to the grand jury a month prior to the publication of the book. And, as the Court may judicially notice, this investigation was the subject of extensive public commentary advocating both in favor of and against a prosecution. Defendant's contention that the District Attorney was moved to placate some commentators but not others is total speculation, and in any event is untrue.

The People's basis for bringing this case is straightforward: After careful review of the facts and law, the People concluded that the conduct constituted a felony offense and the admissible evidence was sufficient to obtain and sustain a conviction. The People's review also compelled the conclusion that any other person who engaged in the same conduct would have been subject to criminal prosecution. And in fact, other participants in this scheme *did* face consequences: Cohen went to jail; Pecker and AMI were found to have committed knowing and willful violations of federal law; and AMI paid a civil penalty. *See* Factual & Legal Analysis, *In re A360 Media* (PX-35); Conciliation Agreement, *In re American Media, Inc.*, Federal Election Comm'n Matter Under Review 7324, 7332, & 7366 (May 18, 2021) (PX-42).

Defendant thus cannot meet his burden to show that this investigation was based on any impermissible purpose.

C. Defendant is not entitled to an evidentiary hearing or discovery on this claim.

Defendant also requests an evidentiary hearing and discovery on his claim of selective prosecution. DB: 31-32. Because defendant has not shown that there is a "reasonable probability of success on the merits" for the reasons described in Points III.A and III.B above, these requests should be denied. *Klein*, 46 N.Y.2d at 690. Indeed, courts routinely deny requests for an evidentiary hearing or discovery on selective prosecution claims in these circumstances. *See, e.g.*, *Call-A-Head Portable Toilets, Inc. v. N.Y. State Dep't of Envtl. Conservation*, 213 A.D.3d 842, 846-47 (2d Dep't 2023) (affirming denial of request for evidentiary hearing); *People v. Trump Org., Inc.*, 205 A.D.3d 625, 626-27 (1st Dep't 2022) (same); *People v. Patino*, 259 A.D.2d 503, 503 (2d Dep't 1999) (same); *Hicks v. N.Y. State Dep't of Health*, 173 A.D.2d 1057, 1059 (3d Dep't 1991) (same); *Trump Corporation* 7-8 (denying request for hearing and discovery); *People v. Jeffreys*, 53 Misc. 3d 1205(A), at *1-2 (Crim. Ct. N.Y. Cnty. 2016) (same); *see also People v. Nelson*, 103 Misc. 2d 847, 853-54 (Syracuse City Ct. 1980) (denying discovery); *see also United States v. Fares*, 978 F.2d 52, 59 (2d Cir. 1992) (same); *Moon*, 718 F.2d at 1229 (same).

Maintaining the integrity of the criminal justice process requires holding defendants to their "weighty burden" before authorizing an evidentiary hearing or discovery on selective prosecution claims: "[L]egitimate law enforcement should not be hampered by requiring that a hearing be held every time one subject to a regulatory or criminal penalty feels he has been unfairly singled out." *Klein*, 46 N.Y.2d at 694. To do otherwise would "encourage use of the defense of selective prosecution, however baseless, as a means of obtaining discovery to which the defense would not otherwise be entitled." *United States v. Berrios*, 501 F.2d 1207, 1211-12 (2d Cir. 1974); *see also Moon*, 718 F.2d at 1230.

This admonition is particularly salient here given defendant's extensive history of raising meritless claims of selective prosecution. *See, e.g.*, *Trump Org., Inc.*, 205 A.D.3d at 626-27

(rejecting Trump's claims of selective prosecution in civil investigation into his business practices), *appeal dismissed*, 38 N.Y.3d 1053 (2022); *Trump v. James*, No. 1:21-cv-1352, 2022 WL 1718951, at *4 (N.D.N.Y. May 27, 2022) (dismissing Trump's claims under 42 U.S.C. § 1983 alleging that civil investigation was based on unconstitutional political retaliation); *Trump Corporation* 7 (rejecting argument by Trump's corporate entities that the People's prosecution of them was based on unconstitutional retaliation for Trump's political views); *Trump v. Vance*, 977 F.3d 198, 213-15 (2d Cir. 2020) (rejecting Trump's arguments that the People's subpoena to accounting firm for his tax and financial records was retaliatory or issued in bad faith), *stay denied*, 141 S. Ct. 1364 (2021); *Trump*, 62 Misc. 3d at 508-09 (rejecting Trump's argument that lawsuit against him and his former not-for-profit foundation was based on bias by the former Attorney General "and the Attorney General's office as a whole").

