To be Argued by:
ALAN S. FUTERFAS
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

PEOPLE OF THE STATE OF NEW YORK, by Letitia James, Attorney General of the State of New York,

Petitioner-Respondent,

– against –

THE TRUMP ORGANIZATION, INC., DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER LLC, SEVEN SPRINGS LLC, ERIC TRUMP, CHARLES MARTABANO, MORGAN, LEWIS & BOCKIUS, LLP, SHERI DILLON and MAZARS USA LLC,

Respondents,

– and –

DONALD J. TRUMP, DONALD TRUMP, JR. and IVANKA TRUMP,

Respondents-Appellants.

Appellate Case No.: 2022-00814

JOINT BRIEF FOR RESPONDENTS-APPELLANTS

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Petitioners-Appellants Donald J. Trump, Donald J. Trump, Jr., and Ivanka Trump (hereinafter also referred to as "Respondents-Appellants") respectfully submit this brief in support of their appeal from the Decision and Order of the Honorable Arthur F. Engoron, Supreme Court of New York, New York County, dated February 17, 2022, which denied Respondents-Appellants' motion to quash subpoenas served on Respondents-Appellants by the Office of the Attorney General of the State of New York ("OAG") on December 1, 2021.

PRELIMINARY STATEMENT

On or about December 1, 2021, Respondents-Appellants were served so-called "office" subpoenas by the OAG ("Subpoenas"). These subpoenas followed years of investigation by the District Attorney of New York County ("DANY") and the OAG, and the announcement of a joint criminal grand jury investigation by the OAG and the DANY. The subpoenas also followed an extraordinary and unprecedented barrage of inappropriate public statements starting in 2018 made by then-candidate Letitia James and, later, elected Attorney General Letitia James, in which she promised and threatened investigation and prosecution of Donald J. Trump and those close to him. On January 3, 2022, Respondents-Appellants moved to quash the Subpoenas on the ground that because the OAG was conducting a joint grand jury investigation with the DANY, its use of "office" subpoenas to obtain evidence from witnesses and targets, in lieu of grand jury subpoenas, unlawfully

circumvented the protections conferred on witnesses pursuant to CPL 190.40 and the N.Y. Const. Article 1 sec. 6. In the alternative, Respondents-Appellants moved for a stay of the Subpoenas pending the conclusion of the joint criminal investigation.

Additional motion practice ensued wherein Respondents-Appellants raised the defense of Selective Prosecution based on the numerous inappropriate public statements of Letitia James. On February 17, 2022, the Hon. Arthur F. Engoron filed an Order denying relief on all grounds raised by Respondents-Appellants. Respondents-Appellants' requests for a hearing on the nature and coordination of the joint OAG/DANY investigation, and on the Selective Prosecution claims, were also denied. This appeal follows.

QUESTIONS PRESENTED

1. Whether the OAG – a law enforcement agency in New York participating in a criminal prosecution where a grand jury has been impaneled to target certain people and circumstances – unlawfully circumvents the protections conferred on witnesses under the New York Constitution and CPL 190.40 when, in lieu of grand jury subpoenas, it requests testimony under the guise of a supposedly administrative "office" subpoena that will be provided to and used by the joint criminal investigation?

Supreme Court's answer: no.

2. Whether New York's constitutional and statutory grand jury protections are improperly circumvented if the same agency involved in a criminal investigation simply opens a "civil" investigation into the very same matters and issues a so-called "office" subpoena for testimony which will be provided to and used by the criminal investigation?

Supreme Court's answer: no.

3. Whether the lower court's denial of Respondents-Appellants' repeated requests for a hearing on the nature and coordination of the joint OAG/ DANY investigation was error, particularly where the lower court acknowledged that all of the relevant facts were not known?

Supreme Court's answer: no.

4. Whether Respondents-Appellants' presented a *prima facie* case of selective prosecution requiring an evidentiary hearing on those claims?

Supreme Court's answer: no.

5. Whether the lower court's denial of Respondents-Appellants' request for a hearing on the selective prosecution claims was error?

Supreme Court's answer: no.

STATEMENT OF FACTS

A. Long Before She was Attorney General, Letitia James Based her Campaign on Promises to Target and Prosecute Donald Trump and his Companies

Well before the future Attorney General could have seen any evidence or known any facts, Ms. James made her opposition to Donald Trump's politics and policies a focal point of her campaign and promised to target Mr. Trump, threatening him with prosecution if she won. In countless statements, Ms. James publicly declared her opposition to then-President Trump's policies and views. Threats of prosecution and promises to "take on Trump" were interwoven with public displays of loyalty to her own political party. *See, e.g.*, @TishJames, TWITTER (June 27, 2018, 10:48 AM ET) ("Congrats [now-Congresswoman Alexandria Ocasio Cortez] on your victory. Looking forward to working with you to help Democrats take on Donald Trump.") (R438). For example, in a campaign video in 2018, Ms. James tied her political opposition to then-President Trump directly to her promise to investigate and prosecute him and his companies. Ms. James stated:

> I'm running for attorney general, because I will never be afraid to challenge this illegitimate president when our fundamental rights are at stake. . . .
>
> . . . .
>
> I believe that this president is incompetent. I believe that this president is ill-equipped to serve in the highest office of this Land. And I believe that he is an embarrassment to all that we stand for. He should be charged with obstructing justice. I believe that the President of these United States can be indicted for criminal offenses and we would join

> with law enforcement and other attorneys general across this nation in removing this President from office.
>
> In addition to that, the office of attorney general will continue to follow the money because we believe he's engaged in a pattern and practice of money laundering. Laundering the money from foreign governments here in New York State, and particularly related to his real estate holdings. It's important that everyone understand, the days of Donald Trump are coming to an end.[1]

In 2018, when Ms. James made this speech, she had no evidence that Donald Trump was engaged in criminal activity. Nonetheless, in this and many other statements, she promised to "take on Donald Trump," and investigate and prosecute him for crimes, including money laundering, an allegation as to which there has never been a shred of evidence.

Further, while campaigning for office (and possessing no evidence about then-President Trump's businesses), Ms. James publicly: (i) accused Mr. Trump of having engaged in "public corruption," Letitia James's 2018 campaign website, *Fighting Corruption No Matter Where it Lies*, TISH JAMES 2018 CAMPAIGN (R439); (ii) stated that she had her "eyes on Trump Tower," @TishJames, TWITTER (Aug. 6, 2018, 3:47 PM ET) (R443); (iii) stated that then-President Trump should be "worried" about her, @TishJames, TWITTER (Aug. 13, 2018, 11:37 AM ET) (R448), and "scared" about her upcoming term, *id.*; @TishJames, TWITTER (Aug. 22, 2018, 9:09 AM ET) (R444); (iv) stated that Mr. Trump's "days of defrauding Americans are coming to

[1] *Letitia James Video, September 28, 2018, available at https://www.youtube.com/watch?v=D1yj0NKSsuU, at :17–:25; 1:50–2:36.*

an end," @TishJames, TWITTER (October 3, 2018, 1:44 PM ET) (R445); (v) stated that, if elected, she would "take on Donald Trump" @TishJames, TWITTER (July 1, 2018, 2:56 PM ET) (R446), and would immediately investigate him and his "cronies," @TishJames, TWITTER (Aug. 21, 2018, 1:01 PM ET) ("Just wait until I'm in the Attorney General's office.")(R447); (vi) that she was "getting ready to ask [Trump] some questions — under oath," @TishJames, TWITTER (Aug. 13, 2018, 11:37 AM ET) (R448); (vii) called upon "any agency with jurisdiction–from the IRS to the NY AG–to follow the facts wherever they may lead," @TishJames, TWITTER (October 3, 2018, 1:44 PM ET) (R445); (viii) stated that she "want[ed] to begin to engage in an investigation into the Trump Administration with respect to [Trump's] finances in the State of New York;"[2] (ix) stated that she planned to "focus on Donald Trump and his abuses . . . we need to follow his money . . . we need to find out where he's laundered money;"[3] and (x) stated that "Donald Trump – that should motivate you to vote" and promised that "we're gonna definitely sue him. We're gonna be a real pain in the ass."[4]

[2] Letitia James On Her Run for Attorney General, Boosting Our Communities and Speaking Truth to Power, The Breakfast Club Power 105.1 FM, October 24, 2018), available at https://www.youtube.com/watch?v=dhH_nLfPUVU, from 5:21 to 5:28.

[3] *New York Attorney General on Plan to Thwart Trump Pardons, The Beat with Ari Melber on MSNBC, April 23, 2019), available at https://www.youtube.com/watch?v=6onOx85SRbc, from 0:27 to 0:32.*

[4] *This video, originally posted on Instagram, is now available on YouTube at https://www.youtube.com/watch?v=V5-MLgPRejM&feature=youtu.be.*

Indeed, though it appears to have since been removed, the Attorney General's campaign website at one time contained a section entitled "*Investigate Trump's New York Business*" in which she promised to undertake "a review of Trump-related real estate transactions, especially those in which the Trump family suddenly started paying cash for properties after years of operating their businesses exclusively by borrowing money." PDF downloaded from Letitia James' 2018 campaign website (R456). At the time the Attorney General made these threats of prosecution, Ms. James had no personal knowledge about Trump-related real estate transactions and possessed no information or insight into Trump's business other than what she presumably had seen in the media.

B. The Threats to Prosecute Continue After Letitia James is Elected Attorney General of the State of New York

On November 6, 2018, Letitia James was elected Attorney General of the State of New York. She was now an elected public official, indeed, the highest law enforcement officer in the state. In her victory speech, she once again promised to "[shine] a bright light into every dark corner of [Trump's] real estate holdings"[5] and, in the days and weeks immediately thereafter, threatened to "use every area of the

[5] Jeffrey C. Mays, *Breaking Barriers, Letitia James is Elected New York Attorney General*, N.Y. TIMES, Nov. 6, 2018 (R459).

law to investigate President Trump and his businesses transactions and that of his family as well," together with "anyone in [Trump's] orbit."[6]

In November 2020, Attorney General James made an appearance on the comedic news program *Full Frontal with Samantha Bee*. Both Attorney General James and the show's host, Samantha Bee, laugh about the Attorney General's threats and promises to prosecute matters that Attorney General James is overseeing. To say that this is conduct unbecoming of the highest law enforcement official in the state is an understatement.

