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

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

DONALD J. TRUMP,

Defendant.

Index No. 71543-23

**PRESIDENT DONALD J. TRUMP'S**
**OPPOSITION TO THE PEOPLE'S MOTIONS *IN LIMINE***

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## I. INTRODUCTION

The People must attempt to try the case they charged, not the case the District Attorney fantasized about when he was on the campaign trial.

The case the People charged is a lawless 34-count indictment relating to record entries reflecting monthly retainer payments President Trump made to his personal attorney Michael Cohen in 2017. The People's motions *in limine*, on the other hand, describe a fantasy: an uncharged "underlying conspiracy" to "influence the 2016 election" that the District Attorney wishes President Trump had not won. This deluded fantasy comes complete with a dreamy wish list that includes (1) hiding from the jury the particulars of the regulatory and legal frameworks the People want to argue President Trump and others intended to violate; (2) offering evidence relating to discrete and dissimilar episodes concerning individuals other than Stephanie Clifford to bolster a fanciful and elaborate narrative that does not exist; (3) precluding President Trump from cross-examining witnesses with established histories of lying, and worse, asking them about their obvious motivations and biases, which would be a relevant line of inquiry in any trial, much less one where the defendant is a leading presidential candidate; and (4) obscuring the absence of evidence by accusing President Trump of uncharged, alleged, nonexistent misconduct based on fabricated hearsay accounts relating to events that supposedly happened on unspecified days during vague timeframes dating back to the late 1970s.

At trial, however, applicable evidentiary rules and related caselaw preclude the People from presenting their fantasy case, as opposed to the narrow business records case they charged. Currently, the People have not met their burden of providing the Court with an adequate basis to make pre-trial rulings adverse to President Trump prior to the presentation of evidence. Accordingly, the Court should deny the People's motions *in limine*.

## II. ARGUMENT

### A. Smith Should Be Permitted To Testify Regarding Specified Campaign Finance Issues

Unless the Court precludes the People from arguing that a violation of the Federal Election Campaign Act ("FECA") was an object offense under Penal Law § 175.10, *see* Def. MILs at 20-30, the Court should reject the People's motion to preclude testimony from Bradley Smith regarding the topics set forth in the four bullet points from President Trump's January 22, 2024 Notice. *See* People's MILs Ex. 1 at 3.

First, President Trump is entitled to contest at trial whether Cohen's alleged payment to Clifford was, as the People put it, "an illegal campaign contribution," which it was not. People's MILs at 14. The People appear to regard their theory as a settled "fact," arguing that the alleged payment "was, in fact, a crime" based on Cohen's guilty plea. *Id.* at 16. The People are wrong, and that guilty plea is inadmissible. *See* Def. MILs at 30-31 (citing, *inter alia*, *People v. Wright*, 41 N.Y.2d 172, 176 (1976) (reasoning that "codefendant's plea of guilt . . . has no probative value as to defendant's guilt")); *see also, e.g.*, *People v. Berkowitz*, 50 N.Y.2d 333, 345 (1980) (reasoning that, because "society has an overwhelming interest in ensuring not merely that the determination of guilt or innocence be made, but that it be made correctly," "the major function of a criminal proceeding is the conviction of the guilty and the acquittal of the innocent, not the swift resolution of some private dispute between the prosecutor and the accused"); *Teshabaeva v. Family Home Care Servs. of Brooklyn & Queens, Inc.*, 214 A.D.3d 442, 444 (1st Dept. 2023) ("[I]t is well settled that lower federal court decisions are not binding on New York state courts." (cleaned up)).

Second, part of President Trump's trial defense is that (a) the alleged payment by Cohen was not, in fact, illegal, and (b) President Trump did not believe that he was doing anything illegal. Through Smith's proposed testimony, President Trump seeks to provide appropriate context

regarding the regulatory framework at issue, *see* People's MILs Ex. 1 at 3 (Notice Bullet Point 1), and the enforcement environment that informed the decision-making and intent of the participants in what the People have wrongfully framed as a "scheme" or "conspiracy," *id.* (Notice Bullet Points 2-4). Evidence regarding the federal regulatory framework will help the jury assess the People's potential argument—which the Court should preclude, *see* Def. MILs at 21-29—that "Cohen made an illegal campaign contribution to [President Trump] by paying $130,000 to Stormy Daniels to silence her on the eve of a presidential election." People's MILs at 14. Subject to connection, which President Trump will establish through cross-examination of AMI witnesses and Cohen, as well as anticipated defense testimony, Smith's proposed testimony regarding the enforcement environment is particularly relevant to the jury's assessment that President Trump did not act with a culpable mental state.[1]

Smith's proposed testimony consists of permissible lay-witness opinions pursuant to Rule 7.03 because the testimony is within the "experience" of the "particular witness," *i.e.*, Smith. Guide to N.Y. Evid. Rule 7.03(1)(b). The description of Smith's background and experience in the Notice provided to the People demonstrates that the proposed testimony meets that requirement. *See* People's MILs Ex. 1; *see also* Guide to N.Y. Evid. Rule 7.03, Note (explaining that "[m]atters within the ambit of experience of a particular witness will normally require foundational testimony establishing the witness's experience with the question presented"). The commentary to Rule 7.03 in the Guide to New York Evidence illustrates that the scope of permissible lay-witness testimony greatly exceeds what is contemplated by the People, and includes "opinions or inferences of a lay witness" regarding "the rational or irrational nature of a

[1] President Trump has no objection to the Court assessing whether the defense has established the requisite connection for testimony regarding Notice Bullet Points 2-4 during the trial, but there is no basis for precluding Smith's testimony prior to the trial.

person's conduct." Guide to N.Y. Evid. Rule 7.03, Note (quoting Jerome Prince, Richardson on Evidence § 364(m) (10th ed. 1973)); *see also People v. Anonymous*, 213 A.D.3d 580, 582 (1st Dept. 2023) (same). Insofar as Rule 7.03 contemplates lay-opinion testimony regarding a person's mental state, it is certainly permissible for Smith to offer opinions based on his particular experience relating to the FECA issues the People wish to improperly inject into this case.

Smith's proposed testimony also passes muster under the rubric of expert opinions pursuant to Rule 7.01.

> The guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror. Moreover, this principle applies to testimony regarding both the ultimate questions and those of lesser significance.

*People v. Rivers*, 18 N.Y.3d 222, 227 (2011) (cleaned up). "Expert opinion testimony is used in partial substitution for the jury's otherwise exclusive province which is to draw conclusions from the facts. It is a kind of authorized encroachment in that respect." *People v. Jones*, 73 N.Y.2d 427, 430-31 (1989) (cleaned up).