Indeed, a federal court recently sanctioned Trump and his counsel nearly one million dollars for frivolous selective-prosecution claims in connection with a lawsuit he filed alleging that a former candidate for office colluded with government officials to prompt a criminal investigation of Trump and his campaign. *Trump v. Clinton*, No. 22-14102-CV, 2023 WL 333699, at *4, 12-20, 26 (S.D. Fla. Jan. 19, 2023); Order on Motion for Indicative Ruling, *Trump v. Clinton*, No. 22-14102-CV, slip op. at 17 (S.D. Fla. Sept. 15, 2023) (finding that Trump and his counsel "dishonestly pursued this lawsuit in bad faith for the improper purpose of dishonestly advancing a political narrative") (PX-43).

Defendant's request here for an evidentiary hearing on his claim of selective prosecution is consistent with his long history of similar baseless claims. The Court should reject his effort to disrupt this prosecution and should deny his request for a hearing and discovery.

POINT IV

THE COURT SHOULD REJECT DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING ON GRAND JURY SECRECY (Answering Defendant's Brief, Point VII).

Defendant requests discovery and an evidentiary hearing regarding alleged violations of the grand jury secrecy requirement. DB: 42-45. But defendant has not shown any violations of grand jury secrecy by the People; nor has he shown that any such violations would require the drastic remedy of dismissal. His requests for discovery and a hearing should therefore be rejected.

For the same reasons identified in the discussion of selective prosecution at Point III.C above, discovery and an evidentiary hearing to identify possible grounds for dismissal on a claim of grand jury secrecy violations should only be permitted if defendant meets his burden of proof to show that he is more likely than not to succeed on such a claim. *Cf. Klein*, 46 N.Y.2d at 694-96. "[G]rand jury proceedings enjoy a presumption of regularity which is the challenger's burden to overcome." *People v. Nash*, 69 A.D.3d 1113, 1114 (3d Dep't 2010). Just as with claims of selective prosecution, requests for discovery regarding alleged grand jury secrecy violations would—if defendants are not first required to make a strong showing of likely success on the merits—undermine the presumption of regularity, hinder law enforcement, and encourage baseless allegations by defendants seeking to delay proceedings and obtain discovery they are not otherwise entitled to receive. *See Klein*, 46 N.Y.2d at 694; *Berrios*, 501 F.2d at 1211-12; *see also Virag v. Hynes*, 54 N.Y.2d 437, 443-44 (1981) ("Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." (quoting *United States v. Dionisio*, 410 U.S. 1, 17 (1973))).

Here, the requests for discovery and an evidentiary hearing should be denied. First, defendant's six examples of purported grand jury information becoming publicly known (DB: 43)

do not support his claim that a violation of grand jury secrecy must have been the source for such disclosure. Many of defendant's examples are inaccurate: others do not involve grand jury-protected information at all. And defendant's examples ignore that grand jury secrecy rules bind only certain people—including prosecutors, grand jurors, the stenographer, and others specifically identified by statute, *see* CPL §§ 190.25(3), (4); PL § 215.70—but do not apply to numerous other individuals who may interact with the grand jury or otherwise become aware of a criminal investigation. Among the many individuals who are not bound by grand jury secrecy rules are the target of an investigation himself, witnesses, subpoena recipients, and their counsel. It is for this reason that the Supreme Court has recognized that grand jury "disclosure restrictions are not perfect." *Trump v. Vance*, 140 S. Ct. 2412, 2427 (2020) (citing *United States v. Nixon*, 418 U.S. 683, 687 n.4 (1974)).