> Samantha Narration: Between the Attorney General's civil investigations of Trump, and the Manhattan DA's criminal investigation, things could get really legal. I don't want to get too excited, but a girl can dream, can't she?
>
> Samantha: I know you can't tell me anything too specific about any of the lawsuits, but can I just sit here and use my imagination to picture the outcomes that I desire.
>
> (both laugh)
>
> . . . .
>
> AG: When he leaves office as a private citizen, he will no longer have presidential immunity, so stay tuned.[7]

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[6] *Chris Mills Rodrigo, Incoming New York AG: 'We Will Use Every Area of the Law to Investigate President Trump', THE HILL, Dec. 12, 2018 (R462); Allan Smith, Incoming New York attorney general plans wide-ranging investigations of Trump and family, NBC NEWS, Dec. 12, 2018 (R1044). Accord* Athena Jones, *New York AG Vows to Target Trump*, CNN (video), available at https://www.cnn.com/videos/politics/2019/01/03/letitia-james-donald-trump-jones-dnt-lead-vpx.cnn. *See also* Kristine Phillips*, New York's next attorney general targeted slumlords. Now she's going after Trump,* THE WASHINGTON POST, Dec.19, 2018 (R1039).

[7] Transcript from Excerpt of Letitia James' Appearance on *Full Frontal with Samantha Bee* (TBS television broadcast Nov. 19, 2020) (R1029).

These improper remarks continued. In December 2021, Ms. James went on the television program *The View* to explain why she withdrew from the race for Governor. She made clear that one of the main reasons was her desire to prosecute Donald Trump and his companies.[8] Joy Behar stated that "I believe in putting Trump in jail." *See* Transcript of an excerpt from Letitia James' appearance on *The View* (ABC television Broadcast Dec. 14, 2021) (R435-37). When Ms. Behar asked if Attorney General James dropped out of the race for Governor because of an upcoming "bombshell," and what would happen if Former President Trump refused to comply with subpoenas, Attorney General James laughed, adding . . . "Joy, you know I love you, right? I do, I do, I do. So, you know I can't admit or deny. [AG James laughing]. I cannot admit and/or deny those allegations in the preface of your question." *Id.* at R435-36. Again, laughing about an investigation she was overseeing, Ms. James went on to discuss the facts of the case and her Office's joint investigation of Donald Trump and the Trump Organization more generally as if a criminal prosecution, or an expansive, costly civil investigation of all of Trump's companies by the Attorney General's Office was a joking matter. *See Id. at* R435-37.

[8] Attorney General James stated: "It was a difficult decision, and I recognize the historical significance of this race. However, I've got unfinished business. I made a – I put my hand on the Bible almost three and a half years ago and I made a commitment to New Yorkers that I would serve them as Attorney General to the best of my ability. And when you have outstanding cases; investigations into the Trump Organization . . ." Transcript of an excerpt from Letitia James' appearance on *The View* (ABC television Broadcast Dec. 14, 2021)(R435).

Letitia James's improper statements continued into 2022. As recently as January 9, 2022, Attorney General James sent an email blast soliciting her supporters to "stand with [her] in this fight [against President Trump.]" *See* January 9, 2022 James Campaign Email with the Subject "One Year Ago" annexed to the Second Futerfas Aff. as Exhibit 2C (R1030,31). In this extraordinary and unprecedented email solicitation, Attorney General James asks recipients whether they "Approv[ed] of Donald Trump as president" and claims that "it now appears that the [January 6, 2021 riot] may be traced back to one person: Trump himself." *Id*. This email was sent less than a week after Respondents-Appellants filed their initial motion to quash, which referenced Ms. James' prior improper statements.

A complete timeline of Ms. James's improper and inappropriate statements regarding Donald J. Trump and his companies is annexed to the Second Affirmation of Alan S. Futerfas[9] as Exhibit 2G.[10] A video compilation of Ms. James making some of these improper statements is annexed to the Second Affirmation of Alan S. Futerfas as Exhibit 2H.[11] Finally, Exhibit 2I,[12] annexed to the Second Affirmation of Alan S. Futerfas, contains two demonstrative spreadsheets cataloging Ms. James's

[9] R1024.
[10] R1052.
[11] R1118.
[12] R1119.

improper statements about Donald J. Trump and video clips of her making those statements.

C. True to her Campaign Promises, the Attorney General Opens an Investigation

Less than six months after being elected, in March 2019, the Attorney General opened a civil investigation into virtually all aspects of Former President Trump's business dealings as well as those of the Trump Organization.[13] The scope of the investigation, which has focused on the valuation of virtually all of Mr. Trump's assets on certain financial statements, has been unprecedented in both its breath and scope and includes the valuation of various conservation easements for properties all across the country, from Westchester to Southern California (Colangelo Aff.at ¶¶ 26, 31-39)(R469, R470-72), and the financing and refinancing of various properties in New York, Illinois, Washington, D.C., and Florida (*id.* at ¶¶ 40-44) (R472-73). Subsequent public filings and press reports show the Attorney General investigating these and other matters.

[13] *See* Affidavit of Matthew Colangelo, dated August 21, 2020 ("Colangelo Aff.") (R469 ¶ 23). The OAG filed the Colangelo Aff. in support of a Motion to Compel, dated August 24, 2020 (ECF 11). A redacted copy of the Colangelo Aff. was publicly filed as ECF 10 and an unredacted copy was filed under seal as ECF 14. The Redacted copy was annexed as Exhibit P to the First Futerfas Aff. (R406).

D. The Attorney General then Opens a Criminal Investigation

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

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

Colangelo Aff. ¶ 109(R485).

That changed. On May 18, 2021, Attorney General Letitia James formally announced that her Office had launched a criminal investigation. Samuel Chamberlain, *New York AG reveals Trump Organization probe is now "criminal*," N.Y. POST, May 18, 2021 (R512). During a press conference held on May 21, 2021, Attorney General James publicly stated that her office was not only conducting its own criminal investigation but was also actively working with the District Attorney in a joint criminal investigation, including cross-designating OAG staff attorneys as "Special ADAs" as part of the joint investigation. *See* Wallace Aff. (Feb. 14, 2022) at ¶ 7-8 (R1193). In a press conference, Attorney General James announced:

> Our civil investigation continues, but we are now actively investigating the Trump Organization in a criminal capacity and we are working alongside, cooperating with the Manhattan District Attorney, Cy

> Vance. As was mentioned in, I believe, some newspaper, two of our assistant attorneys general have been cross designated as district attorneys.[14]

It is undisputed that the joint OAG/DANY investigation is focused on valuations and appraisals of Mr. Trump's properties as reflected in financial statements and as presented to taxing authorities and financial institutions – the same subject matter as the Attorney General's investigation.[15] Press reports show that the joint OAG/DANY investigation is targeting the very same properties and

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[14] *See* A.P.Archive, *US NY Attorney General James (CR)*, Story Number apus148386 ASSOCIATED PRESS (May 21, 2021) available at http://www.aparchive.com/metadata/US-NY-Attorney-General-James-CR-/98998ac8232a485ca68f14d64aed32c0?query=offices&current=17&orderBy=Relevance&hits=96&referrer=search&search=%2fsearch%3fquery%3doffices%26from%3d1%26orderBy%3dRelevance%26allFilters%3dCriminal%2binvestigations%253aSubject%2cASSOCIATED%2bPRESS%253aSource%2cDonald%2bTrump%253aPeople&allFilters=Criminal+investigations%3aSubject%2cASSOCIATED+PRESS%3aSource%2cDonald+Trump%3aPeople&productType=IncludedProducts&page=1&b=ed32c0. *See also* Michael Sisak, *New York AG has 2 lawyers working with DA on Trump probe*, ABC NEWS, May 21, 2021 (R516). See also Danny Hakim et al., *New York's Attorney General Joins Criminal Inquiry Into Trump Organization*, N.Y. TIMES, May 18, 2021 (R519).

[15] *See, e.g.*, David A. Fahrenthold, *Trump's longtime accountant testifies to N.Y. grand jury in criminal probe*, WASHINGTON POST, Dec. 14, 2021)(R523)(reporting that a longtime accountant for former President Trump, recently testified before the grand jury. And "Rosemary Vrablic, a former managing director at Deutsche Bank who arranged hundreds of millions of dollars in loans to Trump," was recently interviewed by prosecutors. "The appearances by Bender and Vrablic suggest prosecutors are seeking information about Trump's finances from a small circle of outside partners who handled details of Trump's taxes and real estate deals. . . Prosecutors are investigating whether Trump's company broke the law by giving widely different values for the same property at the same time. In some cases, for instance, the Trump Organization provided low valuations to property-tax officials, while telling lenders that the same property was worth much more."); William K. Rashbaum, Ben Protess and Jonah E. Bromwich, *Trump Fraud Inquiry's Focus: Did He Mislead His Own Accountants?*, N.Y. TIMES, Dec. 14, 2021 (R528) (reporting that "the prosecutors, working with the Office of the New York State attorney general, Letitia James, have examined the possibility that Mr. Trump and his deputies at the company cherry-picked favorable information — and ignored data that ran counter to it — to essentially mislead the accountants into presenting an overly rosy picture of his finances").

transactions that are the subject of the Attorney General's investigation. The Attorney General's Supplemental Verified Petition in the court below dated January 19, 2022 (ECF 630),[16] proves the point beyond all doubt.

E. The Attorney General Appears at the Arraignment and takes Joint Credit for the Investigation and Indictment

On July 1, 2021, an indictment was filed against the Trump Organization, another corporate entity and the Trump Organization's Chief Financial Officer, Allen Weisselberg. *See* Indictment, *People v. The Trump Organization, et ano,* 1473/2021 (R565). (R565). The indictment arose from the investigations that the DANY and the OAG had been pursuing since at least 2019, first in parallel, and then as a joint OAG/DANY criminal investigation.

Lest there be any doubt that this was a joint prosecution, on the day of the indictment, Attorney General James and District Attorney Vance presented a united front to the public, arriving for the arraignment together, sitting next to each other in the front row of the courtroom and leaving the courthouse side by side.[17] At the arraignment, Mr. Vance announced that the investigation is still "ongoing." July 1,

[16] R128.