Straining to suggest otherwise, the People contend that Smith's proposed testimony amounts to an impermissible "legal conclusion" or testimony "about legal matters." *E.g.*, People's MILs at 9-10, 12 n.3. However, unlike the expert in *United States v. Stewart*, which the People cite, Smith will not opine that the transactions in question "did not violate" the laws at issue. 433 F.3d 273, 311 (2d Cir. 2006); People's MILs at 11. Moreover, "courts and commentators have consistently concluded that expert testimony that ordinarily might be excluded on the ground that it gives legal conclusions may nonetheless be admitted in cases that involve highly technical legal issues." *United States v. Offill*, 666 F.3d 168, 175 (4th Cir. 2011). None of the civil cases cited by the People establish that Smith's proposed testimony is inappropriate because those cases failed to address Rule 7.01(3), which permits expert testimony "even if it embraces an ultimate issue to

be decided by the trier of fact." *Accord* Guide to N.Y. Evid. Rule 7.03(2); *see also id.* Rule 7.03, Note (citing, *inter alia*, *People v. Hicks*, 2 N.Y.3d 750, 751 (2004), *People v. Cronin*, 60 N.Y.2d 430, 433 (1983), *People v. Jones*, 73 N.Y.2d 427, 430-31 (1989)). Smith would not "tell the jury what result to reach," but would rather "guid[e] the trier of fact through a complicated morass of obscure terms and concepts" to assist in the jurors when applying the Court's legal instructions. *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994).

"[C]ourts have permitted regulatory experts to testify on complex statutory or regulatory frameworks when that testimony assists the jury in understanding a party's actions within that broader framework." *Antrim Pharms. LLC v. Bio-Pharm, Inc.*, 950 F.3d 423, 430-31 (7th Cir. 2020). Smith's proposed testimony is admissible to help the "jury understand unfamiliar terms and concepts," *People v. Schwartz*, 21 A.D.3d 304, 308 (1st Dept. 2005), such as campaign "contributions," 52 U.S.C. § 30101(8)(A); "expenditures," *id.* § 30101(9)(A); and expenses for the "personal use" of a candidate, *see* 11 C.F.R. § 113.l(g)(6). Similar testimony offered by the prosecution concerning the particulars of New York election law was permitted in *People v. Anderson*, where the trial judge told the jury that "the charges in the indictment are not Election Law violations but obviously the Election Law is part of the background of the issues here and I will permit the witness to testify about the Election Law as it relates to the events of this case." 3/23/2010 Tr. 589-90, *People v. Anderson*, Ind. No. 5768/08 (Sup. Ct. N.Y. Cnty.) (attached as Ex. 1);[2] *see also, e.g.*, *Schwartz*, 21 A.D.3d at 307-08 (reasoning that trial court "providently exercised its discretion" by "accepting the former president of MPR as an expert in SEC filings" and "permitting a law school professor to give expert testimony on securities laws and

[2] We note that, due to the way in which the transcript was saved (over multiple .pdf files), the document attached as Exhibit 1 begins at page 581 of the trial transcript. A caption appears at page 641.

regulations"); *People v. A.S. Goldmen, Inc.*, 9. A.D.3d 283, 285 (1st Dept. 2004) ("The People's experts did not exceed the bounds of permissible testimony in this intricate securities case involving complicated regulatory requirements. The experts explained the regulations and their relation to the documented actions of defendants. They did not testify to the ultimate issue before the jury but left it to the jury to determine if defendants' conduct, viewed in the context of the statutory requirements, proved that they intentionally engaged in the fraudulent schemes charged."); *People v. Norman*, 789 N.Y.S.2d 613, 632 (Sup. Ct. Kings Cnty. 2004) (reasoning that expert testimony in grand jury proceedings regarding "application of the rules established by the Legislature, in accordance with the Constitution and the statutory law, for reimbursement of expenses to members of the New York State Assembly was admissible" where "the testimony was directly relevant to determinations the grand jury would be called upon to make"); *People v. Lurie*, 249 A.D.2d 119, 122 (1st Dept. 1998) (reasoning that "expert testimony was necessary to explain the complicated regulatory scheme governing co-op conversions and the corresponding disclosure requirements imposed on sponsors" and expert "left for the jury to decide whether the evidence of defendants' conduct, viewed in the context of the statutory requirements, proved beyond a reasonable doubt that defendants intentionally engaged in a fraudulent scheme"); *United States v. McComber*, 2022 WL 16859733, at *16 (D. Md. Nov. 10, 2022) ("[O]n the whole, in cases involving a complex statutory or regulatory scheme, there are many cases that support the use of an expert to address matters pertaining to legal standards."); *United States v. Pac. Gas & Elec. Co.*, 2016 WL 3268994, at *1 (N.D. Cal. June 15, 2016) ("[E]xpert testimony to help the jury digest this complex regulatory framework is necessary and warranted."); *United States v. Yagman*, 2007 WL 4532670, at *1 (C.D. Cal. May 11, 2007) (finding expert testimony permissible regarding "what kinds of information debtors disclose in Chapter 7 proceedings and the purposes

of those disclosures"); *United States v. Lankford*, 955 F.2d 1545, 1551 (11th Cir. 1992) (affirming admission of expert testimony regarding "gift/income tax interpretations unique to a candidate's finances during a political campaign, particularly where the candidate must resign his existing position in order to run for office," because "whether, under facts such as those presented to the jury, it is reasonable for a political candidate to treat certain monies received during a campaign as political contributions, while treating other monies as gifts donated to assist him with living expenses incurred during the campaign").

As to Smith's proposed testimony regarding the enforcement environment, or lack thereof, courts also admit expert testimony regarding factual circumstances bearing on the intent of relevant parties, which include here President Trump, AMI witnesses, and Cohen with respect to the absence of culpable mens rea under Penal Law § 175.10 and of the willfulness element of a FECA violation, *see* 52 U.S.C. § 30109(d)(1)(A).[3] *See, e.g.*, *People v. Leppanen*, 218 A.D.3d 995, 1001 (3rd Dept. 2023) (describing prosecution's "rebuttal expert's opinion that defendant had the requisite mental capacity to be held criminally responsible because there were escalating tensions with the victim culminating in physical threats the night before the incident," which also "support[ed] the conclusion that defendant knew his conduct was wrong"); *People v. Simon*, 128 A.D.3d 433, 433 (1st Dept. 2015) ("The court properly exercised its discretion when it admitted expert testimony concerning circumstances that indicate an intent to sell drugs." (citing *Hicks*, 2 N.Y.3d 750 (2004)); *United States v. Clardy*, 612 F.2d 1139, 1153 (9th Cir. 1980) (affirming admission of expert testimony that "the 'interest deduction is not deductible' on a tax return

[3] In fact, [redacted] 2023 GJ Testimony at 952.

because 'this type of testimony is relevant to the issue of willfulness where the theory of the defense is that there is a good faith dispute as to the interpretation of the tax laws'"); *United States v. Simson*, 1991 WL 141043, at *1 (4th Cir. Aug. 1, 1991) (finding *Strickland* violation where defense counsel "failed to present an expert on standard practices in the surety business" because "evidence of custom and practice in the surety bond industry would have negated criminal intent"); *United States v. Garber*, 607 F.2d 92, 99 (5th Cir. 1979) ("By disallowing [expert's] testimony that a recognized theory of tax law supports [defendant's] feelings, the court deprived the defendant of evidence showing her state of mind to be reasonable."); *see also* Guide to N.Y. Evid. Rule 7.01, Note (explaining that "[e]xamples of accepted expert testimony include testimony that explains" the "impact on the ability to act with the requisite intent," as discussed in *Cronin*, 60 N.Y.2d at 432, and "whether a fire was intentionally set," as discussed in *Rivers*, 18 N.Y.3d at 227).