Each of defendant's examples includes information that was available from sources not bound by grand jury secrecy, is not grand jury-protected, or is simply inaccurate:

- The May 25, 2021 article (DB: 43 & n.20) reports that proceedings before a grand jury included an investigation of the Trump Organization's financial practices. This article appeared three weeks after the People had begun presenting witness testimony to a grand jury, and had been in contact with witnesses and their lawyers who had no secrecy obligations (including [redacted]). Conroy Aff. ¶¶ 25-26.

- The November 24, 2021 article (DB: 43-44 & n.21) reports that the People were investigating asset valuation and tax practices by employees of the Trump Organization based on grand jury subpoenas, document disputes, and a witness interview. The subpoena recipients and witnesses—including the [redacted] Conroy Aff. ¶ 31—are not bound by grand jury secrecy. (The lawyer for one of those witnesses is in fact quoted in this newspaper article.) Defendant also notes that the newspaper article reports on "sealed litigation" regarding "disputes over document production," DB: 43, without acknowledging—as the article reports—that the counterparty to that sealed litigation was [redacted].

- The February 24, 2022 article (DB: 44 & n.22) reports on a "monthlong pause" in grand jury proceedings and the resignations of two attorneys from this Office who reportedly disagreed with the District Attorney on whether and how to continue investigating the Trump Organization's financial practices. The "pause" is sourced in the article to an observation that "appearances at the courthouse by witnesses and

by [the two attorneys] had dropped off," which is a publicly-observable fact in a courthouse with public entrances. And the fact of resignations by prosecutors—even resignations based on disagreement with the District Attorney—do not on their face evidence violations of the secrecy requirement.

- The January 30, 2023 article (DB: 44 & n.23) reports that the People were presenting evidence to a grand jury in connection with the investigation that led to this indictment. The People began [redacted] weeks earlier. Conroy Aff. ¶ 36. Those witnesses and their counsel are not bound by grand jury secrecy.

- The March 9, 2023 article (DB: 44 & n.24) reports that the People offered defendant the opportunity to testify before the grand jury. In the course of the People's investigation, defendant requested notice of grand jury action in order to consider whether to appear as a witness in his own behalf, and the People provided notice pursuant to CPL § 190.50(5)(b) on February 10, 2023. Conroy Aff. ¶ 37. Defense counsel responded on March 8, 2023, that defendant had elected not to appear before the grand jury to testify. *Id.* Defendant and his counsel were parties to this correspondence and are not bound by grand jury secrecy.

- The March 29, 2023 newspaper articles (DB: 44-45 & nn. 25-26) report that the grand jury was "set to break for a month" and would not consider any indictment until the end of April; or, alternately, that an indictment had already been voted. Both reports were inaccurate and therefore could not reflect the disclosure of any grand jury-protected information. Conroy Aff. ¶ 38-39.

In short, every example defendant cites includes information that either could have come from any of dozens of sources not covered by the grand jury secrecy requirement—including defendant, his counsel, and Trump Organization employees or their counsel—or does not include the disclosure of grand jury-protected information at all.

Also baseless is defendant's attempt to infer a violation of grand jury secrecy rules from former Special ADA Mark Pomerantz's invocation of his Fifth Amendment right against self-incrimination in testimony before a congressional committee. DB: 45 & n.27. As of the date of his congressional interview, this Office had advised Mr. Pomerantz of his confidentiality obligations not only under CPL § 190.25(4)(a) but also under Chapter 68 of the New York City Charter, which makes it a misdemeanor for a former public servant to "disclose or use for private advantage any

