

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.

NOTICE OF MOTION

Ind. No. 71543-23

PARTIALLY EX PARTE AND  
UNDER SEAL

PLEASE TAKE NOTICE that the People will move this Court, located at 100 Centre Street, New York, New York on May 4, 2023, at 9:30 a.m., or as soon thereafter as counsel may be heard for the following relief: the issuance of a protective order pursuant to Criminal Procedure Law 245.70(1) to restrict or defer, and make such other orders as appropriate, regarding the discovery and inspection of material and information otherwise discoverable pursuant to Article 245 of the Criminal Procedure Law in the above-captioned case, and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

By:



\_\_\_\_\_  
Catherine McCaw  
Assistant District Attorney

Dated: New York, New York  
April 24, 2023

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.

PARTIALLY EX PARTE AND  
UNDER SEAL

AFFIRMATION AND  
MEMORANDUM OF LAW  
IN SUPPORT OF A MOTION  
FOR A PROTECTIVE ORDER  
PURSUANT TO CPL 245.70(1)

Ind. No. 71543-23

Catherine McCaw, an attorney admitted to practice before the courts of this state, affirms under penalty of perjury that:

1. I am an Assistant District Attorney in the New York County District Attorney's Office. I am assigned to the prosecution of the above-captioned case, and as such I am familiar with the facts and circumstances underlying the case.

2. I submit this affirmation in support of a motion for a protective order pursuant to CPL 245.70(1). Article 245 of the Criminal Procedure Law permits the court, for good cause shown, to enter a protective order that grants the Defense access to discovery materials subject to safeguards that will protect the integrity of the materials, avoid disruption of the proceedings, and reduce the risk of harassment to witnesses and participants in these proceedings. Initially, the People sought to negotiate the terms of a protective order with defense counsel. Defense counsel has since indicated that they will not consent to a protective order, so the People are now moving for such an order. As other courts have recognized, and as set forth in more detail below,

Defendant Donald J. Trump (“Defendant”) has a longstanding and perhaps singular history of attacking witnesses, investigators, prosecutors, trial jurors, grand jurors, judges, and others involved in legal proceedings against him, putting those individuals and their families at considerable safety risk. See, e.g., Mem. & Order Denying Access to Juror Names, Carroll v. Trump, No. 22-cv-10016, 2023 WL 2871045, at \*1 & nn.1-2 (S.D.N.Y. Apr. 10, 2023); Mem. Opinion re Anonymous Jury, Carroll v. Trump, No. 22-cv-10016, 2023 WL 2612260, at \*1-2, 4-5 & nn. 7, 15-16 (S.D.N.Y. Mar. 23, 2023) (“Mr. Trump repeatedly has attacked courts, judges, various law enforcement officials and other officials, and even individual jurors in other matters.”) (collecting examples). The People therefore respectfully submit that good cause is shown for the reasonable restrictions requested in this application.

3. Defendant is charged with thirty-four counts of Falsifying Business Records in the First Degree, PL § 175.10. These charges arise from Defendant’s efforts to conceal an illegal scheme to influence the 2016 presidential election. As part of this scheme, Defendant requested that an attorney who worked for his company pay \$130,000 to an adult film actress shortly before the election to prevent her from publicizing an alleged sexual encounter with the Defendant. Defendant then reimbursed the attorney for the illegal payment through a series of monthly checks. Defendant caused business records associated with the repayments to be falsified to disguise his and others’ criminal conduct including violations of New York Election Law § 17-152 and violations of the individual and corporate campaign contribution limits under the Federal Election Campaign Act, 52 U.S.C. § 30101 et seq.

4. The statements in this affirmation are made upon information and belief, the sources of which include a review of the records and files of the New York County District Attorney's Office ("DANY"), a review of the grand jury minutes, and a review of publicly available material, including Defendant's social media posts, court filings, and news articles.

5. I respectfully submit portions of this affirmation and memorandum of law ex parte, and request that the unredacted version of this motion be sealed and remain under seal upon filing. See People v. Bonifacio, 179 A.D.3d 977, 979 (2d Dept. 2020) ("Article 245 logically and expressly permits a court, when appropriate, to consider evidence and arguments ex parte when considering whether to issue a protective order."). A redacted version of the People's papers, which does not reveal the nature of sensitive discovery materials in advance of the entry of a protective order, will be provided to the Defense. In the copy of this submission provided to the Court, information that is redacted in the defense copy is highlighted in green. Should witness testimony be necessary, it is further requested that such testimony occur ex parte and in camera, and that the resulting transcript be sealed pursuant to CPL 245.70(1).

