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

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

DONALD J. TRUMP,

Defendant.

Index No. 71543-23

PRESIDENT DONALD J. TRUMP'S MOTIONS *IN LIMINE*

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I. INTRODUCTION

President Donald J. Trump respectfully submits these motions *in limine* seeking pretrial rulings regarding improper arguments and inadmissible evidence that the People appear to want to offer at trial in order to bolster their listless "zombie" case and their unsuccessful efforts to interfere with President Trump's leading campaign in the 2024 presidential election. Specifically, for the reasons set forth below, President Trump seeks the following *in limine* rulings:

1. Michael Cohen Perjury. The People should be precluded from suborning additional perjury by Michael Cohen;

2. So-Called Election "Influence." The People should be precluded from arguing that President Trump sought to improperly "influence" the 2016 election was nothing untoward or irregular—and certainly nothing criminal—about his winning candidacy supported by tens of millions of Americans;

3. Improper "Intent To Defraud" Arguments. The People should be precluded from arguing that the "intent to defraud" element under Penal Law § 175.10 can be established through intent relating to a predicate offense or President Trump's intention to win the 2016 election through campaign practices well within established norms;

4. Improper Background Bootstrapping. The People should be precluded from offering evidence relating to an alleged "scheme" dating back to 2015, and from using the prejudicial phrase "catch and kill" because they chose to proceed on the basis of alleged non-conspiracy substantive violations of Penal Law § 175.10 in 2017;

5. Inadmissible Evidence Concerning Dino Sajudin. The People should be precluded from offering testimony from or regarding Dino Sajudin, as issues relating to Sajudin have no bearing on the 2017 records entries at issue in the charges;

6. Inadmissible Evidence Concerning Karen McDougal. For similar reasons, and because such evidence would be unduly prejudicial, the People should be precluded from offering testimony from or regarding Karen McDougal;

7. Inadmissible Evidence Concerning Stephanie Clifford. The People should be precluded from offering testimony from or regarding Stephanie Clifford, who has made clear through public statements that she intends to offer false, salacious, and unduly prejudicial testimony relating to President Trump concerning events from between 2006 and 2008;

8. Inadmissible Evidence Concerning the *Access Hollywood* Recording. The Court should preclude evidence regarding the so-called *Access Hollywood* recording, which also contains inflammatory and unduly prejudicial evidence that has no place at this trial about documents and accounting practices;

9. The People should be precluded from presenting arguments that payments to McDougal and Clifford were illegal campaign contributions under the Federal Election Campaign Act ("FECA"), and thereby satisfy the "other crime" element under Penal Law § 175.10, because that is simply wrong as a matter of law, and has been reviewed by the Federal Election Commission, which did not find any wrongdoing;

10. The People should be precluded from offering hearsay and inadmissible evidence concerning FECA-related resolutions by Cohen and American Media, Inc. ("AMI");

11. The People should be precluded from offering evidence relating to alleged false entries in AMI's books and records, as there is no evidence that President Trump was aware of the entries or their alleged inaccuracy and this case should not involve a mini-trial about AMI's accounting practices;

12. The People should be precluded from offering evidence and argument that President Trump or the Donald J. Trump Revocable Trust constituted the relevant "enterprise" under Penal Law § 175.10, because that is not what they alleged in the Indictment;

13. The People should be precluded from offering alleged notes from January 2017 by non-witness Allen Weisselberg because they cannot establish an adequate foundation for any hearsay exception;

14. The People should be precluded from offering statements by Rudy Giuliani because the People cannot establish that the statements were consistent with governing agency principles;

15. The People should be required to make a pre-trial offer of proof regarding the admissibility of the nearly 100 statements attributed to President Trump, which the People have identified as potential trial exhibits, and which are largely irrelevant, stale, and cumulative; and

16. The People should be required to revise their exhibit list to provide adequate and particularized notice of the exhibits they currently intend in good faith to offer in their case in chief.

II. APPLICABLE LAW

"[E]vidence is relevant only if it tends to prove the existence or nonexistence of a material fact directly at issue in the case." *People v. Robinson*, 38 N.Y.S.3d 601, 602-03 (2d Dep't 2016) (citation omitted). Even relevant evidence must be excluded "if its probative value is outweighed by the danger that its admission would: (1) create undue prejudice to a party; (2) confuse the issues and mislead the jury; (3) prolong the proceeding to an unreasonable extent without any corresponding advantage to the offering party; or (4) unfairly surprise a party and no remedy other than exclusion could cure the prejudice caused by the surprise." Guide to N.Y. Evid., Exclusion of Relevant Evidence, § 4.06; *see also, e.g.*, *People v. Lewis*, 69 N.Y.2d 321, 328 (1987) (finding that the lower court erred by admitting defendant's prior uncharged acts because doing so "seriously prejudiced defendant in the eyes of the jury"); *Caster v. Increda-Meal, Inc.*, 661 N.Y.S.2d 125, 127 (4th Dep't 1997) (affirming lower court's decision to grant motion *in limine* to preclude introduction of unduly prejudicial and irrelevant evidence); *Maraziti ex rel. Maraziti v. Weber*, 713 N.Y.S.2d 821, 822 (Sup. Ct. Dutchess Cnty. 2000) (granting motion *in limine* to preclude evidence of prior medical misconduct that would "create undue hardship and unfair risks for defendants" and "negatively impact the jury's objectivity").

Evidence of uncharged acts "is not admissible if it cannot logically be connected to some specific material issue in the case and tends only to demonstrate the defendant's propensity to commit the crime charged." *People v. Cass*, 18 N.Y.3d 553, 559 (2012). "[A] criminal case should be tried on the facts and not on the basis of a defendant's propensity to commit the crime charged." *People v. Rojas*, 97 N.Y.2d 32, 36 (2001). The *Molineux* rule is meant "to eliminate the risk that a jury, not fully convinced of the defendant's guilt of the crime charged may, nevertheless, find against him because his conduct generally merits punishment." *Cass*, 18 N.Y.3d at 559.

The court must engage in a two-step inquiry to determine whether *Molineux* evidence is admissible in a particular case. First, "the proponent of the evidence must identify some material issue, other than the defendant's criminal propensity, to which the evidence is directly relevant." *Cass*, 18 N.Y.3d at 560 (citation omitted). This "is a question of law, not discretion." *People v. Telfair,* 2023 WL 8039633, at *3 (N.Y. Ct. App. Nov. 21, 2023). If this requisite showing is made, the court then "must weigh the evidence's probative value against its potential for undue prejudice to the defendant." *Cass*, 18 N.Y.3d at 560. Accordingly, "*Molineux* evidence is presumptively inadmissible unless it is [proven directly] relevant to some material issue in the case and . . . the probative value of the evidence outweighs the risk of undue prejudice to the defendant." *People v. Frumusa*, 29 N.Y.3d 364, 369 (2017).[1]

III. ARGUMENT

A. The People Should Be Precluded From Suborning Michael Cohen's Perjury

Michael Cohen is a liar. He recently committed perjury, on the stand and under oath, at a civil trial involving President Trump. If his public statements are any indication, he plans to do so again at this criminal trial. The Court should preclude Cohen's testimony in order to protect the integrity of this Court and the process of justice.

1. Background

Cohen's demonstrated record of lying ranges from minimizing his criminal conduct and distorting his background in public statements to the media, to serious and consequential perjury in *New York v. Donald J. Trump*, Index No. 452564/2022 (Sup. Ct. N.Y. Cnty).

[1] *See also, e.g.*, *People v. Leonard*, 29 N.Y.3d 1, 8 (2017) (finding, under *Molineux*, that the lower court erred in permitting evidence of defendant's past acts of sexual assault because the "prejudicial nature of the *Molineux* evidence far outweighed any probative value that may be attributed to it").

Even before his federal sentencing in 2019, Cohen began to "minimize the seriousness of his decision not to report millions of dollars of income over a period of years by blaming his accountant for not uncovering the reported income."[2] [redacted].

In December 2019, less than one year into his 36-month sentence for federal crimes, including tax evasion and lying to Congress, Cohen sought a sentence reduction pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure. Prosecutors in the Southern District of New York opposed the motion and informed Judge Pauley that they had "substantial concerns about Cohen's credibility as a witness," based in part on lies he told during proffers that included "material false statements"—*i.e.*, violations of federal law, 18 U.S.C. § 1001—in January and February 2019.[3] The federal prosecutors also expressed concern regarding (1) "apparent contradictions" between Cohen's post-sentencing congressional testimony and his guilty pleas and certain filings in the SDNY case, and (2) a "litany of public comments" made by Cohen and his surrogates concerning his federal case, many of which minimized his acceptance of responsibility and were inconsistent with his guilty pleas or other undisputed facts. *Id.* at 5-6.

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[2] Govt's Sentencing Submission at 5-6, *United States v. Cohen*, No. 18 Cr. 602 (S.D.N.Y. Dec. 7, 2018), ECF No. 27.

[3] Govt's Opp'n at 1, 4, *United States v. Cohen*, No. 18 Cr. 602 (S.D.N.Y. Dec. 19, 2019), ECF No. 58.

