To be argued by:
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15 minutes requested

Supreme Court of the State of New York
Appellate Division – First Department

No. 2022-00814

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

Petitioner-Respondent,

v.

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

Respondents-Appellants.

BRIEF FOR PETITIONER-RESPONDENT

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Supreme Court, New York County – Index No. 451685/2020

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PRELIMINARY STATEMENT

In this civil fraud investigation authorized by New York Executive Law § 63(12), the New York Office of the Attorney General (OAG) is investigating potential misrepresentations or omissions in financial statements describing assets of the Trump Organization, an amalgam of entities comprising the real estate holdings and other business interests of appellant Donald J. Trump. So far, the investigation has uncovered significant evidence potentially indicating that, for more than a decade, these financial statements relied on misleading asset valuations and other misrepresentations to secure economic benefits—including loans, insurance coverage, and tax deductions—on terms more favorable than the true facts warranted.

To help reach a final determination about whether there has been fraud within the meaning of § 63(12), and who may be responsible for any such fraud, OAG issued civil testimonial subpoenas to Mr. Trump and to Trump Organization Executive Vice Presidents Donald Trump, Jr., and Ivanka Trump (collectively, appellants). Supreme Court, New York County (Engoron, J.), denied appellants' request to quash these subpoenas and granted OAG's cross-motion to compel the depositions.

This Court should affirm. Supreme Court properly rejected appellants' contention that OAG was required to cease pursuing civil investigative discovery once evidence emerged of potential criminal misconduct that justified also conducting a criminal investigation. Nothing in the law supports that outcome, which would impermissibly constrain the discretion of the Attorney General, New York's chief law enforcement officer, to select from among the investigative tools and remedies conferred on her by statute.

OAG's civil subpoenas do not compel appellants to provide information that may be used against them in a future criminal case. At their depositions, should they so choose, appellants may exercise their right to decline to answer any questions calling for responses that may incriminate them. Nor do the civil subpoenas circumvent any grand jury rules. Contrary to appellants' contention, they do not have any right to be called to testify to the grand jury and obtain immunity from prosecution.

OAG's involvement in grand jury proceedings directed by the Manhattan District Attorney's Office (DANY) does not alter the outcome. OAG began its civil investigation nearly two years before it became involved in any criminal inquiry. And when OAG concluded that opening

a criminal investigation was warranted, OAG promptly informed appellants about the criminal inquiry, enabling them to make a knowing and informed decision about whether and to what extent to invoke their privilege against self-incrimination.

Finally, appellants are not aided by their premature and unsupported claim of selective prosecution. That defense to substantive enforcement charges is unripe because no enforcement action exists and OAG is simply investigating to determine whether to bring civil fraud charges. In any event, as Supreme Court correctly concluded, appellants failed to offer any proof supporting their claim: for example, they failed to show that OAG has declined to investigate or take enforcement action against entities or individuals similarly situated to the Trump Organization or its principals.

OAG's civil investigation began after a corporate insider gave sworn testimony that the Trump Organization had engaged in widespread fraud. That fact, along with the substantial evidence collected to date of possible business fraud, amply supports Supreme Court's finding that the civil subpoenas are part of a valid and well-founded investigation rather than

a product of political animus. Appellants are not above the law, and must abide by the civil testimonial subpoenas.

QUESTIONS PRESENTED

1. Did OAG lawfully issue civil subpoenas for testimony under Executive Law § 63(12) where the subject matter of OAG's civil investigation may also be under review in a criminal grand jury proceeding directed by DANY?

Supreme Court answered in the affirmative.

2. Are appellants entitled to an evidentiary hearing to explore the inner workings of any pending investigations?

Supreme Court did not decide this issue, which was not adequately preserved below.

3. Are appellants being selectively prosecuted in violation of the Equal Protection Clause?

Supreme Court answered in the negative.

FACTUAL AND PROCEDURAL BACKGROUND[1]

A. The Statutory Power of the Attorney General's Office (OAG) to Investigate Possible Business Fraud

New York Executive Law § 63(12) empowers OAG to bring a civil enforcement proceeding for injunctive or monetary relief against "any person" who "engage[s] in repeated fraudulent or illegal acts or otherwise demonstrate[s] persistent fraud or illegality in the carrying on, conducting or transaction of business." Under this subsection, "the test for fraud is whether the targeted act has the capacity or tendency to deceive or creates an atmosphere conducive to fraud." *Matter of People v. Northern Leasing Sys., Inc.*, 193 A.D.3d 67, 75 (1st Dep't 2021) (quotation marks omitted).

In order "to take proof and make a determination of the relevant facts," Executive Law § 63(12) specifically authorizes OAG "to issue subpoenas in accordance with the civil practice law and rules." An investigative subpoena under § 63(12) is valid if OAG demonstrates some

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[1] This matter's factual background is fully detailed in OAG's supplemental verified petition, dated January 18, 2022, and the exhibits thereto, filed in Supreme Court as part of OAG's motion to compel compliance with these subpoenas. Most of the exhibits remain confidential and were submitted under seal.

factual basis for the investigation, and the relevance of the items sought. *E.g.*, *Matter of Libre by Nexus, Inc. v. Underwood*, 181 A.D.3d 488, 488 (1st Dep't 2020). Under this broad standard, a subpoena must be upheld unless the requested information "is utterly irrelevant to any proper inquiry." *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 331-32 (1988) (quotation marks omitted). The Attorney General enjoys a presumption of good faith when issuing a subpoena. *See id.*; *Matter of American Dental Coop. v. Attorney-General of State of N.Y.*, 127 A.D.2d 274, 280 (1st Dep't 1987).

B. The Executive Law § 63(12) Subpoenas to Appellants for Testimony and Documents

1. An investigation reveals evidence of pervasive material misrepresentations in the financial statements of Donald J. Trump

In February 2019, Michael Cohen, a former Trump Organization senior executive and special counsel to Mr. Trump, testified under oath to Congress. In that sworn testimony, Mr. Cohen stated that Mr. Trump's financial statements for 2011, 2012, and 2013—copies of which Mr. Cohen gave to Congress—misrepresented the values of Mr. Trump's assets to obtain, among other things, favorable terms for loans and insurance. *See*

Hearing Before H. Comm. on Oversight & Reform, 116th Cong. 13, 19, 38-39, 160 (2019). The following month, in March 2019, OAG opened this civil investigation under Executive Law § 63(12) into whether the Trump Organization and Mr. Trump misstated the value of Mr. Trump's assets on annual financial statements, tax submissions, and other documents to secure loans, insurance coverage, or other economic benefits. (Record on Appeal (R.) 214 ¶ 304; *see also* R. 129 ¶ 1.[2])

Since then, OAG has interviewed more than forty witnesses. They include many current and former Trump Organization executives and employees—such as General Counsel Alan Garten (*see* R. 229 ¶ 347), since-resigned Chief Financial Officer Allen Weisselberg (*see* R. 218 ¶ 320), and Controller Jeffrey McConney (*see* R. 225 ¶ 339). The second and third of these witnesses played a role in crafting the financial statements at the crux of this investigation. (R. 163 ¶ 125, R. 225 ¶ 339.) OAG also has interviewed outside professionals—such as lawyers, accountants, and appraisers—who provided services to the Trump Organization. (*See, e.g.*, R. 153 ¶ 90, 210 ¶ 287.)

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[2] Paragraph numbers in citations refer to paragraphs of OAG's supplemental verified petition (R. 128-242).

In addition, OAG has received and reviewed hundreds of thousands of documents produced by the Trump Organization.[3] Only a handful of these documents have come from Mr. Trump's own custodial files. (*See* R. 222 ¶ 333.) In testimony, Mr. Garten confirmed to OAG that Mr. Trump regularly reviewed printed material and communicated with employees via sticky notes, and that Mr. Trump's assistants maintained his files in cabinets in the Trump Organization's offices. (R 229 ¶ 347.) To date, the Trump Organization appears not to have searched these files to any meaningful degree despite OAG's subpoenaing those documents. (Documentary subpoenas to the Trump Organization are not at issue here.) (*See* R. 220-231 ¶¶ 326-351.)

The evidence collected to date suggests that financial statements, tax submissions, loan guarantees, and other documents contain material misstatements and omissions. These misrepresentations appear to have been aimed at portraying Mr. Trump's net worth and liquidity as higher than the true facts warranted, to secure economic benefits to which

[3] Nearly all these documents were received after OAG identified serious lapses in the Trump Organization's document preservation and production and its compliance was placed under judicial supervision.

Mr. Trump might not otherwise have been entitled. OAG's supplemental verified petition details a nonexhaustive set of these potential falsehoods, explains why they may be false or misleading, and demonstrates their relevance to particular financial transactions.

Central to the investigation are annual Statements of Financial Condition of Donald J. Trump (Statements), reflecting Mr. Trump's net worth, based on asserted values of specific assets and classes of assets, minus outstanding liabilities. (*E.g.*, R. 135 ¶ 25.) From 2004 until 2020, the accounting firm Mazars compiled the Statements. (R. 135-136 ¶ 26.) Last month, in a letter to the Trump Organization, Mazars announced that the Statements "for the years ending June 30, 2011 – June 30, 2020, should no longer be relied upon."[4] (R. 1195.)