For example, Smith's proposed testimony regarding the failed *Edwards* prosecution and the lack of any similar prosecution in the past is admissible, subject to appropriate connection through cross-examination of Cohen and AMI witnesses, as well as testimony in a possible defense case, that the history of campaign finance regulation supported a good-faith belief by President Trump that (1) the payments at issue did not violate FECA, and (2) personal funds rather than campaign funds needed to be used for such payments. Given the tremendous faith the People place in limiting instructions with respect to their proposed *Molineux* evidence, there is no reason that a limiting instruction with respect to Smith's testimony would not mitigate any risk of unfair prejudice or juror confusion regarding this critical defense testimony.

Decisions concerning testimony by Smith in two "different" "federal" prosecutions are not persuasive here. People's MILs at 12. First, unlike in *Suarez*, President Trump will not elicit from

Smith that FECA is "confusing" or "misunderstood," or that "it is reasonable for individuals to believe that the law allows 'straw man' donations." People's MILs Ex. 2 at 1-2. Rather, President Trump will elicit testimony from Smith to provide context to the jury regarding the FECA regulatory environment during the timeframe at issue, which is relevant to the jury's assessment of intent. It will be for witnesses to explain, or not, how the facts relating to the *Edwards* case described by Smith impacted their mindset and actions. Smith should be permitted to provide a foundation of context regarding the case so that the jury can assess that other testimony.

Second, in *Bankman-Fried*, the trial did not require the jury to assess whether the defendant or any other witness formed an intent to violate FECA.[4] Thus, in the absence of the defense's requested ruling that FECA's legal requirements have no place at this trial, *Bankman-Fried* is inapposite. Further, the *Bankman-Fried* opinion cited by the People relied on *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991). *See Bankman-Fried*, 2023 WL 6162865, at *1 n.3 (S.D.N.Y. Sept. 21, 2023). In *Bilzerian*, however, the court affirmed the admissibility of expert

[4] Despite the People's suggestion to the contrary, Penal Law § 175.10 requires an intent to commit, to aid, or to conceal the commission of "*another crime*." *See* People's Opposition to President Trump's Motions *in Limine* at 11-13 (Feb. 29, 2024) ("People's Opposition"). While a defendant need not have been successful in achieving the crime he intended to commit, he must have intended to engage in conduct that, if completed, would have been a crime. As an obvious example, if someone falsified business records with the intent to conceal his possession of marijuana, not realizing that possession of marijuana was no longer illegal, he would not have acted with the intent to conceal a "crime."

The cases cited in the People's Opposition do not hold otherwise. *See People v. Thompson*, 124 A.D.3d 448, 449 (1st Dept. 2015) (defendant acted with the intent to commit or conceal the unlawful possession of firearm); *People v. McCumiskey*, 12 A.D.3d 1145, 1145 (4th Dept. 2004) (defendant demonstrated an intent to commit or conceal grand larceny); *People v. Holley*, 198 A.D.3d 1351, 1351-52 (4th Dep't 2021) (jury could convict defendant if it concluded that he intended to commit or conceal insurance fraud); *People v. Houghtaling*, 79 A.D.3d 1155, 1157-58 (3d Dept. 2010) (same); *People v. McCumiskey*, 12 A.D.3d 1145, 1145-46 (4th Dept. 2004) (jury could convict defendant if it concluded he had intent to commit or conceal grand larceny). Thus, before the jury can determine whether President Trump acted with the intent to conceal a FECA violation, it must first determine whether the payments in question could or would have been a crime.

testimony "regarding the requirements of Schedule 13D concerning disclosure of the source of funds and arrangements and understandings with others," as well as "hypotheticals" regarding the Schedule. 926 F.2d at 1294. The Second Circuit's statement in *Bilzerian* that an expert may not give testimony regarding "ultimate legal conclusions," *id.*, is also inconsistent with Rules 7.01(3) and 7.03(2) (permitting testimony "even if it embraces an ultimate issue to be decided by the trier of fact.").

Finally, the Court's ruling in *People v. The Trump Corporation*, which did not relate to a proffer of expert testimony and is currently being appealed, is not to the contrary. People's MILs at 11. The People fail to mention that Your Honor did not entirely preclude the expert at issue in *Trump Corporation*. Moreover, President Trump is not seeking to use this trial as a "referendum" on FECA, or to provide a "master class" through Smith's proposed testimony. *Id.* Ex. 4 at 3. Nor does the Court's subsequent reference to that language—in a different case, involving different charges, with a different defendant—serve as persuasive authority for how to address President Trump's proffered testimony from Smith. *Id.* Ex. 5 at 33. It is entirely appropriate, and consistent with Rules 7.01 and 7.03, to permit a criminal defendant to offer expert testimony regarding the regulatory environment that bears on his intent. Accordingly, for all of these reasons, the Court should deny the People's motion to preclude testimony from Smith relating to the four bullet points in the Notice. *See* People's MILs Ex. 1 at 3.

### B. The People's Motions Regarding FEC Rulings And DOJ's Non-Prosecution Of President Trump Are Premature

The People's motions to preclude evidence and argument concerning (1) dismissed FEC complaints, and (2) the decision by the U.S. Department of Justice ("DOJ") not to charge President Trump with campaign finance violations should be denied because they are premature. *See* People's MILs at 19-24. President Trump does not currently intend to offer evidence regarding

these conclusions or charging decisions. For the reasons stated in the defense motions *in limine*, Def. MILs at 30-31, the People should not be permitted to offer this type of evidence, either. *See* People's MILs at 15 (describing inadmissible hearsay including Cohen's judgment of conviction, federal charging instrument, and guilty plea allocution); *see also* 10/20/2022 Tr. 43, *People v. The Trump Corp.*, Ind. 1473/21 (Sup. Ct. N.Y. Cnty.) (attached as Ex. 2) (precluding plea allocution of Allen Weisselberg as "inadmissible hearsay").[5] However, if the Court permits the People to introduce this type of evidence at trial, or if the People open the door based on, for example, their questioning of AMI witnesses or cross-examination of President Trump should he choose to testify, then President Trump should be permitted to introduce the FEC's dismissal of the complaints and DOJ's decision not to prosecute President Trump for potential FECA violations as rebuttal evidence.[6] Accordingly, the People's motion for an *in limine* ruling regarding these issues should be denied and the Court should consider whether to admit such evidence if and when the evidence is presented at trial.

### C. Cross-Examination Regarding Motive And Bias Is Not A "Selective Prosecution" Defense

Defense counsel do not intend to ask the jury to acquit President Trump based on "selective prosecution," *i.e.*, "that DANY . . . targeted him for prosecution in violation of the Equal Protection Clause of both the United States and New York State Constitutions." Decision & Order at 20 (Feb.