Last fall, in *New York v. Trump*, Cohen committed perjury. He testified that he was not guilty of the federal tax evasion charges to which he pleaded guilty and that he lied to U.S. District Court Judge William H. Pauley III during his sworn plea allocution in 2018. *See, e.g.*, 10/24/2023 Tr. 2188, 2288 (attached as Ex. 2) and 10/25/2023 Tr. 2437 (attached as Ex. 3). This included the following sworn testimony regarding his guilty plea:

> Q: Have you ever made any public statements concerning the legitimacy of [your] convictions?
> A: More than one.
> Q: And why did you do that?
> A: Because there was no tax evasion. At best, it could be characterized as a tax omission. I have never in my life not paid taxes. I have never requested an extension until 2017. Every year I had paid, no extensions on time, what my CPA accountant directed me to pay.

Ex. 2 at 2188.

> Q: Did you lie to Judge Pauley when you said that you were guilty of the counts that you said under oath that you were guilty of? Did you lie to Judge Pauly?
> A: Yes.

Id. at 2288.

> Q: So, sir, you lied at the time – you lied more than once in federal court, correct?
> A: Correct.
> Q: When the stakes affected you personally, right?
> A: Correct.
> Q: And you mislead [*sic*] a federal judge?
> A: Yes.

Ex. 3 at 2437.

Cohen committed perjury again when he falsely testified that he "refused" a motion pursuant to U.S.S.G. § 5K1.1 from the U.S. Attorney's Office:

> Q: And did you attempt at any point to cooperate with the government in connection with your guilty pleas?
> A: I did cooperate with the government, yes.
> Q: However, you did not receive 5K1 or substantial assistance letter from the federal government, did you?
> A: No, I refused.

Ex. 2 at 2187. No such motion, or agreement to make a motion, was ever extended to Cohen. Federal prosecutors have also taken the position that Cohen lied under oath.[4] Simply put, the federal government acknowledged what the People will not—Cohen is not a truth teller, he is a serial liar.

2. Discussion

The People are officers of the Court charged with ensuring that testimony presented to judges and juries is truthful. *See* N.Y.C.R.R. 1200, Rules 3.3(a)(3), 3.4(a)(4). They have a sacred obligation to "call[] only those witnesses whom [they] believe[] to be truthful witnesses testifying to facts as they understand them to be." *In re Schapiro*, 144 A.D. 1, 9 (1st Dep't 1911). As refenced above, federal prosecutors have taken the position that Cohen "appears to have lied under oath in a court proceeding."[5] Strikingly, Cohen has also admitted to lying in court. *See* Ex. 3 at 2437. "A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." *People v. Savvides*, 1 N.Y.2d 554, 557 (1956); *see also United States v. Cromitie*, 727 F.3d 194, 221-22 (2d Cir. 2013) ("[P]erjury is 'material' if there is any 'reasonable likelihood that the false testimony could have affected the judgment of the jury,' . . . even if it only undermines a witness's credibility." (cleaned up)). In response, Cohen's own attorney was forced to try to twist his false, sworn words—suggesting that Cohen's testimony, although "clums[y]" and "poorly worded," did not dispute the basis of his guilty plea.[6]

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[4] SDNY's Opp'n at 1, *United States v. Cohen*, No. 18 Cr. 602 (S.D.N.Y. Dec. 4, 2023), ECF No. 90.

[5] *Id*.

[6] Letter Response at 1-2, *United States v. Cohen*, No. 18 Cr. 602 (S.D.N.Y. Dec. 9, 2023), ECF No. 95.

The District Attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *People v. Garcia*, 72 A.D.2d 356, 361 (1st Dep't 1980) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). "[H]e must never lose sight of the fact that a defendant, as an integral member of the body politic, is entitled to a full measure of fairness." *People v. Waters*, 35 Misc. 3d 855, 859 (Sup. Ct. Bronx Cnty. 2012) (quoting *People v. Zimmer*, 51 N.Y.2d 390, 393 (1980)). "It is fundamentally unfair and a clear violation of a defendant's right to due process for a prosecutor to present testimony that he knew, or should have known, was perjured." *Id*. at 861.

Given this clear evidence that Cohen perjured himself in his testimony at the most recent case in which he testified, and the likelihood that he will commit perjury again if called by the prosecutors as a witness in this case, it was disturbing to hear the People blithely proclaim that at the February 15, 2024, conference that this perjury is not their problem and could be addressed by the defense on cross examination. *See* 2/15/2024 Tr. 19. The People's desire to rush ahead with these proceedings rather than look into the ongoing criminal conduct of their star witness is troubling and violates the People's ethical and constitutional obligations. The People's failure to live up to their obligations requires the Court to step in and preclude the People from suborning further perjury by calling Cohen as a witness.

B. The Court Should Preclude The People From Arguing That President Trump Sought To Improperly "Influence" The 2016 Election

The charges that the People chose to bring relate to records entries in 2017. The People chose to proceed on substantive counts; there is no conspiracy alleged. However, their submissions to the Court preview an extraordinary effort to prejudice the jury with salacious and

irrelevant details from years before the entries in question. *See, e.g.*, *People v. Gleason*, 285 A.D. 278, 282 (1st Dep't 1954) ("Every precaution must be taken lest [background evidence] spill over its barriers and distort the jury's contemplation of the determinative and critical evidence."). To ensure a fair trial, the Court must limit—and, for the most part, preclude—such evidence and argument, and require the People to hew carefully to their offer of proof before seeking to admit prejudicial evidence. In no way is "[t]he relevant question" at this trial whether President Trump "had an intent to influence the 2016 election." *See* People's Opp'n to Omnibus Motions at 18 (Nov. 9, 2023) ("People's Opp'n"). The Court should preclude the People from arguing or otherwise suggesting to the jury that President Trump sought to improperly "influence" the 2016 election. *See* People's Opp'n at 1, 5.

Even if the People's evidence comes in exactly as they hope, perjury and all, they will at most have a basis to contend that President Trump was *campaigning*—successfully—as many before him have done, and many after him will do. Essentially the People are arguing that efforts by a candidate to prevent adverse publicity about himself during a campaign equals an attempt to defraud. This argument has no basis in law and is an extraordinary perversion of our election system and the First Amendment. Candidates are not required to disclose everything about their personal life during an election and attempts by a candidate to keep certain matters personal are neither inappropriate nor illegal. President Trump's right to a fair trial requires that the People be prevented from suggesting otherwise because of the false and unduly prejudicial nature of the claim—implicating the very concern of the Court of Appeals in *Robinson* that the case not become a "trial within a trial" because of the potential for jury confusion. *People v. Robinson*, 68 N.Y.2d 541, 550 (1986).

These considerations do not change with respect to events, for example, in 2017, "after [President Trump's] inauguration." People's Opp'n at 18. An elected official "conceal[ing] damaging information" is not probative of criminal intent. *Id.* It is politics. President Biden's suppression of the nature and extent of his mishandling of classified information prior to the release of findings by Special Counsel Robert Hur on February 5, 2024, is a recent example.[7] It is certainly not the only one and is a practice as old as politics itself. No one at President Trump's trial should not be permitted to assail him by suggesting to the jury that trying to avoid negative press is evidence of an "intent to defraud" or is criminal, when that is the opposite from the truth.

C. The Court Should Preclude Improper Arguments On The "Intent To Defraud" Element

In its recent decision, the Court denied President Trump's motion to dismiss due to insufficient grand jury evidence of his intent to defraud by allegedly falsifying business records. In that context, the Court held that the term "with intent to defraud," as used in the falsifying business records statute, "carries a broad meaning and is not limited to the causing of financial harm or the deprivation of money or property." Decision and Order at 19 (Feb. 15, 2024) ("February 15 Decision"). But the Court did not explain what the term means and therefore what it requires the People to prove at trial.[8] Prior to trial, the Court must define "intent to defraud" in a more concrete fashion, and the Court should preclude the People from proceeding on vague

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[7] U.S. Dep't of Justice, Report on the Investigation into Unauthorized Removal, Retention, and Disclosure of Classified Documents Discovered at Locations Including the Penn Eiden Center and the Delaware Private Residence of President Joseph R. Eiden, Jr. (Feb. 5, 2024), *available at* https://www.justice.gov/storage/report-from-special-counsel-robert-k-hur-february-2024.pdf.

[8] In its recent rulings, the Court suggested that the People have presented evidence that Cohen paid both Clifford and McDougal. *See, e.g.*, February 15 Decision at 19 (reasoning that payments to Clifford and McDougal "were made through Cohen who was reimbursed by Defendant"). To be clear, there is no evidence that Cohen paid McDougal. Rather, the evidence presented to the grand jury was that [redacted] *See, e.g.*, 2023 GJ Testimony of [redacted] at 1082-83.

theories that impermissibly conflate "intent to defraud" with the separate intent to commit or conceal the object crime, or invite the jury to make the unsupportable and improper inference of an intent to defraud voters.

1. Intent To Commit Or Conceal A Predicate Offense Is Not "Intent To Defraud"

The People should be precluded from arguing at trial that proof of President Trump's alleged intent to commit or conceal a predicate offense is by itself sufficient to establish that President Trump acted with "intent to defraud." *See* February 15 Decision at 19. As Judge Donnino observed in his practice commentaries, "[i]t should be emphasized that for the first-degree crime there must be *two separate intents* in that the 'intent to defraud' must include 'an intent to commit another crime or to aid or conceal the commission thereof.'" William C. Donnino, *Practice Commentary*, Penal Law § 175.05 (emphasis added). Such a reading is inherent in the language of the felony offense. *See* Penal Law § 175.10 ("A person is guilty of falsifying business records in the first degree when he commits the crime of falsifying business records in the second degree, and *when his intent to defraud includes* an intent" to conceal or commit another offense) (emphasis added). Accordingly, the People should be precluded from arguing that evidence of intent to commit or conceal a predicate offense is sufficient to meet their burden on the "intent to defraud" element as well.

