

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

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

Plaintiff,

vs.

DONALD J. TRUMP, DONALD TRUMP, JR., ERIC
TRUMP, ALLEN WEISSELBERG, JEFFREY
MCCONNEY, THE DONALD J. TRUMP
REVOCABLE TRUST, THE TRUMP
ORGANIZATION, INC., TRUMP ORGANIZATION
LLC, DJT HOLDINGS LLC, DJT HOLDINGS
MANAGING MEMBER, TRUMP ENDEAVOR 12
LLC, 401 NORTH WABASH VENTURE LLC,
TRUMP OLD POST OFFICE LLC, 40 WALL STREET
LLC, and SEVEN SPRINGS LLC,

Defendants.

Index No. 452564/2022
Engoron, J.S.C.

ORDER TO SHOW CAUSE

UPON reading and filing the annexed Affirmation of Clifford Robert, dated November 15, 2023 and the exhibits annexed thereto; the Affirmation of David Demarest, dated November 14, 2023 and the exhibits annexed thereto, and the Memorandum of Law in Support of a Mistrial, dated November 15, 2023; and upon all the pleadings and proceedings heretofore had herein, and sufficient cause having been shown,

LET Plaintiff People of the State of New York by Letitia James, Attorney General of the State of New York, by her attorneys, show cause before this Court on IAS Part ____, Room ____ of Supreme Court of the State of New York, County of New York, located at 60 Centre Street, New York, New York on the ___ day of ____ 2023, at ____ o'clock, or as soon thereafter as counsel may be heard, why an order should not be made and entered:

- (a) granting a mistrial pursuant to CPLR § 4402; and
- (b) granting such other and further relief as this Court deems just and proper.

Sufficient cause therefore appearing, it is

ORDERED that opposition papers, if any, are to be served on Defendants' counsel via e-filing on or before the ___ day of November 2023; and it is further

ORDERED that reply papers, if any, are to be served on Plaintiff's counsel via e-filing on or before the ___ day of November 2023; and it is further

ORDERED that service of a copy of this Order to Show Cause and the papers upon which it is based, be made on or before November ____, 2023, by e-filing same shall be deemed good and sufficient service thereof.

SUPREME COURT OF THE STATE OF NEW YORK
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PEOPLE OF THE STATE OF NEW YORK, BY
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DONALD J. TRUMP, DONALD TRUMP, JR., ERIC
TRUMP, ALLEN WEISSELBERG, JEFFREY
MCCONNEY, THE DONALD J. TRUMP
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**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A
MISTRIAL**

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Donald J. Trump, Donald Trump, Jr., Eric Trump, Allen Weisselberg, Jeffrey McConney, The Donald J. Trump Revocable Trust, The Trump Organization, Inc., Trump Organization LLC, DJT Holdings LLC, DJT Holdings Managing Member, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, and Seven Springs LLC (collectively “Defendants”) submit this Memorandum of Law in Support of Defendants’ Motion for a Mistrial pursuant to CPLR § 4402.

PRELIMINARY STATEMENT

The Constitution guarantees Defendants a fair and impartial trial. Here, in an unprecedented case commanding worldwide interest and attention, it is imperative that nothing compromise that guarantee and thereby undermine public confidence in our legal system. While counsel are subject to a gag order apparently imposed to impede the issues herein presented from becoming public, it is a fundamental precept of American jurisprudence that sunlight is the best disinfectant. Indeed, “[t]he assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. . . . And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.” Bridges v. California, 314 U.S. 252, 270-271 (1941). While the Court has restricted public criticism of itself on the issues herein presented in a series of unconstitutional gag orders entered *sua sponte*, the Supreme Court instructs that “[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern.” Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 839 (1978).

Moreover, there can be no doubt of the public perception of bias in this case. Even commentators who are politically opposed to President Trump have noted the biased nature of the

proceedings and the astonishing departures from ordinary standards of impartiality. *See, e.g.*, Andrew McCarthy, *Elected Dem AG and Judge Cook Up a Fraud Theory in Trump's New York Trial*, Nat'l Review (Nov. 7, 2023), at <https://www.nationalreview.com/2023/11/elected-dem-ag-and-judge-cook-up-a-fraud-theory-in-trumps-new-york-trial/> (“The case against the former president lacks victims, so Tish James and Arthur Engoron are inventing some.... Engoron keeps cutting Trump and his lawyers off by insisting that he has already decided Trump (a) committed fraud, (b) overvalued his assets, and (c) cannot be insulated by the disclaimer in his SFCs (advising counterparties to do their own due diligence in evaluating asset values).”).

This appearance of bias threatens both Defendants' rights and the integrity of the judiciary as an institution. As developed herein, in this case the evidence of apparent and actual bias¹ is tangible and overwhelming. Such evidence, coupled with an unprecedented departure from standard judicial procedure, has tainted these proceedings and a mistrial is warranted. Specifically, the Court's own conduct, coupled with the Principal Law Clerk, Allison Greenfield's (“Principal Law Clerk”) unprecedented role in the trial and extensive, public partisan activities, would cause even a casual observer to question the Court's partiality. Thus, only the grant of a mistrial can salvage what is left of the rule of law.

¹ On argument on Defendants' motion for a directed verdict, specifically the weight that should be accorded to President Trump's testimony, the Court asked the following question: “Can I bring up something not in the record, but a matter of public knowledge? I think the perfect call with Zelensky about the military aid, there might have been code rather than straightforward talk.” Affirmation of Clifford Robert, ¶ 67. Such reference to a purely political trope demonstrates the Court cannot separate his, and his Principal Law Clerk's, political bias from the obligation to be fair and impartial.

BACKGROUND

A. The Court's Extrajudicial Activities Create an Appearance of Impropriety

This Court has contravened the Code of Judicial Conduct (the “Code”) and created the appearance of impropriety through publicly commenting on a proceeding before him.

Affirmation of David Demarest (“Demarest Aff.”) ¶¶ 16. This Court, in his capacity as a Wheatley School alumnus, has publicly posted links in the Wheatley newsletter he maintains to articles disparaging parties and counsel, including Eric Trump, President Trump, Ms. Habba, and Cushman and Wakefield, and covering his own decisions, in derogation of the Code. 22 N.Y.C.R.R. § 100.3(B)(8) (“A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories”); see also Demarest Aff. ¶¶ 16-17.

- In an October 2, 2020, newsletter, this Court included links to articles about Eric Trump being compelled to testify in a subsection entitled “1967- Art Engoron – Articles about Decisions.” See Affirmation of Clifford Robert (“Robert Aff.”) ¶ 6.
- In the December 28, 2020, newsletter, the Court included links to articles about his decision on the Trump Organization’s claims of privilege from, *inter alia*, Bloomberg, the Washington Post, and CNN. Id. ¶ 7.
- In the February 16, 2021, newsletter, this Court included links to articles relating to the trial, characterizing one as a “humorous, irreverent take.” Id. ¶ 8.
- In the November 7, 2021, newsletter, the Court, in a section entitled “1967 – Man in the News,” linked five articles, again from the Washington Post, CNN, and

Bloomberg, about his order in the special proceeding compelling Defendants to turn over certain documents. Id. ¶ 9.

- In the March 14, 2022, newsletter, the Court likewise, in the “Graduate in the News” section, posted links to articles in the New York Times, Washington Post, and Politico regarding his decision in the special proceeding to order Defendants to testify. Id. ¶ 10.
- In the May 8, 2022, newsletter, the Court posted links to New York Times and Newsweek articles regarding his decision to hold President Trump in contempt. Id. ¶ 11.
- In June 2022, the Court again posted a link to an NPR article that President Trump had lost the appeal. Id. ¶ 12.
- On July 3, 2022, the Court similarly linked an article from Business Insider about Cushman & Wakefield and two days later held it in contempt. Id. ¶ 13.
- Finally, on September 11, 2022, just ten days before this lawsuit was filed, the Court posted a link to an Above the Law article criticizing Ms. Habba. Id. ¶ 14.

B. The Court’s Improper “Co-Judging”

This Court has also impermissibly exceeded its discretion in granting his Principal Law Clerk unprecedented status and input into these proceedings and restricted the speech of anyone who seeks to comment on this status, input and/or perceived partisan bias. This Court, has, during the special proceeding, all pre-trial proceedings and since this trial began, allowed his Principal Law Clerk to preside on the bench with him to his right-hand side. Demarest Aff. ¶ 21. This arrangement is depicted in the below photographs published by Getty Images and the Associated Press.