confidential information gained from public service." N.Y.C. Charter, §§ 2604(d)(5), 2606(c); *see* PX-44. Mr. Pomerantz may have been warranted in invoking the privilege on that basis alone. To be sure, the People are extremely concerned about the possibility of any unauthorized disclosures of grand jury-protected or confidential information regarding any ongoing investigation, and made that concern clear in this instance by, among other steps, advising Mr. Pomerantz—within days of the publisher's announcement of the forthcoming publication of his book—that any disclosures regarding this investigation or others may violate CPL Article 190, Penal Law § 215.70, and Chapter 68 of the New York City Charter.[24] PX-44. But the People issued this warning *before* the book was published, not upon confirming that the book violated grand jury secrecy rules. And a pre-publication warning that disclosures about an ongoing investigation may violate grand jury secrecy rules is not proof that such violations actually occurred.

Second, even assuming, arguendo, the Court were to believe that violations of grand jury secrecy occurred here, the extreme remedy of dismissal of the indictment would not be appropriate relief. Defendant suggests that dismissal of an indictment for grand jury secrecy violations could be warranted under CPL §§ 210.20(1)(c) and 210.35(5). DB: 43. But, as noted in Point I.D above, dismissal of an indictment on these grounds "is an extraordinary remedy," *Jones*, 239 A.D.2d at 235, and the test to show the integrity of the proceedings was impaired is "very precise and very high," *People v. Darby*, 75 N.Y.2d 449, 455 (1990). Dismissal is therefore "limited to those instances where

[24] For that reason, and as in *People v. Sergio*, there is no evidence that Mr. Pomerantz's book can be imputed to the People as a "stealthy leak designed to gain tactical advantage," 16 Misc. 3d 1127[A], at *4 (Sup. Ct. Kings Cnty. 2007)—to the contrary, as soon as the People learned of its possible publication, we requested an opportunity for prepublication review and advised the author and publisher that any confidential disclosures were unauthorized. PX-44.

prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the Grand Jury."[25] *People v. Huston*, 88 N.Y.2d 400, 409 (1996).

Because the remedy of dismissal for violations of grand jury secrecy is "exceptional," *Darby*, 75 N.Y.2d at 455, courts regularly reject defendants' requests to dismiss an indictment absent a showing that any disclosures actually and substantially affected the grand jury's decision. In *United States v. Walters*, 910 F.3d 11 (2d Cir. 2018), for example, the Second Circuit held that "highly improper" leaks of grand jury-secret information by an FBI agent to multiple newspapers during a criminal investigation did not warrant dismissal of the indictment where the defendant did not meet his burden to show that the leaks "'substantially influenced the grand jury's decision to indict' or that 'there is "grave doubt" that the decision to indict was free from the substantial influence of such violations.'" *Id.* at 22 (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255-56 (1988)); *see also United States v. Silver*, 103 F. Supp. 3d 370, 373-75, 377-81 (S.D.N.Y. 2015) (holding that notwithstanding a "media blitz" by the government before an indictment that constituted "brinksmanship relative to the Defendant's fair trial rights," the "drastic" and "rarely used" remedy of dismissing the indictment was not warranted because there was no evidence that the public comments substantially influenced the grand jury); *United States v. Myers*, 510 F. Supp.

[25] Defendant also cites CPL § 210.40—with no discussion—as a possible basis for dismissal for grand jury secrecy violations. DB: 43. The standard for dismissal under CPL § 210.40 is at least as high, if not higher, than under CPL § 210.35(5). CPL § 210.40(1) permits dismissal in the interest of justice, "even though there may be no basis for dismissal as a matter of law," where "some compelling factor . . . clearly demonstrat[es] that conviction or prosecution of the defendant . . . would constitute or result in injustice." *Id.* Motions to dismiss in the interest of justice "are granted only in exceptional circumstances," and "trial courts granting such motions are routinely reversed and reminded by appellate tribunals that their discretion is 'not absolute' and is to be exercised 'sparingly.'" Lawrence K. Marks et al., New York Pretrial Criminal Procedure § 5:27 at 459 & nn.94-96 (7 West's N.Y. Prac. Series, 2d ed. 2007 & Supp. 2023) (citing cases).