Over the years, the Trump Organization submitted these potentially misleading valuations to lenders and insurers to obtain financial transactions on favorable terms. (*See* R. 174-183 ¶¶ 161-190.) These

[4] Mr. Trump issued a public response that, among other things, recited and endorsed specific asset and net worth figures from the June 2014 Statement, accused the New York Attorney General of racism, and claimed that Hillary Clinton secretly runs the Manhattan District Attorney's Office. (R 1203-1207.)

efforts procured more than $300 million total in loans from Deutsche Bank for the development of a golf resort in Florida and hotels in Chicago and Washington, D.C. (*See* R. 174-178 ¶¶ 164-175.) Mr. Trump personally guaranteed each of these loans, for which the guarantor's "financial strength" or "financial profile" explicitly factored into the lending decision. (R. 176-178 ¶¶ 170-175.) As a condition of the transactions, the lender received the Statements from before the loans closed and every annual Statement thereafter—each of which, through 2016, Mr. Trump personally certified to be accurate in all material respects. (R. 177-178 ¶¶ 175-176.) From 2016 through 2019, appellant Donald Trump, Jr., did the same. (R. 178 ¶ 177.)

Evidence reveals that misrepresentations in the Statements would have breached contractual covenants, required recalculating the assets' actual worth, altered the transactions' risk profile, or caused the businesses to reconsider entering the transactions. (*See* R. 155 ¶¶ 96-98, 175-176 ¶¶ 166-169, 183 ¶ 190.)

a. Potential misstatements about the value of unsold residential apartments

OAG has preliminarily concluded that the Statements contain misstatements about residential apartments the Trump Organization owns. For example, the 2012–2016 Statements reflected that Mr. Trump's triplex residence in Manhattan's Trump Tower exceeded 30,000 square feet and valued the apartment at up to $327 million based on those dimensions. In 2017, however, the Statement slashed the apartment's value by two-thirds, sizing the residence at just under 11,000 square feet—the figure specified in the building's offering plan. (R. 144-146 ¶¶ 56-59.) Mr. Weisselberg admitted at his deposition that the apartment's value had been overstated by "give or take" $200 million.[5] (R. 145-146 ¶ 59.)

In 2010, an outside appraisal concluded that the unsold residential units in the Trump Park Avenue building had a total market value of $55 million. But the 2010–2012 Statements valued those same apartments at

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[5] Also in 2017, a *Forbes* magazine article publicly revealed, based on a review of real estate records, that Mr. Trump's residence comprised only "10,996 square feet of prime Manhattan real estate—a massive residence, no doubt, but much smaller than what Trump claims to own." (R. 146 ¶ 61.)

$292 million—more than six times their appraised value. This inflated figure derived in part (though not fully) from ignoring the rent-stabilized status that depressed the market value of approximately half of the units.[6] (R. 160 ¶¶ 116-118.) Starting in 2012, the Trump Organization maintained its own internal estimates of the unsold apartments' current market value that it used for business planning purposes. Although still much higher than the independent appraisal, these internal values were, all told, up to $80 million lower than the values that the Statements provided for external consumption. (R. 161-162 ¶¶ 120-122.)

Moreover, from 2011 to 2013, appellant Ivanka Trump held an option to purchase the Trump Park Avenue penthouse apartment where she lived. While the option could be exercised for $8.5 million, the Statements for those years valued that same unit at up to $25 million—triple the option price. (R. 165 ¶ 132.) By contrast, after Ivanka Trump in 2014 acquired an option to buy a larger apartment for $14.3 million, the ensuing year's Statement lowered the larger apartment's value from $45

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[6] In particular, the 2010–2012 Statements collectively valued the rent-stabilized units at $49,596,000—over *sixty-six* times the $750,000 total value the outside appraiser had assigned to these units. (R. 160 ¶ 116, 162 ¶ 123.)

million (the previously assigned value) to $14.3 million (the option price). (R. 165-166 ¶¶ 133-134.)

b. Potential misstatements about the asset valuation process

The 2011–2019 Statements represented that the values reported therein derived from analyses made in conjunction with "outside professionals." (R. 163 ¶ 126.) Yet OAG has not seen any evidence indicating that anyone in the Trump Organization consulted with any outside professional about the market values that the Statements asserted for unsold apartments at Trump Park Avenue. (R. 164 ¶ 127.)

Similarly, the only outside professional listed on seven golf club valuations for the 2013–2018 Statements denied ever having provided a valuation for any Trump golf course for those years. (R. 153-154 ¶¶ 90-91.) And when negotiating renewals of the Trump Organization's surety bond program in 2018 and 2019, to cover items such as liquor licenses and construction projects, Mr. Weisselberg told the underwriter that the Statements' real estate values were produced by a professional appraisal firm—specifically Cushman & Wakefield or the Newmark Group—on which the underwriter relied in crediting the values. (R. 179-182

¶¶ 179-187.) Evidence suggests, however, that only Trump Organization staff created those valuations. (R. 182 ¶¶ 188-189.)

Certain of the Statements' valuations also appear to have been inflated by a hidden percentage for Mr. Trump's alleged "brand value," despite the Statements' express assurance that they excluded brand value in line with generally accepted accounting principles. (R. 151-155 ¶¶ 80-98.) At least twice, Mr. Trump personally supplied a lender with an independent analysis that Mr. Trump said "establishes my brand value, which is not included in my net worth statement." (R. 151-152 ¶ 82, 230 ¶ 349.)

c. Potential misstatements about liquidity

Evidence indicates that the 2013–2020 Statements materially overstated Mr. Trump's liquidity by miscategorizing as liquid "cash" the value of limited partnership interests in which Mr. Trump held only a minority stake, although cash distributions were allowed only in the general partner's sole discretion. (R. 166-168 ¶¶ 135-141.) Internal Trump Organization spreadsheets did not include in cash holdings either the value of these partnership interests or any expected distributions there-

from—and one spreadsheet explained that the general partner alone controlled cash distributions. (R. 167-168 ¶ 139.)

d. Potential misstatements about the value of charitable donations

OAG also has uncovered evidence suggesting that, in submissions to taxing authorities, the Trump Organization inflated the value of two separate development projects—a housing subdivision and a golf course—for the purpose of obtaining more than $5 million worth of tax benefits, over the course of 2014 to 2018, from the donation of environmental conservation easements on the parcels. (R. 183-212 ¶¶ 191-294, 232 ¶ 353.)

2. OAG informs the Trump Organization and its senior executives, including appellants here, about whether there are parallel criminal inquiries

At several points, OAG has updated appellants and the Trump Organization about whether OAG is involved in parallel criminal inquiries, separate from the civil § 63(12) investigation.

In May 2020, more than a year into this investigation, OAG subpoenaed testimony from Trump Organization Vice President Eric Trump. Soon thereafter, counsel for the Trump Organization requested

confirmation that OAG was conducting a civil inquiry only. (*See* R. 215 ¶ 310.) OAG responded that "[t]his Office does not currently have an open criminal investigation into these matters." (R. 215-216 ¶ 311.) And OAG explained that "we have not coordinated with another criminal law enforcement agency on matters related to this investigation." (R. 215-216 ¶ 311.) OAG added that "if at any point we become aware of information that prompts this Office to open a criminal investigation or referral, we will advise counsel and proceed accordingly." (R. 215-216 ¶ 311.)

At their subsequent depositions, each of Eric Trump and Allen Weisselberg repeatedly invoked his Fifth Amendment privilege against self-incrimination, refusing to answer more than 500 questions apiece. (R. 217-219 ¶¶ 317-320.)

In follow-up correspondence sent in January 2021, OAG informed the Trump Organization that the records reviewed so far indicated that the Trump Organization had paid for Mr. Weisselberg's Manhattan apartment from at least 2013 through 2016, and that Mr. Weisselberg had not reported those payments as compensation. OAG advised that this discovery "could prompt [OAG] to open a criminal investigation" or seek a criminal referral for the matter. (R. 905; *see* R. 216 ¶ 312.) OAG

emphasized, however, "that we do not have an open criminal investigation, that we have not coordinated with another criminal law enforcement agency, and that we have not sought a criminal referral for Mr. Weisselberg at this time." (R. 905; *see* R. 216 ¶ 312.)

Three months later, in April 2021, OAG notified counsel for the Trump Organization, Donald Trump, Jr., and Ivanka Trump "that in addition to our ongoing civil investigation, this Office is also engaged in a criminal investigation." (R. 907; *see* R. 217 ¶ 313.) This letter added that the "potentially criminal conduct under review goes beyond the scope of the issues identified in the January 29 letter and may implicate the actions of other current and former officers, directors and employees of the Trump Organization and its affiliates, including matters that are the subject of the ongoing civil investigation." (R. 907; *see* R. 217 ¶ 313.)

On June 30, 2021, DANY charged the Trump Organization and Mr. Weisselberg in a fifteen-count indictment with criminal tax fraud, falsifying business records, and other crimes, all arising from the failure to properly report compensation and benefits paid by the Trump Organization to Mr. Weisselberg over sixteen years. (R. 565-588.) The DANY indictment's allegations are distinct from the events described in OAG's

supplemental verified petition in this subpoena-compliance proceeding: as described above (see *supra* at 6-15), OAG's civil investigation concerns potential misstatements in Mr. Trump's financial statements, guarantees, and related documents. In November 2021, news sources reported that DANY had convened a second grand jury, expected to last for a six-month term, to hear evidence concerning the Trump Organization's financial practices and perhaps vote on criminal charges.[7]

As recently confirmed under oath by a member of OAG's civil investigative team, OAG has not convened a grand jury to investigate Mr. Trump, Donald Trump, Jr., Ivanka Trump, or the Trump Organization. OAG currently lacks a referral under Executive Law § 63(2) or (3) that would confer jurisdiction on OAG to prosecute criminal offenses arising from the misstatements and omissions described in OAG's supplemental petition. Moreover, DANY has not transferred to the Attorney General the responsibility for any grand jury proceeding involving Mr. Trump, Donald Trump, Jr., Ivanka Trump, the Trump Organization, or any of its employees. (R. 1193.)