**PROTECTIVE ORDER REQUESTS UNDER CPL 245.70(1)**

6. The People seek the following restrictions, deferrals, and/or other orders limiting the discovery and inspection of information and materials otherwise discoverable pursuant to Article 245 of the Criminal Procedure Law:

- a. REQUIRING that any materials and information provided by the People to the Defense in accordance with their discovery obligations as well as any other

documents, materials, or correspondence provided to or exchanged with defense counsel of record on the above-captioned matter (“Defense Counsel”), in any form or component part, with the exception of any materials provided to the People by Defendant, the Trump Organization, or any company owned in part or entirely by Defendant or the Donald J. Trump Revocable Trust (the “Covered Materials”) shall be used solely for the purposes of preparing a defense in this matter;

- b. REQUIRING that any person who receives the Covered Materials shall not copy, disseminate, or disclose the Covered Materials, in any form or by any means, to any third party (except to those employed by counsel to assist in the defense of the above-captioned criminal proceeding) including, but not limited to, by disseminating or posting the Covered Materials to any news or social media platforms, including, but not limited, to Truth Social, Facebook, Instagram, WhatsApp, Twitter, Snapchat, or YouTube, without prior approval from the Court;
- c. DELAYING until the commencement of jury selection disclosure of the names and identifying information of New York County District Attorney’s Office personnel, other than sworn members of law enforcement and assistant district attorneys, and permitting the People to redact such names and identifying information from any of the Covered Materials;

- d. REQUIRING that those of the Covered Materials that are designated by the People as limited dissemination (the “Limited Dissemination Materials”), whether in electronic or paper form, shall be kept in the sole possession and exclusive control of Defense Counsel and shall not be copied, disseminated, or disclosed in any form, or by any means, by Defense Counsel, except to those employed by Defense Counsel to assist in the defense of the above-captioned criminal proceeding;
- e. REQUIRING that Defendant is permitted to review the Limited Dissemination Materials only in the presence of Defense Counsel, but Defendant shall not be permitted to copy, photograph, transcribe, or otherwise independently possess the Limited Dissemination Materials; and
- f. REQUIRING that forensic images of witness cell phones shall be reviewed solely by Defense Counsel and those employed by Defense Counsel to assist in the defense of the above-captioned criminal proceeding, except that, after obtaining consent from the People, Defense Counsel may show Defendant portions of the forensic images that relate to the subject matter of the case.

7. Although the People seek limitations before providing the Covered Materials to the Defense, the limitations largely relate to how the Defense must handle the materials and what they may do with them. In this application, the People seek to defer the Defense only from learning the identity of DANY support staff. Thus, this application is narrowly tailored to assure the integrity of the discovery materials, the integrity of these proceedings, and witness

safety, while still allowing the Defense to use and review the materials to prepare a defense at trial.

### **FACTUAL BACKGROUND**<sup>1</sup>

8. Defendant and his associates have been the subject of several investigations during and after his time in office, including a special counsel investigation into allegations that his campaign coordinated with the Russian government, two impeachment inquiries, two additional special counsel investigations into allegations of mishandling of classified documents and concerning the events of January 6, 2021, and a Georgia grand jury investigation into allegations of improper influence on the 2020 Georgia presidential election results. Defendant has posted extensively regarding these investigations on social media and has discussed these investigations in speeches, at political rallies, and during television appearances. His posts have included personal attacks on those involved in the investigation, including witnesses, jurors, and those involved in conducting or overseeing the investigations. In many instances, he has even posted regarding their family members. Defendant has begun to mount similar attacks against those involved in the instant criminal case, publicly disparaging witnesses associated with the case, as well as the District Attorney, District Attorney's Office personnel, and the Court. This pattern, particularly given that Defendant is currently under federal investigation for his handling of classified materials, gives rise to

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<sup>1</sup> The facts and circumstances of this case are summarized for the specific purpose of establishing good cause for a protective order and do not constitute a comprehensive summary of all facts gathered during the investigation and prosecution of the case.

significant concern that Defendant will similarly misuse grand jury and other sensitive materials here.

### **I. Defendant's History of Attacking Those Associated with Prior Investigations**

9. On May 5, 2017, Robert S. Mueller III ("Mueller") was appointed to serve as Special Counsel to investigate "any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump" and other associated matters, an inquiry that came to be known as the Mueller Investigation. Exhibit 1. Dep't of Justice Order No. 3915-2017, Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters.

10. During the course of the Mueller Investigation, Defendant launched numerous social media attacks on individuals associated with the investigation, ranging from the prominent to the obscure. He posted frequently regarding James Comey ("Comey"), the former director of the Federal Bureau of Investigation ("FBI"), a witness in the investigation who alleged that Defendant had pressured him to end the FBI's probe into Russian campaign interference. On April 13, 2018, Defendant referred to Comey as an "untruthful slime ball" in a social media post.<sup>2</sup> On December 9, 2018, a day after Comey testified before Congress, Defendant stated in another post, "Leakin' James Comey must have set a record for who lied the most to Congress in one day. His Friday testimony was so untruthful!"

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<sup>2</sup> All social media posts referenced in this document are collected in Exhibit 2.