323, 324-25 (E.D.N.Y. 1980) (holding that "grossly improper and possibly illegal" public disclosures by the government did not warrant dismissal of the indictment).

Indeed, in addressing this argument, courts regularly note that defendants are "unable to cite a single case where a court has taken the extreme step of dismissing an indictment solely based on pre-indictment publicity, whether instigated by the prosecutor or simply derived from the media at large." *Silver*, 103 F. Supp. 3d at 380. Among other reasons, "if pre-indictment publicity could cause the dismissal of an indictment, many persons, either prominent or notorious, could readily avoid indictment, a result detrimental to the system of justice." *United States v. Mandel*, 415 F. Supp. 1033, 1063 (D. Md. 1976).

Defendant has made no effort to show that any of the purported violations of grand jury secrecy he cites had any impact whatsoever on the grand jury's deliberations or decision. This Court's review of the grand jury minutes will confirm that the grand jury's decision to indict was based on the facts and the law, and that the People's conduct of the proceedings was mindful both of grand jury secrecy obligations and pretrial publicity risks. Defendant thus cannot meet his burden to show that there is any "prosecutorial wrongdoing" at all, much less "fraudulent conduct" that affected the grand jury's ultimate decision to indict. *Huston*, 88 N.Y.2d at 409. The Court should reject defendant's request for discovery and an evidentiary hearing.

POINT V

THE COUNTS ARE NOT MULTIPLICITOUS (Answering Defendant's Brief, Point V).

Defendant claims that the indictment is multiplicitous to the extent it charges him with more than one count for each of the eleven reimbursement payments to Cohen because, he argues, each reimbursement payment constitutes an "allegedly criminal act" that may support only a single criminal charge. DB: 37-38. This claim fails.

An indictment is multiplicitous when "a single offense is charged in more than one count." *People v. Alonzo*, 16 N.Y.3d 267, 269 (2011). Determining multiplicity turns on identifying the "unit of prosecution" for a specific crime—that is, determining whether, for a particular crime, a defendant's conduct amounts to a single or multiple crimes. *Id.* at 269-70. Here, a person commits the crime of falsifying business records in the first degree when, with the requisite intent, he or she "[m]akes or causes *a false entry* in the business records of an enterprise." PL § 175.05(1) (emphasis added). By assigning criminal liability to the making of a single false entry, the Legislature made clear that each false entry constitutes a discrete violation of the statute. *See, e.g.*, *United States v. Bettenhausen*, 499 F.2d 1223, 1234 (10th Cir. 1974) (use of singular in 18 U.S.C. § 1001, prohibiting use of "any false writing or document," indicated that separate documents could support separate charges). Courts have thus held that an indictment charging falsifying business records is multiplicitous only when it contains several counts related to the same allegedly false entry. *See People v. Casiano*, 117 A.D.3d 1507, 1509-10 (4th Dep't 2014).

Under these principles, the indictment here is not multiplicitous because each count is based on a separate allegedly false entry in the business records of the Trump Organization. Specifically, the indictment charges defendant with one count for each of eleven invoices; one count for each of twelve Detail General Ledger entries; and one count for each of eleven checks held by the Trump Organization. Each of these documents constitutes a separate entry in the records of an enterprise, and each served a distinct purpose: the invoices generated the false rationale for the payments; the ledger entries created a false accounting of the expenditures; and the checks effected the false payments. Each document thus constitutes a separate false entry that may be charged separately as single counts in the indictment.

Defendant claims that the indictment essentially alleges eleven transactions, and argues that he cannot face multiple charges related to the same transaction, even if each transaction generated separate false entries in the business records of an enterprise. DB: 37-38. But this argument ignores the text of Penal Law § 175.05. That statute does not speak about "false business transactions"; it imposes liability for making a "false entry in the business records of an enterprise."