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[7] *E.g.*, Shayna Jacobs et al., *Manhattan DA convenes new grand jury in Trump Org. case to weigh potential charges*, Wash. Post (Nov. 4, 2021).

While OAG cross-designated two attorneys to DANY in connection with a 2018 grand jury investigation, those two attorneys reported to DANY and operated at DANY's direction when working on that investigation.[8] These cross-designated attorneys continue to work on other DANY grand jury investigations, where they are likewise subject to DANY's direction. (R. 1193.)

3. OAG subpoenas relevant and necessary testimony from the Trump Organization's senior-most principals

In December 2021, under Executive Law § 63(12), OAG subpoenaed testimony and documents from Mr. Trump and testimony from Donald Trump, Jr., and Ivanka Trump. (*See* R. 413-434.) OAG's supplemental verified petition details the relevance of the information sought in these requests. (*See* R. 224-239 ¶¶ 337-383.) As that pleading explains, Mr. Trump owns the Trump Organization, and the other two individuals are senior executives of the company. (R. 131 ¶¶ 8-10.) All three subpoena recipients were closely involved in the preparation of the Statements,

[8] This investigation concerned, among other things, treatment of sums allegedly paid to two women in 2016, and it generated the document subpoenas to the Trump Organization at issue in *Trump v. Vance*, 140 S. Ct. 2412 (2020).

negotiated major transactions in which the Statements were used, or received information that conflicted with the asset values appearing in the Statements.

For example, Mr. Trump personally certified the accuracy of the Statements for the years prior to 2016, at which point his assets were placed in a revocable trust. (R. 226-228 ¶¶ 342-344; *see also* R. 224-225 ¶ 338 (Statements declared that "Donald J. Trump is responsible for the preparation and fair presentation of the financial statement").) Evidence indicates that he was also involved in reviewing draft statements and preparing asset valuations contained therein. (R. 224-226 ¶¶ 338-340.)

Donald Trump, Jr., an Executive Vice President of the Trump Organization, was responsible for the Statements for the years 2016 to 2020, when he was a trustee for the trust that then held Mr. Trump's assets. (R. 233-234 ¶ 356.) He also personally certified the accuracy of the 2016–2019 Statements, as loan contracts required, sometimes doing so as Mr. Trump's "attorney in fact." (R. 234-235 ¶ 357.) Evidence further reveals that Donald Trump, Jr., received detailed analyses of business segments in the Trump portfolio, with projected and actual cash flow

figures, some of which cast doubt on the Statements' valuation of the company's liquid position. (*See* R. 235 ¶ 358.)

Ivanka Trump, as an Executive Vice President of the Trump Organization, was directly involved in certain financial transactions that rested on the potential misrepresentations in the Statements. For example, she negotiated financing from Deutsche Bank for a golf course in Florida and hotels in Chicago and Washington, D.C.—all backed by Mr. Trump's personal guarantee and certification of the Statements' accuracy. (R. 236-238 ¶¶ 365-374.) Further, Ivanka Trump received internal financial projections relating to assets valued in the Statements. (R. 238 ¶ 379.) If relied on to assess market value, these projections would have produced a lower value for certain properties (e.g., golf clubs) than the Statements reflected. (*See* R. 238-239 ¶ 379.)

C. Appellants' Motion to Quash the Subpoenas, and OAG's Cross-Motion to Compel Compliance

All three recipients moved to quash the subpoenas. Primarily, they argued that requiring them to sit for depositions in OAG's civil fraud investigation would violate their constitutional and statutory rights by circumventing DANY's ongoing grand jury process. (R. 630-635.) Alter-

natively, appellants sought to stay civil discovery until any criminal proceedings ended. (R. 635-638.)

OAG opposed the motion to quash and cross-moved to compel prompt compliance with the subpoenas. In doing so, OAG explained that the circumstances here provided no basis for excusing or staying civil depositions because even if DANY's confidential grand jury proceeding covered the same ground, the law has long permitted parallel criminal and civil proceedings. As OAG further explained, appellants were free to assert their privilege against self-incrimination in response to deposition questioning. (R. 668-683.)

In a reply filing, appellants introduced a claim of selective prosecution, arguing that the Attorney General had chosen to investigate appellants "based solely on political animus" and "political opposition." (R. 1156-1158.)

At no point did Mr. Trump object to the portion of the subpoena to him that sought documents. Rather, counsel for Mr. Trump pledged to "work on getting [OAG] the documents you seek, if any," while insisting that the documents were "in the possession of the Trump Organization." (R. 228-229 ¶ 346.)

D. Supreme Court's Decision and Order Compelling Subpoena Compliance

By decision and order entered on February 17, 2022, Supreme Court denied appellants' motion to quash or stay the subpoenas, and granted OAG's cross-motion to enforce the subpoenas. (R. 6-13.) Based on a review of the evidence to date, the court concluded that OAG had "uncover[ed] copious evidence of possible financial fraud" by the Trump Organization and had "the clear right" to pursue sworn testimony from that entity's principals, including Mr. Trump. (R. 13.)

Supreme Court determined that the civil subpoenas did not violate appellants' constitutional or statutory rights. As the court emphasized, appellants "have an absolute right to refuse to answer questions that they claim may incriminate them"—just as Eric Trump had done "in response to more than 500 questions" at his deposition. (R. 9.) Supreme Court rejected the contention that OAG had issued these civil subpoenas solely as a pretext to obtain evidence for a criminal prosecution. (R. 9.) The court found that OAG had "pursued its civil investigation for more than a year" before becoming involved in any criminal investigation related to the Trump Organization. (R. 9.) And OAG had "promptly and

repeatedly" informed appellants when it determined that "they could be subject to both civil and criminal" remedies. (R. 10.)

Supreme Court also determined that OAG's civil subpoenas did not circumvent state grand jury protections. (R. 8.) While noting that Criminal Procedure Law (CPL) § 190.40 provides for a witness who testifies before a grand jury to receive immunity, unless the witness waives immunity, the court highlighted that neither DANY nor OAG had subpoenaed any appellant "to appear before a grand jury." (R. 8.) And Supreme Court found no support for the "suggestion that, in the absence of a parallel civil investigation, OAG would have been forced to subpoena [appellants] to appear before a grand jury" under circumstances that would permit them to receive immunity. (R. 8-9.)

In addition, Supreme Court concluded that appellants had not shown selective prosecution, and thus declined to quash the subpoenas or convene an evidentiary hearing based on that claim. (R. 11.) In particular, the court explained, appellants failed to show either that OAG was not applying the law to others who were similarly situated or that OAG had discriminated against appellants "based on race, religion, or any other impermissible or arbitrary classification." (R. 11.)

In rejecting these claims, Supreme Court held that various pre-inauguration public comments by Attorney General James pertaining to Mr. Trump did not render the subpoenas unenforceable. As the court found, OAG appropriately began its investigation after "sworn congressional testimony by former Trump associate Michael Cohen" implicated the Trump Organization in widespread financial improprieties. (R. 11.) And from an in camera review of "thousands of documents," the court further found "that OAG has a sufficient basis for continuing its investigation, which undercuts the notion that this ongoing investigation is based on personal animus." (R. 10.)

Finally, applying settled authority, Supreme Court exercised its discretion to decline to stay enforcement of the civil subpoenas pending any criminal investigatory proceedings. (R. 13.) As the court again emphasized, when giving civil depositions, appellants "will have the right to refuse to answer any questions that they claim might incriminate them," and that "refusal may not be commented on or used against them in a criminal prosecution." (R. 13.) The court remarked that a stay would improperly enable appellants to use the privilege against self-incrimina-

tion as both "a shield against questions and a sword against the investigation itself." (R. 13.)

Supreme Court thus ordered Mr. Trump to comply with OAG's document demand within fourteen days of its decision, or by March 3, 2022, and ordered each appellant to appear for a deposition within twenty-one days, or by March 10, 2022. (R. 13.) Through a so-ordered stipulation, Mr. Trump has since agreed to comply fully with OAG's document demands by the end of briefing in this appeal. OAG has agreed to defer enforcing the testimonial subpoenas until after this Court issues a decision resolving the appeal. (Stipulation & Order (Mar. 3, 2022), NYSCEF Doc. No. 660.)

ARGUMENT

POINT I

SUPREME COURT PROPERLY COMPELLED APPELLANTS TO COMPLY WITH THE CIVIL INVESTIGATORY SUBPOENAS

Supreme Court properly rejected appellants' motion to quash or stay the civil testimonial subpoenas that OAG has issued under Executive Law § 63(12), and correctly compelled appellants to comply with the subpoenas.