2. Arguments Regarding "Intent To Defraud" The Electorate Are Legally Invalid

The Court also referenced the People's argument in pretrial motions that "*intent* to influence the 2016 presidential election . . . satisfies the 'intent to defraud prong . . . ." February 15 Decision at 19. That argument is legally flawed and should be precluded at trial.

It is not a criminal fraud for a candidate for office to attempt to prevent negative information about himself coming to light or to represent to voters a position that is not his true

belief. After all, "one would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment." *Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002). And while some cases suggest that intent to defraud is broader than pecuniary harm, those cases tend to involve either breaching a duty owed by a public official, or an intent to defeat a government's "legitimate official action and purpose" through "misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention." *People v. Kase*, 76 A.D.2d 532, 537 (1st Dep't 1980).[9] No evidence in this case supports those facts here. But there can be no non-pecuniary fraud where the defendant owes no duty to the allegedly defrauded party. Here, President Trump owed no legal duty to disclose to the public details about his personal life and so he cannot have "defrauded" the public by allegedly acting to prevent some of those personal details from coming to light.

Indeed, to the extent that the Court construes the "intent to defraud" element to encompass such conduct, that standard would be "too vague." *Percoco v. United States*, 598 U.S. 319, 330 (2023). "Without further constraint" by the Court at this trial, the phrase "intent to defraud" in Penal Law § 175.10 will lack "sufficient definiteness" and be used by the People to "encourage arbitrary and discriminatory enforcement." *Id.* at 331 (cleaned up). To avoid those vagueness problems, the term must be limited to its core meaning, *i.e.*, either a scheme causing pecuniary harm, fraudulent documents submitted to a governmental entity or a fraud involving a deprivation

[9] The *Kase* opinion cited by the Court involved a charge of offering a false instrument for filing, not falsifying business records. The Court likewise cited *People v. Headley*, 37 Misc.3d 815 (Sup. Ct. Kings Cnty. 2012) and *People v. Schrag*, 147 Misc.2d 517 (Cty. Ct. Rockland Cnty. 1990). As in *Kase*, both of those cases involved fraud on a governmental entity, even if charged under the falsifying statute. Thus, *Headley* involved NYCTA records, and *Schrag* involved police department records. Indeed, in *McNally v. United States*, the Court limited *Hammerschmidt* to statutes focused on defrauding the government, *i.e.*, 18 U.S.C. § 371. 483 U.S. 350, n.8 (1987).

of a quasi-property right in the form of bribes or kickbacks. Because a fraud on the electorate satisfies none of these, a conviction on that basis cannot stand.

But even assuming, *arguendo*, that it is possible for a political candidate to intend to "defraud" the voters in this sense, such a "fraud" would have been completed when the polls closed in November 2016—months before the first of the alleged false entries. As a matter of simple logic, nothing that President Trump did in 2017 could have possibly been intended to "influence the 2016 election." At the very least, proof of President Trump's "intent to defraud" must yield to reality. Thus, the People should be precluded from arguing at trial that an "intent to defraud the voting public" constitutes proof of an "intent to defraud" in this case.

D. The Court Should Preclude Evidence And Argument Concerning The So-Called "Catch And Kill" Scheme

If the People's pretrial submissions are any indication, they plan to try to string together a meeting and three separate incidents to argue to the jury that President Trump was part of a somehow nefarious—albeit completely legal—"scheme" beginning over a year before the 2017 records entries that are actually relevant to the charges. However, the "general rule" is that other-acts evidence "is inadmissible in a criminal trial." *People v. Telfair*, 2023 WL 8039633, at *3 (N.Y. Nov. 21, 2023). "Excluding such evidence avoids the risk of infecting jury deliberations with forbidden propensity inferences." *Id.* (citing *People v. Molineux*, 168 N.Y. 264, 291-93 (1901)).

The 34-count Indictment demonstrates that the People have no aversion to pursuing exceedingly aggressive charges without evidentiary support. Despite that posture, the People did not bring conspiracy charges in this case. As a result, the "scheme" concept has no relevance. It serves only as a rhetorical artifice that the People will use to try to shovel in otherwise inadmissible evidence at trial. They must be foreclosed from doing so.

The People's "scheme" theory turns on the conduct of third parties rather than President Trump, including AMI executives. *See, e.g.*, Statement of Facts ¶ 10. Since its inception, AMI has purchased news stories—that is its business model, which is no more a crime than campaigning for office in the fully legal manner that President Trump did. Critically, there is no allegation that AMI paid Stephanie Clifford in connection with the records entries charged by the People in this case. The People will argue that Cohen made that payment using "Essential Consultants LLC" after negotiating the amount directly with Clifford's attorney. Therefore, trial testimony regarding AMI's operations and activities is irrelevant and unduly prejudicial at trial.

Moreover, in an effort to add prejudicial force to a series of discrete and stale stories, the People like to refer to the objective of this purported and uncharged "scheme" using violent language, "Catch and Kill," which has no place at a trial that centers on accounting practices, legal advice, and a crooked, lying, disbarred attorney acting in his own interests without regard to his client, President Trump. *See, e.g.*, Statement of Facts at 3. The Court should preclude the People from using that term and direct the People to instruct their witnesses to comply with that Order as well.

E. The Court Should Preclude Testimony From Or Regarding Dino Sajudin

The People have referred to the supposed "Dino Sajudin payoff" in motion papers and their Statement of Facts. *See* People's Opp'n at 3. The allegations relating to Sajudin—which involve a false, hearsay-based claim relating to an unnamed woman—are so attenuated from the issues in this case that the Court did not even mention him in its February 15, 2024, opinion concerning President Trump's pretrial motions. Sajudin is not on the People's witness list, and other witnesses should not be permitted to testify about him.

According to the People, in "October or November 2015," Sajudin attempted to sell a false story to AMI regarding President Trump. *See* Statement of Facts ¶¶ 10-11. In public filings, the

People have endeavored to suggest that President Trump caused Sajudin's story to be "suppress[ed]." *Id*. However, even [redacted]—who is willing to say virtually anything to hurt President Trump at this point—[redacted]. *See* 2023 GJ Testimony of [redacted] at 820. Moreover, whereas [redacted].

Based on the staleness of this evidence relative to the charges, the lack of a connection to the records entries at issue, and the fact that the routing of the alleged payment bears no resemblance to the People's theory regarding the alleged payment to Clifford, the Court should preclude testimony and evidence relating to Sajudin at the trial.

F. The Court Should Preclude Testimony From Or Regarding Karen McDougal

For similar reasons, the Court should preclude testimony from or regarding Karen McDougal.

While seemingly effectively in convincing the Court that payments to McDougal and Clifford bore comparable hallmarks, *see* February 15 Decision at 19 (reasoning that payments to both "were made through Cohen"), which is not true, the People have erroneously portrayed the alleged payments as part-and-parcel to the same "scheme." *See* Statement of Facts ¶¶ 7-21. In reality, however, the payments lack any meaningful similarity. Thus, testimony and evidence concerning McDougal has no probative value on any permissible issue. And the only conceivable purpose of evidence relating to McDougal's claim regarding President Trump would be to inflame the jury and seek to cast President Trump and his family in a negative light by publicizing an alleged interaction claimed to have occurred nearly twenty years ago.

[redacted]

[redacted] *See* 2023 GJ Testimony of [redacted] at 52; *see also* 2023 GJ Testimony of [redacted] at 417-418. Rather, [redacted]. *See* 2023 GJ Testimony of [redacted] at 52; *see also* 2023 GJ Testimony of [redacted] at 476.

There was nothing "catch and kill" about the interaction, which is why the People should be foreclosed from uttering those words at trial. [redacted]. *See* GJ Ex. 1 at 1.[10] [redacted]. *Id.* [redacted]. *Id.* at 2 [redacted].

[10] For example, in 2017, McDougal was featured on the cover of *Muscle and Fitness Hers* magazine, as well as in an article on beauty and fitness in *Star* magazine. *See* @karenmcdougal98, *X* (Feb 16, 2017), https://twitter.com/karenmcdougal98/status/832364168162406403; @karenmcdougal98, *X* (Mar. 3, 2017), https://twitter.com/karenmcdougal98/status/837778930551566336.

Further, contrary to the People's suggestions that Cohen was intimately involved in negotiations of McDougal's agreement with AMI, *see generally* Statement of Facts ¶¶ 12-15, [redacted]. *See, e.g.*, 2023 GJ Testimony of [redacted] at 412-16, 423, 427 ([redacted]. [redacted]. *See* 2023 GJ Testimony of [redacted] at 1082-83 [redacted]); *see also* 2023 GJ Testimony of [redacted] at 430 ([redacted]).

[redacted] 2023 GJ Testimony of [redacted] at 462. [redacted]. [redacted]. *See* 2023 GJ Testimony of [redacted] at 62, 81-82.