11. Less prominent individuals associated with the probe were also the subject of attacks. For example, Defendant repeatedly attacked Bruce Ohr (“Ohr”), a Department of Justice (“DOJ”) attorney involved with the investigation into Russian campaign interference. On August 14, 2018, he posted regarding both Ohr and his wife, stating, “Bruce Ohr of the ‘Justice’ Department (can you believe he is still there) is accused of helping disgraced Christopher Steele ‘find dirt on Trump.’ Ohr’s wife, Nelly, was in on the act big time – worked for Russian GPS on Fake Dossier.” He also regularly posted regarding Lisa Page and Peter Strzok, two FBI employees associated with the investigation. On June 5, 2018, for example, Defendant posted, “Wow, Strzok-Page, the incompetent & corrupt FBI lovers, have texts referring to a counter-intelligence operation into the Trump Campaign dating way back to December, 2015. SPYGATE is in full force! Is the Mainstream Media interested yet? Big stuff!”

12. In September 2019, the United States House of Representatives began an impeachment inquiry into Defendant, based on allegations that Defendant attempted to use military aid to Ukraine as a bargaining chip in return for Ukraine to begin investigations into his political rival, Joseph Biden. Again, Defendant launched public social media attacks on those associated with the investigation, including two public servants who testified in connection with the inquiry, Marie Yovanovitch and Alexander Vindman (“Vindman”). On November 15, 2019, Defendant posted, “Everywhere Marie Yovanovitch went turned bad. She started off in Somalia, how did that go? Then fast forward to Ukraine, where the new Ukrainian President spoke unfavorably about her in my second phone call with him. It is a U.S. President’s absolute right to appoint ambassadors.” On February 8, 2020, he posted regarding Vindman, “[H]e was very

insubordinate, reported contents of my ‘perfect’ calls incorrectly & was given a horrendous report by his superior, the man he reported to, who publicly stated that Vindman had problems with judgement [sic], adhering to the chain of command and leaking information. In other words, ‘OUT’.”

13. Following the 2020 presidential election, Defendant became the subject of several inquiries involving his response to the election results. These included an inquiry by the House Select Committee to Investigate the January 6th Attack on the U.S. Capitol (the “House Select Committee”) into the events of January 6, 2021; a separate federal criminal investigation into the events of January 6 currently headed by Special Counsel Jack Smith; and a Fulton County, Georgia grand jury investigation into efforts by Defendant and his allies to interfere with the Georgia election results. In connection with these events, Defendant and his allies repeatedly publicly attacked two Fulton County poll workers, Ruby Freeman (“Freeman”) and Wandrea ArShaye Moss, accusing them of election malfeasance. Freeman was a temporary poll worker who worked to tabulate ballots in Fulton County, including for the 2020 presidential election. Freeman Interview 12:13-17 (May 31, 2022), Exhibit 3.

14. Defendant and his allies accused Freeman and her daughter of election misconduct involving suitcases full of ballots, beginning soon after the election and continuing through this year. For example, on January 3, 2023, Defendant queried on social media, “What will the Great State of Georgia do with the Ruby Freeman MESS?” On January 10, 2023, he posted, “Ruby, her daughter, and others who ran back into the counting room, grabbing cases from under the

‘skirted’ table, and then back to their counting machines where they came from prior to hearing ‘water main break’ (which never happened) have got a lot of explaining to do...”

15. Freeman described to the House Select Committee how these attacks from Defendant and his allies affected her personally. She stated that on the advice of the FBI, she was forced to vacate her home “for safety” for approximately two months, beginning around January 6, 2021. Freeman Interview 25:25-26:4 (May 31, 2022), Exhibit 3. She “received hundreds of racist, threatening, horrible calls and messages.” Freeman Interview 7:23-24. She even stated that she was afraid to use her name in public: “Now I won’t even introduce myself by name anymore. I get nervous when I bump into someone I know in the grocery store who says my name. I’m worried about who’s listening. I get nervous when I have to give my name for food orders. I’m always concerned about who’s around me.” Freeman Interview: 6:17-20.

## **II. Defendant Has Begun to Launch Similar Attacks in this Case**

16. In early 2023, press reports began to circulate that a New York County grand jury was conducting an investigation into Defendant. In response, Defendant began to launch a series of attacks against individuals who may testify at trial, including Stephanie Clifford (a/k/a Stormy Daniels) (“Clifford”) and Michael Cohen (“Cohen”), and other personnel associated with this investigation. On March 15, 2023, he posted to social media, “I did NOTHING wrong in the ‘Horseface’ [*i.e.*, Clifford] case. . . . She knows nothing about me other than her conman lawyer, Avanatti, and convicted liar and felon, jailbird Michael Cohen, may have schemed up.” On March 27, 2023, he posted, “I won a Federal lawsuit for almost \$500,000 against Stormy ‘Horseface’ Daniels. Never had an ‘affair’ with her, and would never have wanted to!”

17. Defendant has also launched attacks against the District Attorney, referring to him on March 23, 2023 as a “SOROS BACKED ANIMAL,” and a “degenerate psychopath that truly [sic] hates the USA” on March 24, 2023. On March 23, 2023, he posted two images side-by-side that gave the appearance that he was taking aim at the District Attorney’s head with a baseball bat. He has directed attacks at the Court and his family after he became aware of the commencement of these proceedings. Defendant has also repeatedly referenced an Assistant District Attorney assigned to this prosecution in his posts, including on March 16, 2023, March 27, 2023, March 31, 2023, and April 3, 2023.