As an initial matter, appellants do not contest the court's discretionary rejection of their request to stay the subpoenas until any parallel criminal proceedings terminate. (*See* R. 13.) Appellants have thus abandoned any request for such relief.[9] *See Stefatos v. Frezza*, 95 A.D.3d 787, 787 (1st Dep't 2012) (claims not raised in opening appeal brief are abandoned).

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[9] In any event, Supreme Court properly exercised its discretion in declining to stay the subpoenas' enforcement, given that appellants may invoke the Fifth Amendment privilege against self-incrimination and decline to answer questions during the civil depositions. *See Steinbrecher v. Wapnick*, 24 N.Y.2d 354, 365 (1969); *accord Access Capital v. DeCicco*, 302 A.D.2d 48, 52 (1st Dep't 2002) ("[I]nvoking the privilege against self-incrimination is generally an insufficient basis for precluding discovery in a civil matter.").

In addition, appellants do not contest that the OAG subpoenas here readily satisfy the factual standards for enforceability. Nor could they plausibly make any such argument. In a § 63(12) investigation, OAG's civil subpoenas are generally enforceable so long as they seek information reasonably relevant to an investigation that has "'some factual basis.'" *E.g.*, *Matter of Libre by Nexus*, 181 A.D.3d at 488 (quoting *Matter of American Dental*, 127 A.D.2d at 280).

As Supreme Court found, OAG's investigation plainly has "some factual basis," *id.*, in light of OAG's unearthing of "copious evidence of possible financial fraud" by the Trump Organization (R. 13). Indeed, the supplemental verified petition details the many potential misstatements and omissions that OAG has uncovered to date in the Statements. See *supra* at 11-15.

Supreme Court further found, and appellants do not dispute, that testimony from appellants is relevant to the matters under investigation. (*See* R. 11-12.) Indeed, Mr. Trump and Donald Trump, Jr., were each directly involved in preparing or certifying the accuracy of many of the Statements at issue. See *supra* at 19-21. And each appellant appears to have played a key role in creating, reviewing, or (in Ivanka Trump's case)

negotiating financial transactions resting on the potentially false or misleading valuations and other representations in the Statements.

Instead, appellants seek to quash OAG's civil testimonial subpoenas on the ground that the subpoenas purportedly circumvent appellants' constitutional or statutory rights. *See* Joint Br. for Resp'ts-Appellants (Br.) at 21-41. Appellants argue that the existence of the criminal grand jury investigation directed by DANY means that OAG's civil testimonial subpoenas are unlawful. According to appellants, the subpoenas improperly seek to "compel" their testimony through civil depositions, thereby circumventing appellants' purported right to testify in front of the grand jury and receive immunity from prosecution for the issues about which they testify. *See id.* at 24, 28, 34-37. This argument is meritless because (i) appellants have the right to decline to answer questions in their civil depositions on the basis that the answers might incriminate them; and (ii) appellants do not have any right to be called to testify before the grand jury under circumstances that allow them to obtain immunity from prosecution.

A. The Civil Subpoenas Do Not Compel Appellants to Testify About Any Matters That Might Incriminate Them.

Appellants' arguments here rest on the fundamentally flawed premise that the civil subpoenas will compel potentially incriminating testimony from them. *See* Br. at 36 (maintaining that subpoenas will "compel testimony"); *see also id.* at 22 (asserting that OAG is using civil subpoenas "in lieu of a grand jury subpoena" to secure testimony); *id.* at 37 (stating that civil subpoenas will "obtain the same testimony" as grand jury subpoena). But as Supreme Court correctly held, this assertion overlooks that appellants may invoke their privilege against self-incrimination in response to any questions raising that concern. (R. 9.)

The state and federal constitutional privilege against self-incrimination shields a witness from having to answer official questions in any type of "proceeding, civil or criminal, formal or informal, where the answers might incriminate" that person. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *see People v. Cantave*, 21 N.Y.3d 374, 379 (2013). There is thus no plausible basis for appellants' contention that the civil subpoenas compel them to provide testimony that then may be shared with the prosecutors conducting the grand jury investigation, or otherwise may be used against appellants in any criminal proceeding. To the contrary, appellants

are free to exercise their constitutional right not to answer questions during the civil depositions whenever the answers to those questions might tend to incriminate them—thereby preventing the creation of any civil testimony that could be shared with prosecutors or admitted in a criminal proceeding. *See, e.g.*, *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976). And any invocation of the privilege against self-incrimination also may not be used against appellants during any criminal proceeding. *See Carter v. Kentucky*, 450 U.S. 288, 305 (1981).

Although a civil factfinder may consider a witness's invocation of the privilege against self-incrimination when assessing "the strength of evidence offered by the opposite party on the issue," *Marine Midland Bank v. Russo Produce Co.*, 50 N.Y.2d 31, 42 (1980), the potential for such an adverse inference in a civil proceeding does not supply any basis to quash these civil subpoenas. As an initial matter, there is not currently any civil enforcement proceeding—there is simply a well-founded investigation. Moreover, even in any future civil enforcement proceeding, an adverse inference would not be automatic; the factfinder would decide, under the circumstances, whether an adverse inference is proper on a particular issue and how strong an inference can be drawn. *See LiButti*

v. United States, 107 F.3d 110, 124 (2d Cir. 1997); *Access Capital v. DeCicco*, 302 A.D.2d 48, 52 (1st Dep't 2002). And in enforcement actions under Executive Law § 63(12), the factfinder is the court, which is "presumed capable" of properly evaluating evidence and the inferences to be drawn from that evidence. *People v. Cobb*, 294 A.D.2d 199, 200 (1st Dep't 2002); *see People v. Moreno*, 70 N.Y.2d 403, 406 (1987).[10]

At bottom, appellants are merely complaining about what the right against compelled self-incrimination provides: a choice between testifying in a civil deposition or invoking their privilege against self-incrimination, with all that might entail for the strength of the evidence in a future civil enforcement proceeding. *See Stuart v. Tomasino*, 148 A.D.2d 370, 373 (1st Dep't 1989). There is nothing uncommon about a deponent or witness needing to decide whether to invoke the privilege against self-incrimination in a civil proceeding. *See Steinbrecher v. Wapnick*, 24 N.Y.2d 354, 365 (1969); *El-Dehdan v. El-Dehdan*, 114 A.D.3d 4, 20 (2d Dep't 2013), *aff'd*, 26 N.Y.3d 19 (2015); *see also Stuart*, 148 A.D.2d at 373 (calling

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[10] Appellants therefore miss the mark with references to "potentially poison[ing] the jury pool" (Br. at 29), as there would be no jury in a § 63(12) enforcement proceeding.

such a choice "one which by necessity ha[s] to be made"). And like any other witness, appellants have no right to use the privilege against self-incrimination as both "a shield against questions and a sword against the investigation itself." (R. 13.) *See United States v. Rylander*, 460 U.S. 752, 758 (1983) (declining to convert "shield against compulsory self-incrimination . . . into a sword" against adducing proof in support of evidentiary burden in civil proceeding).

It is "long established" that the privilege against self-incrimination "may not be used as a ground to quash a subpoena" for civil testimony "in advance of compliance." *New York State Commn. on Govt. Integrity v. Congel*, 156 A.D.2d 274, 280 (1st Dep't 1989) (quotation marks omitted); *see also Heit & Weisenthal v. Licht*, 218 A.D. 753, 753 (1st Dep't 1926) ("[T]he claim that an examination before trial ought not to be had because it might result in compelling the witness to give evidence against himself, is not a proper ground for denying the examination."). Rather, appellants must make the choice that the constitution offers and properly assert the privilege, if at all, in response to specific questions at their civil depositions—just as Eric Trump and Allen Weisselberg did during their depositions. (R. 217-219 ¶¶ 317-320.) *See Congel*, 156 A.D.2d at 280.

B. Appellants Do Not Have Any Right to Testify to the Grand Jury and Obtain Immunity from Prosecution.

The next fundamentally false premise of appellants' claim is their contention that absent civil subpoenas, appellants would have a state constitutional or statutory right to be called to testify before a grand jury under circumstances that would give them immunity from prosecution for any transaction about which they testify. *See, e.g.*, Br. at 2, 16, 22, 35-37. In making this argument, appellants rely on the New York State Constitution's bar on compelled self-incrimination. They further rely on CPL § 190.40, which recognizes that a criminal grand jury witness (unlike a civil § 63(12) deponent) can be compelled to give answers to questions that "may tend to incriminate him," CPL § 190.40(1), and thus provides that such a compelled grand jury witness may receive immunity from criminal prosecution arising from that testimony, *see id.* § 190.40(2).

At the outset, as Supreme Court observed (R. 8) and appellants do not dispute, no prosecutor has sought to compel them to testify to a grand jury. And neither the State Constitution nor CPL § 190.40 gives anyone the *right* testify to the grand jury under circumstances that will lead to "automatic immunity" for testifying. *See* Br. at 24.

A "prospective defendant has no constitutional right to testify before the Grand Jury." *People v. Smith*, 87 N.Y.2d 715, 719 (1996); *accord United States v. Williams*, 504 U.S. 36, 52 (1992). And even when a witness appears before a grand jury, immunity does not necessarily follow, as the CPL recognizes. *See* CPL § 190.40(2)(a) (acknowledging that witness may be asked to provide an immunity waiver). CPL § 190.50 delineates the three exclusive circumstances under which New York law permits a witness to appear to testify before a grand jury—none of which creates the supposed right to immunity for testifying that appellants claim is being circumvented here. *See* Br. at 3, 16, 24, 27-28.