In short, events relating to AMI's payment to McDougal are not sufficiently similar to the evidence relating to Cohen's payments to Clifford to be probative of any relevant fact. Rather, the People clearly seek to recast history and interject the details of McDougal's alleged affair with President Trump for the sole purpose of inflaming the jury and prejudicing President Trump's defense.

G. The Court Should Preclude Testimony From Clifford

The Court should preclude testimony from Clifford as unduly prejudicial. Manhattan District Attorney Alvin Bragg agrees that such testimony is at the very best peripheral to the charges in this case, publicly stating recently that "[t]he case [against President Trump] — the core of it — is not money for sex."[11]

The People did not call Clifford to testify in the grand jury, but [redacted] (attached as Ex. 4) and have included her on the witness list. Clifford has also stated publicly that she will testify at the upcoming trial, adding: "I've been asked to kind of behave. I'm biting my tongue so fucking hard right now."[12] Tellingly, [redacted] reveal that [redacted] would use the trial as an opportunity to promote [redacted] and monetize [redacted] story. Similar to Cohen, she seeks to tell contrived stories with salacious details of events she claimed occurred nearly 20 years ago, which have no place at a trial involving the types of charges at issue. In warning Clifford, the People appear to have recognized the risks of presenting this irrelevant and untrue testimony by warning their witness, but they also appear poised to take the chance in order to try to secure a conviction in this high-profile case. Justice requires more than that, and the Court should preclude Clifford's inflammatory testimony. *See, e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 831 (1991) (O'Connor, J., concurring) ("Trial courts routinely exclude evidence that is unduly inflammatory.").

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[11] Ben Protess, Jonah Bromwich, and William Rashbaum, *Manhattan's District Attorney Is Quietly Preparing for a Trump Trial*, NEW YORK TIMES (Jan. 25, 2024), https://www.nytimes.com/2024/01/25/nyregion/trump-hush-money-trial-stormy-daniels.html.

[12] Graham Kates, Stormy Daniels Says She's "Set to Testify" in Trump's New York Criminal Trial in March, CBS NEWS (Jan. 15, 2024), https://www.cbsnews.com/news/stormy-daniels-testify-trump-new-york-criminal-trial/; Stormy Daniels, *Stormy and Kathy Griffin Are Not Sorry* (Feb. 6, 2024), https://audioboom.com/posts/8453426-stormy-kathy-griffin-are-not-sorry.

We note that the People have also produced [redacted], and [redacted]. *E.g.*, Ex. 4 at DANYDJT00201895. The *ex parte* polygraph test was administered in 2011—eight years before the People empaneled their first of several grand juries to investigate President Trump, with only the last returning charges on the "zombie" case. The test was wholly unreliable, privately arranged and unilateral, and designed to produce obvious results to support Clifford's public narrative. Moreover, it is inconsistent with statements Clifford has made denying an affair. We assume the People do not intend to offer such evidence, as "[i]t is well settled that evidence of the results of a polygraph examination is inadmissible in New York." *People v. Smith*, 61 A.D.2d 91, 98 (4th Dep't 1978). However, if the Court permits Clifford to testify, which it should not, the Court should exclude testimony about this polygraph test.

H. The Court Should Preclude Evidence Regarding The So-Called *Access Hollywood* Recording

It appears that the People seek to argue at trial that adverse publicity regarding the *Access Hollywood* recording in October 2016 somehow prompted AMI executives to notify Cohen regarding Clifford's well-worn allegations. *See* People's Opp'n at 6-7. The contents of the recording are not connected to Clifford or McDougal. *See People v. Ventimiglia*, 52 N.Y.2d 350, 360 (1981) (reasoning that probative value depends in part on "the logical distance of the particular fact from the ultimate issues of the case") (cleaned up). And because there will be no dispute about the contact or the resulting connection between Cohen and Clifford's attorney on October 10, 2016, the inference the People seek from the *Access Hollywood* recording has only *de minimis* probative value at the trial.

On the other hand, the contents of the recording are extremely and impermissibly prejudicial. So much so, in fact, that Judge Kaplan reasoned that the *Access Hollywood* recording

was admissible as a "confession" in connection with E. Jean Carroll's false sexual assault claims. *See Carroll v. Trump*, 2023 WL 4612082, at *8 n.20 (S.D.N.Y. July 19, 2023). To state the obvious, we disagree with Judge Kaplan in many respects. Billy Bush, a long-time correspondent for NBC who was with President Trump at the time of recording, commented, "[t]here were seven other guys present on the bus at the time, and every single one of us assumed we were listening to a crass standup act."[13] But the fact Judge Kaplan found the *Access Hollywood* recording to be admissible on the basis that it was a "confession" strongly supports the conclusion that the contents of the recording have no place in a fair trial on the charges the People have filed.

Given the *Access Hollywood* recording's inherent prejudice and extremely limited probative value, the Court should preclude evidence regarding the recording at trial.

I. The Court Should Preclude The People From Presenting Meritless Arguments Concerning FECA's Ambit

President Trump moves to preclude the People from presenting arguments that payments to McDougal and Clifford were illegal campaign contributions, and thereby satisfy the "other crime" element" for a § 175.10 violation. Relatedly, the People should be precluded from arguing that whether something is a campaign contribution (whether licit or illicit) is determined by whether the donor had the *subjective* intent to influence an election; rather, what controls is whether the money is spent on something that is *objectively* campaign related. As discussed below, they were not, as a matter of law, campaign contributions at all.

[13] Laingnee Barron, *"Of Course He Said It." Billy Bush Hits Back at Trump's Access Hollywood Tape Claim*, TIME (Dec. 4, 2017), https://time.com/5047223/donald-trump-access-hollywood-tape-billy-bush/.

1. The Alleged Payments To McDougal And Clifford Did Not, As A Matter of Law, Violate FECA

The People intend to introduce testimony at trial to support their flawed legal theories that payments made to McDougal and Clifford were illegal campaign contributions and thus satisfy the "other crime" element for a felony violation of Penal Law § 175.10. However, the alleged payments to McDougal and Clifford could not constitute violations of FECA, as a matter of law, because they were not "campaign contributions" as defined by federal campaign finance law. In fact, as discussed below, courts have found payments much more closely related to campaign advocacy to fall outside the statute's scope.

A third-party payment can be considered a campaign "contribution" or "expenditure" subject to FECA's applicable limits and reporting requirements in two circumstances: (1) a third-party "expenditure" that is made in coordination with the candidate or the campaign "for the purpose of influencing any election for Federal office," 52 U.S.C. §§ 30101(9)(A) (defining "expenditure"), 30116(a)(7)(B)(i) (treating a coordinated "expenditure" as an in-kind "contribution"), 30101(8)(A) (defining "contribution"); and (2) a third-party payment for the "personal use" expense of a candidate that would not have been made "irrespective of the candidacy." *See* 11 C.F.R. § 113.l(g)(6). It should go without saying, something cannot be an *illegal* campaign "contribution" or "expenditure" unless it is first a "contribution" or "expenditure" as defined by the statute.

The payments at issue in this case cannot have violated either of FECA's respective provisions because, under the statute's *objective* standard, (1) they were not "expenditures," as they were not made "for the purpose of influencing any election," and (2) they were not "contributions," as they would have would have been made "irrespective of [President Trump's] candidacy." In other words, these payments were not campaign contributions within the meaning

of FECA and thus cannot have been illegal campaign contributions. The People should not be permitted to present arguments suggesting otherwise.

a. The Alleged Payments Were Not Made "For the Purpose of Influencing" The Election

In order for a third-party payment made in coordination with a candidate or his campaign to be an in-kind "contribution," it must meet the definition of "expenditure," which requires it to have been made "for the purpose of influencing [a federal] election." *See, e.g.*, *Orloski v. FEC*, 795 F.2d 156, 162-63 (D.C. Cir. 1986). And while the phrase "for the purpose of influencing any election," as used in FECA is not defined in either FECA itself or the FEC's regulations, caselaw and other tools of interpretation make clear that the phrase is limited to spending that is unmistakably *campaign related*.

First is the Supreme Court's interpretation of the phrase "for the purpose of influencing" an election in *Buckley v. Valeo*, in the context of FECA's disclosure provisions relating to third-party independent "expenditures." 424 U.S. 1, 77-82 (1976). *Buckley* found that expenditures by federal campaigns and other political committees themselves "can be assumed to fall within the core area sought to be addressed by Congress" because "[t]hey are, by definition, campaign related." *Id.* at 79. On the other hand, when third-party spending is at issue, it cannot be assumed that there is a relationship between the spending and a campaign purpose. And because FECA threatens to impinge on fundamental First Amendment activity and, further, carries significant criminal penalties, the Court expressed concern that "the ambiguity" of the phrase "for the purpose of . . . influencing the nomination or election of candidates for federal office" "poses constitutional problems" as applied to third parties. *Id.* at 77 (cleaned up); *see also id.* at 76-77 (noting that "serious problems of vagueness" are "particularly treacherous where . . . the violation of [FECA's] terms carries criminal penalties").

To avoid those problems, the Court held that third-party "expenditures" must be construed *objectively*, reaching "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. 1 at 80. This would ensure that the law "is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate," furthering Congress's goal of regulating "campaign-oriented spending" without sweeping too broadly. *Id.* at 78-80.