### **III. Allegations that Defendant Mishandled Classified Materials**

18. According to information publicly filed by the DOJ, after Defendant left office in 2021, the National Archives and Records Administration (“NARA”) began to communicate with Defendant’s representatives to request the return of documents relating to his presidential administration. Dep’t of Justice Response to Motion filed August 30, 2022, 22-Civ-81294, S.D. Fla, Exhibit 4 at 4. In response to a request from NARA, Defendant ultimately produced fifteen boxes of materials. *Id.* Upon reviewing materials, officials from NARA referred the matter to DOJ, observing that a review of the materials revealed that “highly classified records were unfolded, intermixed with other records and otherwise improperly [sic] identified.” Exhibit 4 at 5. The FBI began an investigation and later obtained a warrant authorizing the search of Defendant’s property at Mar-a-Lago for additional documents. Exhibit 4 at 12. As a result of the execution of the warrant, the FBI seized thirty-three items consisting mostly of boxes. *Id.* Upon review of the material, investigators concluded that the materials included

more than a hundred unique documents with classification markings. Exhibit 4 at 13. Since the execution of the warrant, the investigation has been referred to Special Counsel Jack Smith. Recent press reports relay that the investigators have been asking witnesses about allegations that Defendant displayed a map with sensitive information to “aides and visitors.” Exhibit 5.

#### **IV. Procedural History**

19. In the days leading up to Defendant’s April 4, 2023 arraignment, the People reached out to Defense Counsel in an attempt to negotiate the terms of a protective order on consent. Both sides spoke on the phone on several occasions, and the People made several modifications to their original proposed order in response to the Defense Counsel’s requests. On the afternoon before Defendant’s arraignment, the parties reached an agreement in principle. Following the arraignment, the People learned that Defense Counsel would not consent to a protective order.

20. On April 12, 2023, Defendant filed a civil complaint in Florida against Cohen, eight days after Defendant was arraigned in this case. Exhibit 6. The complaint alleges that Cohen, an attorney formerly employed by Defendant’s business, damaged Defendant by speaking about matters including the allegations that gave rise to the instant criminal case, alleging causes of action including breach of fiduciary duty and breach of contract. *E.g.*, Exhibit 6, ¶¶ 111-14. He also alleges conversion with respect to a portion of the payment that related to the falsified business records in this case. Exhibit 6, ¶¶ 161-65.

21. The protective order that the People now seek is substantially similar to the order that the parties agreed to in principle, with a couple of important modifications. The parties

had originally agreed that they would litigate separately the issue of how to handle the public filing of references to discovery materials. The People are now of the view that whatever protective order the Court enters will govern the filing of materials on the public docket. In addition, Defendant's subsequently-filed suit against Cohen heightens the risk that Defendant will use the Covered Materials for purposes other than a defense of this case. The People therefore seek additional limitations regarding who may be present when Defendant views the materials and additional protections for the contents of witness cell phones.

22. The People anticipate turning over a substantial number of materials in discovery. These materials include grand jury minutes, grand jury exhibits, materials received in response to grand jury subpoenas, materials obtained voluntarily from witnesses, and other materials relating to the case. These materials also include forensic images of two cellular telephones obtained from a witness.

### **MEMORANDUM OF LAW**

Criminal Procedural Law Article 245 provides that, upon a showing of "good cause," the court may "at any time order that discovery or inspection of any kind of material or information . . . be denied, restricted, conditioned or deferred, or make such other order as is appropriate." CPL 245.70(1). It is well-settled that "[g]ood cause determinations are necessarily case-specific and therefore fall within the discretion of the trial court." People v. Linares, 2 N.Y.3d 507, 510 (2004). As the Court of Appeals has explained, "By its very nature, good cause admits of no universal, black-letter definition. Whether it exists, and the extent of disclosure that is appropriate, must remain for the courts to decide on the facts of each case."

In re Linda F.M., 52 N.Y.2d 236, 240 (1981). The judicial interpretation of “good cause” varies based upon the context in which it is used. See Matter of Molloy v. Molloy, 137 A.D.3d 47, 52-53 (2d Dept. 2016) (“Good cause should be read in context by considering the statute as a whole [and] should also be interpreted in accordance with legislative intent, as expressed in the legislative history”).

CPL 245.70(4) sets forth a flexible list of factors that bear on the Court’s determination of good cause, including, for example, danger to the safety of a witness and risk of witness intimidation or harassment, as well as lesser impositions such as “unjustified annoyance or embarrassment,” risk of an “adverse effect on the legitimate needs of law enforcement,” and whether the defendant has a history of witness intimidation or tampering. CPL 245.70(4). The statute is non-exhaustive, and also authorizes the Court to consider the “nature of the stated reasons” for the relief sought and other “similar factors” that “outweigh the usefulness of the discovery” to the defense. Id. Thus, at its core, the protective order statute embodies a discretionary balancing test that asks the Court to weigh the prosecutorial and public safety interests raised by the People in support of a protective order with the utility to the Defense of the subject information and materials.