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[5] For example, the People have pre-marked as purported trial exhibits the following inadmissible documents: (1) a [redacted], *see* People's 1/29/2024 Supplemental Exhibit List at Nos. 7, 9 (attached as Ex. 3); and (2) a [redacted]. *Id.* at No. 8. President Trump reserves the right to lodge exhibit-specific objections as the trial proceeds based on guidance from the Court in connection with these motions *in limine*.

[6] The People's argument that President Trump was not charged because of DOJ's policy against the criminal prosecution of a sitting President, PMIL at 23-24, ignores the obvious point that that the policy only pertains to charges while the President remains in office. Here, DOJ declined to charge President Trump with FECA violations after he left office over three years ago.

15, 2024) ("February 15 Decision"). While we disagree with the Court's ruling, we acknowledge that the constitutional question presented is not one for the jury. However, there is no basis for the broader *in limine* rulings sought by the People, especially before the parties have started to present evidence. *See* People's MILs at 24-30.

For example, the People seek a pretrial order precluding argument regarding the "novel" nature of the charges and their supposed "seriousness." People's MILs at 27, 30. At the trial in *The Trump Organization*, while the Court precluded such references during jury selection and in openings, the Court recognized that "what the witnesses are going to say once they are on the witness stand" could "completely open the door or change things." People's MILs Ex. 5 at 39; *see also Luce v. United States*, 469 U.S. 38, 41-42 (1984) (reasoning that an *in limine* ruling "is subject to change when the case unfolds" and, "even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling"). The Court also properly instructed the People to "refrain from suggesting the charges in this case are ordinary, routine, or common place," which in this case should include preliminary preclusion of any argument from the People that "no one is above the law" unless and until the defense suggests otherwise. People's MILs Ex. 5 at 39.

More broadly, as the Court has also previously recognized, cross-examination and argument regarding motivations and bias by prosecution witnesses is a necessary part of any fair trial. *Id.* ("With regard to how the issue of whether these are unprecedented charges or drive by some sort of bias, the defense is correct, a witness's bias can always be explored. And it can always be exploited."); *see also United States v. Householder*, 645 F. Supp. 3d 844, 851 (S.D. Ohio 2022) (reasoning that "Defendants' proposed arguments, in general, do not amount to selective prosecution" and "Defendants' intent to challenge the reliability of the investigation is

generally permissible" (citing *Kyles v. Whitley*, 514 U.S. 419 (1995)). This includes cross-examination and argument regarding witnesses' political animus and other related biases. *See* Guide to N.Y. Evid. Rule 6.11, Note (explaining that "[i]mpeaching evidence is not collateral when . . . independently admissible to impeach the witness, *e.g.* show the witness's bias, [or] hostility . . . ." (citations omitted)); Guide to N.Y. Evid. Rule 6.13, Note ("Illustrative examples of partiality recognized by the Court include a witness's bias in favor of the party calling the witness . . . or the witness's interest in the case, personal, financial or other." (citations omitted)); *see also United States v. Khatallah*, 313 F. Supp. 3d 176, 183 (D.D.C. 2018) ("On cross-examination of the Libyan witnesses, the defense sought to undermine their credibility and draw out potential ulterior motives for their testimony. For instance, the defense emphasized [a witness's] personal and political animus against [defendant]."); *United States v. Cole*, 41 F.3d 303, 311 (7th Cir. 1994) (describing trial defense seeking "inference of politically motivated investigation and charges"); *United States v. LaRouche*, 1993 WL 358525, at *2 (4th Cir. Sept. 13, 1993) (noting that "Defendants had ample opportunity to explore the biases of these witnesses on cross-examination," including "that four government witnesses . . . had some contacts with [defendant's] political adversaries"); *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1371-72 (9th Cir. 1987) (describing trial defense that "consisted of challenges to the credibility of government witnesses and in allegations that the government was politically motivated in bringing the prosecution against him"); *United States v. Eley*, 723 F.2d 1522, 1526 (11th Cir. 1984) (describing trial defense "that the Department of Justice and all law enforcement officers had set out to convict a man they knew to be innocent"); *United States v. Jones*, 44 C.M.R. 269, 273 (C.M.A. 1972) ("Appellate Government counsel concede that cross-examination as to political beliefs may be proper to disclose bias or prejudice on the part of the witness . . . ."); c*f. United States v. Lacey*, 2021 WL

511209, at *2 (D. Ariz. Feb. 11, 2021) (noting that evidence that authorities' were "motivated by political concerns" could "be relevant . . . to impeach the Government's witnesses").

The Supreme Court has also made clear that President Trump may "attack[] the reliability of the investigation" at trial. *Kyles v. Whitley*, 514 U.S. at 447. Under *Kyles*, President Trump is entitled to argue that the investigation was generally "shoddy," in that it was lengthy, sprawling, and conducted in fits and starts. *Id.* at 442 n.13 ("There was a considerable amount of . . . *Brady* evidence on which the defense could have attacked the investigation as shoddy."). This includes cross-examination and argument regarding witnesses' participation in the District Attorney's blatant election interference efforts, as well as any relevant assertions from Mark Pomerantz's book. *See* People's MILs at 28; *see also Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1353 (11th Cir. 2011) (reasoning that "the strategies, tactics, and defenses that the defense could have developed and presented to the trier of fact" included impeaching the "lead detective" in order to "*impugn*[] . . . *the character of the entire investigation*" (emphasis added)); *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (reasoning that evidence "discrediting, in some degree, of the police methods employed in assembling the case against him" should have been disclosed for use at trial); *United States v. Bagcho*, 151 F. Supp. 3d 60, 70 (D.D.C. 2015) ("Impeachment evidence can be damaging when it allows defense counsel to attack the reliability of an investigation."); *United States v. Quinn*, 537 F. Supp. 2d 99, 116 (D.D.C. 2008) (reasoning that defense could "use[] information regarding the government's suspicions of [informant's credibility] to conduct a pointed attack on the government's investigation, with its uncritical reliance on [the informant]"). The fact that President Trump cited some portions of Pomerantz's book in support of his selective

prosecution motion does not mean that no portions of the book are admissible at trial, and no case the People cite suggests otherwise. *See* People's MILs at 28.[7]

Accordingly, the People have not demonstrated that they are entitled to a blanket order, applicable to the whole trial, precluding all of the defense arguments they claim fit under the topic of "selective prosecution." People's MILs at 24-30.

### D. Evidence And Argument Regarding DOJ's Assessments Of Cohen Is Admissible

Consistent with the District Attorney's refusal to even investigate Cohen's recent perjury, *see* Def. MILs at 4-8, the People seek to effectively preclude cross-examination of Cohen regarding federal prosecutors' written representations to two federal judges that Cohen lied to them. The prosecutors' court filings present a reliable, good-faith basis for questions during cross-examination. The Court should reserve judgment on the admissibility of the statements in those filings until President Trump confronts Cohen and decides whether and to what extent he will seek to offer the filings based on Cohen's answers.

In a December 2019 submission opposing Cohen's request for a reduced sentence, federal prosecutors in the Southern District of New York asserted to Judge William H. Pauley III that:

- They had "substantial concerns about Cohen's credibility as a witness."
- Cohen had "lied" to the Special Counsel's Office in August 2018.
- Subsequent to those lies, Cohen "repeatedly declined to provide full information" to SDNY prosecutors.
- Cohen "made material false statements" to SDNY prosecutors in January and February 2019.