[17] *See* Melissa Macaya, Melissa Mahtani, Maureen Chowdhury, Veronica Rocha and Fernando Alfonso III, *Trump Organization and its CFO Charged with Tax Crimes*, CNN, Jul. 1, 2021) at photo caption below 3:10 p.m. update, "New York attorney general says the 'investigation will continue'" ("Letitia James, Attorney General of New York, center, and Cyrus Vance Jr., New York County District Attorney, right, leave Manhattan criminal court, Thursday, July 1, in New York.") (R589); the photograph can be viewed here: https://www.cnn.com/politics/live-news/trump-organization-charges-07-01-21/index.html).

2021 Arraignment, *People v. The Trump Organization, et ano*, 1473/2021 at Tr. at Tr. at 6:17-21.[18] Similarly, Ms. James issued a Press Release announcing that "we" indicted the Trump Organization and Mr. Weisselberg, and that "we" will continue to conduct the investigation. *See* Press Release July 1, 2021 (R616). As the Attorney General stated:

> . . . "Today is an important marker in the ongoing criminal investigation of the Trump Organization and its CFO, Allen Weisselberg. In the indictment, we allege, among other things, financial wrongdoing whereby the Trump Organization engaged in a scheme with Mr. Weisselberg to avoid paying taxes on certain compensation. This investigation will continue, and we will follow the facts and the law wherever they may lead."
>
> The charges relate to the alleged failure by Weisselberg to pay New York state and federal income taxes on approximately $1.7 million in compensation. This is part of an ongoing criminal investigation conducted by Attorney General James and Manhattan District Attorney Cyrus Vance Jr. . . ."

Statement from Attorney General James on Criminal Indictment of Trump Organization and CFO Weisselberg, Office of the N.Y. Attorney General Press Release, July 1, 2021 (R616).

Appearing on "*The View*" talk show on December 14, 2021, Ms. James stated the following in response to a question about reports that the OAG was "trying to depose Trump under oath next month":

> We indicted the Chief Financial Officer of the Trump Organization and the Trump Organization itself. So, I have two parallel investigations,

[18] R606.

> one civil, one criminal … We indicted Mr. Weisselberg, the CFO, and the Trump Organization – that investigation is ongoing.

The View (ABC television Broadcast Dec. 14, 2021) (R436).

F. The Subpoenas at Issue

On or about December 1, 2021, the OAG issued subpoenas seeking the testimony of Respondents-Appellants Donald Trump, Jr., Ivanka Trump, and Donald J. Trump (and, for Donald J. Trump, seeking documents as well), in connection with the OAG's ongoing investigation into alleged misstatements in the valuations of certain assets on annual financial statements. *See for* Donald J. Trump (R413); Donald Trump, Jr. (R433); and Ivanka Trump (R434). The subject areas identified by the document subpoena request information about valuations and appraisals of assets that have long been the subject of the OAG/DANY's criminal investigation.

G. Challenges to the Subpoenas Below

On January 3, 2022, Respondents-Appellants moved to quash the Subpoenas on the ground that the OAG's use of "office" subpoenas, in lieu of grand jury subpoenas, unlawfully circumvented the protections conferred on grand jury witnesses pursuant to CPL 190.40 and the N.Y. Const. Article 1 sec. 6. In the alternative, Respondents-Appellants moved for a stay of the Subpoenas pending the conclusion of the joint criminal investigation. *See* Memorandum of Law in Support of Respondents-Appellants/Moving Parties Donald J. Trump, Donald J. Trump, Jr.,

and Ivanka Trump's Motion to Quash Subpoenas or, in the Alternative, to Stay Enforcement of the Subpoenas Pending Resolution of the Criminal Investigation (the "Movants' MOL") (ECF 354), filed January 3, 2022;[19] the Affirmation of Alan S. Futerfas (the "First Futerfas Aff.") (ECF 322) filed on January 3, 2022,[20] and the Exhibits attached thereto (Exhibits A-EE) (ECF 323-253).[21]

The OAG responded on January 18, 2022, *see* OAG's Response in Opposition, filed on January 18, 2022 ("OAG Response")(NYSECF 359),[22] and filed an Amended Supplemental Verified Petition on January 19, 2022 (ECF 630).[23] In its Response, the OAG effectively conceded that the purpose of the "office" Subpoenas was to support the criminal investigation. Indeed, citing to the (Federal) DOJ Manual, the OAG's papers admit that they fully intend to use the "office" subpoenas for testimony and documents to support, buttress and further the OAG's criminal investigation. *See* OAG's MOL Response at 23 (R670-72) ("The DOJ recognized [in 1997] that '[i]n order to maximize the efficient use of resources, it is essential that our attorneys consider whether there are investigative steps common to civil and criminal prosecutions' and '[w]hen appropriate, criminal [and] civil . . . attorneys should coordinate an investigative strategy,' noting in particular that

[19] R619.
[20] R406.
[21] R413-618.
[22] R642.
[23] R128.

'evidence can be obtained without the grand jury by administrative subpoenas' . . . and 'can then be shared among the various personnel responsible for the matter.'") (quoting from the 1997 DOJ Justice Manual)**;** OAG's MOL Response at 24 (R670) ("During the investigation, attorneys should consider investigative strategies that maximize the government's ability to share information among criminal, civil, and agency administrative teams, including the use of investigative means other than grand jury subpoenas for documents or witness testimony[.]")

Respondents-Appellants filed a Reply Brief on February 1, 2022. Points One and Two addressed the constitutional grand jury issues; Point Three responded to the OAG's claims in their Amended Petition by raising the defense of selective prosecution based on the myriad public statements of Letitia James. *See* Respondents-Appellants' Joint Memorandum of Law in Support of their Motion to Quash and/or Stay Subpoenas and in Opposition to the Attorney General's Motion to Compel, filed on February 1, 2022. (ECF 642).[24]

On February 14, 2022, the OAG filed a reply memorandum, an affirmation and an exhibit. *See* OAG Reply Memorandum, Affirmation and Exhibit (ECF 644, 645, 646).[25] In the OAG's Affirmation (at para.'s 5-8), the Office, for the first time, made sworn representations about its coordination with the DANY. (R1193)

[24] R1134.
[25] R1172; R1192; R1195.

Specifically, the OAG affirmed: that it has not convened a grand jury; it does not have a referral under Executive Law 63(2-3) relating to a valuation investigation of Donald J. Trump; that the DANY has not transferred grand jury responsibility to the OAG; and that the OAG has cross-designated two attorneys to the DANY in connection with a grand jury investigation. *Id.* The lower court denied a hearing directed to these assertions, much less to the nature and coordination of the joint OAG/DANY investigation generally. *See* Point Two, *infra*.

On February 16, 2022, the OAG sent a letter and an exhibit to Judge Engoron[26] to which Respondents replied on the morning of February 17, 2022.[27] On February 17, 2022, after hours of oral argument (resulting in a 92-page transcript),[28] the Hon. Arthur F. Engoron filed the Order, an eight-page decision denying relief on all grounds raised by Respondents-Appellants. (ECF 653)[29] Respondents-Appellants had requested a hearing on the nature and coordination of the joint OAG/DANY investigation and the lower court acknowledged that all of the relevant facts were not known. Respondents-Appellants also requested a hearing on the Selective Prosecution claims. Both hearings were denied.

[26] R1197; R1203.
[27] R1208.
[28] R15.
[29] R5.

STANDARD OF REVIEW

A trial court's determination of a motion to quash a subpoena is generally reviewed for abuse of discretion. *See, e.g., Tribeca Space Managers, Inc. v. Tribeca Mews Ltd.*, 200 A.D.3d 626 (1st Dep't 2021) ("Supreme Court did not abuse its discretion in quashing the subpoenas . . ."). However, as discussed more fully *infra*, this Court should address the constitutional claims and the claims under CPL § 190.40, i.e., the errors of law, *de novo* (*see* Point One). For the same reasons, the Court should address the selective prosecution claims, addressed in Point Three, *de novo.* The Court should review the lower court's denial of the requested hearings, addressed in Points Two and Three, under an abuse of discretion standard.

ARGUMENT

POINT ONE

THE OAG'S SUBPOENAS VIOLATE CPL § 190.40 AND THE NEW YORK STATE CONSTITUTION AND SHOULD HAVE BEEN QUASHED

A. Standard of Review

This Court should review the lower court's denial of Respondents-Appellants' constitutional claims and the claims under CPL § 190.40, the errors of law, *de novo*. While generally, a trial court's decision whether to quash a subpoena is reviewed for abuse of discretion, *see, e.g., Tribeca Space Managers, Inc. v. Tribeca Mews Ltd.*, 200 A.D.3d 626 (1st Dep't 2021) ("Supreme Court did not abuse its discretion in quashing the subpoenas . . ."), where, as here, the question presented is largely one of statutory and constitutional interpretation, *de novo* review is appropriate. *Nat'l Energy Marketers Ass'n v. New York State Pub. Serv. Comm'n*, 33 N.Y.3d 336, 348 (2019)("As petitioners argue, the statutory interpretation issues raised in this appeal involve matters 'of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent' and, thus, '*de novo* review is appropriate"), *quoting Weingarten v. Board of Trustees of N.Y. City Teacher's Retirement Sys.*, 98 N.Y.2d 575, 580 n. 5 (2002). *See also Walsh v. New York State Comptroller*, 34 N.Y.3d 520, 523–24 (2019) (engaging in *de novo* review even though the standard of review of in Article 78 proceedings is whether there was substantial evidence to support the agency hearing officer's decision, because a question of statutory

interpretation underlay the question presented and in such cases appellate courts "need not accord any deference" to the decision below), *quoting Matter of DeVera v. Elia*, 32 N.Y.3d 423, 434, 93 N.Y.S.3d 198, 117 N.E.3d 757 (2018).

B. New York's Constitution and CPL 190.40 Enumerate More Protective Legal Standards Governing Witnesses in a Criminal Investigation than Exists under Federal Law

The question presented in this case is whether the OAG, a law enforcement agency jointly participating in a criminal prosecution where a grand jury has been impaneled and has targeted certain people and circumstances, violates the rights conferred on witnesses under New York's Constitution and CPL 190.40 when, in lieu of a grand jury subpoena, it requests testimony under the guise of a supposedly administrative "office" subpoena that will be provided to and used by the joint criminal investigation?