In making his multiplicity argument, defendant does not cite any authority interpreting the text of the statute that he is charged with violating. Defendant's reliance on *People v. Quinn*, 103 A.D.3d 1258, 1259 (4th Dep't 2013), *see* DB: 38, is particularly confounding.[26] *Quinn* involved charges under Penal Law § 175.35(1), which makes it a crime if a person offers "a written instrument [that] contains a false statement or false information" with the requisite knowledge and intent. *Quinn* understandably held that a single allegedly false "instrument" could not form the basis for more than one charge. *See* 103 A.D.3d at 1259. But courts routinely permit charges under Penal Law § 175.35(1) where each count relates to a *separate* allegedly false "instrument." *See, e.g.*, *People v. Rice*, 172 A.D.3d 1616, 1618 (3d Dep't 2019); *People v. Willette*, 290 A.D.2d 576, 577 (3d Dep't 2002); *People v. Norman*, 6 Misc. 3d 317, 328 (Sup. Ct. Kings Cnty. 2004). And they do so even when each separate document contains the same false information, *see People v. Rosedale Carting Corp.*, 1986 WL 55320, at *9 (Sup. Ct. Kings Cnty. 1986), or where they all relate to the "same alleged events or transactions," *People v. Laumeyer*, 10 Misc. 3d 184, 188, 191 (Yates Cnty. Ct. 2005). These cases thus further support the conclusion that each fraudulent

[26] Defendant is also not aided (DB: 38) by *People v. Greene*, 213 A.D.3d 418 (1st Dep't 2023), or *People v. Williams*, 214 A.D.3d 828 (2d Dep't 2023), since the unit of prosecution intended by the Legislature under the differently-worded perjury statute (Penal Law § 210.15) and rape statute (Penal Law § 130.35) simply has no bearing on what unit of prosecution the Legislature intended in enacting the falsifying business records statute.

document alleged in the indictment is a separate "false entry in the business records of an enterprise" that can support a separate count.

POINT VI

DEFENDANT'S MOTION FOR A BILL OF PARTICULARS SHOULD BE DENIED (Answering Defendant's Brief, Point VI).

On April 27, 2023, defendant requested a bill of particulars pursuant to CPL § 200.95(3). On May 12, the People timely served and filed their response pursuant to CPL §§ 200.95(2) and (4). The People's response noted that the indictment, Statement of Facts, and then-forthcoming discovery (which has now been produced) included all factual information regarding "the substance of . . . defendant's conduct encompassed by the charge[s] which the people intend to prove at trial on their direct case." CPL § 200.95(1)(a); *see People v. Kyoung Ja Choi*, 259 A.D.2d 423, 424 (1st Dep't 1999). Notwithstanding that defendant was already receiving far more factual information regarding the substance of the charged conduct than is required by a bill of particulars, the People nonetheless provided even more information in response to defendant's requests regarding his intent to defraud and his intent to commit or conceal another crime. *See* People's Resp. to Def.'s Req. for a Bill of Particulars (May 12, 2023).

Defendant's demand for yet more information in a bill of particulars, DB: 38-42, is meritless. To succeed on his motion, defendant must show both that "the items of factual information requested are authorized to be included in a bill of particulars," and "that such information is necessary to enable the defendant adequately to prepare or conduct his defense." CPL § 200.95(5). Defendant has failed to establish either of these required showings.

First, the additional information he seeks is not authorized to be included in a bill of particulars. "A bill of particulars serves to clarify the pleading; it is not a discovery device." *People v. Davis*, 41 N.Y.2d 678, 680 (1977). Nor may a bill of particulars be used to compel disclosure

of the prosecution's theory of proof at trial: the People are not "required to include in the bill of particulars matters of evidence relating to how the people intend to prove the elements of the offense charged or how the people intend to prove any item of factual information." CPL § 200.95(1)(a); *see People v. Earel*, 220 A.D.2d 899, 899 (3d Dep't 1995), *aff'd*, 89 N.Y.2d 960, 961 (1997). And with regard to defendant's request for further information regarding his intent to commit or conceal another crime, the Court of Appeals has made clear that an indictment need not identify any particular crime that the defendant intended to commit or conceal, and defendant is not entitled to such information in a bill of particulars. *See Mackey*, 49 N.Y.2d at 277-79.