Second, a narrow meaning is evidenced by the statute's use of the definite article "the" in the phrase "the purpose of influencing any election." "[I]t is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'" *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000) (cleaned up); *see also Renz v. Grey Advert., Inc.*, 135 F.3d 217, 222 (2d Cir. 1997) ("Placing the article 'the' in front of a word connotes the singularity of the word modified"). Thus, as used in FECA, the word "the" indicates that, to come within the definitions of "contribution" and "expenditure," the sole purpose of the payment at issue must be "influencing [a federal] election"—not an incidental purpose, not a related purpose, and not one purpose among many.

Consistent with the above, the FEC looks to objective factors to determine whether third-party spending is sufficiently related to fundamental campaign activity—such as advocacy or fund-raising—to be considered a campaign contribution or expenditure. *See, e.g.*, 52 U.S.C. § 30102(e); 11 C.F.R. § 101.2(a) (imputing as contributions to a candidate's campaign funds received or spent by a candidate only when received or spent "in connection with his or her campaign"). It is irrelevant whether such a payment *arguably* may have enhanced the public perception of a candidate; rather, the payment must *objectively* be shown to have had a clear connection to political

advocacy in order to be deemed campaign related.[14] Such objective tests "enable donees and donors to easily conform their conduct to the law." *Orloski*, 795 F.2d at 163, 165 (noting that "the Act may implicitly mandate an objective test"). Subjective tests, on the other hand, "would condition a recipient's liability . . . solely on the state of mind of the donor," meaning the recipient would be liable under FECA so long as the donor intended to influence the election "[e]ven if the donation did not directly or indirectly influence the election." *Id.* at 163.

The D.C. Circuit's decision in *Orloski* is a leading example of reliance on objective factors to evaluate the campaign nature of third-party spending. There, the FEC reviewed payments made by three corporations in connection with a senior citizens' picnic at which an incumbent federal candidate spoke and which had been planned by the candidate's campaign workers. 795 F.2d at 158. The picnic was held shortly before the election, the candidate's poor voting record on senior citizens' issues was a point of contention during the campaign, the candidate had never previously held a senior citizens' picnic, the park where the event was held was ringed with posters advocating the candidate's re-election, and campaign workers attended wearing "Don Ritter–Congress" buttons. *Id.* at 158-59. The FEC nonetheless determined, and the D.C. Circuit affirmed, that the corporations' payments were not in-kind "contributions" to the campaign and were not made "for the purpose of influencing any election," because the picnic was a "non-political" event—despite the fact that it clearly benefited the candidate's electoral prospects. *Id.* at 167.

The D.C. Circuit held that the expenditures on the picnic were "non-political" and beyond FECA because they did not support unambiguously campaign-related activity. To the contrary, the D.C. Circuit noted, at the event "there [was] an absence of any communication expressly

[14] *See, e.g.*, Factual & Legal Analysis at 6-8, MUR 7025 (Friends of Mike Lee) (Mar. 23, 2016) ("MUR 7025"), *available at* https://www.fec.gov/files/legal/murs/7025/16044392445.pdf.

advocating the nomination or election of the [candidate] or the defeat of any other candidate, and . . . there [was] no solicitation, making, or acceptance of a campaign contribution in connection with the event." *Id.* at 160. That there was coordination between the campaign and the entities that made the payments did not change the analysis: "[T]he mere fact that [the third-party] donations were made with the consent of the candidate does not mean that a 'contribution' within the meaning of the Act has been made. Under the Act this type of 'donation' is only a 'contribution' if it first qualifies as an 'expenditure[.]'" *Id.* at 162-63.

Here, viewed objectively, the alleged payments to McDougal and Clifford were not campaign related and thus were not made "for the purpose of influencing [the] election" within the meaning of FECA. Neither AMI nor Cohen worked for the Trump campaign, and the payments did not fund core political activity, such as advocating for a candidate, or otherwise relieve any financial obligations of the campaign so as to free up the campaign's own resources for expressly political activity. By any measure, these expenditures were far less related to an election than those at issue in *Orloski*, which the D.C. Circuit refused to deem "contributions" subject to FECA's spending limits.

For this reason, expected testimony that the payments at issue were made with the *subjective* purpose of influencing the election, even if credited, is beside the point: the agreements with McDougal and Clifford, under the objective test established by *Orloski*, were not campaign "expenditures" or "contributions" within the meaning of FECA.[15]

[15] Moreover, before he was elected, President Trump was the head of an extensive business empire that operated businesses around the world, most of which bear his name. He also has a wife and five children for whom he cares deeply. In light of these significant personal and business interests, accounts of alleged interactions posed the risk of significant reputational damage to President Trump, his family, and business interests, separate and apart from his candidacy. Thus, even assuming that AMI and Cohen entered into these transactions to protect President Trump's reputation, the requisite objective nexus to campaign or electoral activity is lacking.

A contrary view, that these sorts of payments constitute "campaign contributions," would lead to absurd results. Simply put, if the payments to McDougal and Clifford were, as a matter of law, considered made "for the purpose of influencing [the] election," it would necessarily mean that campaign funds could have been used to make those hush payments. That is because, as discussed above, FECA uses identical language to define both "contribution" and "expenditure": "for the purpose of influencing an[] election." *Orloski*, 795 F.2d at 161. Applying "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning," *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (cleaned up), would mean that if the payments to McDougal and Clifford were in-kind "contributions" made "for the purpose of influencing [the] election," then the campaign could have made those payments directly as authorized "expenditures." *See* 52 U.S.C. § 30114(a)(l) (providing that campaign funds may be used "for otherwise authorized expenditures in connection with the campaign for Federal office of the candidate or individual"). One need not be particularly cynical to believe that if the McDougal/Clifford payments had been made from campaign funds, the People would be taking the position that such spending constituted the unlawful conversion of campaign funds to personal use, as personal matters wholly unrelated to the campaign. *See* 52 U.S.C. § 30114(b) (prohibiting the conversion of campaign funds to any "personal use"); 11 C.F.R. § 113.2(e) (same).

And while the FEC did find "reason to believe" that the AMI payments to McDougal violated FECA, and Cohen pleaded guilty to FECA violations for the payments to Clifford, no appellate court has ever held that third-party payments of this sort violate FECA. Moreover, neither Cohen nor AMI chose to litigate the alleged FECA violations and so those precedents have minimal value. For all these reasons, we submit that neither the McDougal nor Clifford payments violated FECA and the Court should therefore preclude the People from arguing that they did.

b. The Payments Would Have Been Made "Irrespective Of The Candidacy"

Under the second respective provision, a third party's payment of a candidate's "personal use" expense is considered to be an in-kind "contribution" *unless* the payment would have been made "irrespective of the candidacy." 11 C.F.R. § 113.l(g)(6). The FEC has made clear that the test for "irrespective of the candidacy" is the same objective test that guides the evaluation of whether a given payment was made "for the purpose of influencing any election"—*i.e.*, whether the payment was made clearly in connection with campaign activity.[16]

To determine whether a third-party payment of a candidate's personal expense is in connection with the campaign (and subject to regulation) or was made "irrespective of the candidacy" (and not subject to regulation), the FEC applies objective criteria to determine if there is a clear link, or "nexus," between the payment and the campaign that indicates that the payment actually furthered campaign activity.[17] This requirement reflects the inescapable fact that "candidates continue to engage in personal transactions during their candidacy that are beyond the campaign-finance matters regulated by [FECA]."[18] Thus, the mere fact that a personal transaction has the potential to capture the public's interest during a political race does not bring it within FECA's scope. As the FEC has noted, "there are a number of issues arising from a candidate's personal situation (divorce, whether children attend public or private schools, business disputes,

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[16] *See, e.g.*, Statement of Reasons at 3, Comm'rs McDonald, Mason, Sandstrom, Smith & Thomas, MUR 4944 (Hillary Rodham Clinton) (Aug. 28, 2001) ("MUR 4944") (explaining that the analysis under 11 C.F.R. § 113.l(g)(6) "is . . . whether the [payment of the personal expense] is 'in connection with the campaign'"), *available at* https://eqs.fec.gov/eqsdocsMUR/0000012A.pdf.

[17] *See, e.g.*, MUR 7025 at 6 ("[A] finding of reason to believe that a candidate's personal transaction resulted in a contribution to his or her campaign requires specific information demonstrating a nexus between the transactions and the campaign.").

[18] MUR 7025 at 6.

criminal actions against family members) that may become campaign issues, but the Commission will not necessarily therefore deem expenses arising from such controversies to be campaign expenses."[19]

Thus, rather than focusing on subjective intent, the FEC, when assessing whether a third-party payment of a candidate's personal expense is sufficiently campaign-related, focuses on objective factors such as whether the payment "freed up the candidate's funds for campaign purposes" or "granted the candidate more time to spend on the campaign instead of pursuing usual employment."[20] For example, and of particular relevance to this case, the FEC unanimously dismissed a complaint alleging that the payment of $96,000 by a senator's parents to the family of a former campaign worker who had an affair with the senator was an unlawful campaign contribution, finding no evidence that the payment fulfilled an obligation of the campaign.[21] In short, under FECA, the test is whether the third-party payment of a candidate expense *objectively* affected the ability of the candidate's campaign to fund traditional campaign activity—such as advertisements, phone banks, staff salaries, office space, travel costs, and the like. The FEC does not wade, however, into speculative abstractions as to whether the payor may have hoped that the payment would impact an election, or whether the payment could have affected voter perception of a candidate.[22]

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[19] MUR 4944 at 2 n.2.