New York Constitution Article I, § 6 guarantees that "No person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury . . . . No person shall . . . . be compelled in any criminal case to be a witness against himself or herself." N.Y. Const. art. I, § 6. In New York, the right against compelled incriminating testimony is broader than its federal counterpart. Under the New York Constitution, "a prospective defendant or one who is a target of an investigation may not be called and examined before a Grand Jury and, if he is, his constitutionally-conferred privilege against self-incrimination is deemed

violated even though he does not claim or assert the privilege.'" *People v. Steuding*, 6 N.Y.2d 214, 216-17 (1959) citing *People v. De Feo*, 308 N.Y. 595, 603 (1955) ; *People v. Ferola*, 215 N.Y. 285, 288–89 (1915 ; *People v. Gillette*, 126 App. Div. 665, 667 et seq. (1st Dep't 1908); *People v. Bermel*, 71 Misc. 356, 359 (N.Y. Sup. Ct. 1911). "An automatic result of the violation of this constitutional privilege is that the defendant is protected not only from indictment based on any incriminating testimony which he may have given, but also from use of such evidence. And the right and protection thus accorded by the Constitution may not be taken away or cut down by statute." *People v. Steuding*, 6 N.Y.2d 214, 217 (1959).

The constitutional principal that no witness or prospective defendant may be compelled to give testimony before the grand jury is codified in CPL 190.40, which provides that "A witness who gives evidence in a grand jury proceeding receives immunity[.]"[30]

As the Commentary explains:

> The automatic immunity feature provided in this section was put forward as a method of solving a long and tangled history of confusing litigation revolving about the issue of the rights of a suspect or "target" subpoenaed to give evidence before the Grand Jury. The Court of Appeals has held that compelling a target to appear before the Grand Jury violates the New York constitutional Privilege Against Self-Incrimination (see e.g., *People v. Steuding*, 6 N.Y.2d 214, 189 N.Y.S.2d 166, 160 N.E.2d 468 (1959). Moreover, various other holdings have ruled that such witnesses not only would have immunity

[30] CPL § 190.40 (2) includes three excerptions not pertinent here.

> but also could not be charged with perjury or contempt for their answers or refusal to answer (see Judge Denzer's original practice commentary for the present section in the 1971 edition of this volume). Accordingly, the CPL neutralized the New York constitutional problems by granting automatic immunity to all witnesses, so that a subpoena to appear and give evidence would not violate the rights of any witness, whether target or not.

Peter Preiser, Commentary to CPL 190.40 (McKinney).

Federal law is very different. Neither the federal Constitution, nor any federal statute, grants automatic immunity to a grand jury witness. Indeed, under federal law, immunity for a witness can only be obtained by application to a federal judge for a grant of immunity under 18 U.S.C. § 6002. There is thus no reason or motivation for DOJ agencies and prosecutors to circumvent the grand jury.

Since, in New York, witnesses in grand jury investigations are granted automatic immunity in the grand jury, there is a strong motivation for New York City and State investigations to avoid putting witnesses before the grand jury, *ergo* the instant "office" subpoenas.

C. The OAG's Plan and the Lower Court's Order Violates the New York Constitution and CPL 190.40 in that it permits the OAG to Unilaterally Eviscerate New York's Constitutional Protections and the Legislature's Statutory Requirements

Under the OAG's construction, which the lower court adopted, New York's Constitutional and statutory protections can be easily circumvented, indeed, eviscerated, if the same agency involved in the criminal investigation simply opens

a "civil" investigation into the very same matters. We respectfully submit that the protections that New York provides cannot be so easily nullified. The law is clear that constitutional provisions and statutes are to be interpreted to effectuate the intent and purpose of the protections or obligations set forth therein.

This principle was made clear in *People v. Coss*, 178 A.D.3d 25, 28, 111 N.Y.S.3d 137 (3d Dept. 2019). There, the Third Department interpreted CPL 195.20 to be consistent with Article 1 § 6 of the N.Y. Constitution which provides an exception to the requirement that felony charges be prosecuted by indictment by a grand jury where "a person . . . may waive indictment by a grand jury and consent to be prosecuted on an information." CPL 195.20 provides that a superior court information (SCI) "may include any offense for which the defendant was held for action of a grand jury and any offense or offense properly joinable therewith . . ." *Id.* at 27.

The question presented in *Coss* was whether, "under CPL 195.20, and consistent with the constitutional waiver provision, an SCI that charges an offense for which a defendant was held for action of the grand jury may also charge a *joinable* offense which is 'higher in grade or degree than the triggering offense.'" *Id.* at 28. The *Coss* Court recognized that the plain language of the pertinent provision in CPL 195.20 did not appear to prohibit such a charge. However, permitting an offense of higher grade to be joinable in the SCI would frustrate the

intent of the legislature which was to "strike a balance between judicial efficiency and the constitutional right to prosecution by indictment." *Id.* at 30.

In a holding directly applicable here, the Third Department held that a literal interpretation of CPL 195.20 would "circumvent" and "undermine[] the protections provided in N.Y. Constitution, article I, sec. 6."

> A literal interpretation of the phrase "any offense or offenses properly joinable therewith" in CPL 195.20 would permit the circumvention of this constitutional imperative by the simple expedient of permitting the inclusion of joinable offenses in a higher degree or grade that were never charged in a felony complaint. Such a statutory interpretation is inconsistent with and undermines the protections provided in N.Y. Constitution, article I, § 6. It is well settled "that the Legislature in performing its law-making function may not enlarge upon or abridge the Constitution" (*People v. Allen*, 301 N.Y. 287, 290, 93 N.E.2d 850 (1950)) , and that "courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional." (*Overstock.com, Inc. v. New York State Dept. of Taxation & Fin.*, 20 N.Y.3d 586, 593, 965 N.Y.S.2d 61, 987 N.E.2d 621 (2013), *cert denied* 571 U.S. 1071, 134 S.Ct. 682, 187 L.Ed.2d 549 (2013)

Id. at 30. *See also People v. Reichman*, 26 N.Y.Crim.R. 313, 73 Misc. 212 (N.Y. Co. July 1, 1911) (prosecutor deprived defendant of his grand jury protections by hauling him before a judge to answer questions without the privilege against self-incrimination, resulting in his indictment. "There are certain constitutional protections thrown around those accused of crime that prosecuting officers are constantly striving to circumvent and destroy.")

Similarly, the Court of Appeals rejected a Freedom of Information Law ("FOIL") request that would have effectively circumvented a statutory scheme designed to protect personnel records of police officers. In *Matter of New York Civ. Liberties Union v. New York City Police Dept*, 32 N.Y.3d 556, 94 N.Y.S.3d 185 (2018), the question was the enforcement and interpretation of Civil Rights Law § 50-a. That law requires police officer personnel records to be kept confidential and notice given to the police officer and a court order obtained before any disclosure is made. In response to the FOIL request, and recognizing compelling policy arguments in favor of disclosure, the lower court ordered the NYPD to produce disciplinary records after redacting the identity of the subject of the complaints. The Court of Appeals found that this solution would "eviscerate the legislature's mandate" reflected in Civil Rights Law § 50-a.

> [T]he legislature made the "policy choice" to "shield the personnel records of these officers from disclosure" by extending broad statutory protection while providing only limited exceptions for their release [citation omitted]. We are not at liberty to second-guess the legislature's determination, or to disregard—or rewrite—its statutory text (*see Matter of Wolpoff v Cuomo*, 80 N.Y.2d 70, 79 (1992). The alternative "redacted disclosure" regime proposed by the parties would eviscerate the legislature's mandate. Civil Rights Law § 50-a sets up a "legal process whereby the confidentiality of the records may be lifted by a court, but only after an in camera inspection and affording affected parties notice and an opportunity to be heard" [*Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 154 (1999)]. The parties' proposal would, instead, enable an agency to circumvent the host of statutory protections belonging to covered officers by simply applying redactions that the agency, in its sole discretion, deems adequate. That scheme

> would transform Civil Rights Law § 50-a into an optional mechanism applicable only when (and if) the agency chooses to invoke it.

Id., 32 N.Y.3d at 567.

These cases apply with full force here. The lower court and the OAG's interpretation of CPL 190.40 is that these grand jury protections apply, unless the investigating body has a "civil" investigation into the very same matters being investigated by the grand jury – and then they do not. Under this interpretation, any joint grand jury investigation can strip grand jury witnesses of the protections guaranteed by Art. I § 6 and CPL 190.40, at will, by the simple expedient of serving civil subpoenas with the resulting testimony being provided to, and used by, the joint criminal investigation. Indeed, in its papers below, the OAG effectively concedes that that is precisely what they intend to do. (*See* R670-73) Neither the New York Constitution nor the legislature intended for the OAG to be able to, at will, "eviscerate the legislature's mandate" reflected in CPL 190.40 through the use of "office" subpoenas to obtain testimony it will use in a criminal investigation. That is not, and cannot be, the law.

D. The Decision Below Does Not Address Attorney General James' Statements, which are Binding on the OAG in this Litigation

Like the OAG's filings, the decision below declines to address Letitia James's numerous improper statements. But they cannot be ignored. In fact, they are

admissible and binding on the OAG and should have been included in and examined by the lower court as part of its analysis.

Ms. James' public statements express co-ownership of the criminal investigation; assume and imply wrongdoing on behalf of the Respondents-Appellants; concern an active investigation; reveal extraordinary animus on the part of Ms. James; and potentially poison the jury pool. Her statements utterly refute the notion that this case presents a garden variety parallel investigation permitted under the law.

As Attorney General, Letitia James' statements are imputed to, and are binding upon, the OAG. Her statements have the force and effect of statements by the OAG. *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 465 (2010) ("the acts of agents [i.e. the Attorney General], and the knowledge they acquire while acting within the scope of their authority are presumptively imputed to their principals [i.e. the OAG][.]"); *see also Loschiavo v. Port Authority*, 58 N.Y.2d 1040, 1041, 462 N.Y.S.2d 440 (1983) (statement admissible against employer where "the making of the statement is an activity within the scope of his authority") (citations omitted); *Fernandez v. State of New York*, 2002 WL 31955397, at *3, n. 3 (Ct. Cl. 2002) (superintendent had authority to speak for correctional facility, and statements made during labor management meeting were clearly within scope of his duties).