[7] Moreover, some statements in the book are likely admissible as party admissions of the District Attorney's Office, while others can be used to impeach witnesses with, for example, prior inconsistent statements.

- "Cohen then made numerous false statements and repeatedly minimized his own conduct in both his post-sentencing proffers with the Office and his public statements."

- "Cohen's lies and minimization continue to this day. In this very motion, Cohen once again attempts to blame his tax evasion on his accountant."

ECF No. 58 at 3-4, 10 & 11 n.10, *United States v. Cohen*, No. 18 Cr. 602 (S.D.N.Y. Dec. 19, 2019) (attached as Ex. 4). Judge Pauley credited the prosecutors' assertions and reasoned that Cohen "made material and false statements in his post-sentencing proffer sessions." *United States v. Cohen*, 2020 WL 1428778, at *1 (S.D.N.Y. Mar. 24, 2020).

In a 2023 submission opposing Cohen's request for early termination of his probation, SDNY prosecutors reiterated that they had "previously delineated many of Cohen's lies that undermined his attempts at cooperation, and pointed to Cohen's repeated attempts to downplay his own conduct after his guilty plea." ECF No. 87 at 3, *United States v. Cohen*, No. 18 Cr. 602 (S.D.N.Y. Jun. 16, 2023) (attached as Ex. 5). The prosecutors emphasized false statements made by Cohen in a book and on TV, including lies in which he tried to distance himself from his prior sworn guilty plea, and that he had falsely claimed to have been threatened:

> More recently, just before making his last motion, Cohen falsely wrote in a book he authored that he "did not engage in tax fraud," that the tax charges were "all 100 percent inaccurate," and that he was "threatened" by prosecutors to plead guilty. See Michael Cohen, REVENGE 54 (2022). Additionally, in a recent attempt to distance himself from his guilty plea to making false statements to a financial institution about tax medallion liabilities, see Dkt. 27 at 8-11, Cohen stated on television, "first and foremost, there was no fraud in the medallions, I don't know even what he's talking about." See The Beat with Ari Melber, MSNBC (Mar. 20, 2023), https://shorturl.at/cvDI8. Cohen's recent statements are belied by his under-oath statements when he pled guilty, which included that he was guilty of tax evasion and false statements to banks, and that he had not been threatened or forced to plead guilty. (Dkt. 7). And they are evidence that Cohen has not "taken full responsibility for his actions," as he asse[r]ts in his motion.

*Id.* at 3. Judge Jesse M. Furman credited the prosecutors' assessments and denied Cohen's motion "substantially for the reasons set forth in the Government's letter." *Id.* at 4. Less than six months

later, Cohen committed perjury *at a trial where President Trump was a defendant*. *See* Def. MILs at 6.

Cohen's documented history of lies during and regarding federal proceedings, and his related perjury in the New York County Supreme Court, are some of the important reasons that no objective observer could credit his testimony. *See, e.g., People v. Rouse*, 34 N.Y.3d 269, 278 (2019) (reasoning that "acts of individual dishonesty, or untrustworthiness . . . will usually have a very material relevance with respect to a witness's credibility" (cleaned up)); Guide to N.Y. Evid. Rule 6.17(1)(a) (permitting impeachment on "prior specific, criminal, vicious, or immoral conduct"); *cf. id.* Rule 6.29(3)(c) ("[A]cts of dishonesty and misstatements about an event or the officer's conduct made to a prosecutor, constitutes a good faith basis for an impeachment inquiry of the witness.").[8] President Trump is entitled to cross-examine Cohen on these issues. *See Rouse*, 34 N.Y.3d at 277 ("[T]he court abused its discretion as a matter of law in refusing to allow defense counsel to explore misstatements one of the [defendant] officers made to a federal prosecutor."). For example, defense counsel must be permitted to confront Cohen with his lies about being "threatened" by federal prosecutors so that the jury can assess—and reject—his anticipated testimony that he somehow felt threatened by President Trump. *See* People's MILs at 50 (proffering testimony that President Trump "singled out" Cohen with "harassing comments" and "threats").

[8] Although Rule 6.29 pertains to impeachment of law enforcement witnesses, the premise of the Rule is that "'law enforcement witnesses should be treated in the same manner as any other witness for purposes of cross-examination.'" Guide to N.Y. Evid. Rule 6.29, Note (quoting *People v. Smith*, 27 N.Y.3d 652, 660 (2016)). In *Smith*, the Court of Appeals described that proposition as "unremarkable." 27 N.Y.3d at 659. Therefore, the principles in Rule 6.29 apply equally to cross-examination of Cohen.

In addition to core impeachment under Rules 6.11 and 6.17, Cohen's lies to federal authorities are probative of bias and motivation to curry favor with New York authorities—including, but not limited, to the District Attorney—by fabricating stories regarding President Trump. *See* Guide to N.Y. Evid. Rules 6.12, 6.13; *see also Badr v. Hogan*, 75 N.Y.2d 629, 635 (1990) (distinguishing between "matters such as a witness's bias, [or] hostility" and "prior misconduct had no direct bearing on any issue in the case other than credibility"). Cohen's expectation of a benefit is illustrated by, for example, [redacted] *See* [redacted] (attached as Ex. 6); [redacted] (attached as Ex. 7);[9] *see also, e.g.*, *People v. Giuca*, 33 N.Y.3d 462, 477-78 (2019) ("The disclosed evidence provided ample basis for defense counsel to argue to the jury that [the witness] had a bias in favor of the People, as he hoped to receive a benefit in exchange for his testimony . . . ."). Therefore, the Court should (1) deny the People's motion to preclude questioning or argument regarding federal court filings declaring Cohen to be a liar, as there is a good-faith basis for such questions, and (2) reserve judgment on the admissibility of the filings until President Trump has had an opportunity to lay a foundation for their admission through the cross-examination of Cohen.

**E. The People's Motion Regarding An Advice-Of-Counsel Defense Is Premature**

The People's motion *in limine* regarding the advice-of-counsel defense is premature. On February 7, 2024, the Court set a deadline of March 11, 2024 for President Trump to "provide

[9] Exhibit 7 is a heavily redacted [redacted] Because of the relevance of this email to cross-examination regarding Cohen's bias and motivation, President Trump respectfully requests that the People be ordered to produce the entire email and any similar emails for which they have applied redactions that obscure text relevant to Cohen's cross-examination.

notice and disclosure of his intent to rely on the defense of advice-of-counsel." The People acknowledge as much in footnote 14 of their brief, and defense counsel understand the Court's ruling.