[20] MUR 7025 at 8; *see generally Orloski*, 795 F.2d at 162 (noting that FECA "may implicitly mandate an objective test" to determine whether a payment is a "contribution").

[21] *See* Statement of Reasons at 10, Comm'rs Petersen, Bauerly, Hunter, McGahn & Weintraub, MUR 6200 (John Ensign) (Nov. 17, 2010), *available at* https://eqs.fec.gov/eqsdocsMUR/SORMUR6200.pdf.

[22] *See, e.g.*, MUR 4944 at 2 n.2.

The payments to McDougal and Clifford, by any objective measure, did not materially "free up" funds to the Trump campaign. President Trump's campaign was extremely "well-funded" in 2016—having reported more than $38 million in cash on hand as of July 31, 2016, more than $50 million in cash on hand as of August 31, 2016, and more than $15 million as of mid-October 2016.[23] President Trump, a very wealthy individual in his own right, also had the means to contribute more than $10 million to his campaign after these transactions.[24]

For all these reasons, the payments to McDougal and Clifford lacked any objective connection to campaign activity and cannot be "contributions" within the meaning of FECA.

2. Arguments Assuming The People's Erroneous Interpretations Of FECA Should Be Precluded

Because the alleged payments to McDougal and Clifford cannot have violated federal campaign finance laws, the People should be precluded from introducing testimony or making arguments that the payments were illegal campaign contributions. Even more, the People should be precluded from presenting erroneous and highly prejudicial legal arguments or claims to the jury that: (1) whether something is a campaign contribution is determined by whether the donor had the *subjective* intent to influence an election, as opposed to whether the money is used for something that is *objectively* campaign related; and (2) the "intent to defraud" element can be

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[23] *See* Donald J. Trump for President, Inc. Am. 2016 August Monthly FEC Form 3P, *available at* https://docquery.fec.gov/cgi-bin/forms/C00580100/1096341/ (covering campaign activity between July 1, 2016 and July 31, 2016); Donald J. Trump for President, Inc. Am. 2016 September Monthly FEC Form 3P, *available at* https://docquery.fec.gov/cgi-bin/forms/C00580100/1100920/ (covering campaign activity between August 1, 2016 and August 31, 2016); Donald J. Trump for President, Inc. Am. 2016 Pre-General FEC Form 3P, *available at* https://docquery.fec.gov/cgi-bin/forms/C00580100/1119574/ (covering campaign activity between October 1, 2016 and October 19, 2016).

[24] *See, e.g.*, Donald J. Trump for President, Inc. Am. 2016 Post-General FEC Form 3P at 7396, *available at* https://docquery.fec.gov/cgi-bin/forms/C00580100/1162153/.

satisfied in this case by either the purported intent to aid or conceal campaign finance violations, or by the intent to defraud the government by undermining campaign contribution limits and disclosure requirements because, as discussed above, the payments in question did not violate campaign finance law.

J. The Court Should Preclude Evidence Of Third Parties' Admissions Of FECA Violations

The Court must preclude evidence and argument concerning FECA-related admissions or resolutions by AMI and Cohen. As to Cohen, the inadmissible evidence includes his federal guilty plea to a FECA violation. As to AMI, the inadmissible evidence includes: (1) AMI's non-prosecution agreement with the U.S. Attorney's Office for the Southern District of New York;[25] (2) the FEC's "Factual and Legal Analysis" regarding AMI;[26] and (3) FEC's Conciliation Agreement with AMI, which AMI entered "[s]olely for the purpose of settling this matter expeditiously and avoiding litigation, with no admission as to the merit of the Commission's legal conclusions."[27]

"[A] codefendant's plea of guilt *might* be admissible *on the question of credibility*" if "the codefendant takes the stand in defendant's trial." *People v. Wright*, 41 N.Y.2d 172, 176 (1976)

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[25] *See* Statement of Admitted Facts, AMI Non-Prosecution Agreement (Sept. 20, 2018), *available at* https://www.justice.gov/usao-sdny/press-release/file/1119501/download.

[26] *See* Factual & Legal Analysis re MURs 7324, 7332 & 7366 (A360 Media, LLC f/k/a American Media, Inc., et al.) (Apr. 13, 2021), *available at* https://www.fec.gov/files/legal/murs/7366/7366_21.pdf.

[27] AMI Conciliation Agreement ¶ V (May 18, 2021), *available at* https://www.fec.gov/files/legal/murs/7366/7366_21.pdf; *see also id.* ¶ 21 ("AMI further contends that it believed its purchase of McDougal's story right in 2016 and the decision not to publish the story were fully protected by the Press Exemption and the First Amendment because AMI is a well-established press entity regularly publishing magazines in print and online for decades. AMI further contends that the choice of an individual to sell their story right and of AMI to purchase that right and not publish the story would not necessarily result in a contribution under the Act.").

(emphasis added). But the plea "has no probative value as to defendant's guilt." *Id.* Thus, while Cohen's federal convictions are a permissible basis for cross-examination, his guilty plea to a FECA violation is not admissible as substantive evidence of intent by President Trump to commit a predicate offense. President Trump will craft cross-examination to address Cohen's felonies, generally, without probing the facts of what Cohen claims was a FECA violation. And the People may not elicit these facts in an effort to bolster their case. *See People v. Rivera*, 116 A.D.2d 371, 373-374 (1st Dep't 1986) (finding error where "[t]he District Attorney, by his remarks, also implied that Villanueva's guilty plea was suggestive of defendant's guilt"). The People should also be precluded from arguing to the jury that Cohen's guilty plea to FECA violations is evidence that President Trump is guilty of the charged crimes or acted with the requisite intent to commit or conceal a FECA violation.

AMI's resolutions are also inadmissible under *Wright*. 41 N.Y.2d at 176. AMI will not testify at President Trump's trial. And it does not matter that [redacted] and [redacted], who were AMI employees at the time of the conduct at issue, may testify at trial. The non-prosecution agreement was entered into by AMI, rather than its employees, and [redacted]. *See* 2023 GJ Testimony of [redacted] at 1090 ([redacted]). In addition, AMI's resolutions are testimonial hearsay, and admitting them against President Trump would violate the Confrontation Clause. *See generally People v. Hardy*, 4 N.Y.3d 192, 198 (2005) (holding that "a plea allocution of a nontestifying codefendant is 'testimonial'" and, thus, inadmissible under *Crawford v. Washington*, 541 U.S. 36 (2004)); *People v. Andujar*, 105 A.D.3d 756, 757 (2d Dep't 2013) (same). For all of these reasons, the FECA-related resolutions by Cohen and AMI are inadmissible against President Trump.

K. The Court Should Preclude Evidence Concerning AMI's Books And Records

The Court already ruled that the People may not argue at trial that AMI's alleged falsification of its records is a permissible "other crime" for purposes of their efforts to escalate the misdemeanor charges against President Trump. February 15 Decision at 17-18. However, the Court left open the possibility that the People could offer evidence on this issue in support of the other three theories that the Court suggested it would put to the jury. *See id.*

According to the People's most recent exhibit list, they will seek to do so, as they did in the grand jury. The People's evidence includes [redacted]. GJ Exs. 80 and 81. The People also seek to introduce testimony from [redacted] on these issues. However, evidence concerning AMI's books and records is not admissible on the issue of whether President Trump had "intent to commit another crime or to aid or conceal the commission thereof" under § 175.10 because there is no evidence that President Trump was aware of these entries or that they were inaccurate.

The Court already expressed hesitation about the People's proffer of evidence that President Trump "knew about AMI's falsification of its records." February 15 Decision at 17. The Court quoted general language regarding "falsification of business records" from one of the People's pretrial submissions, but the People did not specify at that point in their brief whose records they were referring to. To be clear, President Trump disputes that he had such knowledge, and we do not believe that the People will be able to establish that fact at trial. We are unaware of any evidence that Cohen knew about AMI's records, either. In fact, absent a familiarity with AMI's recordkeeping practices, there is nothing on the face of the records which would suggest that the records had been misbooked.

Furthermore, arguments regarding alleged misbooking at AMI will require a sideshow mini-trial concerning AMI's accounting and circumstances on the entries the People seek to put at issue. The intricate and highly disputed nature of this evidence is illustrated by the lengthy footnote in the People's opposition to President Trump's pretrial motions regarding [redacted] marked as GJ Ex. 79 (presently included on the People's exhibit list). *See* People's Opp'n at 41 n.14. Even if this evidence has some minimal relevance to the case, the People should be precluded from introducing it at trial because it will only engender jury confusion. *See, e.g.*, *People v. Primo*, 96 N.Y.2d 351, 355 (2001) (reasoning that "[e]vidence of merely slight, remote or conjectural significance will ordinarily be insufficiently probative to outweigh these countervailing risks," such as "the prospect of trial delay, undue prejudice to the opposing party, confusing the issues or misleading the jury") (cleaned up).