Justice Arthur Engoron presides over the former President Donald Trump's civil fraud trial alongside his principal clerk, Allison Greenfield. Michael M. Santiago/Getty Images



Justice Arthur Engoron presides over Donald Trump's civil fraud trial as his principal law clerk, Allison Greenfield, sits alongside him. | Shannon Stapleton/Pool via AP

As these photographs reflect, the Principal Law Clerk is given unprecedented and inappropriate latitude. Demarest Aff., ¶23. Indeed, before the Court rules on most issues, the Court either pauses to consult with her on the bench or receives from her contemporaneous written notes. Demarest Aff., ¶ 21. While a Justice of the Court no doubt has ample discretion to consult with his or her Law Secretaries, this unprecedented arrangement exceeds the outer limits of such discretion. Demarest Aff., ¶ 23. At a minimum, the appearance of “co-judging” is manifest, and the public (and litigants) may conclude fairly that an unelected staff member has, as is evident from the above images, a direct role in presiding over the trial. Demarest Aff., ¶ 23. This creates an appearance of impropriety contrary to the letter and spirit of the Rules of Judicial Conduct. See id. ¶ 23; see also 22 N.Y.C.R.R. § 100.2 (“A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities”). Only a judge, not an unelected staff member, may exercise judicial authority under the New York Constitution, and the People of New York declined to elect the Principal Law Clerk when she ran for office. She therefore has no constitutional authority to act as a “co-judge,” and the impropriety of her participation is further magnified by the fact that she has violated a separate canon of ethics by making partisan political contributions in excess of strict limits, *including to organizations actively supporting Attorney General James and opposing President Trump.*

The impact of this untoward level of participation by the Principal Law Clerk cannot be overstated. Indeed, during a candidate forum in connection with her erstwhile campaign for Manhattan Civil Court, the Principal Law Clerk herself framed her role as co-equal, describing her participation in a high-profile real estate case as follows: “*we* were incredibly active in that case” and “*we* tried to stop the two towers.” See <https://youtu.be/3Ug0lo7cYxo?feature=shared&t=2968> at 57:35 - 57:50. During that same

forum, she described her judicial philosophy as driven not by the facts and the law but by political considerations: “[o]ne thing that I think is incredibly important to consider, *what would the people who elected me want me to do* and is there any precedent . . . that would allow me to achieve that outcome.” Id. at 53:51-54:30. This statement is fully contrary to the Rules of Judicial Conduct which mandate that a judge must “be faithful to the law” and “not be swayed by partisan interests.” See Demarest Aff. ¶ 23; see also 22 N.Y.C.R.R. § 100.3(B)(1) (“A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.”).

C. The Gag Orders

Also, as part of her campaign, the Principal Law Clerk created and maintained a “Greenfield4CivilCourt” website, Instagram, and Twitter account. Robert Aff., ¶ 19. In February 2022, while the special proceeding against many of the same defendants was ongoing, she posted on her public “greenfield4civilcourt” Instagram endorsements from the Village Independent Democrats and the Grand Street Democrats. Id. ¶ 20. On February 26, 2022, she made a post purporting to withdraw from the Democratic primary but advised followers to “[k]eep an eye on this space.” Id. ¶ 21. Thereafter, she continued to post on the “greenfield4civilcourt” account. Id. ¶ 22. For example, on April 30, 2022, she posted the picture with Sen. Chuck Schumer² that ultimately was reposted by the @JudicialProtest Twitter account, and, subsequently, President Trump. Id. ¶ 24.

² She captioned the photograph as follows: “[s]o thrilled to attend the Chelsea Reform Democratic Club Founder’s brunch today honoring incredible and fearless lifelong public servants like @senschumer and @repmaloney. Thank you @crdcnyc for a fantastic event!!!!” Id. Upon information and belief, the “greenfield4civilcourt” account is still active but was made private in the days leading up to trial. Id. ¶ 25.

Following a repost of the Schumer picture by President Trump, in what may reasonably be interpreted as an effort to shield the Principal Law Clerk's "co-judging" and partisan political activity from public scrutiny, the Court *sua sponte* entered an unconstitutional gag order prohibiting all parties from "posting, emailing, or speaking publicly" about any members of his staff. NYSCEF Doc. No. 1619. Nonetheless, the Principal Law Clerk's unprecedented role in the proceedings thereafter continued to be the subject of significant on-the-record colloquy.

For example, on October 25, 2023, Mr. Kise described the "considerable tension" caused by her position on the bench and indicated that it is "unusual" for a Principal Law Clerk to sit on the bench. Robert Aff., ¶ 40. Mr. Robert described his experience in New York State, such that he had never seen a situation where "you're literally trying the case to two judges" with "notes constantly being passed," where it "would appear the Court is in consultation with the Principal Law Clerk" with each ruling. Id. ¶ 41. Mr. Robert further described that this Court would "appear to be leaning in one direction and then [will] either receive a note or there will be an eye gesture or a roll of the face and something changes and it is of significant concern to [Defendants]. Id. ¶ 42. Ms. Habba added, "It is incredibly distracting when there are eye rolls and constant whispering at the bench when I'm trying to cross-examine a witness. Id. ¶ 43.

The following day, counsel added, "I think that [President Trump] has a legitimate basis to raise these arguments because he is seeing as he's told me on a regular basis head nods, eye rolls, notes being passed, head shaking, you know, comments on arguments that I'm making." Id. ¶ 44. This Court, notably, had no rejoinder to that statement.

The following week, counsel requested further clarification as to how they could continue to make a record of the Court "accept[ing] a note" or other conduct they believed evinced bias, particularly given news reports of violations of the ethical rules by both this Court and his

Principal Law Clerk. Id. ¶ 46. Counsel also noted that since comments were made on the record about the constant note-passing, the closed-circuit camera angle had been changed, which made it more difficult for the public to see any note-passing.³ Id. ¶ 47.

After further colloquy, this Court concluded that he would continue to “consult” with his Principal Law Clerk “for the trial”—in fact, “every week or every day”—and to consider the record preserved and closed as the Court has “an unfettered, absolute right to consult with my law clerks anytime, anyplace about any matter. Id. ¶ 48. Ultimately, the Court issued a second gag order prohibiting even *counsel* from “making any public statements, in or out of court, that refer to *any* confidential communications, in any form, between my staff and me.” NYSCEF Doc. No. 1631 (emphasis in original).

The following day, counsel sought clarification asking whether moving for a mistrial would implicate the gag order, to which the Court responded, using counsel’s given name rather than his surname, “[d]on’t file that motion, Chris.” Robert Aff. ¶ 50. Then, after yet another “confidential communication” with the Principal Law Clerk the Court allowed Defendants to make a motion without violating the gag order but directed that any such motion would “ha[ve] to be in writing.” Id. ¶ 51

Imposing limits on a party and/or counsel’s ability to address in court the issues herein presented is simply not justifiable and certainly not consistent with the avoidance of an appearance of impartiality. The right to a fair trial is sacrosanct. Thus, anything that at all infringes, potentially or otherwise, on such a right must and should be questioned in an open and public forum.

³ The Court admitted knowing the camera angle had been changed but feigned ignorance as to the reason: “[a]s for the camera being moved, I was vaguely aware that Rob, the tech person, was switching the angle of the camera. Never occurred to me that it could have anything to do with what we’re discussing today or why it was.” Robert Aff. ¶ 47.

D. The Principal Law Clerk's Partisan Activities Are Imputed to the Court

The appearance of impropriety created by this Court's Principal Law Clerk's "co-judging," and this Court's repeated attempts to silence discussion thereof, is further exacerbated by her demonstrated partisanship, which is imputed to this Court under the Code. 22 N.Y.C.R.R. § 100.5(C).

First, this Court has violated the Code by permitting his Principal Law Clerk to contribute to Democrat causes in excess of the permitted amounts and engage in impermissible partisan activity. Demarest Aff. ¶ 29; see also 22 N.Y.C.R.R. § 100.5(C)(2) ("A judge shall prohibit members of the judge's staff" from "contributing, directly or indirectly, money or other valuable consideration in amounts exceeding \$500 in the aggregate during any calendar year."). As set forth below, *during the pendency of the special proceeding leading up to this case and then after this case was filed by the Attorney General*, she contributed over \$3,000 to Democrat candidates and organizations in 2022 and over \$900 in 2023. Robert Aff., ¶ 17. The official New York State website publicly chronicles these contributions as follows:

Expand	Contribution Date	Amount	Contributor Name	Detail Original Name	Contributor Address	Transaction Type	Contributor Type	Transfer Type	Recipient	Disclosure Report	Committee Type
+	05/02/2022	\$200.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Four Freedoms Democratic Club - ID# 2673	2022 State/Local 32-Day Pre-Primary	Authorized Multi-Candidate Committee
+	04/05/2022	\$175.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Chelsea Reform Democratic Club Crdc - ID# 11340	2022 State/Local July Periodic	Authorized Multi-Candidate Committee
+	06/15/2022	\$350.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		West Side Democrats, Inc - ID# 14178	2022 State/Local July Periodic	Authorized Multi-Candidate Committee
+	09/08/2022	\$50.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		New Yorkers For Alex Bores - ID# 9788	2022 State/Local 32-Day Pre-General	Authorized Single Candidate Committee
+	10/26/2022	\$50.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Four Freedoms Democratic Club - ID# 2673	2023 State/Local January Periodic	Authorized Multi-Candidate Committee
+	07/25/2022	\$210.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Chelsea Reform Democratic Club Crdc - ID# 11340	2023 State/Local January Periodic	Authorized Multi-Candidate Committee

+	09/12/2022	\$100.00	Allison Greenfield		United States	A - Monetary Contributions Received From Ind. & Part.	Individual		Grand Street Democrats - ID# 20442	2023 State/Local January Periodic	Authorized Multi-Candidate Committee
+	12/02/2022	\$125.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Hell's Kitchen Democrats - ID# 1032	2023 State/Local January Periodic	Authorized Multi-Candidate Committee
+	11/21/2022	\$250.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Downtown Independent Democrats DID - ID# 18654	2023 State/Local January Periodic	Authorized Multi-Candidate Committee
+	11/10/2022	\$250.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Downtown Independent Democrats DID - ID# 18654	2023 State/Local January Periodic	Authorized Multi-Candidate Committee
+	09/06/2022	\$250.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Village Independent Democrats - ID# 7276	2023 State/Local 32-Day Pre-Primary	Authorized Multi-Candidate Committee
+	12/27/2022	\$500.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Jim Owles Liberal Democratic Club - ID# 10404	2023 State/Local January Periodic	Political Action Committee