Even beyond the People's motion being premature, we note that while a formal advice-of-counsel defense may result in a privilege waiver, the separate defense that President Trump "lacked criminal intent" based on "the involvement of attorneys in certain decision-making" does not. *United States v. Bankman-Fried*, 2024 WL 477043, at *1 (S.D.N.Y. Feb. 7, 2024) (cleaned up); *see also id.* at *2 (distinguishing between advice-of-counsel defense and "evidence of attorneys' presence for and participation in certain events to support his good-faith defense"). Moreover, in addressing the distinction between these defenses in *Bankman-Fried*, Judge Kaplan relied on one of the very same cases the People cite—*Scully*—demonstrating that it does not support the People's position. *See id.* at *1 n.9; People's MILs at 33. In *Scully*, the Second Circuit reversed a conviction because the trial court erred in its balancing determination under Rule 403, and did not specifically address a defendant's informal "involvement of counsel" defense as to intent. 877 F.3d 464, 474 (2d Cir. 2017) (district court erred in its balancing of the probative value and prejudicial effect of the proposed evidence concerning legal advice under Rule 403).

The People's reliance on *Charlemagne* is also unavailing. People's MILs at 34. Charlemagne similarly addressed the advice-of-counsel defense, not a defense based on the People's lack of proof as to the intent element. *See* 2016 WL 11678620, at *2 (M.D. Fla. Sept. 2, 2016). The Court's March 11, 2024 deadline relates to the version of the defense that would require a privilege waiver. On the other hand, a defense based on non-privileged facts relating to attorney presence and conduct bearing on a defendant's intent requires no waiver or pre-trial notice. The factual basis for this distinct challenge to the People's mens rea evidence is obvious:

their principal accomplice witness was an attorney before he was disbarred. *See United States v. Bankman-Fried*, 2023 WL 6392718, at *3 (S.D.N.Y. Oct. 1, 2023) (reasoning that "circumstances in which lawyer presence, involvement, or advice known to the defendant at the time of his alleged misconduct might have a real bearing on whether he acted with or without fraudulent intent"). Accordingly, there is no basis for precluding argument regarding this separate defense.

### F. The People's Motion Regarding The Court's Prior Rulings Is Overbroad And Meritless

The People devote less than a page to seeking to preclude "legal defenses" that, they say, "the Court has already rejected." People's MILs at 35.[10] The People are wrong. The Court did not address admissibility in its February 15, 2024 ruling. And the People fail to account for President Trump's right to cross-examine witnesses regarding impeachment, bias, and motive, *see supra* Part II.C, which the Court has recognized previously, *see* People's MILs Ex. 5 at 39. Thus, President Trump must be permitted to cross-examine witnesses regarding leaks, policy violations, and other misconduct that are relevant to their credibility.

Therefore, the People have not identified a basis for the broad ruling they seek, and such a ruling would violate the Sixth Amendment. *See People v. Deverow*, 38 N.Y.3d 157, 164 (2022) ("[A] court's discretion in evidentiary rulings is circumscribed by" the defendant's constitutional right to present a defense." (cleaned up)); *see also* Guide to N.Y. Evid. Rule 6.13, Note ("In criminal proceedings, both the United States Supreme Court and the Court of Appeals have cautioned that the exercise of discretion to limit or exclude evidence of partiality of witnesses

[10] The People include among these "legal defenses" (1) that the People unconstitutionally delayed in bringing charges; (2) that a federal offense is not a valid object crime for charges of first-degree falsifying business records; (3) that New York Election Law § 17-152 does not apply to the charged conduct and is preempted; (4) that this prosecution was motivated by an improper purpose; (5) that the charges are not timely under the statute of limitations; and (6) that there are violations of grand jury secrecy that affected the integrity of these proceedings. People's MILs at 35

testifying against defendants must be exercised in light of the Sixth Amendment's right of confrontation guaranteed to the defendant.").

### G. The Court Should Exclude The People's *Molineux* Evidence

The People seek a host of pretrial rulings regarding the admissibility of evidence they hardly describe based on arguments relating to "res gestae" and *Molineux*. *See* People's MILs at 35-53. The motion does not put the Court in a position to rule on these issues, except to the extent the People's positions illustrate that some of the evidence they seek to offer is so inflammatory that it should not be admissible at a trial on the charges in the Indictment.

The charges in the Indictment allege the type of "single instance crimes"—*i.e.*, individual substantive counts, not supported by a conspiracy charge—that cannot warrant the decades of purported background evidence the People seek to offer at trial. *People v. Grant*, 104 A.D.2d 674, 674 (3d Dept. 1984) (distinguishing "single instance crimes" from "crimes that cover a lengthy period of time"); *People v. Noriega*, 610 N.Y.S.2d 739, 741 (Sup. Ct. N.Y. Cnty. 1994) (same, citing *Grant*); *see also People v. Johnson*, 114 A.D.2d 210, 212 (1st Dept. 1986) (excluding evidence of prior uncharged acts where they were "neither connected parts of a common scheme, nor so related as to show a common nature"); *cf. People v. Davis*, 2024 WL 559200, at *6 (1st Dept. Feb. 13, 2024) (improper joinder where incidents were "separated by nearly six months" and "each occurred at a different location"). The term "res gestae" is too vague to justify admitting the disparate types of evidence the People have lumped into their motions *in limine*. *People v. Luke*, 519 N.Y.S.2d 316, 317 (Sup. Ct. Bronx Cnty. 1987) ("In recent years, the term 'res gestae' has come into disfavor for its imprecision. 'Res gestae' does, however, encompass four distinct exceptions to the hearsay rule: (1) statements of present bodily condition, (2) statements of present mental states and emotions, (3) excited utterances, and (4) statements of present sense impression.").

On the other hand, *Ventimiglia* illustrates the exacting level of scrutiny that is necessary to a determination of admissibility of other-acts evidence. 52 N.Y.2d 350, 360-61 (1981). The Court of Appeals broke down the testimony sentence by sentence, ruling that testimony regarding the middle of a conversation bookended by admissible statements was unduly prejudicial and "should have been excluded." *Id.* at 361. Thus, it is not sufficient for evidence to simply fill "gaps" in the People's evidence. People's MILs at 46. "Inextricably intertwined" requires more than alleged sequential or temporal proximity; it requires that the evidence be "explanatory of the acts done or words used in the otherwise admissible part of the evidence." *Ventimiglia*, 52 N.Y.2d at 361. Therefore, for the reasons set forth below, the People have not demonstrated that they are entitled to pretrial rulings that the evidence they reference is admissible.

**1. Evidence Of An Uncharged "Underlying Conspiracy" Is Not Admissible**

As explained in President Trump's motions *in limine*, evidence concerning what the People have referred to as "the underlying conspiracy to promote [President Trump's] election" is not admissible with respect to the substantive violations of Penal Law § 175.10 charged in the Indictment. People's MILs at 36.

The People claim that the Court "already recognized" that alleged "payoffs to Sajudin" are probative of the intent element of Penal Law § 175.10. People's MILs at 39. In fact, the Court did not mention Sajudin once in the February 15, 2024 opinion. He hardly bears mention. In the People's motions *in limine*, other than an opaque reference to the "purchase of information from Dino Sajudin," the People offer no evidentiary detail or argument in support of their position that Sajudin has any relevance to this case. *Id.* at 38. Even Cohen has admitted that AMI decided to pay Sajudin before discussing the potential story with Cohen or President Trump. *See* Def. MILs at 15. AMI paid Sajudin without expectation of compensation from President Trump. *See id.*

Thus, even if the People could establish that there was some sort of "scheme," which there was not, AMI's transaction with Sajudin could play no role in it.