Given the plain language of CPL 245.70 and its stated purpose in the legislative history, the statute’s good cause requirement should be broadly interpreted and protective orders should be liberally granted. Regarding the plain language, a comparison of the factors listed in CPL 245.70(4) and the former CPL 240.50(1) confirms that the statute expands the use of protective orders to protect witnesses and the integrity of the criminal justice system. Both

sections list factors to consider in determining whether good cause exists; however, CPL 245.70(4) incorporates the factors included in the predecessor section while simultaneously reducing the threshold for determining risk to others and expanding the list of relevant factors. For example, while former CPL 240.50(1) authorized the Court to consider “a substantial risk of physical harm, intimidation, economic reprisal, bribery, or unjustified annoyance or embarrassment to any person,” CPL 245.70(4) omits the word “substantial” and includes “harassment”—a fairly low level of impact—as a relevant factor. And, while the current and predecessor statutes each authorize the Court to consider “danger to the integrity of physical evidence,” CPL 245.70(4) also authorizes the Court to consider “danger to the . . . safety of a witness.”

It is clear from the text of CPL 245.70(4), which expands the non-exhaustive list of factors that may be considered by the Court in weighing good cause, that the statute imposes a more favorable standard on the movant than its predecessor. The legislative history confirms that such a result was intended by the statute’s drafters. During floor debates, Senator Jamal Bailey, who served as a leader of the discovery reform efforts, noted that “there is a broader protective order under this bill than there is in the [then] current law.” Senate Debate Transcript of Senate Print 1509C, Mar. 31, 2019, at 2602. Senator Bailey further stated that a protective order could be obtained under CPL Article 245 for good cause shown, which he described as a “very reasonable and . . . [l]iberal standard.” *Id.* at 2604. This language evinces an obvious intent on the part of the Legislature to establish an expanded protective order practice to counterbalance the statute’s otherwise liberal discovery obligations in cases where



the non-exhaustive factors in CPL 245.70(4) outweigh the benefit of early disclosure. Cf. People v. Phillips, 67 Misc.3d 196, 201 (Sup. Ct., Bronx Co. 2020) (“[I]t seems that the legislature eased the ‘good cause’ showing required where a risk of witness safety or harassment is alleged in part to balance the new requirement that witness names and contact information and other sensitive discovery [such as grand jury testimony] be provided long before a trial begins”).<sup>3</sup>

The People seek a protective order that grants the Defense access to the Covered Materials, while employing certain safeguards to protect the integrity of those materials and of the proceedings. Specifically, the People seek to shield the identity of DANY support staff to prevent them from experiencing public harassment. The People seek to prevent the Defense from discussing or disseminating the Covered Materials publicly. The People seek to prevent Defense Counsel from leaving materials designated as Limited Dissemination Materials with the Defendant. And finally, the People seek to make forensic images of witness cell phones viewable only to Defense Counsel in the first instance. There is good cause to grant this motion under CPL 245.70. At bottom, the Defense will have near-complete access to the People’s discovery

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<sup>3</sup> As one appellate justice has observed on expedited review, the presumption of openness found in CPL 245.20(7) does not apply to protective order motions. People v. Bonifacio, 179 A.D.3d 977, 978 (2d Dept. 2020). The presumption, by its own terms, applies exclusively to CPL 245.10 (setting forth the timing of the parties’ automatic disclosures), 245.20(1) (setting forth the scope of automatic disclosures), and 245.25 (pertaining to disclosures prior to guilty pleas). It does not apply to CPL 245.70, which is the section of the statute that deals with protective orders. On the contrary, CPL 245.70 was designed to offset the presumption of openness and serve a broad license for a court to limit the People’s discovery obligations when factors such as witness safety outweigh the benefit of early disclosure. The fact that the main proponent of the new legislation described CPL Article 245 as embracing a more “lenient” standard for protective orders confirms that the omission of the protective order section from the presumption of openness is an intentional feature of the statute.

materials pursuant to the People's proposed protective order. This access will allow the Defense to defend this matter in Court, while still safeguarding against the improper use of the materials.

#### **I. The People Seek Permission to Shield the Identities of DANY Support Staff**

The People request that they be allowed to delay disclosure of the names and identifying information for DANY personnel, other than sworn members of law enforcement and assistant district attorneys, until the commencement of jury selection and that they be permitted to redact such names and identifying information from any of the discovery materials. As described above, Defendant has an extensive history of publicly attacking individuals with connections to investigations into his conduct, including some who are only tangentially related.