Indeed, the statements of a party can be used as direct evidence of the matters asserted. *See United States v. GAF Corp.*, 928 F.2d 1253, 1262 (2d Cir. 1991) (holding admissible the government's prior statements as inconsistent with the theory of the case it presented to the jury); *United States v. McKeon*, 738 F.2d 26, 33 (2d Cir. 1984) (holding that a prior statement made by defendant's attorney during opening statement was properly admitted against the defendant in a subsequent trial.) "In a civil action, the admissions by a party of any fact material to the issues are always competent evidence against the party, wherever, whenever or to whomever made." *Reed v. McCord*, 160 N.Y. 330, 334, 54 N.E. 737 (1899); *People v. Chico*, 90 N.Y.2d 585, 665 N.Y.S.2d 5 (1997).

The public statements and press releases of Letitia James are, consequently, binding upon the OAG in this litigation. *See, e.g., United States v. Bases*, 1:18-cr-00048 (N.D.Ill. February 24, 2021)(announcement by CFTC and DOJ of criminal charges, *inter alia*, "illustrate extensive cooperation, joint participation, and sharing of resources between the CFTC and DOJ related to the investigation").

E. The Lower Court's Decision is Erroneous. Authorities Cited by the Lower Court are Inapplicable to the Facts Presented Here and Relevant Facts and Authorities were not Addressed

Declining to address the Attorney General's public statements,[31] the use of OAG prosecutors in the grand jury investigation,[32] the undoubted sharing of information, and all other displays of a joint prosecution evident from the conduct of Ms. James and Mr. Vance at the July 1, 2021 arraignment, the court below found that this case is akin to a garden variety parallel investigation. Most respectfully, that is simply not an accurate description of the circumstances presented to the lower court.[33]

The lower court did acknowledge that "[s]ince this Court last issued a substantive Decision and Order in this case, the nature of OAG's investigation has expanded from purely civil to a civil/criminal hybrid," and that "OAG has made numerous public statements confirming its ongoing assistance to the Manhattan District Attorney's criminal investigation into the Trump Organization." Order at 2. But it did not recognize the scope of the OAG's involvement in DANY's

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[31] *See Statement from Attorney General James on Criminal Indictment of Trump Organization and CFO Weisselberg*, Office of the N.Y. Attorney General Press Release, July 1, 2021 (R616); Transcript of Excerpts from *The View* (ABC television Broadcast Dec. 14, 2021) annexed as (R435) to the First Futerfas Aff.); Michael Sisak, *New York AG has 2 lawyers working with DA on Trump probe*, ABC NEWS, May 21, 2021 annexed to the First Futerfas Aff as (R516).

[32] *Id.*

[33] All relevant facts about the joint investigation are not fully known and, for this reason, Appellants-Respondents repeatedly sought an evidentiary hearing. Those requests were denied. *See* Point Two, *infra*.

investigation or permit a hearing on those matters. (*See* Point Two, *infra*) For example, the OAG was not merely "assisting" DANY. By her own words, the Attorney General took co-ownership of the criminal investigation. Ms. James said so on May 18, 2021 and May 21, 2021. She appeared with then-District Attorney Cyrus Vance at the July 1, 2021 arraignment and sat with him in the front row of the courtroom, publicly announcing her co-ownership of the case. And if that were not clear enough, the Attorney General said so afterwards in a press conference (*see* R616), and later on a national television show, *The View*, on December 14, 2021. (*See* R435) Quite evidently, a hearing would establish the full nature and scope of information sharing and coordination between the two agencies and thus reveal why Attorney General James deemed it appropriate to take co-ownership of the July 1, 2021 indictment and the investigation.

For these reasons, the cases cited by the court below do not reflect the facts of this case and thus do not address the question presented by the motion to quash. For example, the court below spends two pages on a federal decision, *United States v. Kordel*, 397 U.S. 1, 4-8 (1970), suggesting that Respondents-Appellants' "reliance" on the case is "unpersuasive." Decision at 4-5 (R9-10). But Respondents-Appellants did not rely on that case; it was relied on heavily by the OAG in their papers. *See* OAG MOL Response at 27-28, citing *Kordel*, 397 U.S. at 11 (R674-75). Respondents-Appellants noted in response to the OAG's reliance on *Kordel*, that the

Kordel decision stood for the rather standard proposition that the federal government may pursue parallel civil and criminal investigations and that the federal government is not required to stay or forego either investigation.

We noted, in addition, that the *Kordel* court placed limitations on improper government conduct which are cited by the lower court in its decision, i.e., the *Kordel* case did not present "any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution." Decision at 4 (R9), *citing Kordel*, 397 U.S at 11-12. To justify its reliance on *Kordel*, the OAG claimed in the court below that "Respondents do not and cannot allege any improper purpose here." *See* OAG MOL Response at n. 24 (R675). Obviously, the OAG's assertion is incorrect as Respondents-Appellants were crystal clear in the court below that the purpose of issuing the subpoenas was to circumvent the grand jury process and that the investigation is predicated on improper animus toward Former President Trump.

Without any of the requested hearings, the lower court found that none of the limitations set forth in *Kordel* were applicable, justifying all of Letitia James' improper statements, and her repeated claims of joint ownership of the criminal case with the DANY, on the fact that the OAG had prior dealings with Mr. Trump and

thus was not "writing on a clean slate." Decision at 4 (R9). This, respectfully, is a *non-sequitur*.[34]

Prior OAG experience with Mr. Trump or one of his companies in no manner justifies the Attorney General's unfounded public claims of money laundering, for instance, or her repeated threats to target Mr. Trump, his companies, or anyone close to him with anything she can find. And whether or not prior Attorneys General had matters with Mr. Trump is wholly irrelevant to whether the current Attorney General has, in her official capacity, taken co-ownership of a criminal grand jury investigation with the DANY – which is the issue presented to the court below.

Indeed, the lower court's extended discussion of *Kordel* is largely irrelevant to the issue presented. Federal law sets a floor, not a ceiling, on constitutional protections. New York law affords prospective criminal defendants, witnesses, and targets of grand jury investigations greater protections than federal law. *See People v. Steuding*, 6 N.Y.2d 214 (1959); N.Y. Const. art. I, § 6; and CPL 190.40. The lower

[34] Also a *non-sequitur* is the lower court's statement that just because "a prosecutor dislikes someone does not prevent a prosecution." Decision at 5 (R10). No one was suggesting mere dislike in the court below or is suggesting mere dislike on this appeal. However, where a prosecutor expresses political animus; raises money on the promise of investigation and prosecution; and makes repeated threats of prosecution to attract and keep political support; we are in very different territory. Indeed, far less egregious circumstances have easily led courts, including the NY Court of Appeals, to require recusal of the prosecutor. *See People v. Adams*, 20 N.Y. 3d 608, 613 (2013) ; *People v. Zimmer*, 51 N.Y. 2d 390, 396 (1980) ; *1616 Second Ave. Restaurant v. NY State Liquor Auth.*, 75 N.Y. 2d 158 (1990)*; Johnson v. Hornblass*, 93 A.d. 2d 732, 733 (1st Dept 1983*; People v. Zappacosta*, 77 A.D. 928, 929 (2d Dept 1980); *People v. Carlin*, 56 Misc. 3d 1098, 1103 (St. Lawrence Co. 2017); *People v. Calderone*, 151 Misc. 2d 530 (NYC Crim Ct., 1991).

court's decision thus fails to address the issue presented to it – which is whether agencies jointly conducting a grand jury investigation can circumvent the New York Constitution and CPL 190.40 by issuing an administrative office subpoena to subjects of the investigation and then use that testimony in their criminal investigation. The failure of the decision below to address *People v. Coss*, 178 A.D.3d 25, 28, 111 N.Y.S.3d 137 (3d Dept. 2019), or *Matter of New York Civ. Liberties Union v. New York City Police Dept*, 32 N.Y.3d 556, 94 N.Y.S.3d 185 (2018), for instance, both of which hold that laws cannot be interpreted to undermine or circumvent Constitutional or statutory protections – the issue presented here – is demonstrative and telling. The court below did not squarely address the issue presented.

The decision below elided the issue presented in other ways. For example, the lower court rejected Respondents-Appellants' argument by accepting at face value that "OAG affirms in its reply that it is not conducting a grand jury investigation of Respondents-Appellants." Decision at 3 (R8). But the issue is not simply whether the OAG has been conducting its own criminal investigation alongside its civil investigation, but whether it is conducting a joint grand jury investigation with DANY and using the civil subpoena as an end-around the grand jury protections. The joint investigation proposition is beyond dispute as the Attorney General has publicly stated so repeatedly. Indeed, Judge Engoron

rejected the OAG's argument that its investigation was purely civil in nature and acknowledged that the OAG is wearing both civil and criminal hats. *See* Decision at 2 (R7) ("Since this Court last issued a substantive Decision and Order in this case, the Nature of the OAG's investigation has expanded from purely civil to a civil/criminal hybrid."). Ergo, whether agencies jointly conducting a grand jury investigation can circumvent the New York Constitution and CPL 190.40 by issuing an administrative office subpoena to subjects of the investigation – is the question the lower court does not squarely address.

On another occasion, the lower court endeavors to excuse the circumvention of 190.40 by stating that neither the DANY nor the OAG have subpoenaed Respondents-Appellants to testify before the grand jury and that "New York prosecutors do not call the subjects of their criminal investigations to testify before grand juries about their suspected criminal conduct without first securing an immunity waiver." *Id.* at 3. This logic is perplexing. In all criminal investigations, prosecuting authorities have to make decisions about whom to call, or not, to the grand jury. That is a dilemma and burden that is inherent under the grand jury rights afforded by New York law to potential witnesses and targets in a criminal investigation. The question is whether the OAG can use the office subpoenas to avoid the grand jury process and compel testimony from those to whom it does not wish to grant immunity. Stated differently, the OAG is

circumventing 190.40 to avoid the very dilemma that all grand jury investigations face. Which is precisely why the civil subpoenas violate the grand jury protections guaranteed by Article I § 6 and CPL § 190.40.

The lower court also relies on the fact that Respondents-Appellants have the ability and right to refuse to answer questions (*see* Decision at 4)(R9). But this begs the question of whether an agency, be it the DANY, the OAG, or any other, conducting a criminal investigation can end-run the Constitution and CPL 190.40 by commencing a civil action and issuing subpoenas to obtain the same testimony but circumvent grand jury protections. We respectfully submit that this maneuver is prohibited by CPL 190.40 and not the result intended by the NY Constitution or the legislature.