The People's motion is similarly sparse with respect to details regarding Karen McDougal. That is because, as with Sajudin, it is only at the highest level of abstraction that the People can suggest with a straight face that AMI's interactions with McDougal were part of a common "scheme." People's MILs at 38. When the specifics are examined, the argument falls apart. *See* Def. MILs at 15-17. For example, because McDougal never threatened to publish a story, *see id.*, there was no "suppress[ion]," People's MILs at 38. Unlike with Clifford, Cohen played no role in the negotiations. *See* Def. MILs at 17. Finally, Cohen negotiating and ultimately executing an NDA with Clifford, even if true, has no bearing and is different in kind than the supposed scheme involving McDougal. Therefore, testimony and argument regarding McDougal has no appropriate place at the upcoming trial.

The People have also made only vague reference to AMI's alleged "publication of negative information about defendant's competitors for the election, as well as the publication of positive stories regarding defendant." People's MILs at 38. The People should not be permitted to reference those issues, including during jury selection and in openings, until they have provided the Court and the defense with sufficient particulars to address admissibility (including lack of probative value and risk of undue prejudice). At least as described, this evidence is too far afield from the charges in this case and could actually open the door to many of the issues the People seem to want to avoid. Moreover, AMI's published stories fall easily within the ambit of the "press exemption" to FECA, *see* 52 U.S.C. § 30101(9)(B)(i),[11] and the First Amendment that exemption

[11] "The term 'expenditure' does not include—(i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other

is intended to protect. *See generally Mills v. Alabama*, 384 U.S. 214, 220 (1966) (holding that "no test of reasonableness can save a [] law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election."). As such, AMI's published articles were, without question, legal and cannot have been part of any supposed "scheme to defraud" the electorate. Finally, introducing these articles will also needlessly confuse the jury by interjecting yet another complicated area of campaign finance law—the Press Exemption— into the trial.

**2. The *Access Hollywood* Recording Is Unduly Prejudicial**

For the reasons set forth in the defense motions *in limine*, the Court should preclude evidence of the October 2016 *Access Hollywood* recording because evidence of the recording would be unduly prejudicial and confusing to the jury. *See* Def. MILs at 19-20.

To start, the People's discussion of *Carroll* and its bearing on prejudice concerning use of the *Access Hollywood* recording at the upcoming trial is disingenuous. People's MILs at 47. As they know, the *Carroll* trial involved not only a defamation claim, but also false allegations by the Plaintiff, E. Jean Carroll, of rape and sexual assault. As we have noted, Judge Kaplan's evidentiary analysis of the *Access Hollywood* recording only serves to support President Trump's position that the highly prejudicial contents of the recording of a 2005 conversation have no place at this trial about business records entries in 2017. *See* Def. MILs at 19-20.

The People focus on the timing of the "release" of the recording in proximity to the 2016 election and the alleged payment to Clifford, which is not a basis for admitting the recording's highly prejudicial contents. *E.g.*, People's MILs at 45-47. In fact, the People's desperately

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periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate . . . ."

stretched arguments regarding some dreamed up conspiracy are inconsistent with the theory of the case that they advocate elsewhere. If, as the People claim, the payment to Clifford was made pursuant to the August 2015 "Trump Tower agreement" to "promote defendant's election," People's MILs at 39, then the October 2016 *Access Hollywood* recording could not have been the driving force behind the payment. *Id*. at 45-47.

The People's citations to *Santiago*, *Vails*, *Leonard*, and *Flambert* for arguments regarding purported narrative integrity only illustrate why their position regarding the recording is meritless. People's MILs at 46. Each of these cases involved a prior interaction between the defendant and an important witness in the case. In *Santiago*, the evidence concerned "uncharged crimes committed by defendant against the civilian victim" in the case. 295 A.D.2d 214, 215 (1st Dept. 2002). In *Vails*, the court admitted evidence of a prior drug transaction involving the defendant and the same officer who bought drugs from the defendant in the transactions at issue. 43 N.Y.2d 364, 368 (1977). The Court of Appeals found that the prior transaction was "inextricably interwoven with the crime charged" because it was relevant to "the price to be paid and the quality of the drugs." *Id.* *Leonard* involved other-acts evidence of a prior incident between the defendant and a critical witness. 29 N.Y.3d 1, 8 (2017).[12] *Flambert* involved evidence of "defendant's past physical and verbal abuse of the victim." 160 A.D.3d 605, 605 (1st Dept. 2018). Here, there is no victim at all, and the contents of the recording do not relate to any of the three "stories" the People hope to present at trial (Sajudin, McDougal, or Clifford).

[12] For the "no gaps in the story line" proposition relied on by the People, People's MILs at 46, *Leonard* cited two cases that also involved evidence of a prior incident involving the same witness: *People v. Frankline*, 27 N.Y.3d 1113, 1115 (2016) and *People v Leeson*, 12 N.Y.3d 823, 827 (2009). *Frankline* and *Leeson* both addressed evidence of an earlier attack on the victim witness by the defendant in the case.

Thus, the contents of the *Access Hollywood* recording shed no light on the terms of Cohen's alleged transaction with Clifford, much less the 2017 records entries at issue in the Indictment. Nor do the contents of the *Access Hollywood* recording "'complete[] the narrative'" of the alleged transaction with Clifford. People's MILs at 46 (quoting *People v. Alfaro*, 19 N.Y.3d 1075, 1077 (2012)). Alleged statements from 2005 that do not relate to Clifford bear no resemblance to the "imitation handcuffs, keys and gun" seized incident to the arrest of the defendant in *Alfaro*, where that evidence "could have been used during the commission of the crimes" charged. 19 N.Y.3d at 1076. For all of these reasons, the Court should exclude evidence of the *Access Hollywood* recording or, at minimum, limit mention of the recording to the fact that there was adverse media coverage relating to President Trump beginning on October 7, 2016.

**3. False Allegations Of Sexual Assault Have No Place At This Trial**

Straining credulity and confirming that they have no interest in a fair trial, the People seek to offer hearsay evidence of sexual assault allegations by Jessica Leeds, Natasha Stoynoff, and another woman, which were publicized on October 12, 2016—a day after Cohen sent Clifford "the first draft of the non-disclosure agreement." People's MILs at 47. In connection with an evidentiary ruling President Trump is currently challenging at the Second Circuit,[13] Leeds and Stoynoff were permitted to testify in a highly publicized trial in the Southern District of New York regarding similarly false allegations by Carroll. Litigation over both *Carroll* trials is ongoing, and media coverage of that litigation is extensive. Therefore, this evidence, and President Trump's public statements responding to these false claims, should be excluded as irrelevant and unduly prejudicial.