	06/01/2022	\$250.00	Allison Greenfield	[REDACTED]	A - Monetary Contributions Received From Ind. & Part.	Individual		Jim Owles Liberal Democratic Club - ID# 10404	2022 State/Local 11-Day Pre-Primary	Political Action Committee
	06/01/2022	\$250.00	Allison Greenfield	[REDACTED]	A - Monetary Contributions Received From Ind. & Part.	Individual		Jim Owles Liberal Democratic Club - ID# 10404	2022 State/Local 11-Day Pre-Primary	Political Action Committee
	03/10/2022	\$100.00	ALLISON GREENFIELD	[REDACTED]	A - Monetary Contributions Received From Ind. & Part.	Individual		Sivin for New York - ID# 186373	2022 State/Local 32-Day Pre-Primary	Authorized Single Candidate Committee
	05/12/2022	\$125.00	ALLISON GREENFIELD	[REDACTED]	A - Monetary Contributions Received From Ind. & Part.	Individual		Sivin for New York - ID# 186373	2022 State/Local 32-Day Pre-Primary	Authorized Single Candidate Committee
	03/03/2022	\$50.00	ALLISON GREENFIELD	[REDACTED]	A - Monetary Contributions Received From Ind. & Part.	Individual		Sivin for New York - ID# 186373	2022 State/Local 32-Day Pre-Primary	Authorized Single Candidate Committee
	02/13/2022	\$25.00	ALLISON GREENFIELD	[REDACTED]	A - Monetary Contributions Received From Ind. & Part.	Individual		New York County Democratic Committee - ID# 6732	2022 State/Local 32-Day Pre-Primary	Constituted County House Keeping Committee
	07/17/2022	\$50.00	ALLISON GREENFIELD	[REDACTED]	A - Monetary Contributions Received From Ind. & Part.	Individual		New York County Democratic Committee - ID# 6732	2022 State/Local 32-Day Pre-General	Constituted County House Keeping Committee

As noted, the 2023 partisan political contributions were made *while this action was pending!*⁴

Expand	Contribution Date	Amount	Contributor Name	Detail Original Name	Contributor Address	Transaction Type	Contributor Type	Transfer Type	Recipient	Disclosure Report	Committee Type	Filer type
+	04/06/2023	\$100.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Coda District Leaders - ID# 5385	2023 State/Local 32-Day Pre-Primary	Authorized Multi-Candidate Committee	County
+	05/17/2023	\$100.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Coda District Leaders - ID# 5385	2023 State/Local 32-Day Pre-Primary	Authorized Multi-Candidate Committee	County
+	02/06/2023	\$20.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Friends Of Kim - ID# 16541	2023 State/Local July Periodic	Authorized Single Candidate Committee	County
+	05/30/2023	\$250.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Jim Owles Liberal Democratic Club - ID# 10404	2023 State/Local 11-Day Pre-Primary	Political Action Committee	State
+	01/26/2023	\$56.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Harvey For New York - ID# 308705	2023 State/Local July Periodic	Public Campaign Finance Committee	State
+	07/21/2023	\$75.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		New York County Democratic Committee - ID# 6732	2023 State/Local 32-Day Pre-General	Constituted County House Keeping Committee	County
+	03/23/2023	\$400.00	ALLISON GREENFIELD			A - Monetary Contributions Received From Ind. & Part.	Individual		Four Freedoms Democratic Club - ID# 2673	2023 State/Local July Periodic	Authorized Multi-Candidate Committee	State

More troubling than even the fact of these contributions exceeding lawful limits, many (if not all) of these organizations *actively support the Attorney General!* For example, the president of the Grand Street Democrats published an op-ed in October 2020 proclaiming that “Letitia James Serves as Last Line of Defense Against Trump Administration.” See <https://www.gothamgazette.com/130-opinion/9811-letitia-james-last-line-defense-against-trump-administration>. The Principal Law Clerk contributed to the Grand Street Democrats, which

⁴ Complete copies of the contributions spreadsheet are available online at <https://publicreporting.elections.ny.gov/Contributions/Contributions>.

endorsed the Attorney General in 2022 openly supported her fight against President Trump, on September 12, 2022—*less than two weeks before the Attorney General filed this action!*



See <https://twitter.com/grandstreetdems/status/1348994426580979713>. Moreover, on October

27, 2022, *while this case was pending*, the Principal Law Clerk attended a Grand Street

Democrats event, where speakers, *inter alia*, openly advocated for Joe Biden. See

<https://www.youtube.com/watch?v=DMCEeSLugHE> at 6:40-7:15. Speakers also commented, to

significant applause, on the fight against “development and the profits of big real estate” and the

“consequences of the former President,” *i.e.*, President Trump. See

<https://youtu.be/DMCEeSLugHE?feature=shared&t=609> at 12:14-12:21 and 12:24-12:31.

All these contributions and partisan activities violate the Code and are attributable to the Court. Indeed, even as a candidate for judicial office, Ms. Greenfield was bound by Section 100.5 of the Code, which precludes a “candidate for public election to judicial office” from, *inter alia*, “**engaging in [] partisan political activity**,” “publicly endorsing . . . another candidate for public office,” and “**attending political gatherings**.” At base, “a judge or a non-judge who is a candidate for public election to judicial office . . . shall maintain the dignity appropriate to judicial office.” 22 N.Y.C.R.R. § 100.5(A)(4). Yet here, the Principal Law Clerk, who sits on the bench next to the presiding judge, co-judging and consulting with him on a real-

time basis about nearly every ruling, has engaged in prohibited partisan political activity with respect to *the parties before the Court, while their case is pending before the Court.*

E. The Court's Demonstrable Bias

The foregoing partisan conduct from both this Court and his Principal Law Clerk has resulted in biased rulings throughout these proceedings. First, the Court refused to transfer this complex case to the Commercial Division, where it unquestionably belongs. Robert Aff., ¶ 54. Shortly thereafter, on November 22, 2022, before the Attorney General even opposed Defendants' motion to dismiss or any discovery had been exchanged, this Court determined the trial would begin on October 2, 2023, the date suggested by the Attorney General in her proposed preliminary conference order.⁵ NYSCEF Doc. Nos. 228-229. The Court ignored both the presumptive 15-month standard in complex commercial cases and the burden imposed on the defense to review and assimilate millions of pages of documentary evidence and evaluate dozens of witnesses. Robert Aff., ¶ 56. This compressed schedule also provided a massive advantage to the Attorney General, whose staff had already conducted an exhaustive, three-year investigation in preparation for filing the case and taking it to trial. Robert Aff., ¶ 57. Thereafter, despite a letter request and a motion by Defendants, this Court refused to adjourn the trial, stating it did not "see a need for extensive disclosure." NYSCEF Doc. No. 528, 558.⁶

On January 6, 2023, this Court denied Defendants' motions to dismiss in their entirety. NYSCEF Doc. No. 453. On June 27, 2023, the First Department, on appeal of this Court's decision, modified the underlying decision and order, dismissing certain claims as time-barred

⁵ This Court entered the Attorney General's proposed preliminary conference order essentially as written. NYSCEF Doc. Nos. 228-229.

⁶ The third-party discovery received by Defendants in December 2022 consisted of several terabytes of data containing 700,000 documents, which, after processing and de-duplicating, would require more than 11,000 hours to review. Robert Aff., ¶ 57.

and directing this Court to determine the scope of the tolling agreement. NYSCEF Doc. No. 641. On September 5, 2023, with an impending trial date and no action by this Court to comply with the First Department mandate, Defendants moved for a brief stay of trial until after this Court ruled on the motions for summary judgment. Defendants submitted a fifteen-page memorandum of law, affirmations in support, and three exhibits. NYSCEF Doc. Nos. 1267-1272. Less than twenty-four hours later, this Court uploaded an unsigned order to show cause with the notation “[d]ecline to sign; Defendants’ arguments are completely without merit.” NYSCEF Doc. No. 1275.

Defendants were then forced to commence an Article 78 proceeding to compel this Court to comply with the First Department’s directives. Case No. 2023-04580, NYSCEF Doc. Nos. 2-4. This Court finally issued a decision on the summary judgment motions on September 26, 2023, a mere five days before trial was scheduled to begin. NYSCEF Doc. No. 1531. That thirty-five-page decision denied Defendants’ motion in its entirety and granted the Attorney General’s motion for summary judgment.⁷ The Court also granted the Attorney General’s motion for sanctions against Defendants’ counsel. *Id.* This left the Defendants in the unprecedented position of discovering what claims and issues would actually be tried just a few days before beginning a months-long trial with dozens of witnesses.

The trial began as ordered on October 2, 2023. On October 3, 2023, the Court, *sua sponte*, imposed its first gag order based on President Trump’s reposting of the Principal Law Clerk’s Schumer photograph:

Consider this statement *a gag order forbidding all parties from posting, emailing, or speaking publicly about any members of my staff.* Any failure to

⁷ The Court imposed sanctions on Defendants’ counsel for making legal arguments to preserve same for appeal. *Id.*

abide by this directive will result in serious sanctions. NYSCEF Doc. No. 1619 (emphasis added).⁸

In contravention of the Judiciary Law and Rules of the First Department, the Court subsequently twice sanctioned President Trump for violation of that gag order. On October 20, 2023, this Court *sua sponte* issued another order finding that President Trump violated the gag order because the original post was inadvertently still archived on the Trump campaign website. NYSCEF Doc. No. 1584. This Court proceeded to state that “this Court is way beyond the ‘warning’ stage” and fined him \$5,000. *Id.*

On October 25, 2023, during Mr. Cohen’s testimony, this Court *sua sponte* raised President Trump’s statement to the press made moments before in the hallway outside the courtroom:

It was just brought to my attention that the Associated Press reported, I wasn’t there, this is the Associated Press, that Mr. Donald J. Trump just stated the following to the press outside the courtroom:

“This judge is a very partisan judge with a person who is very partisan sitting alongside of him, perhaps even much more partisan than he is.”

Now, it’s very easy for the public, for anyone to know who that person is.