Defendant argues that because *Mackey* involved a prosecution for second degree burglary, its holding does not apply to Penal Law § 175.10. *See* DB: 40-41. But there is no meaningful difference between the burglary statute and Penal Law § 175.10 that would justify treating the two statutes differently. Both statutes require the People to establish an intent to commit some further unspecified crime. *Compare* PL § 140.20 ("intent to commit a crime"), *with* PL § 175.10 ("intent to commit another crime"). And neither statute requires proof that the defendant committed or was convicted of the intended crime. *See Thompson*, 124 A.D.3d at 449 (falsifying business records); *Mahboubian*, 74 N.Y.2d at 193 (burglary). Just as with the burglary statute, "[h]ad the Legislature intended" to require the People to "prove an intent to commit a particular crime as distinct from the general intent to commit crime" in Penal Law § 175.10, "it could easily in revising the Penal Law have inserted the word 'specified' or the word 'particular' between 'a' and 'crime.'" *Mackey*, 49 N.Y.2d at 279. It did not, signifying that "what [was] omitted or not included was intended to be omitted or excluded." *People v. Jackson*, 87 N.Y.2d 782, 788 (1996) (quoting *Matter of Jose R.*, 83 N.Y.2d 388, 394 (1994)).

Defendant's argument that "intent to commit *a* crime" imposes only a general intent requirement, but "intent to commit *another* crime" creates a different intent standard, DB: 41, makes no sense. Nothing in *Mackey* turned on the meaning of the word "a"; rather, the Court applied basic principles of statutory interpretation to conclude that the absence of the words "specified" or "particular" meant that the Legislature did not intend the People to identify or prove any particular object crimes. *Mackey*, 49 N.Y.2d at 279.

Second, defendant has not shown that the additional information he seeks is "necessary" to enable him to prepare or conduct his defense. CPL § 200.95(5). To the contrary, defendant's filings in this Court and in federal court demonstrate that defendant has all the factual information necessary to prepare his defense. *See People v. Morris*, 28 Misc. 3d 1215(A), at *48-49 (Sup. Ct. N.Y. Cnty. 2010) (denying motion for bill of particulars where defendant's briefing "indicates a level of understanding of the transactions involved, the charges arising therefrom and the possible defenses as extensive as this Court has seen"). And, going well beyond what is legally required, the People have now provided extensive elaboration on the charges against defendant: in the response to defendant's request for a bill of particulars, the indictment, the Statement of Facts, voluminous discovery, and this opposition to defendant's omnibus motions. Taken together, these filings provide defendant with factual information that amply discloses the charged conduct that he is to defend against. *See id.*; *see also People v. Zurita*, 64 A.D.3d 800, 801 (2d Dep't 2009). No more is required, and defendant's motion for a bill of particulars should be denied.

POINT VII

DEFENDANT'S REQUEST TO STRIKE THE PEOPLE'S CERTIFICATE OF COMPLIANCE SHOULD BE DENIED (Answering Defendant's Brief, Point VIII).

Defendant asks the Court to strike the People's certificate of compliance on the basis of two claimed violations: the purported failures to produce books in discovery and to designate exhibits that the People intend to introduce in our case-in-chief at trial. DB: 46-48. Both claims are frivolous.

On May 23, 2023, the People served defense counsel with the Automatic Discovery Form ("ADF"), an addendum to the ADF, a hard drive containing an initial production of discovery materials, and a cover letter. *See* Conroy Aff. ¶¶ 46-47; PX-10. The ADF noted that Addendum A included "a list of books and other materials in possession of the People, which may include witness statements," and Addendum A identified 30 publicly-available books.[27] PX-10 at 6. The first page of the ADF advised: "*Should counsel for the defendant wish to discover, inspect, copy, photograph, or test any document or item listed below, counsel should contact the undersigned assistant.*" *Id.* at 1. Defense counsel never made any such request. Conroy Aff. ¶ 52.