[13] *See* ECF No. 74, *Carroll v. Trump*, No. 23 Civ. 0793 (2d Cir. Nov. 20, 2023)

The People offer little more than *ipse dixit* to explain their views on why this evidence is "critical context" and "manifestly relevant." People's MILs at 48. In fact, the probative value of these articles is non-existent. Stoynoff claimed falsely to the media that she had an interaction with President Trump at some point in 2005. Leeds said she encountered President Trump on a crowded commercial aircraft—but, on her telling, without witnesses—at some point in the late 1970s. But she was not sure when it happened, or even the embarkation point of her flight. Likewise, Carroll, whose litigation against President Trump is referenced by the People in their motions *in limine*, *see* People's MILs at 45, 47, alleged that she had an implausible interaction with President Trump at some point in the 1990s, the day of the week unknown, the month unknown, and the year unknown. News articles regarding these allegations—released after Cohen started to negotiate with Clifford—shed no light on any relevant fact.

Even if the Court or the People disagree with the defense views on the complete lack of credibility to these claims by Leeds, Stoynoff, Carroll or others referenced in media the admission of the proffered articles would require a mini-trial on each. Specifically, pursuant to Rule 6.27(1), President Trump would be entitled to impeach Stoynoff, Leeds, and Carroll to the same extent as if they testified at the trial. *See People v. Delvalle*, 248 A.D.2d 126, 127 (1st Dept. 1998). And he would do so, vigorously. As part of that impeachment, President Trump would be entitled to offer evidence of the political motivations driving the timing and content of these lies. For example, Carroll only told her story at the urging of an extremely vocal and troubled critic of President Trump, George Conway, and with financial backing from Reid Hoffman, a wealthy donor to the Democratic Party and critic of President Trump.

Lastly, there is no authority to support a conclusion that manufactured claims of sexual assault that were uncorroborated, stale, and not true can properly be admitted at a trial relating to

records entries and Penal Law § 175.10. *See, e.g., Leonard*, 29 N.Y.3d at 8 ("The introduction of the prior alleged assault was not necessary to clarify their relationship or to establish a narrative of the relevant events."); *People v. Rosenfeld*, 11 N.Y.2d 290, 299 (1962) ("This record shows continued efforts by the prosecutor to put into the record matter inadmissible and prejudicial."). A limiting instruction that the allegations are not being offered for the truth, especially in close proximity to the extremely prejudicial publicity relating to the recent damages verdict in the *Carroll* case, would not be sufficient. *See United States v. Curley*, 639 F.3d 50, 57 (2d Cir. 2011) ("A limiting instruction 'does not invariably eliminate the risk of prejudice notwithstanding the instruction.'" (quoting *United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980)). The People offer no case-specific reason to the contrary, and instead simply cite *United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir. 1990) and *United States v. Siegel*, 717 F.2d 9, 16-17 (2d Cir. 1983). People's MILs at 49. In *Roldan-Zapata*, evidence of "previous cocaine transactions" was found not to be unduly prejudicial in the context of a trial relating to the distribution of kilogram quantities of cocaine. 916 F.2d at 804. In *Siegel*, evidence of a $30,000 bribe was found not to be unduly prejudicial "with detailed testimony concerning defendants' participation in the receipt of proceeds from unrecorded cash sales." 717 F.2d at 17. These cases have no relevance, lend no support to the People's position, and the Court should preclude the evidence because its probative value, of which there is none, is substantially outweighed by its prejudicial nature.

#### 4. The People Have Not Established The Admissibility Of Unspecified Evidence That They Say Relates To "Efforts To Dissuade Witnesses"

The People devote the final three pages of their submission to asking the Court to blindly endorse the admissibility of evidence they have hardly described. They have not created a sufficient record to support the ruling they seek. *United States v. Fiumano*, 2016 WL 1629356, at

*2 (S.D.N.Y. Apr. 25, 2016) ("On a motion *in limine*, the movant bears the burden of establishing the admissibility of the evidence.").

Because of the potentially prejudicial nature of evidence relating to alleged efforts to influence witness testimony, the People must pre-clear this evidence with the Court before presenting arguments or testimony to the jury on these issues. In particular, when considering the admissibility of this as-of-yet unspecified evidence, the Court must confront the risk that the evidence would "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *United States v. Munoz*, 765 F. App'x 547, 551 (2d Cir. 2019); *see also United States v. Morgan*, 786 F.3d 227, 233 (2d Cir. 2015) ("[N]o limiting instruction would likely mitigate the prejudicial effect of the death threat evidence, i.e., the likelihood that the jury would substitute the death threat evidence for consideration of the elements of the charged crimes."). Thus, to admit evidence regarding a so-called "pressure campaign" allegedly involving President Trump and unspecified "others," the People need to identify the witness(es) in question, the substance of the proffered testimony, and any related exhibits they seek to offer. People's MILs at 50.

Similarly, the Court cannot issue a general advisory ruling regarding what the People describe as "harassing comments on social media and in other public statements" without specifically addressing the exhibits in question (including whether they are cumulative). *Id.* The People cite as "example[s]" cherry-picked quotes from a co-authored book concerning business advice to support their request to admit "evidence of past comments by defendant endorsing aggressive attacks on one's perceived opponents." *Id*. However, quotes from more than a decade prior to the time period at issue in the Indictment are not probative of consciousness of guilt, not

relevant to any issue at the trial, and are too likely to cause juror confusion. *See* Def. MILs at 40-43.

The People's citation to Robert Mueller's *Report on the Investigation into Russian Interference in the 2016 Presidential Election* only serves to illustrate the attenuated probative value that the People's categories of evidence have with respect to any consciousness of guilt, which does not exist, and the fraught nature of the prejudice balancing the Court will be required to conduct when the People get around to disclosing the details of what they will actually seek to prove at trial. *See* People's MILs at 51. Robert Mueller was not talking about DANY when he referred to the "government" in his report. The fact that Mueller believed there was an available "inference" that President Trump sought to "deter the provision of information or undermine Cohen's credibility" in connection with Mueller's investigation undercuts the People's argument that President Trump's unspecified statements reflect consciousness of guilt in connection with this case. Mueller specifically referred to the timing of when Cohen "started cooperating," which Cohen did with Mueller's office in August 2018. Mueller's March 2019 report predates Cohen's first disclosed meeting with the People in August 2019. Therefore, to the extent Mueller may have believed that President Trump's statements somehow reflected consciousness of guilt concerning his investigation, the potential availability of such an inference reduces the probative value and increases the risk of unfair prejudice from admitting the (unidentified) statements in this case, and the evidence should not be admitted.

Finally, similar to the inadmissible and highly inflammatory hearsay the People seek to offer from Stoynoff, Leeds, and Carroll, the People's wish to offer unspecified evidence relating to the 32-page civil complaint filed against Cohen threatens to turn this case into a series of mini-trials. *See* ECF No. 1, *Trump v. Cohen*, No. 23 Civ. 21377 (S.D. Fla. Apr. 12, 2023) (attached as

Ex. 8). If the People are permitted to question Cohen regarding the pleading or offer the document itself in an effort to suggest that President Trump levied false allegations, President Trump will be entitled to offer evidence in support of those allegations. While the People should be careful what they wish for in this regard, the Court should not indulge their fantasy and should instead require the prosecutors to stick to the case they charged.

## III. CONCLUSION

For the many reasons described above, President Trump respectfully submits that the Court should deny the People's motions *in limine*.

Dated: February 29, 2024
New York, New York

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