Robert Aff. ¶ 33. This Court simply assumed President Trump was referring to the Principal Law Clerk. NYSCEF Doc. No. 1598. While President Trump testified, under oath, he had been referring to Mr. Cohen,⁹ this Court nonetheless concluded, *relying on its own testimony* describing the layout of the bench and witness box, that:

As the trier of fact, I find that the witness is not credible; that he was referring to my law clerk, the principal law clerk, who is sitting much closer to me, who doesn’t have a barrier, whom I

⁸ President Trump’s caption to the post was as follows: “Schumer’s girlfriend, Alison [sic] R. Greenfield, is running this case against me. How disgraceful! This case should be dismissed immediately.” Robert Aff., ¶ 25.

⁹ President Trump also testified that he believed the Principal Law Clerk was “very biased against us” and that he had “made that clear.” Robert Aff. ¶ 36.

believe has been accused by the defendant of being partisan or Democrat or partisan Democrat. I hereby fine you \$10,000, which is on the low side, to be paid within 30 days to the Lawyer's Fund for Client Protection. Robert Aff. ¶ 37.

The Court thereafter issued the second gag order prohibiting even *counsel* from commenting on his Principal Law Clerk's public conduct in the courtroom. NYSCEF Doc. No. 1631.

Finally, this Court's evidentiary rulings throughout the trial have been both legally misguided and biased in favor of the Attorney General. For one, this Court has overruled, as a matter of course, any objection to the Attorney General's introduction of time-barred evidence under the guise it bears on potential injunctive relief, despite being clearly rejected by the First Department decision. Robert Aff. ¶ 62. The First Department unequivocally dismissed as time-barred claims that accrued prior to July 2014 for defendants subject to the tolling agreement and claims that accrued prior to February 2016 for the other defendants. NYSCEF Doc. No. 641. The First Department further directed this trial be circumscribed to the timely claims that accrued, *i.e.*, the loans closed, after 2014. Nonetheless, the Court has overruled summarily Defendants' continuing objections to documents indisputably predating that period, as well as testimony on events prior to 2014. Robert Aff. ¶ 65. This Court has also permitted the introduction of hearsay testimony under inapplicable exceptions and, in some circumstances, without identifying *which* Defendant(s) it might be admissible against. Robert Aff. ¶ 63.

Additionally, this Court denied Defendants' motion *in limine* to preclude expert testimony explicitly keyed to filling in gaps in the Attorney General's *prima facie* case with testimony that the Attorney General failed to elicit from fact witnesses. NYSCEF Doc. Nos. 1623-1624. The Attorney General never elicited any testimony from any bank representative as to what, if anything, the respective banks would have done differently in approving the subject

loans. NYSCEF Doc. No. 1623. Instead, this Court permitted the Attorney General to backfill the hole in her *prima facie* case with the testimony of a purported expert. Id.

ARGUMENT

A MISTRIAL IS WARRANTED DUE TO DEMONSTRABLE BIAS

A. The Legal Standard For a Mistrial

CPLR § 4402 provides that “[a]t any time during the trial, the court, on motion of any party, may order a continuance or a new trial in the interest of justice on such terms as may be just.” The “decision to grant or deny a mistrial in the interest of justice pursuant to CPLR 4402 is within the sound discretion of the court, and is to be made on a case-by-case basis.” Johnson-Hendy v. Mosu, 201 A.D.3d 896 (2d Dep’t 2022). The denial of such a motion “may, given the facts of a particular case, constitute reversible error where it appears that the motion should have been granted to prevent a substantial possibility of injustice.” Id. “A fair trial in a fair tribunal is a basic requirement of due process.” People v. Towns, 33 N.Y.3d 326, 328 (2019), quoting In re Murchison, 349 U.S. 133 (1955). Moreover, “[n]ot only must judges actually be neutral, they must appear so as well.” Towns, 33 N.Y.3d at 331. Where a trial court “abandon[s] the role of neutral arbiter and assume[s] the function of an interested party,” it “creat[es] a specter of bias that requires reversal.” Id. at 328.

The code of judicial conduct underscores fully the importance of these responsibilities. See 22 NYCRR § 100.2(A) (“[A] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”); 22 NYCRR § 100.3(B)(4) (“A judge shall perform judicial duties without bias or prejudice against or in favor of any person.”). The Code further provides that a “judge shall prohibit members of the judge’s staff who are the judge’s personal appointees from . . .

contributing, directly or indirectly, money or other valuable consideration in amounts exceeding \$500 in the aggregate during any calendar year to all political campaigns for political office, and other partisan political activity including, but not limited to, the purchasing of tickets to political functions.” 22 N.Y.C.R.R. § 100.5(C)(2); see also Judicial Ethics Opinions 07-11 (2007), 10-76 (2010), 97-103 (2010), available at: <https://ethicssearch.nycourts.gov/>. Finally, the Code provides that “[a] judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories.” 22 N.Y.C.R.R. § 100.3(B)(8).

B. The Court’s Ample Bias Warrants a Mistrial

1. This Court Has Violated the Code Both Directly and By Imputation

First, as detailed above, the Court’s own public comments in the Wheatley newsletter are beyond the pale. The Court is indisputably bound by the Code, which precludes comment on a pending or impending case. 22 N.Y.C.R.R. § 100.3(B)(8) (“A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories.”); see also 22 N.Y.C.R.R. § 100.4(A) (“A judge shall conduct all of the judge’s extra-judicial activities so that they do not . . . cast reasonable doubt on the judge’s capacity to act impartially as a judge.”) Regardless of the venue, and the fact that the links were often posted without comment¹⁰, this Court’s repeated publicizing of its own rulings—and, worse, previewing forthcoming rulings—gives an appearance of impropriety in contravention of the Code. Id.

This Court has also violated the Code by permitting his Principal Law Clerk to make political donations in excess of the permitted amount. See 22 N.Y.C.R.R. § 100.5. This conduct is directly imputed to the Court under the Code. See Demarest Aff. ¶29. Additionally, the

¹⁰ The Court’s sanction of President Trump makes clear it understands the import of reposting.

Principal Law Clerk's position as a *de facto* co-judge violates the Code. As noted, this unprecedented arrangement exceeds the discretion of the Court and creates the appearance, if not the fact, of a co-judge presiding over the trial. Demarest Aff. ¶ 23. Indeed, having the Principal Law Clerk sitting on the bench leads inexorably to the conclusion she is acting in accordance with her overtly public and partisan views to essentially implement what "the [political] people who [support] me want me to do." The notion she somehow provides impartial input is, based on her own words and conduct, untenable. This creates an appearance of impropriety which violates the Code. See id. ¶ 23, citing 22 N.Y.C.R.R. § 100.2 ("A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities"). Indeed, "Court employees shall avoid impropriety and the appearance of impropriety in all their activities" and "shall conduct their outside activities in a manner that does not conflict with their employment duties." 22 N.Y.C.R.R. § 50.1.

The Principal Law Clerk's extensive partisan activities during the pendency of the special proceeding and this action violate the Code.¹¹ As set forth in detail above, public postings with prominent Democrats, contributions to Democrat causes in excess of the amount permitted under the Code, and support for, *inter alia*, the Grand Street Democrats and attendance at and participation in highly partisan political activities both violates the Code and raises serious concerns regarding bias and impartiality, especially given her active role "co-judging" this trial.¹² All of this conduct, including supporting political groups vehemently opposed to President

¹¹ The fact the Principal Law Clerk was campaigning for judicial office while engaging in certain of the conduct does not exculpate her or this Court, as ***there is no exception to the stated maximum contribution limit or other relevant Rules for candidates.*** Demarest Aff. ¶ 30; see also § 100.5(A)(4) ("[A] judge or a non-judge who is a candidate for public election to judicial office . . . shall maintain the dignity appropriate to judicial office.")

¹² She has also engaged with and financially supported numerous other partisan political organizations, including (1) the Manhattan Democrats, whose County Leader, Keith Wright, has spoken out against President Trump and in favor of Alvin Bragg's indictment, (2) the Village Independent Democrats, who endorsed the Attorney General and campaigned actively against President Trump, and (3) the Four Freedoms Democratic Club, which has likewise taken anti-Trump positions. Robert Aff., ¶ 18.

Trump, was singularly partisan and, thus, in violation of the Code. Demarest Aff. ¶ 29. Simply put, the Court must “be faithful to the law” and “not be swayed by partisan interests.” 22 N.Y.C.R.R. § 100.3(B)(1).

In sum, there is simply no room at the bench for such open and obvious indicia of bias. Indeed, left unchecked, the introduction of such demonstrable pro-Attorney General and anti-Trump/big real estate bias into a case of worldwide interest involving the front-runner for the Presidency of the United States impugns the integrity of the entire system.

2. The Gag Orders and Enforcement Thereof Evince Further Bias

The gag orders and the enforcement thereof reveal the Court has christened itself *camera stellata*: judge, jury, and executioner, proceeding *sua sponte* to act against President Trump in violation of the Constitution, the Judiciary Law, and First Department rules. This Star Chamber approach is particularly indefensible when the gag orders *actually shield the Court itself from public criticism for perceived bias*—one of the most fundamental rights under the First Amendment. *See Landmark Commc'ns*, 435 U.S. at 839. This Court’s efforts to silence counsel from objecting to and creating a record of what anyone could observe publicly taking place in the courtroom during the trial thus plainly augment the appearance of impropriety. Demarest Aff., ¶ 12.