Lastly, there are important authorities that were not addressed. For example, while cited in a footnote by the OAG, the lower court does not address the decision in *Haggerty v Himelein,* 89 N.Y. 2d 431, 436 (1997). There, the Court of Appeals held that the cross-designation of Assistant Attorneys General to the local District Attorney did not violate Executive Law §63(2) because "the record is devoid of any proof of any appearance by the Attorney-General in any of the criminal proceedings in this case, either personally or on his behalf." *Haggerty v Himelein,* 89 N.Y. 2d 431, 436 (1997) Here, the opposite is true. The Attorney General theatrically entered the courtroom with then-District Attorney Cyrus Vance and sat with him in the front

row of the courtroom.[35] She then proceeded to give a post-arraignment press conference. And Ms. James has repeatedly asserted that her office indicted the Trump criminal case on July 1, 2021 and is fully engaged in the ongoing criminal grand jury investigation. *See* R616.

In addition, the most analogous and relevant federal authorities were not cited by the OAG in its papers below or addressed by the lower court in its decision. For example, in *United States v. Bases*, No. 1:18-cr-00048 (N.D.Ill. February 24, 2021), information in the possession of the DOJ from the Commodity Futures Trading Commission (CFTC) was held discoverable under *Brady* because the DOJ and CFTC's extensive coordination and information sharing constituted a "joint investigation." In arguing against a finding of a joint investigation, the DOJ asserted that the CFTC's involvement was limited, since it attended only some of the witness interviews and provided trading data only in response to an access request. Similarly, the CFTC argued that its investigation was conducted parallel to, not jointly with, the DOJ. Both agencies cited cases holding that jointly attended witness interviews were not enough to find a joint investigation.

The Court rejected these arguments and found a coordination of efforts investigating the same allegations. In particular, CFTC and DOJ sought production

[35] *See* Melissa Macaya, Melissa Mahtani, Maureen Chowdhury, Veronica Rocha and Fernando Alfonso III, *Trump Organization and its CFO Charged with Tax Crimes*, CNN, Jul. 1, 2021 (R589).

of the same documents from the same investment bank around the same time, and the investment bank "made sure" in its response to the DOJ's information requests that it included data it had already provided to the CFTC. *Id.* at *4. In addition, a chief trial attorney for CFTC, who was "detailed" to the DOJ's investigation to develop his attorney skills, "admit[ed] (without further elaboration) that he had multiple contacts and calls with the CFTC as part of the DOJ's prosecution team." *Id.*

Topping off this proof, the district court cited the press statements. Officials representing the CFTC and DOJ jointly announced criminal charges against eight individuals on the same day. *Id.* (citing press releases). The public statements praised their shared commitment to bringing the criminal case. "The DOJ's press release emphasized that the CFTC 'is committed to identifying individuals responsible for unlawful activity and holding them accountable' and that the DOJ received 'invaluable assistance from' the CFTC." *Id.* In sum, the *Bases* court found that "extensive cooperation, joint participation, and sharing of resources between the CFTC and DOJ related to the investigation of this case" constituted a joint investigation triggering *Brady* obligations. *Id.* at 6.

In *United States v. Connolly,* 2019 WL 2120523 (May 2, 2019)(McMahon, J), *rev'd on other grounds,* 2022 WL 244669 (2d Cir. Jan. 27, 2022), another case addressed neither by the OAG nor the lower court, the district court found that an

outside entity, Deutsche Bank (DB), had effectively served as an arm of the government to extract statements from its own employees in the course of an internal investigation into the manipulation of the London Inter-Bank Offered Rate ("LIBOR"). *Id.* at *1. Accordingly, the Court held that DB's attorneys were essentially acting as agents of the US Attorney's office and thus statements made by a bank employee to DB's lawyers, Paul Weiss, were improperly obtained in violation of the employee's Fifth Amendment rights.

The *Connolly* court found that Deutsche Bank cooperated in the hopes of receiving cooperation credit and "that the Government was kept abreast of developments on a regular basis, and that the federal agencies gave considerable direction to the investigating Paul Weiss attorneys, both about what to do and about how to do it." *Id.* at *3. Indeed, "Deutsche Bank representatives and counsel continued to update the Government about their findings and coordinate next steps" and directed DB and Paul Weiss's activities. *Id.* Further, Paul Weiss procured numerous interviews of bank employees, the results of which it provided to the government. Because there was a "close nexus" between the government and the company interviews, Judge McMahon found that the Fifth Amendment rights of employees of Deutsche Bank were triggered since Paul Weiss had conducted the interviews effectively as an arm of the government. *Id.* at *11, 14-15.

The facts presented to the court below showed that the OAG, the state's principal law enforcement agency, admitted that it is criminally prosecuting the Trump Organization and is investigating Respondents-Appellants with DANY. The obligations and responsibilities in a criminal investigation are not subject to fanciful claims of severability. Ms. James and her office are bound by the same Criminal Procedure Law protections that DANY is; just like SDNY's legal obligations carried over to the private, non-governmental business, Deutsche Bank.

For all of these reasons, the lower court erred as a matter of law in finding that the protections of New York's Constitution and CPL 190.40 can be so easily and readily circumvented.

POINT TWO

THE LOWER COURT ERRED IN DENYING A HEARING ON THE SCOPE AND EXTENT OF THE COORDINATION OF THE INVESTIGATION BETWEEN THE ATTORNEY GENERAL'S OFFICE AND THE DANY

The lower court's denial of Respondents-Appellants' repeated requests for a hearing on the nature and extent of the coordination of the joint OAG/DANY investigation was error, particularly where the lower court acknowledged that all of the relevant facts were not known.

While it is undisputed that the OAG and the DANY have collaborated and coordinated in the investigation, the full extent of their cooperation, communication, and information sharing is still unknown. Indeed, although the February 14, 2022 Affirmation, for the first time below, made certain averments, it is obvious that it failed to address fundamental questions about the nature and coordination of the joint investigation. (*See* R1193). Specifically, at a minimum, the following questions remain:

i. Whether and to the extent that the OAG prosecutors imbedded with the DANY were providing information to or reporting back to the OAG. This is neither addressed nor denied in the Affirmation;

ii. Whether the OAG is providing all its subpoenaed and collected information, including witness interviews and depositions to the DANY. This is neither addressed nor denied in the Affirmation;

iii. Whether the OAG will immediately provide "office" subpoena testimony to the DANY. This is neither addressed nor denied in the Affirmation;

iv. Why did the Attorney General have a coordinated, planned arrival to the arraignment on July 1, 2021 with Cyrus Vance if they were not coordinating the criminal investigation and indictment?

v. Why would the Attorney General say that "I have two parallel investigations, one civil, one criminal," if it is not true?

vi. Whether the OAG prosecutors are in the Grand Jury?

vii. Why were OAG prosecutors designated to the DANY when the DANY's office has hundreds of prosecutors?

viii. Why did the Attorney General say that "we are now actively investigating the Trump Organization in a criminal capacity and we are working alongside, cooperating with the Manhattan District Attorney, Cy Vance," if it is not true?

ix. Why did the Attorney General say that "This is part of an ongoing criminal investigation conducted by Attorney General James and Manhattan District Attorney Cyrus Vance Jr. . . .," if it not true?

x. Why did the Attorney General say that "In the indictment, we allege, among other things, financial wrongdoing whereby the Trump Organization engaged in a scheme with Mr. Weisselberg to avoid paying taxes on certain compensation? This investigation will continue, and we will follow the facts and the law wherever they may lead," if that is not true?

xi. Whether the OAG and DANY have discussed the valuation investigation and what additional evidence they still need on those claims. This is neither addressed nor denied in the Affirmation;

xii. Whether there was communication between the OAG and DANY about, or an understanding reached, that DANY would not serve grand jury subpoenas because of the protections of CPL 190.40 and that the OAG would, instead, use "office" subpoenas? This is neither addressed nor denied in the Affirmation.

Where there is a deficiency of facts, the court should hold a hearing. *In re 215-219 W. 28th St. Mazal Owner LLC*, 177 A.D.3d 482, 483 (1st Dep't 2019) ("The

case is remanded to the IAS court for an evidentiary hearing and further factual development on whether the non-signatory petitioners were bound to the arbitration clause[.]"); *Silbowitz, Garafola, Silbowitz, Schatz & Frederick, LLP v. Paravas*, 192 A.D.3d 609 (1st Dep't 2021) ("The issue of whether plaintiff was discharged for cause prior to the completion of legal services cannot be determined on this record and a hearing is required."); *Matter of Dixson*, 194 A.D.3d 444 (1st Dep't 2021)(remanding surrogate matter concerning distribution of the settlement proceeds resulting from a Supreme Court wrongful death action for hearing to determine the statutory distributes and damages in proportion to the pecuniary injuries suffered by him or her); *People v. Flanders*, 187 A.D.3d 483 (1st Dep't 2020) ("We conclude that defendant is entitled to a hearing on the factual issue of whether or not the store security guards involved in his detention were licensed to exercise police powers, or acting as agents of the police."); *People v. Sneed*, 199 A.D.3d 90 (1st Dep't 2021) ("For the reasons that follow, we conclude that defendant is entitled to a hearing on the factual issue of whether or not the store security guard involved in his detention was licensed to exercise police powers, or acting as an agent of the police."); *Roberts v. Maxis*, 198 A.D.3d 579, 580–81 (1st Dep't 2021) ("In the determination of guardianship for an incapacitated person, the court remanded the "matter for a new hearing because petitioner was deprived of his right to present evidence and for the court to make findings before reaching any

conclusion on the Court Examiner's motion[.]"); *People v. Fernandez*, 185 A.D.3d 527 (1st Dep't), *leave to appeal denied,* 35 N.Y.3d 1112 (2020) (Concerning defendant's motion to vacate judgement for inassistance of counsel, the court found "that the motion court should have granted a hearing to enable the court to have subpoenaed trial counsel to testify or otherwise present evidence as to whether there were strategic or other reasons for his decisions with regard to the suppression proceedings."); *Prop. Clerk v. Nurse*, 185 A.D.3d 459, 459 (1st Dep't 2020) (Reversing "order den[ying] plaintiff's motion for summary judgment on his civil forfeiture action and *sua sponte* dismiss[ing] the complaint" and remanding the matter "for a hearing to determine whether forfeiture would be grossly disproportionate to defendant's offense . . . .").