First, the district attorney's office "may call as a witness in a grand jury proceeding any person believed by the district attorney to possess relevant information or knowledge." CPL § 190.50(2). The prosecutor may seek an immunity waiver from the prospective grand jury witness as a precondition of testifying. *See id.* § 190.45(3). Where such a waiver is given, the witness does not receive any immunity from prosecution. Where the witness refuses to provide a waiver, the prosecutor must exercise discretion in determining whether to compel the witness's grand jury

testimony—and thereby confer immunity from prosecution for the topics about which the witness is compelled to testify. *See id.* § 190.40(1)-(2).

Thus, a witness does not have any *right* to be called by the prosecutor to testify to the grand jury—let alone to obtain immunity for doing so. Instead, prosecutors have "broad discretion" and "substantial control over the Grand Jury proceedings," including the power to "determine[] what witnesses to present to that body." *People v. Di Falco*, 44 N.Y.2d 482, 486-87 (1978); *see also Matter of Soares v. Carter*, 25 N.Y.3d 1011, 1013 (2015) (decision whether to call witness "is solely within the broad authority and discretion" of prosecutor). Every competent prosecutor thus appreciates the need, "in calling witnesses before a Grand Jury, [to] proceed with caution, lest [that act] unintentionally bestow such immunity upon a witness." *People v. Weisman*, 231 A.D.2d 131, 134 (1st Dep't 1997).

Second, the grand jury itself "may cause to be called as a witness any person believed by it to possess relevant information or knowledge," CPL § 190.50(3)—including someone proposed by a "defendant or person against whom a criminal charge is being or is about to be brought," *id.* § 190.50(6). But in that event, the prosecutor "may demand" that the proposed witness "sign a waiver of immunity" as a prerequisite to testi-

fying. *Id.* § 190.50(4). This limitation underscores that a potential witness called by the grand jury itself does not automatically obtain immunity, even where the grand jury is calling that witness at the defendant's suggestion.[11]

Third, if not called by the prosecutor or grand jurors, a person against whom a criminal charge "is being or is about to be or has been submitted to a grand jury" has the "right to appear before such grand jury as a witness in his own behalf."[12] *Id.* § 190.50(5)(a). But critically, a prospective defendant will "be permitted to testify" *only* "upon signing and submitting to the grand jury a waiver of immunity." *Id.* § 190.50(5)(b). The proceeding's subject thus has a "statutory option to appear" before the grand jury, *People v. Evans*, 79 N.Y.2d 407, 413-14 (1992), conditioned on "waiving the right to immunity" and "necessarily giv[ing] up the Fifth

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[11] "Absent this provision, a lay body of Grand Jurors could immunize a suspect without consent of the People and without sufficient knowledge of, or even access to, all of the relevant facts." Peter Preiser, Practice Commentaries to CPL § 190.50 (Westlaw).

[12] Prosecutors have no duty to inform a person about a pending grand jury proceeding, except for a defendant previously arraigned on a felony charge the grand jury is then reviewing. CPL § 190.50(5)(a).

Amendment privilege against self-incrimination," *Smith*, 87 N.Y.2d at 719; *see People v. Brumfield*, 24 N.Y.3d 1126, 1127-28 (2015).

Accordingly, as Supreme Court correctly ruled here, nothing supports appellants' "suggestion that, in the absence of a parallel civil investigation, OAG would have been forced" to subpoena appellants to testify before a grand jury with an attendant grant of immunity. (R. 8-9.) Nor does CPL § 190.40 or the State Constitution give appellants any right to block OAG's civil testimonial subpoenas. Indeed, CPL § 190.40 does not apply at all to OAG's civil investigation under Executive Law § 63(12). *See Shales v. Leach*, 119 A.D.2d 990, 991 (4th Dep't 1986). Rather, by its terms, § 190.40 is limited to witnesses in a grand jury proceeding—a type of proceeding where a witness may be compelled to give answers that may incriminate him or her.[13] But as explained (see *supra* at 30-33), in this Executive Law § 63(12) investigation, appellants cannot be compel-

[13] A separate Criminal Procedure Law section governs the giving of testimony in proceedings other than grand jury proceedings. That section confirms that, outside the grand jury, any witness "may refuse to give evidence requested of him on the ground that it may tend to incriminate him." CPL § 50.20(1). And it makes clear that a "witness who, without asserting his privilege against self-incrimination, gives evidence in a legal proceeding other than a grand jury proceeding *does not* receive immunity." *Id.* § 50.20(4) (emphasis added).

led to testify to matters that may incriminate them because they may invoke their privilege against self-incrimination.

The cases on which appellants rely (Br. at 25-28) are irrelevant. For example, neither *People v. Coss*, 178 A.D.3d 25 (3d Dep't 2019), nor *Matter of New York Civil Liberties Union v. New York City Police Department*, 32 N.Y.3d 556 (2018), concerns grand jury witnesses or immunity. Rather, these cases merely recite the general proposition that a statute should not be interpreted in a manner that circumvents its plain language or the State Constitution. But no provision of the CPL or State Constitution is being circumvented here given that neither gives appellants any right to testify to the grand jury and obtain automatic immunity.[14]

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[14] Appellants also misplace their reliance on *United States v. Bases*, which extended the *Brady* obligations of a prosecutor to other agencies participating in "a joint investigation." 549 F. Supp. 3d 822, 829 (N.D. Ill. 2021); *see also People v. Santorelli*, 95 N.Y.2d 412, 423 (2000). In this civil proceeding, appellants are required to provide information to OAG to comply with the subpoenas. And, as established, appellants do not have any right to appear and give immunized testimony in grand jury proceedings—whether jointly conducted or not.

C. The Existence of Parallel Civil and Criminal Investigations Does Not Alter the Result.

Appellants are also incorrect in arguing (Br. at 24-29) that the existence of parallel civil and criminal investigations, including OAG's role in the grand jury investigation directed by DANY, invalidates the civil subpoenas OAG has issued under Executive Law § 63(12). There is nothing unusual about civil and criminal investigations into the same conduct. To the contrary, such parallel investigations are common and do not allow the recipients of civil subpoenas to avoid their obligations or halt the civil investigation. And a single agency may often be involved in both investigations. Appellants are thus simply incorrect in asserting that a government agency conducting a civil investigation is precluded from enforcing civil subpoenas if it discovers potentially criminal conduct and becomes involved in a criminal inquiry.

For example, in *People v. Kordel*, the federal Food and Drug Administration (FDA) was conducting a civil investigation during which it coordinated with federal criminal prosecutors to send civil interrogatories to the company under investigation. 397 U.S. 1, 3-6 (1970). During that civil investigation, the FDA formally recommended a criminal prosecution against the company's principals, and the U.S. Department of

Justice obtained an indictment and, eventually, convictions. *Id.* at 5-6. The U.S. Supreme Court upheld the use of the answers to the civil interrogatories in the criminal proceeding. The Court explained that their use in the criminal proceeding had not transformed the civil interrogatories into an encroachment on the recipients' privilege against self-incrimination or rendered the criminal proceedings unfair. *Id.* at 11-12. Rather, a recipient "need not have answered the interrogatories" for "[w]ithout question he could have invoked his Fifth Amendment privilege." *Id.* at 7-8; *see also Matter of Edge Ho Holding Corp.*, 256 N.Y. 374, 381 (1931) (rejecting argument that separate inquiry "pending in a court" about a topic "displaces and supersedes inquiry by an administrative officer" on the same topic).

Similarly, in *United States v. Gel Spice Co.*, the FDA conducted inspections of a company, brought a civil seizure proceeding based on its inspections, subsequently recommended a criminal prosecution based on many of the same inspections, and then continued to pursue civil inspections and proceedings against the same company. 773 F.2d 427, 429-31 (2d Cir. 1985). The Second Circuit rejected the argument that the FDA had acted in bad faith, explaining that the FDA's decision "to utilize its

criminal enforcement option" did not require it to "abandon its civil enforcement responsibilities" or forgo further inspections "pending the conclusion of criminal proceedings." *Id.* at 432. As the court explained, "[c]ivil and criminal enforcement may proceed simultaneously." *Id.* at 434; *see also SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1383 (D.C. Cir. 1980) (holding that mere "existence of a grand jury proceeding neither adds to nor detracts from" obligation to supply civil investigative evidence "in obedience to a lawful subpoena").

New York authority similarly recognizes that an investigation into potential misconduct may yield proof for use in either civil or criminal proceedings. For example, the Martin Act vests OAG with "broad regulatory and remedial powers to prevent fraudulent securities practices by investigating and . . . thereafter, if appropriate," bringing a "civil or criminal prosecution." *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgt. Inc.*, 18 N.Y.3d 341, 349-50 (2011) (quotation marks omitted); *see* General Business Law §§ 353, 358. Likewise, OAG may use information obtained when investigating antitrust violations for civil remedies as well as "possible criminal prosecution." *Matter of Grandview Dairy v. Lefkowitz*, 76 A.D.2d 776, 777 (1st Dep't 1980); *see* General Business Law §§ 342-343.

Although Executive Law § 63(12), unlike these other statutes, authorizes civil remedies only, OAG can receive authorization pursuant to Executive Law § 63(2) or (3) to prosecute a criminal offense established by the evidence obtained in a § 63(12) fraud investigation.