First, the October 20, 2023, sanction was raised *sua sponte* by this Court upon its own independent, *ex parte* investigation, in violation of the Judiciary Law and First Department rules. A Court is permitted to summarily punish contempt, *i.e.*, in the absence of a motion on notice or order to show cause, only “[w]here the offense is committed in the immediate view and presence of the Court.” Judiciary Law § 755; see also Judiciary Law § 751. The continued existence of an online post, inadvertent or otherwise, on President Trump’s website is indisputably outside the

view and presence of this Court.¹³ Setting aside the procedural infirmities of punishing President Trump in contravention of principles of fundamental fairness and due process, and the plain language of Judiciary Law, this Court has made clear it would like nothing more than to manufacture reasons to sanction the frontrunner for the 2024 Presidential election because he disagrees with him about the existence of bias in these proceedings.

Second, the October 26, 2023, sanction was again raised *sua sponte* after the Court learned of a remark President Trump made to the Associated Press during Mr. Cohen's testimony that this Court is "very partisan [] with a person who is very partisan sitting alongside of him." NYSCEF Doc. No. 1598. That remark was also made outside of this Court's presence but nonetheless punished summarily in contravention of Judiciary Law §§ 751, 755.¹⁴ Put simply, this Court had no authority under the Judiciary Law or any other law to summon President Trump to the stand for spontaneous questioning. Worse even, this Court summarily deemed President Trump's testimony "not credible." Robert Aff. ¶ 37.¹⁵

A trial judge cannot serve "in the roles of complainant, indicter, prosecutor and Judge, a situation at odds with the notion of fundamental fairness." People v. Alomar, 93 N.Y.2d 239, 245 (1999), citing In re Murchison, 349 U.S. 133, 137 (1955). Yet here, this Court has served as (1) complainant, in *sua sponte* raising the issue of the statement to the Associated Press, (2) indicter,

¹³ To the extent that the order consisted of vituperative criticism of his Principal Law Clerk and this Court's testimony was necessary to the adjudication thereof, this Court should have been disqualified from "presiding at [any] plenary hearing or trial." 22 N.Y.C.R.R. § 604.2(a)(1).

¹⁴ This sanction was plainly predicated on the Court's own record testimony on the orientation of the bench and the witness box and consisted of vituperative criticism about this Court and his Principal Law Clerk, such that this Court was disqualified from conducting the examination of President Trump or presiding over the proceedings at all. 22 N.Y.C.R.R. § 604.2(a)(1).

¹⁵ In the written decision characterizing President Trump's testimony as "hollow and untrue," this Court relied on its interpretation of the Oxford English Dictionary definition of "alongside," President Trump's "past public statements" about Mr. Cohen, and that I "mirror[ed] the language [President Trump] used in public statements to the press on October 2, wherein he inappropriately and unquestionably spoke" about his Principal Law Clerk. NYSCEF Doc. No. 1598.

in calling President Trump to the stand to give testimony, (3) prosecutor, in questioning President Trump on the stand, and (4) judge, in deeming President Trump not credible and issuing the decision sanctioning him. Such a conflation of roles is plainly improper under New York law and in derogation of deeply rooted principles of due process and fundamental fairness. Indeed, “[i]t would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused of his investigations.” Murchison, 349 U.S. at 137. The Court here effectively “assumed the advocacy role traditionally reserved for counsel and ventured from its own role as a neutral arbiter stationed above the clamor of counsel or the partisan pursuit of procedural or substantive advantage.” People v. Towns, 33 N.Y.3d 326, 328 (2019). Worse even, it did so to prevent public comment on his Principal Law Clerk and her demonstrated, and public, partisan activity.

Even if President Trump had referred to the Principal Law Clerk - which he did not - the veracity and propriety of the conclusion that she is a partisan has only been bolstered since the statement was made. Having made credibility findings of testimony the Court compelled in violation of the rules, all the while presiding over a bench trial, the Court cannot un-ring the bell of its own demonstrated bias. This entire episode establishes fully the Court has already determined President Trump is incredible based on nothing more than the Court’s own surmise. To proceed with a bench trial under these circumstances would be the apogee of bias.

Third, on November 3, 2023, the Court impermissibly extended its gag order to counsel for seeking to preserve for the appellate record their well-founded objections. This unconstitutional order interferes with counsel’s ability to zealously advocate for their clients and was entered after—and arguably, because of—comments by counsel on the record relative to the Principal Law Clerk’s “co-judging” and potential bias. In the written order, this Court again

specifically named “defendants’ principal attorneys” and accused them of making “repeated, inappropriate remarks” about his Principal Law Clerk “falsely accusing her of bias against them and of improperly influencing the ongoing bench trial.” NYSCEF Doc. No. 1631. As the record herein reflects, the record observations of counsel were both accurate and well-founded.

Nonetheless, the gag order curtails Defendants’ rights by precluding their counsel from abiding by their ethical obligations to create a thorough record on appeal. *Id.* Given the Principal Law Clerk’s obvious and demonstrable partisan activities, and her *de facto* role as “co-judge,” the notion of impeding counsel’s ability to establish a record and/or seek appropriate relief creates an unquestionable appearance of bias and impropriety inconsistent with both the Code and the constitutional guarantee of a fair trial.

3. Other Rulings

As noted above, this Court’s evidentiary and *in limine* rulings at trial demonstrate bias. The reason for these rulings appears plain: the Court intends to, in contravention of the First Department’s decision, consider “evidence,” rather than “claims,” accruing prior to 2014 in order to grant overbroad and unauthorized injunctive and monetary relief. The Court’s rejoinder throughout the trial—effectively that it is uniquely capable of separating the wheat from the chaff—neither vitiates the harm now nor the inevitable harm that will result from an adverse judgment. The Court’s desire to “get the whole picture” and not “blind” itself does not justify admitting time-barred, hearsay, or improper expert evidence. Robert Aff. ¶ 65.

In sum, this Court’s bias is exemplified well by remarks made during President Trump’s own November 6, 2023, testimony. Specifically, this Court stated it is “not here to hear what [President Trump] has to say.” Robert Aff. ¶ 59. The Court expounded as follows: “[w]ell, Mr.

Kise, I think you said several times we should hear what he did, what the witness has to say. No, I am not here, and these people are not here, and the Attorney General is not here to hear what [President Trump] has to say.” Id. ¶ 60.

The role of the Court, particularly in a bench trial, is to carefully listen to and consider the testimony of all witnesses without bias or predilection. The foregoing statements, especially coupled with the Court's prior, and inappropriate, finding President Trump is not credible, certainly create an appearance of bias. These record facts also lead, fairly, to the conclusion the Court has predetermined the outcome of this proceeding and is merely going through the motions before it ultimately doles out punishment.

On a fundamental level, the way to dispel the appearance of impropriety is not to double down by precluding comment on it or by simply ignoring its manifest existence. At this point, the taint of these proceedings is both obvious and irreversible. Worse even, the Court has abrogated its constitutional responsibility to ensure each Defendant, including President Trump, receives a fair trial free from even the appearance of impropriety and impartiality. Therefore, given the demonstrable partisan bias present on the bench at trial, the only way to maintain public confidence in a truly independent and impartial judiciary and the rule of law is to bring these proceedings to an immediate halt.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant a mistrial and grant any other such and further relief it may think proper.

Dated: New York, New York
November 15, 2023

Respectfully submitted,


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-and-

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

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

Plaintiff,

vs.

DONALD J. TRUMP, DONALD TRUMP, JR., ERIC
TRUMP, IVANKA TRUMP, ALLEN WEISSELBERG,
JEFFREY MCCONNEY, THE DONALD J. TRUMP
REVOCABLE TRUST, THE TRUMP
ORGANIZATION, INC., TRUMP ORGANIZATION
LLC, DJT HOLDINGS LLC, DJT HOLDINGS
MANAGING MEMBER, TRUMP ENDEAVOR 12
LLC, 401 NORTH WABASH VENTURE LLC,
TRUMP OLD POST OFFICE LLC, 40 WALL STREET
LLC, and SEVEN SPRINGS LLC,

Defendants.

Index No. 452564/2022

Hon. Arthur F. Engoron

**EXPERT AFFIRMATION OF
DAVID DEMAREST, J.S.C. (Ret.)**

STATE OF FLORIDA }
 } ss.:
COUNTY OF HERNANDO }

DAVID DEMAREST, J.S.C. (Ret.), an attorney duly admitted to practice law before the
Courts of the State of New York, hereby affirms the following statements to be true under the
penalty of perjury:

Introduction

1. I have been retained as an expert by Robert & Robert PLLC, which is counsel for
defendants Eric Trump and Donald Trump, Jr., in the above-captioned action. I have been asked
to provide an opinion with respect to the judicial conduct of the Hon. Arthur F. Engoron, J.S.C.
("Justice Engoron") and his Principal Law Clerk Allison Greenfield, Esq. (the "Law Clerk") on
behalf of all defendants.

2. For the reasons set forth below, it is my opinion, to a reasonable degree of legal certainty, that the judicial conduct of Justice Engoron and his Law Clerk in this action has violated the Code of Judicial Conduct.

Professional Qualifications

3. I am an attorney at law duly admitted to practice law in the State of New York.
4. I graduated from St. Lawrence University in 1970, and from Albany Law School in 1973.
5. I was a Commissioned Officer in the United States Army Reserve. I was on active duty attending Quartermaster Officer Basic School from October 1973 to January 1974.
6. Prior to serving on the bench, I was engaged in the general practice of law from 1974 to 1983. During that time, I handled civil and criminal matters, including real estate, domestic relations, and commercial matters. In 1983, I left the general practice of law to serve within the New York State Unified Court System as the Principal Law Clerk to the Hon. Edmund L. Shea, J.S.C. In 1984, I was given the opportunity to serve as the Principal Law Clerk to the Hon. Michael W. Duskas, J.S.C. I served in that position until 1993.
7. I was elected to the Supreme Court of the State of New York for the Fourth Judicial District in 1993, and began my first term in January of 1994. I was re-elected to a second term in 2007. During that time, I presided over a general calendar of civil trials and proceedings, and many of the opinions that I authored were published.
8. After being employed by the New York State Unified Court System for more than 30 years, I retired from the bench in 2015. At that time, having had more than 20 years on the Bench, I was the longest-serving Supreme Court Justice in the history of St. Lawrence

County. Since retiring from the Bench, I have provided, and continue to provide, mediation and arbitration services throughout northern New York, primarily in civil litigation.