L. The Court Should Preclude Evidence And Argument That President Trump Or His Trust Is The § 175.10 "Enterprise"

The People should be precluded from introducing evidence and arguing at trial that either President Trump or the Donald J. Trump Revocable Trust (his "Personal Trust") is the "enterprise" whose business records were falsified within the meaning of Penal Law § 175.10. Such evidence and arguments would constitute a constructive amendment to the Indictment. Vitally, both of these theories would be legally insufficient in their own right, as neither Donald J. Trump himself nor the Donald J. Trump Revocable Trust constitute and "enterprise" under the definition provided in § 175.00(1).

In each count in the Indictment, the People alleged that the record at issue was "kept and maintained by the Trump Organization." In other words, the People's allegation was that the Trump Organization was the "enterprise" whose "business records" were falsified within the meaning of the statute. Nevertheless, in their opposition to President Trump's Omnibus motion,

where he argued that the People had failed to introduce sufficient evidence that the records at issue were Trump Organization business records, the People argued, in the alternative, that both President Trump himself and his Personal Trust constitute "enterprises" under § 175.10. *See* People's Opp'n at 14.[28]

But this was not the theory the People presented in the grand jury or charged in the Indictment. The Indictment explicitly identifies the Trump Organization as the relevant enterprise, and any attempt to convict President Trump on the theory that the documents in questions were the business records of either the supposed "enterprise" of President Trump himself or his Personal Trust would constitute a prohibited constructive amendment of the Indictment. *See generally People v. Charles*, 61 N.Y.2d 321, 328 (1984) (holding that a constructive amendment occurs in cases "in which the jury is charged in a manner that changes the theory of the prosecution from that in the indictment").

Furthermore, President Trump and his Personal Trust are not enterprises within the meaning of § 175.10.[29] An "enterprise" is "any entity of one or more persons, corporate or otherwise, public or private, engaged in business, commercial, professional, industrial, eleemosynary, social, political or governmental activity." Penal Law § 175.00(1) (emphasis added). Significantly, the term "enterprise" refers to an "entity" or unit of organization or activity. *Id.*; *see also* Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 175.05 ("An 'enterprise' is broadly defined to include virtually any person or group of persons

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[28] Although President Trump argued in his reply that this was not the theory the People presented to the grand jury, and would constitute a constructive amendment of the indictment if adopted, *see* President Trump's Reply in support of his Omnibus Motions at 6, the Court did not reach this issue in its decision on the Omnibus Motions.

[29] The Court's February 15, 2024 Decision and Order declines to reach the question of whether President Trump and his Personal Trust fit within the definition of an "enterprise" under the statute. *See* February 15 Decision at 9-11.

engaged in any *organized activity* for which records are kept.") (emphasis added). This includes organized activities of a commercial, charitable, social, political, or governmental nature. Penal Law § 175.00(1). The "enterprise" within the meaning of the statute does not, however, encompass the personal activities of President Trump or his Personal Trust because an individuals personal activities are not the statute was intended to prevent.

The Court should therefore preclude the People from presenting evidence or arguing at trial that the "enterprise" in question is anything other than the Trump Organization.

M. The Court Should Preclude The Alleged Notes By Allen Weisselberg

In pretrial briefing, the People emphasized "handwritten notes" that they claim were written by Allen Weisselberg during a January 2017 meeting with Cohen. *See* People's Opp'n at 8; *see also* GJ Exs. 5 & 8 at 1. Allen Weisselberg is not on the People's witness list, and the notes are inadmissible hearsay without his testimonial foundation. For example, no witness laid an adequate business records foundation for the notes in the grand jury. [redacted]. *See, e.g.*, 2023 GJ Testimony at 154; *see also id.* at 157-58 [redacted]

The unreliability of the hearsay from Weisselberg is underscored by material differences between those notes and notes by McConney in the same timeframe. *See, e.g.*, 2023 GJ Testimony of [redacted] at 161-62 [redacted] further undercuts any business-records proffer the People could make with respect to Weisselberg's notes:

[redacted]

2023 GJ Testimony at 171-72. Accordingly, absent a proffer on admissibility and an appropriate evidentiary foundation—which the People do not appear to be in a position to make—the notes attributed to Weisselberg must be excluded.

N. The Court Should Preclude Evidence Concerning Mayor Rudolph Giuliani

President Trump moves to preclude the People from introducing into evidence exhibits, including video and transcripts, or derivative testimony concerning out-of-court statements made by Mayor Rudolph Guiliani on or around May 2 and 6, 2018, concerning payments at issue in this case. The statements are inadmissible hearsay and do not fit within the CPLR § 4549 exception for opposing party statements. Giuliani was neither authorized to make the statements in question nor was he acting within the scope of an existing employment or agency relationship when he made them. Even if the statements were admissible, which they are not, the People should not be

allowed to cherry pick portions that are taken out of and without context; rather, the full recording or statement should be presented to the jury.

1. Background

On April 19, 2018, the *New York Times* and numerous other media outlets reported that President Trump would hire Giuliani to represent him in connection with the ongoing federal investigation into potential Russian interference in the 2016 presidential election, led by Special Counsel Robert Mueller.[30]

Less than two weeks later, on May 2, 2018, Giuliani appeared on *Hannity* to discuss the latest developments in the Mueller investigation, including Special Counsel Mueller's interest in interviewing President Trump.[31] More than halfway through the interview, Giuliani—off script, without authority, and without preparation or sufficient knowledge of the underlying facts—referenced recent developments unrelated to the Special Counsel's investigation that concerned payments at issue in this case. Giuliani alleged, most notably, that Cohen was "repaid" by President Trump and that President Trump "did know about the general arrangement that Michael would take care of things like this."[32] Following a commercial break, Hannity asked Giuliani if President Trump knew that he had reimbursed Cohen for payments he made to Stormy Daniels.

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[30] *See, e.g.*, Maggie Haberman & Michael S. Schmidt, *Giuliani to Join Trump's Legal Team*, NEW YORK TIMES (Apr. 19, 2018), https://www.nytimes.com/2018/04/19/us/politics/giuliani-trump.html; Darren Samuelsohn, *Trump brings in Giuliani as court action heats up*, Politico (Apr. 19, 2018, 9:10 PM), https://www.politico.com/story/2018/04/19/giuliani-to-join-trump-legal-team-538371.

[31] Transcript, *Rudy Giuliani on potential Trump interview for Mueller*, FOX NEWS (May 3, 2018, 10:20 AM), https://www.foxnews.com/transcript/rudy-giuliani-on-potential-trump-interview-for-mueller.

[32] *Id.*

Giuliani answered: "Look, I don't know, I haven't investigated that, no reason to dispute that, no reason to dispute my recollection."[33]

When asked about Giuliani's statements two days later, President Trump indicated that Giuliani had not yet begun his role on President Trump's legal team and did not know the relevant facts when he misspoke on *Hannity*.[34] Giuliani also released a statement the following day clarifying that his "references to timing were not describing my understanding of the President's knowledge, but instead, my understanding of these matters."[35]

While appearing on *This Week* with George Stephanopoulos on May 6, 2018, Giuliani reiterated that he did not know when President Trump learned of the payments:

> STEPHANOPOULOS: You – you did call it a settlement payment. The president did make these payments to Michael Cohen over the course of 2017, according to you. Then why did -- on April 5, why did the president deny any knowledge of the payments when in fact, he had made the payments?
>
> GIULIANI: Well I don't know – I don't know when the president learned about it, he could have learned about it after or not connected the whole thing at – at that time. The reality is those are not facts that worry me as a lawyer. . . .[36]

Despite the clear context of Giuliani's statements, including his lack of knowledge and authority, the People [redacted]

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[33] *Id*.

[34] *Transcript of Trump's Remarks on Giuliani and Stormy Daniels, and Korea*, NEW YORK TIMES (May 4, 2018), https://www.nytimes.com/2018/05/04/us/politics/transcript-trump-giuliani-stormy-daniels.html.

[35] Rebecca Ballhaus and Louise Radnofsky, *Rudy Giuliani Seeks to 'Clarify' Remarks About Stormy Daniels Payment*, WALL ST. J. (May 4, 2018, 3:26 PM), https://www.wsj.com/articles/trump-giuliani-will-get-his-facts-straight-1525450034.

[36] *'This Week' Transcript 5-6-18: President Trump's personal attorney Rudy Giuliani and Stormy Daniels' lawyer Michael Avenatti*, ABC NEWS (May 6, 2018), https://abcnews.go.com/Politics/week-transcript-18-president-trumps-personal-attorney-rudy/story?id=54962143.

[redacted]. *See* GJ Ex. 46 [redacted]); GJ Ex. 46A [redacted]; GJ Ex. 47 ([redacted]); GJ Ex. 47A [redacted]); *see also* Aug. 24, 2023 Production Letter at 2 ("At present, the grand jury exhibits are the exhibits the People intend to introduce in our case-in-chief at trial.").

2. Discussion

The statements selected by the People should be excluded from evidence. Giuliani's statements are inadmissible hearsay and do not satisfy the requirements of any hearsay exclusion or exception, including the Speaking Agent Exception or the Agent or Employee Exception created by CPLR § 4549.