Freeman's moving testimony highlights how Defendant's use of his bully pulpit can completely upend the lives of ordinary private citizens who were simply doing their jobs. When Defendant posts on social media, he commands a large audience, and certain of his followers have been willing to take action against those Defendant mentions online. Freeman, a temporary poll worker, had to leave her home upon the advice of the FBI for two months, so great was the risk posed by Defendant's followers. Indeed, in recognition of the unique risks posed by Defendant's "repeated" attacks against "courts, judges, various law enforcement officials and other public officials, and even individual jurors in other matters," Judge Lewis A. Kaplan, presiding over the civil trial between Defendant and E. Jean Carroll, took the unusual step of preventing even attorneys assigned to the case from learning the identities of potential jurors. Mem. Opinion re Anonymous Jury, Carroll v. Trump, No. 22-cv-

10016, 2023 WL 2612260, at \*2 & n.7 (S.D.N.Y. Mar. 23, 2023); see also Mem. & Order Denying Access to Juror Names, Carroll v. Trump, No. 22-cv-10016, 2023 WL 2871045 (S.D.N.Y. Apr. 10, 2023).

DANY support staff includes its dedicated paralegals. For many DANY paralegals, this is their first job after graduating from college. While lawyers and sworn members of law enforcement who work for the Office must do their work in public, there is no corresponding need for its support staff to be identified to the world and potentially subject to Defendant's attacks. Courts routinely grant protective orders delaying disclosure of witness information where there is a risk of harassment or intimidation, and appellate courts have even held that to deny such a request by the People is an abuse of discretion. See, e.g., People v. Brown, 180 A.D.3d 1107, 1109 (2d Dept. 2020).

Further, the prejudice to the Defense of granting such a request is minimal. The identities of support staff relate to the subject matter of the case only in limited ways. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Paralegals also identify themselves as notetakers within witness notes, but the identity of the paralegal as notetaker only becomes relevant to the extent that a witness testifies at trial in a manner that is inconsistent with these notes. If the Defense receives this information upon commencement of jury selection, they will have ample time to make use of

this information in preparation for trial. Given the risks posed by the Defendant's behavior and the minimal prejudice to the Defendant, the People request that the Court enter a protective order shielding the identity of DANY support staff in the form proposed by the People.

## **II. Defendant and the Defense Should Be Limited in the Ways They Use the Covered Materials**

The People seek an order that Defendant and the Defense Counsel shall use the Covered Materials solely for the purposes of preparing a defense in this case and shall be prohibited from disclosing the materials to third parties or posting them on social media. At the outset, it is important to note that the People are not at this time seeking a gag order in this case. Defendant has a constitutional right to speak publicly about this case, and the People do not seek to infringe upon that right. That said, neither Defendant nor Defense Counsel have a First Amendment right to speak publicly regarding materials they receive through discovery. See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33-34 (1984) (upholding a protective order preventing public disclosure of discovery materials in a civil case against a First Amendment challenge); see also United States v. Caparros, 800 F.2d 23, 25 (2d Cir. 1986) (following Seattle Times and holding the same in the context of criminal discovery); In re Ctr. on Priv. & Tech. v. New York City Police Dep't, 181 A.D.3d 503, 504 (1st Dep't 2020), recalled and vacated (Apr. 29, 2021) (following Seattle Times in the context of civil discovery).<sup>4</sup>

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<sup>4</sup> This opinion was recalled and vacated upon the petition of the parties after the parties reached a settlement regarding the treatment of the underlying documents. It does not appear that the vacatur was based on the merits of the case. See Exhibit 7.

As the United States Supreme Court emphasized in upholding the protective order at issue in Seattle Times, “As the Rules authorizing discovery were adopted by the state legislature, the processes thereunder are a matter of legislative grace.” 467 U.S. at 33. As described above, the People’s ability to seek protective orders is integral to the functioning of Article 245. The law now requires the People to disclose a great deal of highly sensitive information shortly after arraignment, including grand jury testimony, material obtained by means of a grand jury subpoena, and victim name and contact information, to name just a few. There are strong public policy reasons why grand jury materials should be kept secret prior to trial, including “prevention of subornation of perjury and tampering with prospective witnesses at the trial” and “assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely.” People v. Di Napoli, 27 N.Y.2d 229, 235 (1970). Unlike the People, neither the Defendant nor Defense Counsel is bound by the requirements of grand jury secrecy, nor can they be prosecuted for Unlawful Grand Jury Disclosure, P.L. § 215.70. For these reasons, courts have routinely entered orders preventing defendants and their counsel from using discovery materials for purposes other than preparing a defense and from disseminating the materials to third parties.