9. I have been a Member of the Pattern Jury Instructions (Civil) Committee of the Association of Justices of the Supreme Court of the State of New York since 2003, which consists of active and retired Supreme Court Justices who edit Pattern Jury Instructions (Civil) published by Thompson-Reuters. I was elected Chair of the Committee in 2015, and devote much of my time to that role. The Committee meets fairly regularly, usually in New York City, and is responsible for drafting jury charges and regularly-updated commentaries on the law, providing a new edition of the Pattern Jury Instructions (Civil) each year.

10. I am also a former President of the Association of Justices of the Supreme Court of the State of New York, former President and Director of the St. Lawrence County Bar Association, former Member of the Executive Council of the New York State Conference of Bar Leaders (representing eleven County Bar Associations in Northeastern, New York), former Delegate of the New York State Bar Association House of Delegates, former Member of the Board of Directors of the North County Legal Services, Inc., and former Member of the Board of Directors of the St. Lawrence County Legal Assistance Corporation.

11. I have lectured to various bar association groups on the Uniform Rules for the Trial Courts of the State of New York, and have presented continuing legal education programs for the New York State Academy of Trial Lawyers. I have also been active in community-service organizations.

12. My curriculum vitae is annexed hereto as **Exhibit A**.

Basis for Opinions and Materials Reviewed

13. My opinion and analysis are based upon over 30 years of experience in the New York State Unified Court System, including more than 20 years on the Bench. In forming my opinion and preparing this affirmation, I have considered the documents listed in **Exhibit B**.

Summary of Opinions

14. Set forth below is a summary of the opinions I express herein with respect to the judicial conduct of Justice Engoron and his staff:

- a. Justice Engoron's repeated publication in the Wheatley School Alumni Association Newsletter, as the self-proclaimed Founder and Editor of the Newsletter, of articles about his own decisions in the Special Proceeding (defined *infra*), which articles in some instances disparage the parties and counsel, creates an appearance of impropriety in his judicial activities in contravention of the Code of Judicial Conduct, and could undermine public confidence in the integrity of and impartiality of the judiciary, most especially in a case of worldwide attention and interest.
- b. Justice Engoron's conduct, in permitting his Law Clerk to preside on the Bench with him to his right-hand side during the Special Proceeding (defined *infra*), and all pre-trial proceedings in this action and since the trial began is unprecedented and violates the Code of Judicial Conduct. Justice Engoron's conduct, which creates the appearance that an unelected staff member has a direct role in presiding over and co-judging the trial, creates an appearance of impropriety contrary to the letter and spirit of the Code of Judicial Conduct.

- c. Justice Engoron's *sua sponte* entry of the gag orders reasonably gives rise under the circumstances to the conclusion that they are an apparent effort to shield this unprecedented co-judging arrangement from public scrutiny. Indeed, entering gag orders prohibiting all parties from "posting, emailing, or speaking publicly" about any members of his staff (NYSCEF No. 1619), and all counsel "from making any public statements, in or out of court, that refer to *any* confidential communications, in any form, between [Justice Engoron's] staff and [Justice Engoron]" (NYSCEF No. 1631), plainly augment the appearance of impropriety, and violates the Code of Judicial Conduct.
- d. Justice Engoron's conduct, in permitting his Law Clerk to make political donations in excess of the permitted amount and engage in impermissible partisan activity, violates the Code of Judicial Conduct. The Law Clerk's conduct, including supporting political groups vehemently opposed to President Trump, was singularly partisan and, thus, further violates the Code of Judicial Conduct and Code of Non-judicial Employee Conduct.

Opinions

I. **Justice Engoron's Conduct Creates the Appearance of Impropriety in Contravention of the Code of Judicial Conduct, and Could Undermine Public Confidence in the Integrity of and Impartiality of the Judiciary.**

15. Part 100 of the Rules of the Chief Administrative Judge (22 NYCRR § 100 *et seq.*) (the "Code of Judicial Conduct") governs the conduct of judges. Section 100.2 of the Code of Judicial Conduct (22 NYCRR § 100.2) is titled, "A Judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities" and states that, "A judge shall respect

and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” 22 NYCRR § 100.2(A). Section 100.3 of the Code of Judicial Conduct (22 NYCRR § 100.2) is titled, “A judge shall perform the duties of judicial office impartially and diligently” and states as follows:

A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This paragraph does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This paragraph does not apply to proceedings in which the judge is a litigant in a personal capacity.

22 NYCRR § 100.3(B)(8) (emphasis added); *see also* 22 NYCRR § 100.4(A) (“A judge shall conduct all of the judge’s extra-judicial activities so that they do not . . . cast reasonable doubt on the judge’s capacity to act impartially as a judge.”)

16. Based upon my review of the website for The Wheatley School Alumni Association (www.wheatleyalumni.org), including The Wheatley School Alumni Association Newsletters, it is apparent that Justice Engoron, in his private capacity as a Wheatley School alumnus and self-proclaimed “Founder and Editor of the Wheatley School Alumni Association Newsletter,” has publicly posted links in the Wheatley Newsletters to articles disparaging certain parties and their counsel, including President Donald J. Trump, Eric Trump, Alina Habba, Esq., and Cushman and Wakefield, and covering his own decisions. A sampling of the Newsletters is set forth below:

- a. October 2, 2020, Newsletter: Justice Engoron included links to articles from CNBC, Law360, and *The New York Times* about Eric Trump being compelled to testify in the proceeding over which he is presiding captioned

People of the State of New York, by Letitia James, Attorney General of the State of New York v. The Trump Organization, et al., Index No. 451685/2020 (Sup. Ct. N.Y. County) (the “Special Proceeding”). The foregoing links were included in a subsection of the Newsletter entitled “1967- Art Engoron – Articles about Decisions.”

- b. December 28, 2020, Newsletter: Justice Engoron included links to articles from Bloomberg, Law & Crime, ABC News, CNN, Salon, and *The Washington Post* about his decision in the Special Proceeding about the Trump Organization’s claims of privilege. The foregoing links were included in a subsection of the Newsletter entitled “1967 – Art Engoron – In the News” and included a picture of Justice Engoron.
- c. February 16, 2021, Newsletter: Justice Engoron included links to articles from *The New York Times* and Above the Law about his decision in the Special Proceeding, characterizing one article as a “humorous, irreverent take” and touting the other as “another time (in the New York Times).” The foregoing links were included in a subsection of the Newsletter entitled “1967 – Art Engoron – In the News (the Daily News).”
- d. October 7, 2021, Newsletter: Justice Engoron included links to articles from *The Washington Post*, *The Wall Street Journal*, Bloomberg, CNN, and the Central Recorder about his decision in the Special Proceedings compelling defendants to turn over certain documents to the Attorney General. The foregoing links were included in a subsection of the Newsletter entitled “1967 – Man in the News.”

- e. March 14, 2022, Newsletter: Justice Engoron included links to articles from *The New York Times*, *Newsweek*, the *New York Post*, Politico, Reuters, and *The Washington Post* about his decision in the Special Proceeding ordering President Trump and his children to testify in that proceeding. The foregoing links were included in a subsection of the Newsletter entitled “1967 – Arthur Engoron – graduate in the News.”
- f. May 8, 2022, Newsletter: Justice Engoron included links to articles from *The New York Times* and *Newsweek* about his decision in the Special Proceeding to hold President Trump in contempt of court. The foregoing links were included in a subsection of the Newsletter entitled “1967 – Art Engoron – In the News.”
- g. June 20, 2022, Newsletter: Justice Engoron included a link to an article from National Public Radio about the Appellate Division’s affirmance of his decision in the Special Proceeding ordering President Trump and his children to testify in that proceeding. The foregoing link was included in a subsection of the Newsletter entitled “1967 – Art Engoron – In the News.”
- h. July 3, 2022, Newsletter: Justice Engoron included a link to an article from *Business Insider* about the Attorney General’s application in the Special Proceeding to enforce Cushman & Wakefield’s compliance with a subpoena; two days later Justice Engoron held Cushman & Wakefield in contempt of court. The foregoing link was included in a subsection of the Newsletter entitled “1967 – Art Engoron – In the News.”

- i. September 11, 2022, Newsletter: Justice Engoron included a link to an article from Above the Law criticizing Ms. Habba; this Newsletter was published a mere 10 days before this action was commenced by the Attorney General. The foregoing link was included in a subsection of the Newsletter entitled “1967 – Art Engoron – In the News.”

17. It is my opinion that Justice Engoron’s conduct, as the self-proclaimed Founder and Editor of the Wheatley School Alumni Association Newsletter, creates an appearance of impropriety in his judicial activities in contravention of the Code of Judicial Conduct. Regardless of the venue, and the fact that the links were often posted without comment, Justice Engoron’s repeated publication of articles about his own decisions in the Special Proceeding, which in some instances disparage the parties and their counsel, creates an appearance of impropriety in his judicial activities, and could undermine public confidence in the integrity of and impartiality of the judiciary, most especially in a case of worldwide attention and interest.

II. Justice Engoron Violated the Code of Judicial Conduct by Permitting His Law Clerk to Preside on the Bench with Him and *Sua Sponte* Issuing Gag Orders to Shield this Unprecedented Co-Judging Arrangement from Public Scrutiny.