There was no agency relationship between President Trump and Giuliani when Giuliani made these statements. *See* CPLR § 4549 ("A statement offered against an opposing party shall not be excluded from evidence as hearsay if made by a person whom the opposing party authorized to make a statement on the subject or by the opposing party's agent or employee on a matter within the scope of that relationship and during the existence of that relationship."); Mem in. Supp. at 1, Bill Jacket, L. 2021, ch. 833 ("The measure would add a new CPLR 4549, and cause New York's hearsay exception to follow the approach of Federal Rule of Evidence 801(d)(2)(D)."); *Morris v. Dep't of Corr. Servs*., 1995 WL 155953, at *8 (N.D.N.Y. Apr. 5, 1995) (Federal Rule of Evidence 801(d)(2)(D) requires the existence of an agency relationship). Notably, the agent's own statement—here Giuliani's—"cannot be used as proof of the agency or employment relationship, or the claimed authority to make the statement, or the scope of the agency or employment." Guide to N.Y. Evid., Admissibility of Hearsay, § 8.01(2). And, in fact, Giuliani was not authorized to make statements concerning Stormy Daniels; nor did Giuliani make the statements within the scope of an agency relationship. Rather, to the extent that any agency relationship existed, it had

not yet started, its scope was "limited" and did not extend beyond Special Counsel Mueller's investigation into potential Russian interference in the 2016 presidential election.[37]

O. Absent An Offer of Proof, The People Should Be Precluded From Introducing The Nearly 100 Statements They Seek To Attribute To President Trump

The People have provided the defense with a listing of 94 statements allegedly made by President Trump in various forms of media, including books, interviews, and social media posts. Many of the statements that the People seek to admit have no apparent relevance to the issues in this case and will only lead to juror confusion. The People should be required to proffer a reason why each individual statement is relevant, and for what purpose they seek to admit them, and then the admissibility of each statement can be determined by the Court, after President Trump has had an opportunity to address the People's professed rationale.

1. Background

Approximately four dozen excerpts come from President Trump's books, some published nearly forty years ago. *See* People's Supplemental Exhibit List (Jan. 3, 2024) (attached as Ex. 5).[38] Indeed, only two of the book statements were made contemporaneously with President Trump's run for office. Ex. 5 at Rows 48-49. The various statements the People seek to use can be grouped into the following categories:

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[37] *See, e.g.*, Associated Press, *Rudy Giuliani To Join Trump Legal Team In Russia Probe*, CBS NEWS (Apr. 19, 2018), https://www.cbsnews.com/sanfrancisco/news/rudy-giuliani-trump-legal-team-russia-investigation/; Pamela Brown, Dana Bash and Sophie Tatum, *Giuliani says he is joining Trump's legal team to help bring Mueller probe to a conclusion*, CNN (Apr. 20, 2018, 2:48 PM), https://www.cnn.com/2018/04/19/politics/giuliani-trump-legal-team/index.html.

[38] Exhibit 5 consists of a list of the excerpted statements the People seek to introduce. For ease of reference this motion will refer to the row numbers provided by the People for each of those statements.

- statements tending to show that President Trump operated his businesses in a highly cost-efficient manner (*e.g.*, Ex. 5 at Rows 1-5, 8-12, 14, 16, 31-32, 41);

- statements that President Trump was hands-on in his business (*id.* at Rows 6, 7, 13, 17-18, 22-28, 33-34, 37, 48);

- statements reflecting his philosophy of aggressively going after anyone who crosses him (*id.* at Rows 19, 21, 35, 36, 46);

- statements tending to show his relationship with or reliance on various employees (*id.* at Rows 38-39, 43); and

- statements reflecting his alleged interactions with women (*id.* at Rows 30, 44-45).

For example, the People seek to admit a statement from President Trump's 1987 book, *The Art of the Deal,* that "What I didn't want to do was run 100 Central Park South as if it were a white-glove Park Avenue building." Ex. 5 at Row 1. Similarly, the People seek to admit the following statement from *Trump: Think Like a Billionaire*:

> The ceiling, the flooring, the walls, the chandeliers, the mirrors – you have to be insane about the details or the whole enterprise will fail. For instance, I've spent a good eight months choosing the right chairs for the ballroom being built at Mar-a-Lago. The ballroom is seventeen thousand square feet in area, so the chairs will be a big part of the room. I have seen probably hundreds of them by now. They have to be just right or the effect will be lessened, if not spoiled. The gilt on them has to be compatible with the entire room, and their shape and comfort must be considered as well. You should be as attentive to details as I am, no matter what the scale of your project.

Ex. 5 at Row 7; *see also, e.g.*, *id.* at Row 47 (Excerpt from 2007 book: "Q: Mr. Trump, since you are not running for president, who do we support and how do we get started? DT: You have a lot of good people. Rudy Giuliani is a very good person. . . . This country is very, very resilient."); *id.* at Row 52 ("While I am not at this time a candidate for the presidency, I will decide by June whether or not I will become one. And I will tell you the reason that I'm thinking about it is that the United States has become the whipping post for the rest of the world. The world is treating us

without respect. They are not treating us properly. America – America today is missing quality leadership."). The same lack of apparent relevancy is true of many of the other statements.

2. Discussion

The People should be precluded from introducing any of the purported statements by President Trump until it has established their relevance and admissibility outside the presence of the jury. In order to avoid any delay during trial, we request that the Court direct the People to make that offer of proof pre-trial.

Many of the books at issue were written with the assistance of a ghostwriter.[39] Even if the People can attribute such statements to President Trump, the evidence has limited probative value. Moreover, most of the statements were written at a substantially different time period from the events at issue in this case, thus negating any possible relevance. Whatever President Trump's style of business operations was in 1987, 2004 and 2007 (when 47 out of the 49 book excerpts were written), is by no means probative for how he would have operated those businesses when he was President of the United States of America. This issue is in actuality not applicable in light of the fact that President Trump, upon assuming the Presidency, had relinquished day to day control of his assets after they were placed in a Trust.

Any minimal probative value that some of these statements may have is outweighed by the unfair prejudice that the statements would cause. For example, the People seek to introduce such

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[39] Indeed, all but one of the books make it clear on its face that it was written together with a co-author. Thus, the byline for *Art of the Deal* is Donald J. Trump and Tony Schwartz; for *Trump: How to Get Rich* and *Trump: Think Like a Billionaire*, it is Donald J. Trump with Meredith McIver; and *Think Big - Make it Happen in Business and Life* was Donald J. Trump together with Bill Zanker. Moreover, although not noted on the cover, *Great Again - How to Fix our Crippled America* was written together with David Fisher. *See*, Trump, Donald (November 2015). Crippled America. Threshold Editions. p. 171 ("I would like to thank David Fisher ... [for] assistance throughout writing this book."); https://www.amazon.com/stores/author/B000APX6JC/about

statements as "For many years I've said that if someone screws you, screw them back," (Ex. 5 at Row 19) and that "When someone hurts you, just go after them as viciously and as violently as you can. Like it says in the Bible, an eye for an eye." *Id.* at Row 21. The People likewise seek to introduce irrelevant statements concerning President Trump's relationship with women that some may be offended by. *See, e.g.* Ex. 5 at Row 44 ("I always think of myself as the best-looking guy and it is no secret that I love beautiful women. That is why I bought the *Miss USA* and *Miss Universe* pageants. I love being around beautiful women."). These statements have no admissible purpose at the trial and would only serve to attempt to portray President Trump to the jury in a negative light. *See People v. Wilkinson*, 43 A.D.2d 565 (2d Dep't 1973) ("It is axiomatic that the prosecution may not attempt to prove a defendant's bad character unless the latter has introduced evidence of his good character").

Finally, even if the People proffer a legitimate basis to admit some of these statements, they should be precluded from admitting cumulative statements that make the same basic point. *See generally People v Rodriguez*, 149 A.D.3d 464, 465-66 (1st Dep't 2017) ("A trial court has wide latitude to admit or preclude evidence after weighing its probative value against any danger of confusing the main issues, unfairly prejudicing the other side, or being cumulative."). Here, for example, statements in Exhibit 5 at Rows 1-4 all relate to the People's view that President Trump was a cost-conscious owner and manager.

P. The Court Should Require The People To Disclose A Realistic Exhibit List

Despite the People's complaints about President Trump's supposed failure to disclose trial exhibits he has not yet marked, the People's exhibit list is currently in such a state of disarray that it is virtually meaningless. Between August 2023 and February 13, 2024, the People have identified an enormous number of trial exhibits that they could not possibly intend in good faith to offer at trial. This includes unspecified "[p]ortions" of the huge amount of data that the People

obtained from Cohen's cell phones. In addition, the People have designated as purported trial exhibits *all* of the exhibits offered in the grand jury. This act is extremely misleading, as many of those alleged trial exhibits were admitted during grand jury testimony from witnesses who are not on the People's list, such as Kellyanne Conway and Robert Costello.[40] The People should be precluded from offering these exhibits at trial, and ordered to disclose forthwith a revised exhibit list that describes with specificity and in good faith the documents they presently intend to offer in their case-in-chief.

IV. CONCLUSION

For the many reasons described above, President Trump respectfully requests that the Court exclude the foregoing evidence and arguments.

Dated: February 22, 2024
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[40] *See, e.g.*, GJ Exs. 45 & 45A ( ), 46 & 46A (, 47 & 47A (, 48 and), 49, 49B, 49C & 49D , 66 ( ), 72 ( ), 75), 76, 76A, 76B, 76C, 76D, 76E & 76F (