In *Kordel*, the U.S. Supreme Court noted two circumstances where an agency's involvement in both a civil and criminal inquiry might raise constitutional concerns. Neither situation exists here. *First*, the Court noted that there might be concern if the government failed to advise the recipients of civil investigatory demands about the possibility of a criminal inquiry or proceeding. 397 U.S. at 12. That circumstance might prevent the recipient from making an informed decision about whether to provide civil testimony or instead invoke the privilege against self-incrimination.

Here, appellants—senior principals of the Trump Organization who are represented by counsel—plainly understand that parallel criminal inquiries exist, and that they can safeguard their interests by deciding to invoke their privilege against self-incrimination. *See id.* at 11. OAG has "promptly and repeatedly" updated appellants (R. 10) about criminal inquiries, including by telling appellants a year before the civil subpoenas issued that "in addition to our ongoing civil investigation, this Office is

also engaged in a criminal investigation" (R. 907). Trump Organization executives Allen Weisselberg and Eric Trump each already invoked his Fifth Amendment privilege as a reason for not answering deposition questions. (R. 217-219 ¶¶ 317-320.) And each appellant here filed an unverified answer to OAG's supplemental verified petition (R. 243-403), arguing that an unverified answer was "permitted as to allegations for which the witness has a fifth amendment privilege" (R. 1209). Because appellants confront this situation with their eyes open, the criminal inquiries do not warrant quashing the civil subpoenas.[15] *See Kordel*, 397 U.S. at 10; *United States v. Stringer*, 535 F.3d 929, 940 (9th Cir. 2008); *United States v. Parrott*, 425 F.2d 972, 976 (2d Cir. 1970).

Second, the Court in *Kordel* observed that there might be concern if the government "brought a civil action *solely* to obtain evidence for its

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[15] Plaintiffs misplace their reliance (Br. at 38-40) on *United States v. Connolly*, which is completely inapposite. In *Connolly*, the district court determined that employee interviews could not be admitted as criminal evidence because the employer had forced them to submit to the interviews at the behest of federal prosecutors without advising them of the prosecutors' involvement. 2019 WL 2120523, at *10-16 (S.D.N.Y. 2019). Here, by contrast, OAG has issued formal civil investigative subpoenas to appellants, who know about the grand jury investigation directed by DANY. In addition, unlike in *Connolly*, OAG's civil subpoenas cannot coerce testimony for use in any future criminal case.

criminal prosecution." 397 U.S. at 11-12 (emphasis added). That is plainly not the case here, contrary to appellants' unsupported suggestions (*see* Br. at 22, 24-25, 28; *see also* R. 10).

OAG's civil investigation began in March 2019, after Michael Cohen testified to Congress under oath that the Trump Organization regularly misrepresented the value of its assets in financial statements and other documents to obtain favorable loan terms and tax treatment, among other benefits. See *supra* at 6-7. The civil investigation then proceeded for approximately two years before OAG became involved in any criminal inquiry—either its own or the grand jury proceedings directed by DANY. (*See* R. 905-906.) During that two-year period, OAG interviewed witnesses, reviewed documents, and repeatedly litigated subpoena compliance issues before Supreme Court. (*See* R. 7.) Indeed, "at the outset of this special proceeding," Supreme Court "held that OAG's investigation, undertaken pursuant to New York Executive Law § 63(12), was lawful." (R. 7; *see also* R. 10.) Subsequently, in late January 2021, OAG informed the Trump Organization that information reviewed so far could prompt OAG to open a criminal investigation or seek a criminal referral. And a few months later, in April 2021, OAG informed the Trump Organization that it had

begun a criminal investigation in addition to the ongoing civil investigation.

This sequence of events—conducting an extensive civil investigation before becoming involved in any criminal inquiry—"tends to negate any likelihood that the government began the civil investigation in bad faith," such as "to obtain evidence for a criminal prosecution." *Stringer*, 535 F.3d at 939. The current civil subpoenas represent the natural culmination of OAG's multiyear civil fraud investigation. It is standard practice to interview an organization's senior principals towards the end of an investigation, when the factual record is well developed, and the questioning can be efficient and precise. See *supra* at 19-21 (detailing specific need for and relevance of each appellant's testimony). The fact that criminal inquiries may have begun after the civil investigation had progressed extensively does not remotely require quashing the civil subpoenas.

Appellants' contrary position would impermissibly constrain the authority of the Attorney General, who "must be given the personal discretion to decide upon the remedies which [s]he wishes to employ." *People v. Bunge Corp.*, 25 N.Y.2d 91, 100 (1969). Indeed, appellants'

theory would require OAG to halt its civil investigation, or at least stop enforcing its civil investigatory tools, whenever an ongoing civil investigation uncovers conduct that might raise criminal liability; OAG would then be limited solely to a criminal inquiry, even where the Office has authority to pursue both civil and criminal enforcement mechanisms.

But "[i]t is the settled policy of the courts not to review the exercise of discretion by public officials in the enforcement of State statutes, in the absence of a clear violation of some constitutional mandate." *Gaynor v. Rockefeller*, 15 N.Y.2d 120, 131 (1965). And as the U.S. Supreme Court has cautioned, forcing an investigating agency either to "defer civil proceedings" or to "forgo recommendation of a criminal prosecution" would "stultify enforcement" to the public's detriment. *Kordel*, 397 U.S. at 11. Supreme Court below was correct to reject appellants' arguments and compel compliance with the civil subpoenas.

POINT II

APPELLANTS' HEARING REQUEST IS FORFEITED AND IMPROPER

Contrary to appellants' contention (*see* Br. at 42-46), Supreme Court properly denied their motion to quash OAG's civil testimonial subpoenas without first ordering an evidentiary hearing into the inner workings of OAG's ongoing civil investigation or OAG's involvement in the grand jury inquiry directed by DANY.

As a threshold matter, appellants' hearing request is unpreserved for review. In Supreme Court briefing, appellants raised this request solely in a footnote, asserting only that the "degree of coordination and information sharing between OAG and DANY in the grand jury investigation is clearly relevant to the issues presented, and a hearing is warranted." (R. 1150 n.9.) They never specified the purported relevancy of any such information, however, and a court may properly deny a motion without a hearing when, as here, the request for a hearing is "totally conclusory." *People v. Kitchen*, 162 A.D.2d 178, 178 (1st Dep't 1990); *see also People v. Tevaha*, 84 N.Y.2d 879, 881 (1994) (reiterating that merely saying the "word 'objection' alone" fails to preserve issue for appeal). Nor did appellants' request for a hearing at oral argument adequately preserve

the issue. *See OFSI Fund II, LLC v. Canadian Imperial Bank of Commerce*, 82 A.D.3d 537, 538 (1st Dep't 2011).

In any event, no evidentiary hearing is warranted. As a rule, discovery in special proceedings is disfavored, and thus is available only on a showing of "ample need" for the material. *Northern Leasing*, 193 A.D.3d at 74 (quotation marks omitted). Appellants do not, and cannot, meet that standard here. For example, appellants want to delve into, among other things, the depth of information sharing between OAG and DANY, and whether these two agencies "have discussed the valuation investigation and what additional evidence they still need on those claims." Br. at 42-43 (item 'xi'). In other words, they demand an inquiry into the confidential investigatory process of not only OAG's § 63(12) investigation, but also the DANY grand jury proceeding that is required to be secret.

These requests transparently and improperly aim "to obtain discovery of the prosecutor's investigation far beyond what is countenanced in state criminal procedure." *Barr v. Abrams*, 641 F. Supp. 547, 555 (S.D.N.Y. 1986), *aff'd*, 810 F.2d 358 (2d Cir. 1987). And a hearing about such confidential information would improperly invade grand jury secrecy,

which "shield[s] grand jurors from interference by those under investigation" and "prevent[s] subornation of perjury and witness tampering." *People v. Sayavong*, 83 N.Y.2d 702, 706 (1994). *See generally* CPL § 190.25(4)(a).

There is no plausible basis for such an intrusion into OAG's civil investigation or the criminal grand jury proceeding, especially when the information that appellants seek is not material to their legal claims.[16] *See Matter of Joseph v. City of New York*, 201 A.D.2d 397, 398 (1st Dep't 1994) (declining to order hearing that "would serve no purpose" when remedy sought "would be beyond the proper power of the courts in any case"). There is no dispute that a grand jury has convened, or that two OAG attorneys have been cross-designated to work at the direction of DANY. (*See* R. 1193.) There is no "jurisdictional bar" to that type of

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[16] None of the cases on which appellants rely supports the use of a hearing to allow the subjects of an ongoing civil or criminal investigation to probe into that investigation. Rather, those cases concerned factual issues about arbitration clauses, breaches of contract, tort settlements, legal guardianship, ineffective assistance of counsel, and civil forfeiture of an automobile. Br. at 43-45. Nor did Supreme Court "acknowledge[]" any need for a hearing here. *See id.* at 45. Appellants simply take out of context a question that Supreme Court posed during oral argument. (*See* R. 27.) A question is not a statement of the court's decision or views.

arrangement. *Matter of Haggerty v. Himelein*, 89 N.Y.2d 431, 437 (1997). And contrary to appellants' suggestion (*see* Br. at 32, 37-38), Attorney General James's presence in a public courtroom during Mr. Weisselberg's July 2021 arraignment and her statements at a press conference following that arraignment do not "show any transfer of the fundamental and ultimate responsibility" of the District Attorney to direct criminal proceedings. *Matter of Haggerty*, 89 N.Y.2d at 436.