18. The duties of a law clerk primarily include but not are not limited to the following tasks: researching and analyzing legal issues and questions; drafting decisions, orders, correspondence, and other written materials; proofreading written materials and checking citations, conferring with and advising the judge on legal issues; arranging the judge’s calendar and scheduling meetings and conferences; and conducting discovery, pre-trial, and settlement conferences. These duties are all performed to assist the judge in maintaining a well-run Chambers and fulfilling the judge’s judicial responsibilities.

19. Law clerks do not usually attend pre-trial proceedings or trials because they work behind the scenes performing other activities relating to the case at issue, or other cases that require their attention. In the event that law clerks are called upon to attend pre-trial proceedings or trials, their duties primary include but are not limited to the following tasks: listening to and taking notes on testimony, researching legal issues that arise during the course of a trial, and in non-jury cases, assisting the judge in drafting findings of fact and conclusions of law.

20. In my 30-plus years of experience in the New York State Unified Court System, including more than 20 years on the Bench, I have never seen, or heard of, a law clerk presiding on the Bench with the judge during pre-trial proceedings or during trials actively engaged as a *de facto* co-judge.

21. Based upon my review of the transcripts of the proceedings, and photographs published by Getty Images and the Associated Press, it is apparent that Justice Engoron has permitted his Law Clerk to preside on the Bench with him to his right-hand side during the Special Proceeding, and all pre-trial proceedings in this action and since the trial began acting as a *de facto* co-judge. I also understand Justice Engoron has repeatedly and frequently paused the trial proceedings before ruling on evidentiary objections and *in limine* issues to consult with his Law Clerk or read contemporaneous hand-written notes from her.

22. Based upon my review of a public video of the Law Clerk during a candidate forum in connection with her erstwhile campaign for Manhattan Civil Court, the Law Clerk herself framed her role as co-equal, describing her participation in a high-profile real estate case as follows: “*we* were incredibly active in that case” and “*we* tried to stop the two towers.” See <https://youtu.be/3Ug0lo7cYxo?feature=shared&t=2968> at 57:35 - 57:50. During that same forum, the Law Clerk described her judicial philosophy as driven not by the facts and the law but

by political considerations: “[o]ne thing that I think is incredibly important to consider, *what would the people who elected me want me to do* and is there any precedent . . . that would allow me to achieve that outcome.” *Id.* at 53:51-54:30.

23. It is my opinion that by granting his Law Clerk unprecedented status and inappropriate latitude, Justice Engoron violated the Code of Judicial Conduct. Although a Justice of Supreme Court has ample discretion to consult with his law clerk, this unprecedented arrangement exceeds the outer limits of such discretion. At a minimum, the appearance of “co-judging” is manifest, and the public (and litigants) may conclude fairly that an elected staff member has, as is evident from the public photographs, a direct role in presiding over the trial. Indeed, permitting the Law Clerk to preside on the Bench leads inexorably to the conclusion that she is acting in accordance with her overtly public and partisan views to implement what “the people who elected her [would] want her to do[.]” This creates an appearance of impropriety contrary to the letter and spirit of the Code of Judicial Conduct, which mandates that a judge must “be faithful to the law” and “not be swayed by partisan interests.” 22 NYCRR 100.3(B)(1); *see also* 22 NYCRR § 100.2 (“A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities”).

24. To make matters worse, in an effort to shield this unprecedented arrangement from public scrutiny, the Court *sua sponte* entered gag orders prohibiting all parties from “posting, emailing, or speaking publicly” about any members of his staff (NYSCEF No. 1619), and counsel “from making any public statements, in or out of court, that refer to *any* confidential communications, in any form, between [Justice Engoron’s] staff and [Justice Engoron]” (NYSCEF No. 1631). It is my further opinion that Justice Engoron’s forceful efforts to silence

counsel from objecting to and creating a record of what anyone could observe publicly taking place in the courtroom during the trial plainly augment the appearance of impropriety.

III. Justice Engoron Violated the Code of Judicial Conduct by Permitting His Law Clerk to Make Political Donations in Excess of the Permitted Amount and Engage in Impermissible Partisan Activity, which Activity is Imputed to the Court.

25. A law clerk plays an important role in the judicial process and must uphold the integrity of the judiciary. As a result of the close association between judges and law clerks, their professional and personal actions reflect on the judge and ultimately the judiciary as a whole. For this reason, it is important for law clerks to understand the obligations imposed upon them, including with respect to political activity.

26. Section 100.5 of the Code of Judicial Conduct (22 NYCRR § 100.5) is titled “A judge or candidate for elective judicial office shall refrain from inappropriate political activity” and states that “a judge or a non-judge who is a candidate for public election to judicial office . . . shall maintain the dignity appropriate to judicial office.” 22 NYCRR § 100.5(A)(4). The Code of Judicial Conduct further provides that a “judge shall prohibit members of the judge’s staff who are the judge’s personal appointees from . . . contributing, directly or indirectly, money or other valuable consideration in amounts exceeding \$500 in the aggregate during any calendar year to all political campaigns for political office, and other partisan political activity including, but not limited to, the purchasing of tickets to political functions.” 22 N.Y.C.R.R. § 100.5(C)(2); *see also* Judicial Ethics Opinions 07-11 (2007), 10-76 (2010), 97-103 (2010), available at: <https://ethicssearch.nycourts.gov/>.

27. Part 50 of the Rules of the Chief Judge is titled “Rules Governing Conduct of Nonjudicial Court Employees,” and Section 50.1 is titled “Code of Ethics for Non-judicial Employees of the Uniform Court System” (“Code of Non-judicial Employee Conduct”). The

Code of Non-judicial Employee conduct begins with the admonition that “Court employees must observe and maintain high standards of ethical conduct in the performance of their duties in order to inspire public confidence and trust in the fairness and independence of the courts.” 22 NYCRR § 50.1. The Code of Non-judicial Employee Conduct states that “Court employees shall avoid impropriety and the appearance of impropriety in all their activities” and “shall conduct their outside activities in a manner that does not conflict with their employment duties.” 22 NYCRR § 50.1(I) and (III).

28. Based upon my review of publicly available information, including information on the official New York State website, it appears that during the pendency of the Special Proceeding leading up to this action, and then after this action was filed by the Attorney General, the Law Clerk contributed over \$3,000 to Democratic candidates and organizations in 2022 and over \$900 in 2023. It also appears that the Law Clerk made public Instagram[®] posts with prominent Democrats. The organizations to which the Law Clerk contributed include the Grand Street Democrats, who openly and actively support the Attorney General and her fight against President Trump. In addition, during the pendency of this action, it appears that Law Clerk attended a Grand Street Democrats event, where speakers *inter alia* actively and openly advocated for Joe Biden and commented to monstrous applause, on the fight against “development and the profits of big real estate” and the “consequences of the former President,” i.e., President Trump. See <https://youtu.be/DMCEeSLugHE?feature=shared&t=609> at 12:14-12:21 and 12:24-12:31.

29. It is my opinion that Justice Engoron has violated the Code of Judicial Conduct by permitting his Law Clerk to make political donations in excess of the permitted amount and engage in impermissible partisan activities. The Law Clerk’s support for the Grand Street

Democrats and her attendance at and participation in highly-partisan political activities raises serious concerns regarding bias and impartiality, especially given her active, outward-facing role in this action. Indeed, the appearance of impropriety created by Justice Engoron having permitted his Law Clerk to act as a *de facto* co-judge and his repeated attempts to shield this unprecedented arrangement from public scrutiny, is only further exacerbated by the Law Clerk's demonstrated partisanship, which is imputed to this Court under the Code. *See* 22 NYCRR 100.5(C). All of this conduct, including supporting political groups vehemently opposed to President Trump, was singularly partisan and, thus, in violation of the Code of Judicial Conduct and Code of Non-judicial Employee Conduct.

30. It is my further opinion that the Law Clerk's candidacy for judicial office is of no moment in assessing whether her or Justice Engoron's conduct was in violation of the Code of Judicial Conduct. As a candidate, the Law Clerk was bound by Section 100.5 of the Code of Judicial Conduct, which precludes a "candidate for public election to judicial office" from, *inter alia*, "engaging in [] partisan political activity," "publicly endorsing . . . another candidate for public office," and "attending political gatherings." At base, "a judge or a non-judge who is a candidate for public election to judicial office . . . shall maintain the dignity appropriate to judicial office." 22 NYCRR § 100.5(A)(4). The fact that the Law Clerk might have been campaigning for judicial office while engaging in certain of the aforementioned conduct does not exculpate her or Justice Engoron, as there is no exception to the stated maximum contribution limit for candidates.

Conclusion

31. In sum, it is my opinion, to a reasonable degree of legal certainty, that the judicial conduct of Justice Engoron and his Law Clerk in this action has violated the Code of Judicial Conduct.

Dated: Spring Hill, Florida
November 14, 2023

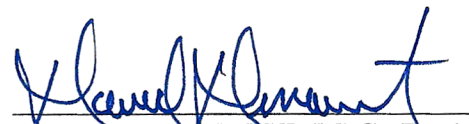

DAVID DEMAREST, J.S.C. (Ret.)

EXHIBIT A

DAVID DEMAREST, J.S.C. (ret.)

RESIDENCE: 137 Postwood Rd, Hannawa Falls, NY 13647
MAILING ADDRESS: PO Box 313, Hannawa Falls, NY 13647-0313
Tel. No. 315-322-1480
ddemares@twcny.rr.com

PERSONAL: D/O/B: August 30, 1948, College Point, NY.
Married, Sandra Pike Demarest, Retired
Underwriting Director, North Country Public
Radio, Canton, N.Y.
Two children, two grandchildren.

EDUCATION: JURIS DOCTOR, Albany Law School, 1973.
BACHELOR OF ARTS, St. Lawrence University,
1970.