The People's disclosure fully complies with the People's discovery obligations. Article 245 requires the People to "disclose to the defendant, and permit the defendant to discover, inspect, copy, photograph and test," items and information in the People's possession that relate to the subject matter of the case. CPL § 245.20(1). Addendum A to the ADF disclosed the books in the People's possession, and the first page of the ADF made clear that counsel should contact the People to inspect or copy the books—which defense counsel never did. *See* PX-10 at 1; Conroy Aff. ¶¶ 47-52. The motion to strike the certificate of compliance on this basis should thus be

[27] The People served a supplemental addendum to the ADF on July 24, 2023 that identified 33 books, and advised defense counsel that the list of books had been updated. Conroy Aff. ¶ 50.

denied. Defense counsel may contact the People at any time to make arrangements to inspect or copy the publicly-available books identified on Addendum A. Conroy Aff. ¶ 53.

Defendant also falsely claims that the People "have not designated any documents that they plan to use in their case-in-chief" in violation of CPL § 245.20(1)(o). DB: 47. The People's first discovery production on May 23, 2023 included all of the exhibits presented to the grand jury and an index identifying each exhibit by Bates number. Conroy Aff. ¶ 48. On August 24, 2023, the People advised defense counsel in writing that:

> [A]lthough the People are not required to provide an exhibit list as part of discovery, on May 23, 2023, we provided you with a list of all grand jury exhibits and their identifying Bates numbers, and we produced each of those exhibits in a clearly identified folder in our discovery production for your ease of reference. At present, the grand jury exhibits are the exhibits the People intend to introduce in our case-in-chief at trial. The People have not yet formed an intention as to other exhibits we will introduce in our case-in-chief at trial. We will update you as soon as practicable, subject to the continuing duty to disclose in CPL § 245.60, when we determine any additional exhibits that we will introduce.

PX-13; Conroy Aff. ¶ 54. This is the exact interpretation of the People's statutory obligations under CPL § 245.20(1)(o) that this Court reached in a prior proceeding. *See* Hearing Tr. 7-9, *People v. The Trump Corporation*, Ind. No. 1473/2021 (Sup. Ct. N.Y. Cnty. Aug. 12, 2022) (PX-37). Defense counsel simply ignored the People's August 24 correspondence.

As of the date of this memorandum, the grand jury exhibits are the exhibits the People intend to introduce at trial, and the People will update the defense as soon as practicable as we identify additional exhibits we intend to introduce as part of our case-in-chief. Conroy Aff. ¶ 55. Because the People had already—before defendant filed his motion—provided the exhibit list defendant claims he was due, the Court should deny the motion to strike the certificate of compliance.

CONCLUSION

Defendant is alleged to have lied in New York business records over and over to conceal the truth about his involvement in an illegal conspiracy to undermine the integrity of the 2016

presidential election. A grand jury decided based on the facts and the law to charge defendant with felony crimes for his conduct. This case should now proceed to trial. Defendant's omnibus motions should be denied.

DATED: November 9, 2023

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

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

AFFIRMATION OF SERVICE

The undersigned affirms under penalty of perjury that on November 9, 2023, he served the People's Memorandum of Law in Opposition to Defendant's Omnibus Motions, the Affirmation of Christopher Conroy in Support of the People's Opposition, and the accompanying exhibits on counsel for defendant (Todd Blanche, Susan Necheles, Emil Bove, Chad Seigel, Gedalia Stern, Joe Tacopina, and Stephen Weiss) by email with consent.

Dated: November 9, 2023
New York, New York

Respectfully submitted,

/s/ Matthew Colangelo
Matthew Colangelo
Assistant District Attorney