Respondents-Appellants repeatedly requested a hearing on the nature and coordination of the joint OAG/DANY investigation. *See* Respondents-Appellant's Reply Brief at 3, 12 n. 6, 17 n. 9 (R1136, R1145, 1150); Feb. 17, 2022 Argument OAG at T. 10:2-3; 11:17-18; 12:8; 13:15-22; 14:5-15; 27:8-20; 50:2-11; and 84:3-16 (R24-28, R41, R64, R98). The lower court acknowledged that all of the relevant facts were not known. *See* Feb. 17, 2022 Proceeding T. at 9:24-25 (R23) ("In what sense is she conducting an investigation 'with the D.A.?'"). *See also* Feb. 17, 2022 Proceeding T. at 12:24-13:14 (R26-27) ("A little while ago you quoted the Attorney General as saying 'we' are doing something. It wasn't clear

to me whether 'we' meant the Attorney General and the D.A. or just the royal 'we.'").

Nonetheless, the court denied the motion to quash without a hearing, or even the *in camera* review of evidence suggested by OAG attorney Kevin Wallace in his affirmation. Wallace Aff. (Feb. 14, 2022) at ¶ 9 (R1193) ("If the Court requires any additional confidential information concerning the foregoing disclosures, OAG is prepared to provide any necessary submissions in camera. . . . Indeed, this Court already has permitted OAG to make similar in camera submissions in this proceeding.")

For these reasons, this Court should reverse the order of the lower court and remand the matter with directions to hold an evidentiary hearing to determine the extent of coordination between the OAG and the DANY.

POINT THREE

RESPONDENTS-APPELLANTS' SELECTIVE PROSECUTION CLAIM SHOULD HAVE BEEN GRANTED

The lower court erred in denying Respondents-Appellants' selective prosecution claim. The lower court misapplied the law and failed to appreciate the significance and uniqueness of the factual circumstances presented in this matter. Among other things, the lower court applied an incorrect standard of law, overlooked key facts, and neglected to address well-supported arguments put forth by Respondents-Appellants.

"[T]he underlying right . . . to equal protection of the laws as guaranteed by the 14th Amendment and the New York State Constitution (art I, § 11) , [is] one of the governing principles of society." *People v Abram*, 178 Misc.2d 120, 124 (NY City Ct. 1998). A selection prosecution claim, which arises from the Equal Protection Clause, goes to the "basic threshold question [of] whether the court, as an agency of government, should lend itself to a prosecution which discriminates against the defendant by singling him out for prosecution because of personal animosity, nonconformity, unpopularity, or some other illegitimate reason offensive to our notions of fair play and equal treatment under the law." *People v Goodman*, 31 N.Y.2d 262, 269 (1972). "The theory is that conscious discrimination by public authorities taints the integrity of the legal process to the degree that no court should

lend itself to adjudicate the merits of the enforcement action." *303 W. 42nd St. Corp. v Klein*, 46 N.Y.2d 686, 694 (1979).

A. The Lower Court Applied an Incorrect Standard of Law in Determining Whether the Investigation is a Selective Prosecution

It is well established that to succeed on a claim of selective prosecution a movant must show "both the 'unequal hand' and the 'evil eye' requirements must be proven – to wit, there must be not only a showing that the law was not applied to others similarly situated but also that the selective application of the law was deliberately based upon an impermissible standard such as race, religion or some other arbitrary classification." *303 W. 42nd St. Corp.*, 46 N.Y.2d at 693 (1979). Stated differently, "[a] violation of equal protection arises where *first*, a person (compared with others similarly situated) is selectively treated and *second*, such treatment is based on impermissible considerations . . . intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person*."* *Sonne v Bd. of Trustees of Vil. of Suffern*, 67 A.D.3d 192, 203 (2d Dep't 2009) (citing *Bower Assoc. v Town of Pleasant Val.*, 2 N.Y.3d 617, 631 (2004); *303 W. 42nd St. Corp.*, 46 N.Y.2d at 693 (1979)).

The lower court correctly identified these two factors—the "evil eye" and the "uneven hand"—as being the appropriate test for determining whether the OAG selectively prosecuted Respondents-Appellants. However, in delving into its

analysis on each of these issues, the lower court overlooked several pertinent holdings and demonstrated an incomplete understanding of the relevant legal structure underpinning a claim for selective prosecution.

i. The Lower Court's Analysis Under the "Evil Eye" Prong was Flawed

First, the lower court applied an incorrect standard in determining whether the OAG had acted with an "evil eye," concluding that Respondents-Appellants had failed to satisfy this burden since they "failed to submit any evidence of discrimination based on race, religion, or any other impermissible or arbitrary classification." (R 11). While it is true that the government acts with an "evil eye" when its actions are "based upon an impermissible standard such as race, religion or some other arbitrary classification," *see 303 W. 42nd St. Corp*., these are not the only impermissible motives that have been acknowledged by New York courts.

Indeed, New York courts have recognized that the government acts with an "evil eye" when its actions are motivated by "impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Bower Assoc. v. Town of Pleasant Valley*, 2 N.Y.3d 617, 631 (2004) ; *see also Sonne v. Board of Trustees of Village of Suffern*, 67 A.D.3d 192, 203 (2d Dep't 2009); *States v. Fares*, 978 F.2d 52, 59 (2d Cir. 1992) (impermissible considerations include "race, religion, or the desire to prevent [the] exercise of constitutional rights.") (emphasis added) (citing *United*

States v. Moon, 718 F.2d 1210, 1229 (2d Cir.1983) (quoting *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir.1974). In other words, the relevant inquiry is whether an individual was "singled out for an impermissible motive not related to legitimate governmental objectives, which could include personal or political gain, or retaliation for the exercise of constitutional rights." *Sonne*, 67 A.D.3d at 203-204.

Here, Respondents-Appellants submitted with their underlying motion papers a robust record of proofs of the many inappropriate public statements made by Ms. James which demonstrate her unrequited bias against Respondents-Appellants and serve as strong evidence that she was acting with precisely these kinds of impermissible motives when she commenced the OAG's investigation. *See Cornelius v. NACCP*, 473 U.S. 788, 812 (1985) (statements by government officials on the reasons for an action can indicate an improper motive); *see also Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cty.*, 653 F.3d 290, 297 (3d Cir. 2011) (noting that, since the government "rarely flatly admits it is engaging in viewpoint discrimination," courts recognize that "statements by government officials on the reasons for an action can indicate an improper motive.").

Upon examination of these statements, it cannot be reasonably disputed that Ms. James acted with "malicious[,] bad faith intent," *Bower*, 2 N.Y.3d at 631, and that she commenced her investigation of Respondents-Appellants as a means of achieving "personal or political gain," *Sonne, supra*. Indeed, her entire campaign

for New York Attorney General was premised on her promise to "take on Donald Trump" if elected. (R 1061). She even pledged, during a campaign speech, that she would employ her power as Attorney General as a "sword" against Donald Trump and that she "looked forward to going into the office of Attorney General every day, suing him…and then going home." (R 1063). Her stated objective was to "fight" against "Donald Trump and his harmful administration," (R 1062), by being a "real pain in the ass" to him, (R 1096), and "us[ing] every area of the law to investigate" him and "anyone in his orbit." (R 1098) That her conduct and public statements are overtly political cannot be reasonably disputed. She not only staked her election for Attorney General on her pursuit of Donald Trump, but since becoming Attorney General, she has made her continued attacks against him part of her agenda. In short, the record clearly establishes that Ms. James has used, and continues to use, the OAG's investigation as a means of furthering the agenda of her political party and advancing her own political career.

Further, Ms. James's statements also serve as powerful evidence that Ms. James acted with an "intent to "inhibit or punish the exercise of [Respondents-Appellants] constitutional rights"—namely those afforded under the First Amendment—since it is clear that she impermissibly targeted them based on their political views, affiliations, ideologies and/or beliefs, which are diametrically opposed to her own. *Bower, supra*. For instance, Ms. James has frequently referred

to Donald Trump as an "illegitimate president," (R 1058, 1063, 1076, 1079, 1099, 1113), led "die-in" protests against him while claiming that "we are all being killed by [the Trump] administration," (R 1056), accused him of engaging in "public corruption," (R 1114. 1115), of "defrauding Americans," (R 1083), declared that he is waging a "cruel crusade against…invaluable members of our society," (R 1103), claimed that he "doesn't believe in the rights and liberties of marginalized and vulnerable populations," (R 1125), and accused him of "abus[ing] [the] power" of his presidential office (R. 1040).

These statements, on their own, provide a sufficient basis to conclude that Ms. James has intentionally targeted Respondents-Appellants on the basis of their political affiliations. There is no question that this type of politically motivated attack constitutes a grave violation of Respondents-Appellants' First Amendment rights. The Supreme Court has consistently affirmed the notion that "[t]he First Amendment protects political association . . . political expression" and "[t]he right to associate with the political party of one's choice." *Buckley v. Valeo*, 424 US 1, 15, 96 S Ct 612 (1976) ; *see also Mills v. Alabama*, 384 U.S. 214, 218-19 (1996) (noting that speech addressing "governmental affairs" and "the manner in which government is operated or should be operated" is protected political speech.); *Brady v. Town of Colchester*, 863 F.2d 205, 217 (2d Cir. 1988) ("The Supreme Court has recognized a freedom to associate with others "to pursue goals independently

protected by the first amendment—such as political advocacy."). Taken together, the "First and Fourteenth Amendments guarantee [the] 'freedom to associate with others for the common advancement of political beliefs and ideas,' a freedom that encompasses '[t]he right to associate with the political party of one's choice.'" *Id.* (citing *Kusper v. Pontikes*, 414 U.S. 51, 56, 57, 94 S.Ct. 303 (1973), quoted in *Cousins v. Wigoda*, 419 U.S. 477, 487, 95 S.Ct. 541, 547 (1975)).