Awareness of OAG attorneys' involvement in the grand jury proceeding is all the information that appellants need to make an intelligent decision whether to testify in response to the civil subpoenas or instead invoke their privilege against self-incrimination. Moreover, OAG's involvement in any criminal inquiry does not alter the rules regarding grand jury testimony or give appellants any right to be called to testify in front of a grand jury without waiving immunity.[17]

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[17] Nevertheless, OAG is prepared to supply, ex parte and in camera, such additional confidential information about its investigation that the Court deems necessary. *Cf. Dellwood Foods v. Abrams*, 109 Misc. 2d 263, 269-70 (Sup. Ct. Bronx County) (concluding after in camera offer of proof that civil subpoena was not "attempting to freeze evidence" for trial of pending criminal case against same parties by same office), *aff'd*, 84 A.D.2d 692 (1st Dep't 1981).

POINT III

APPELLANTS' CLAIM OF SELECTIVE PROSECUTION IS MISPLACED AND MERITLESS

In addition to challenging the civil testimonial subpoenas, appellants also assert that OAG's civil investigation constitutes a selective prosecution in violation of the Equal Protection Clause. Br. at 47-61. This claim lacks merit, as Supreme Court properly held.

A. Selective Prosecution Is Not a Valid Defense Against Subpoena Compliance.

As a threshold matter, selective prosecution is no defense to subpoena compliance. As the case on which appellants rely makes clear (Br. at 47-48), a selective prosecution claim concerns whether a court should "adjudicate the merits of [an] *enforcement action*" allegedly brought for a discriminatory purpose, *Matter of 303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 694 (1979) (emphasis added). In this analysis, the "greater [the] threat to society" posed by the charged violations, the weaker any inference of "unlawful selective enforcement." *People v. Blount*, 90 N.Y.2d 998, 1000 (1997). And these question are to be "addressed [by] the court [on] a pretrial motion to dismiss the information or indictment." *People v. Goodman*, 31 N.Y.2d 262, 269 (1972).

Here, any such questions are premature. This proceeding involves no accusatory instrument or civil complaint: that is, there is no current prosecution or enforcement action. Rather, through the civil subpoenas, OAG endeavors to determine *whether* fraud in violation of § 63(12) has occurred, and which entities or individuals might be responsible for any such fraud. The court may not presume that charges, let alone charges against specific persons, are a foregone conclusion. *See Anheuser-Busch*, 71 N.Y.2d at 331-32 (investigative subpoena enjoys presumption of good faith). And unlike a civil fraud case, "an administrative investigation adjudicates no legal rights." *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742 (1984).

Supreme Court thus properly rejected appellants' selective prosecution claim. Indeed, investigations "will be paralyzed" if subpoenaed parties could invoke defenses to potential future charges to block the fact-gathering necessary to determine if such charges should even be brought and against whom. *Matter of Edge Ho Holding*, 256 N.Y. at 381-82; *see also Matter of American Dental*, 127 A.D.2d at 282-83.

B. Appellants Failed to Establish Either Element of a Selective Prosecution Claim.

Even if a selective prosecution claim could in some circumstances defeat a subpoena, Supreme Court correctly rejected that claim here. (R. 10-11.) Such a claim demands proof that officials singled out the challenger for enforcement with both an "'evil eye'" and an "'unequal hand.'" *Klein*, 46 N.Y.2d at 693 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886)); *accord Bower Assoc. v. Town of Pleasant Val.*, 2 N.Y.3d 617, 631 (2004). Specifically, the challenger must present evidence that (i) the law "was not applied to others similarly situated," and (ii) the challenger was singled out "based upon an impermissible standard such as race, religion or some other arbitrary classification." *Klein*, 46 N.Y.2d at 693. Neither element is established here.

1. The record contains no evidence whatsoever of unequal civil enforcement.

First, appellants have "failed to submit any evidence that the law was not applied to others similarly situated." (R. 11.) For example, they have not asserted that OAG declined to investigate any other prominent individual who was a senior principal or owner of a large New York business and who was publicly implicated by a corporate insider's sworn

testimony as having perpetrated extensive business fraud. Much less have appellants met their "heavy burden of showing" that OAG has "consciously practiced" discriminatory fraud enforcement. *Goodman*, 31 N.Y.2d at 269.

That appellants are high-profile businesspeople does not plausibly demonstrate selective treatment. As "the financial capital of the world," New York is home to "untold numbers of sophisticated" parties and transactions. *Bluebird Partners v. First Fid. Bank*, 94 N.Y.2d 726, 739 (2000). And like any other litigant, even "controversial public figure[s]" in "highly visible cases" must provide "the necessary *prima facie* evidence that others similarly situated have not been prosecuted." *United States v. Moon*, 718 F.2d 1210, 1230 (2d Cir. 1983).

Mr. Trump and his affiliated entities are not the first or only subjects of an OAG investigation into allegations of fraud or misrepresentation concerning asset valuations of the type involved here. *See, e.g.*, *People v. First Am. Corp.*, 18 N.Y.3d 173, 176 (2011) (OAG enforcement action under Executive Law § 63(12) and state consumer law against appraisal firm alleged to have committed fraudulent and deceptive acts related to real estate appraisals).

Moreover, as this State's chief law enforcement officer, the Attorney General regularly investigates and takes enforcement action, where appropriate, against prominent individuals and companies. Several such proceedings have resulted in significant settlements. For example, OAG brought a securities fraud case against the former chief executive and financial officers of the world's largest insurer, American International Group, following that company's admission that it had deployed sham transactions for the purpose of materially misstating its liabilities. *See People v. Greenberg*, 21 N.Y.3d 439 (2013).[18] In addition, OAG brought a proceeding under § 63(12) and New York's False Claims Act against Sprint Communications, based on whistleblower evidence that the company for years had knowingly underpaid sales taxes on flat-rate wireless calling plans.[19] *See People v. Sprint Nextel Corp.*, 26 N.Y.3d 98

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[18] After many years of litigation, the case settled with, among other things, a $9 million disgorgement payment. *See* Press Release, N.Y. State Off. of Att'y Gen., *A.G. Schneiderman Announces Settlement of Martin Act Case Against Former AIG CEO Maurice R. Greenberg and Former AIG CFO Howard I. Smith* (Feb. 10, 2017).

[19] The case resulted in a settlement producing a large recovery. *See* Press Release, N.Y. State Off. of Att'y Gen., *A.G. Underwood and Acting Tax Commissioner Manion Announce Record $330 Million Settlement with Sprint in Groundbreaking False Claims Act Litigation Involving Unpaid Sales Tax* (Dec. 21, 2018).

(2015). Still other OAG enforcement efforts have addressed widespread fraudulent conduct involving significant financial sums. *See, e.g.*, *People v. Credit Suisse Sec. (USA) LLC*, 31 N.Y.3d 622, 627 (2018) (claiming that major investment bank "misrepresented the quality of the mortgage loans" and "the due diligence process" for billions of dollars' worth of residential mortgage-backed securities). The current investigation of appellants and the Trump Organization is in no way unique in these respects.[20]

Lacking the requisite evidence of unequally treated comparators, appellants suggest their singling out is shown by the number of depositions and document submissions in OAG's civil investigation. *See* Br. at 56. But the attention OAG has paid to this investigation correlates with the complexity of the subject matter, the decades-long timeframe at issue, and the sheer number of potential misstatements to analyze. It is not unusual for a complex investigation or case to last for years. For example, the judge who presided over the "sprawling, six-month trial" in which

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[20] Thus, it cannot be said that appellants have "never before seen the office" take similar positions "in a case involving comparable charges and a similar defendant." *People v. Adams*, 20 N.Y.3d 608, 613 (2013) (cited in Br. at 34 n.34).

OAG secured landmark tort verdicts against opioid manufacturers likened that proceeding, filed years earlier, to an "ultramarathon."[21]

2. The record does not support, and in fact negates, appellants' eleventh-hour claim of a politically motivated investigation.

Second, appellants fail to demonstrate that OAG subpoenaed them "based on race, religion, or any other impermissible or arbitrary classification." (R. 11.) They concede that they are not members of any protected class. *See* Br. at 52-55. Instead, appellants assert selective prosecution based on "'malicious or bad faith intent to injure a person.'" *Id.* at 54 (quoting *Bower Assoc.*, 2 N.Y.3d at 631). That theory requires proof that appellants have "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (defining equal protection "class of one" claim); *accord Harlen Assoc. v. Incorporated Vil. of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001) (same); *see Bower Assoc.*, 2 N.Y.3d at 630-31 (citing *Olech* and *Harlen* as governing selec-

[21] Sarah Maslin Nir et al., *Pharmaceutical Company Is Found Liable in Landmark Opioid Trial*, N.Y. Times (Dec. 30, 2021).

tive-enforcement claim based on asserted malicious intent unrelated to protected status).

As explained, appellants have not even attempted to show objectively discriminatory treatment by OAG. *See Amazon.com, LLC v. New York State Dept. of Taxation & Fin.*, 81 A.D.3d 183, 206 (1st Dep't 2010) (rejecting website's equal protection claim of "being exclusively targeted" by taxing authorities when competitor was "being treated exactly the same"), *aff'd*, 20 N.Y.3d 586 (2013).