The risk that this Defendant will use the Covered Materials inappropriately is substantial. Defendant has a long history of discussing his legal matters publicly—including by targeting witnesses, jurors, investigators, prosecutors, and judges with harassing, embarrassing, and threatening statements on social media and in other public forums—and he has already done so in this case. Further, Defendant may seek to use the Covered Materials

to advance his recently-filed lawsuit against Cohen. The legislature did not mandate broad disclosures by the People in advance of trial so that the People’s discovery materials could be used for these purposes. Rather, the purpose of the discovery reforms was to allow defendants to make informed decisions about whether to plead guilty in criminal cases. See, e.g., Press Release, Governor Andrew Cuomo, In 9th State of the State Address, Governor Advances Agenda to Ensure the Promise of Full, True Justice for All, Exhibit 8 (“Defendants will also be allowed the opportunity to review whatever evidence is in the prosecution’s possession *prior to pleading guilty to a crime.*”) (emphasis added); Donnino, Practice Commentary, McKinney’s Cons. Laws of N.Y., N.Y. Crim. Pro. CPL 245.10 (“Broader pre-trial discovery enables the defendant to make a more informed plea decision, minimizes the tactical and often unfair advantage to one side, and increases to some degree the opportunity for an accurate determination of guilt or innocence.”) (quoting People v. Copicotto, 50 N.Y.2d 222, 226 (1980)). The proposed order will in no way prejudice Defendant in his ability to mount a defense to the allegations in court or to determine whether to plead guilty. By the very terms of the order, Defendant and Defense Counsel will be allowed to use the materials freely—with certain safeguards discussed, infra—in order to prepare a defense or consider any plea decision. The People therefore request that the Court enter the proposed order permitting Defendant and Defense Counsel to use the discovery materials solely for the purpose of preparing a defense in this matter and limiting their ability to provide the materials to third parties, including the press, or to post them to social media platforms.

### **III. Defendant Should be Permitted to Review Certain Discovery Materials Only in the Presence of Defense Counsel**

The People seek the ability to mark certain materials as “Limited Dissemination Materials” and that such materials shall be kept solely in the possession of Defense Counsel, that Defendant may view these materials only in the presence of Defense Counsel, and that Defendant will not be allowed to copy, photograph, transcribe, or otherwise independently possess the materials. The People seek to apply this designation to any materials other than (1) materials that the People received from Defendant or any company owned in part or entirely by Defendant or the Donald J. Trump Revocable Trust or (2) third-party records that relate to an account that is in Defendant’s name or in the name of a company that is owned in part or entirely by Defendant or the Donald J. Trump Revocable Trust.

These restrictions are reasonable and necessary to protect the discovery materials. Many of the materials the People will provide in discovery are highly sensitive in nature. Defendant is currently under a separate criminal investigation for mishandling classified materials. Investigators are also reportedly looking into whether Defendant improperly shared these materials with individuals who were not entitled to see them. Given these allegations, the restrictions the People propose are reasonable to prevent Defendant from mishandling the discovery materials. Further, these restrictions will have minimal impact on Defendant’s ability to prepare a defense. He will have full access to these materials, so long as he is in the presence of Defense Counsel. This access will afford him ample opportunity to prepare a defense. See People v. Olivieri, 2022 WL 402744, at \*4 (Sup. Ct., N.Y. Co. February 9, 2022)

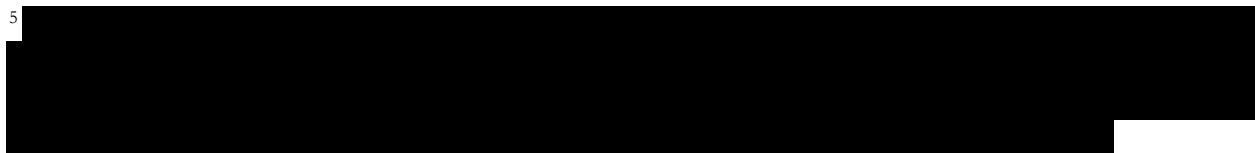
(Statsinger, J.) (granting a protective order that allowed only defense counsel to watch certain videos and only in the prosecutor’s office and further observing that while the proposed process might be “more inconvenient than simply viewing the videos along with his client, it will certainly be sufficient to allow counsel and the defendant to prepare a defense”).

#### **IV. The People Seek Additional Protections for Forensic Images of Witness Cell Phones**

The People are prepared to disclose full forensic images of two cell phones belonging to a witness.<sup>5</sup> Only a fraction of materials contained in these images relate to the subject matter of the case, and much of the content is highly personal in nature, including text messages with friends and family, vacation photos, and other materials that would be invasive for others to see. See Riley v. California, 573 U.S. 373, 395 (2014) (“[I]t is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate.”). Defendant has an antagonistic relationship with witnesses in this case, referring to Clifford in social media posts as “horseface” and to Cohen as a “liar” and “jailbird.” Exhibit 2. Under these circumstances, it would be highly inappropriate to grant Defendant unfettered access to a witness’s most personal materials. See People v. Cole, 2020 NYLJ LEXIS 537, at \*14 (Sup. Ct., Queens Co. 2020) (“Legislative debate concerning the enactment of the new

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discovery rules indicates that the ability to obtain a protective order was considered an important safeguard for the safety and privacy of victims and civilian witnesses.”).

Nonetheless, the People acknowledge that these forensic images do contain materials that relate to the subject matter of the case and that the Defendant should be entitled to review such materials. The People therefore propose that only Defense Counsel will be authorized to view the full forensic images. Should Defense Counsel wish to share certain portions of the forensic images with the Defendant, they should first notify the People and may share the materials with the Defendant only if the People do not object. This procedure strikes a fair balance between the People’s interest in protecting the private information of a witness with the Defendant’s interest in preparing a defense. See People v. Olivieri, 2022 WL 402744, at \*4.