Yet, despite the wealth of evidence submitted in support of Respondents-Appellants' underlying motion papers, Judge Engoron dismissed Respondents-Appellants' "evil eye" argument out of hand. In doing so, he focused solely on the traditional classes protected by the Equal Protection Clause, reasoning that Respondents-Appellants' argument fell short because there was no "evidence of discrimination based on race, religion, or other permissible or arbitrary classification," (R 11), and overlooking the additional forms of "impermissible motives" outlined above. Further elucidating the lower court's misunderstanding of this issue, at oral argument Judge Engoron and his law clerk appeared to insist that Respondents-Appellants were required show that they were part of a "protected class" to prevail on their selective prosecution claim. For instance, Judge Engoron's clerk posed the following question to Respondents-Appellants' counsel during oral argument:

> Counselor, I just have one more question. Protective class is usually referred to a very, very high scrutiny such as race, religion, ethnicity.

> Do you have any case law to support the idea that his viewpoint is a protected class such that it enjoys the highest level of scrutiny?

(R 71).

Likewise, Judge Engoron made the following statement echoing the mistaken belief that it was necessary for Respondents-Appellants to prove that they were being discriminated against as a member of a "protected class":

> The traditional protected classes are race, religion, etc. Donald Trump doesn't fit that model. He's not being discriminated against based on race, is he? Or religion, is he? He's not a protected class. If Ms. James has a thing against him, OK, that's not in my understanding unlawful discrimination. He's just a bad guy she should go after as the chief law enforcement officer of the state.

(R 75).

These statements show the lower court's misunderstanding of what Respondents-Appellants were required to prove to prevail on their selective prosecution claim. Contrary to the lower court's contention, it was not necessary for Respondents-Appellants to show that they are part of a "protected class." Rather, they were only required to show that the OAG's actions were based on any one of the numerous impermissible standards recognized by New York courts, including an "intent to inhibit or punish the exercise of constitutional rights," a "malicious or bad faith intent to injure a person," or even a desire to achieve "personal or political gain." *Bower Assoc.*, 2 N.Y.3d at 631*; Sonne*, 67 A.D.3d at 203-204.

In fact, the very scenario contemplated by Judge Engoron is directly on point. Ms. James does have a "thing" against Respondents-Appellants—she is targeting them for her own political gain and in retaliation for their political affiliations, ideologies, and beliefs. This scenario exemplifies the type of "evil eye" conduct that New York courts have expressly forbidden. *See generally Bower*, 2 N.Y.3d 617; *Sonne*, 57 A.D.3d 192; *Fared*, 978 F.2d 52; *Moon*, 718 F.2d 1210; *Berrios*, 501 F.2d 1207. Indeed, it would defy all logic to permit such wanton, politically motivated conduct by any state actor, let alone the highest-ranking law enforcement official in the state of New York. The lower court's failure to recognize this salient fact is a significant omission which, on its own, warrants reversal of the lower court's decision.

ii. The Lower Court Failed to Appreciate the Significance of the Proofs Showing that the OAG Has Acted with an "Uneven Hand"

The lower court similarly erred in analyzing the second prong of Respondents-Appellants' selective prosecution claim—whether the OAG's investigation has been carried out with an "uneven hand"—by failing to acknowledge the evidence submitted by Respondents-Appellants which shows that they have been selectively treated.

To establish that the government has acted with an "uneven hand," a movant must show that, "compared with others similarly situated, [he] has been selectively treated." *Sonne*, 67 A.D.3d at 203. The "similarly situated" element of the test asks

"whether a prudent person, looking objectively at the incidents, would think them roughly equivalent." *Bower*, 2 N.Y.3d at 631 (citing *Penlyn Dev. Corp. v. Incorporated Vil. of Lloyd Harbor*, 51 F.Supp 2d 255, 264 (E.D.N.Y. 1999). The relevant inquiry is whether the government has engaged in "conscious, intentional discrimination" against an individual. *People v. Goodman*, 31 N.Y.2d 262, 269 (1972) (citing *People v Utica Daw's Drug Co.*, 16 A.D.2d 12, 19 (4th Dep't 1962). This may be shown by establishing that the authorities have selected a "single defendant or a single class of defendants for prosecution because of personal animosity or for some other illegitimate reason." *Utica Daw's Drug Co.*, 16 A.D.2d at 17-18.

Here, there is little doubt that Ms. James has selectively targeted Respondents-Appellants and has singled them out for her own politically motivated purposes. This much is clear from the manner in which the OAG has handled its investigation of Respondents-Appellants, which is starkly different than how it handles its other investigations. The OAG has devoted truly gargantuan resources to its investigation of Respondents-Appellants, subpoenaing millions of pages of documents from the Trump Organization, Respondents-Appellants and other third parties, as well as taking dozens of lengthy depositions. In addition, the OAG has made every effort to obtain a maximum amount of media exposure for its investigation, making frequent public statements and issuing press releases in connection with the service of

subpoenas, discovery disputes, and court filings. Plainly stated, the OAG's handling of this investigation is far from ordinary and no reasonable observer could conclude that the OAG's treatment of Respondents-Appellants is "roughly equivalent" to its treatment of similarly situated corporations and their officers, managers, and employees.

This differential treatment is perhaps no greater exemplified than by Attorney General James' callous disregard of the presumption of innocence, a hallmark of prosecutorial ethics which requires a prosecutor to "refrain from speaking in public about pending and impending cases except in very limited circumstances." *United States v. Bowen*, 799 F.3d 336, 353-354 (5th Cir. 2015); *see also* N.Y.R.P.C. 3.6 ("A lawyer who is participating in or has participated in a criminal or civil matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."); ABA M.R.P.C. Rule 3.8 ("[A] [p]rosecutor shall…refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused"); *United States v. Silver*, 103 F. Supp. 3d 370, 378-79 (S.D.N.Y. 2015), (rebuking remarks which "bundle together unproven allegations regarding [a] [d]efendant with broader commentary on corruption and a lack of transparency in certain aspects of . . . politics," noting that these types of

statements are inherently prejudicial because "it would not be unreasonable for members of the media or the public to interpret" them "as a commentary on the character or guilt of the individual or entity under investigation.")

Far from merely informing the public of the existence of an on-going investigation, Ms. James—as both a candidate and now as Attorney General—has made public pronouncements on countless occasions that amount to determinations that Respondents-Appellants are guilty of crimes or wrongdoing. In fact, she has seemingly jumped at every opportunity to do so. For example, among other things, she has stated: "We need to focus on Donald Trump and his abuses. We need to follow his money. We need to find out where he's laundered money," (R 1100); "[Trump's] days of defrauding Americans are coming to an end." (R 1083); "I believe that the president of these United States can be indicted for criminal offenses," (R 1113); and "we're definitely going to sue him. We're going to be a real pain in the ass. He's going to know my name personally," (R 1096). There is no question that these statements are improper, as they are not only made short of a conviction, but in the absence of any charging instrument. Ms. James' willingness to contravene well-established prosecutorial standards and violate Respondents-Appellants' fundamental rights is powerful proof that the Office is engaging in targeted discrimination and that Respondents-Appellants are being treated in a

manner that the OAG would not treat similarly situated individuals who do not bear the last name "Trump."

Based on the foregoing, the lower court erred in failing to recognize the OAG's selective treatment of Respondents-Appellants, which has been unprecedented in nature and highly indicative of "conscious, intentional discrimination." *Goodman,* 31 N.Y.2d at 269.

B. The Viability of the OAG's Investigation is Irrelevant to the Selective Prosecution Claim

Another erroneous basis upon which the lower court denied Respondents-Appellants' selective prosecution claim was its finding that the OAG's investigation has, at least in the lower court's view, turned up sufficient evidence to justify its continued existence. Specifically, the lower court found that the investigation is "hardly unsubstantiated," noting that an "in camera review of the thousands of documents responsive to OAG's prior subpoenas demonstrates that OAG has a sufficient basis for continuing its investigation." (R 10). Critically, the lower court found that this evidence "undercuts the notion that [the OAG's] ongoing investigation is based on personal animus, not facts and law." *Id.*

The lower court's reasoning was flawed in this regard. It is firmly established that government action that constitutes selective prosecution is *per se* unconstitutional; in other words, whether the action has an otherwise legitimate basis

"is beside the point." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 396–97 (1993); *Accord Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 812 (1985) ("While we accept the validity and reasonableness of the justifications offered by petitioner . . . those justifications cannot save an exclusion that is in fact based on the desire to suppress a particular point of view."); *see also Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*426 F.3d 617, 633 (2d Cir. 2005) (holding that selective prosecution is "prima facie, unconstitutional" even if the government action is "reasonably related to legitimate . . . interests."); *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 812 (1985) (noting that even "valid[] and reasonable[] . . . justifications . . . cannot save" government action that is "based on the desire to suppress a particular point of view"); *Utica Daw's Drug Co.*, 16 A.D.2d at 18 (for a selective prosecution claim, "[t]he court is asked to stop the prosecution at the threshold, not because the defendant is innocent but because the public authorities are guilty of a wrong in engaging in a course of conduct designed to discriminate unconstitutionally against the defendant."). Thus, even if the lower court were correct that the OAG's investigation has a legitimate evidentiary basis, the investigation is unconstitutional nonetheless since it is the product of selective prosecution.

Accordingly, the lower court's improper consideration of the sufficiency of the evidence obtained by the OAG after its investigation was commenced by

selective prosecution is an error which warrants reversal of its decision. For these same reasons, the lower court's denial of an evidentiary hearing on the selective prosecutions claims was error.

Dated: March 21, 2022
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STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—First Department

PEOPLE OF THE STATE OF NEW YORK, by Letitia James, Attorney General of the State of New York,

Petitioner-Respondent,

– against –

THE TRUMP ORGANIZATION, INC., DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER LLC, SEVEN SPRINGS LLC, ERIC TRUMP, CHARLES MARTABANO, MORGAN, LEWIS & BOCKIUS, LLP, SHERI DILLON and MAZARS USA LLC,

Respondents,

– and –

DONALD J. TRUMP, DONALD TRUMP, JR. and IVANKA TRUMP,

Respondents-Appellants.

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1. The index number of the case in the court below is 451685/20.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on or about August 24, 2020, by filing of a Petition. A Supplemental Verified Petition was filed on or about January 18, 2022. Respondents Donald J. Trump, Ivanka Trump and Donald Trump, Jr., filed Answers to the Supplemental Verified Petition on or about February 14, 2022.

5. The nature and object of the action is to Compel compliance with subpoenas served by the Office of the Attorney General of the State of New York.

6. This appeal is from the Decision and Order of the Honorable Arthur Engoron, dated February 17, 2022, which denied Respondents' motion to quash subpoenas.

7. This appeal is on the full reproduced record.