In addition, as Supreme Court found, the investigation's solid factual predicate—both at its inception and now—"undercuts the notion that this ongoing investigation is based on personal animus." (R. 10.) For example, OAG's investigation began in March 2019, after Mr. Trump's former special counsel, Michael Cohen, gave sworn testimony to Congress that Mr. Trump's financial statements from 2010 onward misrepresented asset values to secure favorable loan terms, tax treatment, and insurance benefits. (*See* R. 214 ¶ 304.) There is nothing arbitrary or discriminatory about OAG opening an investigation into these troubling allegations about a purportedly multi-billion-dollar New York real estate conglomerate's business practices, particularly when the revelations were from a

senior corporate insider who was a close confidant of the entity's owner. Appellants' assertion that Mr. Cohen's testimony is "untrustworthy" (R. 1165) begs the question that this fraud investigation seeks to answer: i.e., whether the Trump Organization's financial statements in fact contain misstatements or omissions—and, if so, who bears responsibility for that wrongdoing. As Supreme Court observed, investigating such allegations of fraud lies at the heart of OAG's duties. (R. 11.)

Moreover, as Supreme Court observed, the "copious evidence of possible financial fraud" by the Trump Organization that OAG has uncovered to date further demonstrates that the civil subpoenas do not constitute selective prosecution. (R. 12-13.) Supreme Court based that conclusion on a review of "thousands of documents" (R. 10), some of which OAG's supplemental petition describes.

As summarized above (*supra* at 11-15), the evidence unearthed by OAG suggests that the Trump Organization's financial statements relied on asset valuations that ignored verifiable facts and market conditions, diverged from independent appraisals, purported to derive from outside appraisals when no such appraisals were conducted, conflicted with internal company calculations and data, and included amounts for alleged

brand value despite explicit assurances to the contrary. At various points, appellants Mr. Trump and Donald Trump, Jr., personally certified these valuations' accuracy, and appellant Ivanka Trump used the valuations to negotiate several major transactions. See *supra* at 19-21.

Further, the accounting firm that compiled these Statements has since disavowed a decade's worth of them, for the years 2011 to 2020—advising the Trump Organization to tell third parties that these documents "should no longer be relied upon." (R. 1195.) This "red-flag warning that the Trump financial statements are unreliable" (R. 12) further reinforces the legitimacy of OAG's continued investigation.

Contrary to appellants' argument (Br. at 59-61), Supreme Court properly relied on the strength of this evidence in assessing a claim of selective prosecution. Although factual innocence is not a prerequisite to such a claim, law enforcement may permissibly focus on "serious violations" to combat misconduct that causes more substantial harm and to "deter[] other potential transgressors." *Klein*, 46 N.Y.2d at 694. Such exercise of discretion in choosing enforcement priorities does not violate equal protection. *See Blount*, 90 N.Y.2d at 999. To the contrary, under the type of class-of-one theory that appellants assert here, the serious-

ness of the misconduct supports a conclusion that enforcement "relate[s] to legitimate governmental objectives." *Sonne v. Board of Trustees of Vil. of Suffern*, 67 A.D.3d 192, 203 (2d Dep't 2009) (cited in Br. at 49-55). And the strength of the evidence reviewed to date also matters because a claim that prosecutors retaliated against protected activity—as appellants allege here (*see* Br. at 51-55)—must overcome the presumption of regularity with proof that this discretionary action lacked an objective basis. *See Hartman v. Moore*, 547 U.S. 250, 263 (2006); *see also Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019).[22]

Especially given the extensive evidence supporting OAG's continuing investigation, there is no merit to appellants' assertion that the investigation springs solely from alleged political animus towards Mr. Trump. *See, e.g.*, Br. at 52, 55. That argument rests on public statements made by Attorney General James over the course of five years,

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[22] These federal decisions establishing the elements of retaliation claims are far more relevant than the federal decisions on which appellants rely (Br. at 59-60), which invalidated viewpoint-based restrictions on speech on public property. *See, e.g.*, *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617 (2d Cir. 2005). The civil subpoenas at issue here do not legally prohibit anyone from speaking.

most of which preceded her taking office. But the Trump Organization produced "millions of pages of documents" and "dozens" of witnesses during OAG's § 63(12) investigation (*id.* at 56) without raising concerns about political animus or those statements, until Mr. Trump received the subpoena at issue here—at which point he and the Trump Organization brought a meritless federal lawsuit collaterally attacking OAG's ongoing civil investigation. *See* Mem. of Law in Supp. of Mot. to Dismiss, *Trump v. James*, No. 21-cv-1352 (N.D.N.Y. Jan. 26, 2022), ECF No. 15.

Mere "'political' opposition . . . is not the equivalent of the 'evil eye and an unequal hand' for constitutional equal protection purposes." *Bower Assoc.*, 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). Indeed, if the rule were otherwise, individuals who have held public office could immunize themselves forever after against any civil investigatory demands by claiming that the investigation was motivated by purported political animus.

At any rate, the statements on which appellants rely do not show selective enforcement.[23] As Supreme Court observed (R. 9-10), nearly all the cited remarks come from 2017 or 2018, before the Attorney General's inauguration and before OAG's civil fraud investigation began. And the bulk of those comments criticized official Trump Administration policies—many of which OAG had challenged as unlawful. (*See, e.g.*, R. 1054 (ban on entry by residents of Muslim-majority nations), 1055 (construction of border wall), 1062 (multiple policies of "Donald Trump and his harmful administration"), 1071 (similar), 1079 (similar), 1092 (similar).)

Representing a State's residents against potentially unlawful federal action is squarely within the law enforcement function of a State Attorney General, and does not reflect either personal or political animus. Indeed, during Attorney General James's tenure, OAG obtained judicial rulings invalidating numerous Trump Administration rules and policies adversely affecting this State and its residents.[24]

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[23] To the extent appellants invoke these statements in connection with their other claims (*see* Br. at 28-29), the same analysis applies.

[24] *E.g.*, *Department of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (rescission of Deferred Action for Childhood Arrivals policy); *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019)

Nor does appellants' claim find any support in comments mentioning the possibility of investigating Mr. Trump's business dealings. Many of these comments were made in 2018, before Ms. James took office as Attorney General, and they did not prejudge the results of any such investigation. In any event, there is no cause to infer bias from statements that reference the possibility of investigating activities that had been publicly reported, and in some cases were already the subject of existing inquiries—including a then-ongoing federal investigation extending to Mr. Trump's business dealings, press accounts of suspected tax improprieties by Mr. Trump, and criminal guilty pleas entered by several of Mr. Trump's closest associates. (*See, e.g.*, R. 1087 (pledging to look into any "Trump businesses that *may be engaged* in illegal conduct" (emphasis added)), 1094 (previewing that such an inquiry would "*demand*[] *truthfulness* at every turn" (emphasis added)).)

(addition of citizenship question to decennial census); *New York v. United States Dept. of Homeland Sec.*, 969 F.3d 42 (2d Cir. 2020) (expansion of rule penalizing non-citizens' receipt of public benefits), *cert. dismissed*, 141 S. Ct. 1292 (2021); *New York v. National Highway Traffic Safety Admin.*, 974 F.3d 87 (2d Cir. 2020) (reduction of monetary fines for violating fuel economy standards).

Few of the cited comments were made after Ms. James took office as Attorney General. Appellants rely most heavily on statements confirming that OAG had an ongoing "civil investigation into the Trump Organization" and "a parallel . . . criminal investigation," as "has been publicly reported." (R. 436, 1110.) But these comments merely echoed disclosures that OAG had made to the Trump Organization about the investigation. Simply put, a public statement confirming the existence or importance of a law enforcement investigation is not evidence that the subpoenas were improperly politically motivated. *See Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 707-08 (S.D.N.Y. 2018) (rejecting claim that bias was shown by prior Attorney General's remark that corporation was "sowing confusion" about climate change), *dismissed as moot*, *Exxon Mobil Corp. v. Healey*, No. 18-1170, 2022 WL 774516 (2d Cir. Mar. 15, 2022).

Both before and after assuming office, including at least once in the context of this investigation, Attorney General James has pronounced that "no one is above the law," including the President. (*E.g.*, R. 1028, 1031, 1063, 1068, 1070, 1100-1101, 1116.) This statement does not reflect bias or political animus, but rather conveys an indisputable neutral principle: that appellants, like anyone else, have a duty to comply with a

validly issued civil subpoena. *See Trump v. Vance*, 140 S. Ct. 2412, 2432 (2020) (Kavanaugh, J., joined by Gorsuch, J., concurring) ("In our system of government, as this Court has often stated, no one is above the law. That principle applies, of course, to a President.").

Because OAG's subpoenas are proper, the Court should affirm the order compelling appellants to sit for civil depositions.

CONCLUSION

Supreme Court's order compelling compliance with these Executive Law § 63(12) subpoenas should be affirmed.

Dated: New York, New York
March 28, 2022

Respectfully submitted,

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AFFIRMATION OF SERVICE

Eric Del Pozo affirms upon penalty of perjury:

I am over eighteen years of age and an employee in the Office of the Attorney General of the State of New York, attorney for the Petitioner-Respondent herein.

On March 28, 2022, I served the accompanying Brief for Petitioner-Respondent by using the New York State Courts Electronic Filing system or by sending one portable document format copy by electronic mail as complete and effective personal service upon the following named person(s):

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