**V. The People Request that Defendant be Advised on the Record of the Terms of Any Protective Order the Court Enters**

Should Defendant violate the terms of any protective order issued by the Court, the People may seek to enforce its terms by initiating a prosecution for Criminal Contempt in the Second Degree, P.L. § 215.50(3). In advancing such a prosecution, the People will be required to show that Defendant had knowledge of the contents of the order. “Notice of the contents of, and therefore of the conduct prohibited by, [a mandate of the court] may be given either orally or in writing or in combination.” People v. Clark, 95 N.Y.2d 773, 775 (2000). The People request, therefore, that Defendant be advised on the record of the terms of any protective order the Court enters. Such a proceeding would also permit the Court to

determine on its own whether any future noncompliance with a protective order is sanctionable under Judiciary Law § 750(A).

### **CONCLUSION**

Criminal Procedure Law 245.70 expressly permits broad restrictions and limitations of discovery materials and information upon a showing of good cause. The facts set forth above establish good cause to conclude that a protective order, in the form proposed above, is appropriate. The requested limitations are reasonable, narrowly written, and necessary to protect witnesses' safety and privacy interests and the legitimate needs of law enforcement.

No application for this or similar relief, other than that described herein, has been made in any court.

WHEREFORE, the People respectfully request that a protective order be granted pursuant to CPL 245.70, in the form annexed, and that the Court grant such other and further relief as it may deem just and proper.

Respectfully submitted,



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Catherine McCaw  
Assistant District Attorney

Dated: New York, New York  
April 24, 2023

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

THE PEOPLE OF THE STATE OF NEW YORK PROTECTIVE ORDER

-against-

Ind. No. 71543-23

DONALD J. TRUMP,

Defendant.

The Court, being satisfied based upon the application of Assistant District Attorney Catherine McCaw, dated April 24, 2023 that good cause exists for an order to restrict, defer, and make such other order as is appropriate with respect to disclosure and inspection of discoverable materials and information, pursuant to Section 245.70 of the Criminal Procedure Law, it is hereby:

ORDERED that any materials and information provided by the People to the Defense in accordance with their discovery obligations as well as any other documents, materials, or correspondence provided to or exchanged with defense counsel of record on the above-captioned matter (“Defense Counsel”), in any form or component part, with the exception of any materials provided to the People by Defendant, the Trump Organization, or any company owned in part or entirely by Defendant or the Donald J. Trust Revocable Trust (the “Covered Materials”) shall be used solely for the purposes of preparing a defense in this matter; it is further

ORDERED that any person who receives the Covered Materials shall not copy, disseminate, or disclose the Covered Materials, in any form or by any means, to any third party (except to those employed by counsel to assist in the defense of the above-captioned criminal

proceeding) including, but not limited to, by disseminating or posting the Covered Materials to any news or social media platforms, including, but not limited, to Truth Social, Facebook, Instagram, WhatsApp, Twitter, Snapchat, or YouTube, without prior approval from the Court; it is further

ORDERED that disclosure of the names and identifying information of New York County District Attorney's Office personnel, other than sworn members of law enforcement and assistant district attorneys, shall be delayed until the commencement of jury selection and permitting the People to redact such names and identifying information from any of the Covered Materials; it is further

ORDERED that those of the Covered Materials that are designated by the People as limited dissemination (the "Limited Dissemination Materials"), whether in electronic or paper form, shall be kept in the sole possession and exclusive control of Defense Counsel and shall not be copied, disseminated, or disclosed in any form, or by any means, by Defense Counsel, except to those employed by Defense Counsel to assist in the defense of the above-captioned criminal proceeding; it is further

ORDERED that Defendant is permitted to review the Limited Dissemination Materials only in the presence of Defense Counsel, but Defendant shall not be permitted to copy, photograph, transcribe, or otherwise independently possess the Limited Dissemination Materials; it is further

ORDERED that forensic images of witness cell phones shall be reviewed solely by Defense Counsel and those employed by Defense Counsel to assist in the defense of the above-

captioned criminal proceeding, except that, after obtaining consent from the People, Defense Counsel may show Defendant portions of the forensic images that relate to the subject matter of the case; it is further

ORDERED that, in the event Defendant seeks expedited review of this protective order under CPL 245.70(6)(a), any obligation that would exist on the part of the People to produce the information and materials that are the subject of this order is held in abeyance pending the determination of the intermediate appellate court; and it is further

ORDERED, that the portions highlighted in green in People's Motion in Support of a Protective Order dated April 24, 2023, and any accompanying documents, exhibits, or transcripts, are sealed pursuant to CPL 245.70(1).

DATED: New York, New York

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So Ordered:

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Justice of the Supreme Court

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

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DONALD J. TRUMP,

Defendant.

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MOTION FOR PROTECTIVE ORDER

Indictment No. 71543-23

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