**PROFESSIONAL
EDUCATION:**

National Judicial College, Reno, NV.
- "Trying and Settling Land Use Cases" - April,
1997.
- "Logic for Judges" - May, 1997.
- "Opinion Writing" - May, 1997.
- "Financial Statements in the Courtroom" - Oct.,
2001.

Law and Organizational Economics Center,
University of Kansas, Lawrence KS.
- "Economics Institute for State Judges" - Nov.,
1998;
July, 1999.

EMPLOYMENT: 2015 – present: Principal, Demarest Mediation Services – provides mediation and arbitration services throughout northern New York, primarily to attorneys involved in civil litigation.

1994 - 2015: New York State Justice of the Supreme Court, Fourth Judicial District. Elected in November 1993 to a fourteen year term serving in Northern New York. Re-elected to a second fourteen year term in 2007. Duties included presiding over a general calendar of civil trials and proceedings.

1984-1993: Principal Law Clerk, N.Y.S. Unified Court System. Confidential Law Advisor to the Hon. Michael W.Duskas, Justice of the Supreme Court. Duties include legal research, drafting opinions, presiding over pre-trial conferences and undefended matrimonial actions.

1983-1984: Principal Law Clerk to the Hon. Edmund L. Shea, Justice of the Supreme Court.

1974-1983: Attorney engaged in the general practice of law; civil and criminal trial work; real estate; domestic relations; and commercial.

Admitted to the N.Y.S. Appellate Division, Third Department and United States District Court, Northern District of New York, February, 1974.

DAVID DEMAREST

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MILITARY: **Commissioned Second Lieutenant, U.S.A.R., 1970
Active Duty; Oct., 1973 - Jan. 1974,
Quartermaster Officer Basic School, Fort Lee, VA
Commander, C. Co., 479th Eng Bn, Canton Army
Reserve Center, Canton, NY
Honorable Discharge**

**PROFESSIONAL
SERVICE:** **Former President, Association of Justices of the
Supreme Court of the State of New York.**

**Current Chair of the Pattern Jury Instructions
Committee of the Association of Justices.
Committee of active and retired Supreme Court
Justices who edit Pattern Jury Instructions (Civil)
published by Thomson-Reuters.**

**Former President and Director, St. Lawrence
County Bar Association.**

**Former Member Executive Council, New York
State Conference of Bar Leaders (representing
eleven County Bar Associations in Northeastern,
NY).**

**Former Delegate, New York State Bar
Association House of Delegates.**

DAVID DEMAREST

Page 4

Former Member, Board of Directors, North Country Legal Services, Inc.

**Former Member, Board of Directors, St. Lawrence County Legal Assistance Corporation.
Lecturer to bar groups on the Uniform Rules for the Trial Courts of the State of New York.**

COMMUNITY SERVICE:

Past International President, Phi Kappa Sigma Fraternity, Chester Springs, Pa. (Presiding over a sixteen member Executive Board which governs sixty-five undergraduate chapters and a full-time staff of eight).

Lecturer on college campuses on campus legal issues, risk management, social responsibility and alcohol awareness.

Former Vice-chair, Seaway Valley Crime Stoppers.

Former Chair, Advisory Committee, Court Reporting Curriculum, Mater Dei College, Ogdensburg, NY.

Former Chairman, St. Lawrence County Industrial Development Agency.

DAVID DEMAREST

Page 5

**Former Committeeman and Treasurer, Potsdam
Town Republican Committee.**

Host Family for the Fresh Air Fund.

MEMBERSHIPS:

**Association of Supreme Court Justices of the
State of New York, President - 2004, Treasurer -
2005 - 2010, Member - Pattern Jury Instructions
Committee - 2003 – present – elected Chair in
2015.**

St. Lawrence County Bar Association.

B.P.O.E. # 2074, Potsdam, NY.

Past member, C.S.E.A.

PUBLISHED OPINIONS:

**HCI Distributors, Inc. V. New York State Police,
36 Misc. 3d 743 (2012)**

**In re State of New York v. John Doe, 26 Misc. 3d
962 (2010)**

**In re State of New York v. Dale R., 25 Misc. 3d 285
(2009)**

Harrington v. APA, 24 Misc. 3d 550 (2009)

**Brinkerhoff v. County of St. Lawrence, 24 Misc. 3d
426 (2009)**

House v. Stephens, 21 Misc. 3d 527 (2008)

DAVID DEMAREST

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Mattter of Avery v. Aery, 20 Misc. 3d (2008)
Beneke v. Town of Santa Clara, NYLJ, March 25, 2008; 19 Misc. 3d 591 (2008)
Hazen v. Hazen, NYLJ, Dec. 22, 2004
Sharpe v. Webb, 2 Misc. 3d 945 (2004)
Amo v. Little Rapids Corp., 2001 NY Slip Op 40289; NYLJ, Dec. 18, 2001.
Williams v. Munna, Inc., 187 Misc. 2d 613 (2001)
Slayko v. Security Mutual, 183 Misc. 2d 688, (2000); aff'd A.D.2d (3d Dept. 2001)
Tyler v. Mahoney, New York Law Journal , January 16, 2001.
**Gouverneur Housing Associates v. Town of Gouverneur,
New York Law Journal, July 5, 2000.**
LeFebvre v. Dumas, New York Law Journal, Dec, 20, 1999.
Wilson v. Lumb, 181 Misc. 2d 1033 (1999)
In re 8,662.5 Liters of Liquor, 180 Misc. 2d 603 (1999). In re General Motors v Town of Massena, 180 Misc. 2d 682 (1999).
Hamelin v. Etna Abstract Co., 174 Misc. 2d 712 (1997).
Monroe v. Numed, Inc., 173 Misc. 2d 817 (1997).
In re Gulf Stream Coach, Inc. v. DiSanto, 173 Misc. 2d 242 (1997).
United Stationers Supply Co. v. Forsythe, 170 Misc. 2d 173 (1996).
Waste-Stream, Inc. v. St. Lawrence County Solid

DAVID DEMAREST**Page 7**

Waste Disposal Authority, 167 Misc. 2d 542 (1995)

Sarkin v. Nates Auto Parts, Inc., 166 Misc. 2d 913 (1995).

Brooks v. Town of Hammond, 166 Misc. 2d 323 (1995).

Waste-Stream, Inc. v. St. Lawrence County Solid Waste Disposal Authority, 166 Misc. 2d 6 (1995).

In re Abrantes v. Board of Education, 165 Misc. 2d 658 (1995).

Cooper v. Peterson, 164 Misc. 2d 878 (1995).

Wilson v. Palmer, 163 Misc. 2d 936 (1995); aff'd 229 A.D.2d 647 (3rd Dept., 1996).

In re Niagara Mohawk Power Corporation v. Town of Potsdam, 162 Misc. 2d 388 (1994); aff'd 216 A.D.2d 775 (3rd Dept, 1995).

NYS Department of Taxation and Finance v. St. Regis Group, 161 Misc. 2d 383 (1994); rvsd 217 A.D.2d 214 (3rd Dept., 1995).

In re Niagara Mohawk Power Corporation v. Town of Potsdam, 160 Misc. 2d 606 (1994).

AWARDS:

**Upstate New York Super Lawyer
Alternative Dispute Resolution, 2019**

St. Lawrence University Alumni Citation, June, 1999.

DAVID DEMAREST

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**Award for Judicial Excellence and Leadership,
Association of Justices of the Supreme Court of
the State of New York,
January, 2007.**

**Alumnus of the Year, Phi Kappa Sigma
International Fraternity, 2016.**

EXHIBIT B

APPENDIX

- A. Website for The Wheatley School Alumni Association (www.wheatleyalumni.org), including The Wheatley School Alumni Association Newsletters dated October 2, 2020, December 28, 2020, February 16, 2021, October 7, 2021, March 14, 2022, May 8, 2022, June 20, 2022, July 3, 2022, and September 11, 2022, and the relevant articles for which links are provided therein;
- B. Transcripts of proceedings, including the trial transcripts in the action captioned *People of the State of New York, by Letitia James, Attorney General of the State of New York v. Donald J. Trump*, Index No. 452564/2022 (Sup. Ct. N.Y. County);
- C. Photographs published by Getty Images and the Associated Press, depicting the Hon. Arthur F. Engoron, J.S.C. (“Justice Engoron”) presiding on the Bench with his Principal Law Clerk, Allison Greenfield, Esq. (the “Principal Law Clerk”), also presiding on the Bench to his right-hand side;
- D. Video posted on YouTube® by Grand Street Democrats titled “VID DID 2022JudicialForum Web” (<https://www.youtube.com/watch?v=3Ug0lo7cYxo&t=2968s>);
- E. Gag Orders issued by Justice Engoron on October 3, 2023 (NYSCEF No. 1619) and November 3, 2023 (NYSCEF No. 1631);
- F. New York State website listing political contributions made by the Law Clerk in 2022 and 2023 (<https://publicreporting.elections.ny.gov/Contributions/Contributions>)
- G. Video posted on YouTube® by Grand Street Democrats titled “Grand Street Dems Fall 2022 Event” (<https://www.youtube.com/watch?app=desktop&v=DMCEeSLugHE>)
- H. Twitter® post made by Grand Street Democrats on January 12, 2021 (<https://twitter.com/grandstreetdems/status/1348994426580979713>); and
- I. Opinion published in the Gotham Gazette on October 8, 2020 by Jeremy Sherber (founding president of the Grand Street Democrats in New York) titled “Letitia James Serves as Last Line of Defense Against Trump Administration” (<https://www.gothamgazette.com/130-opinion/9811-letitia-james-last-line-defense-against-trump-administration>).

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

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

Plaintiff,

vs.

DONALD J. TRUMP, DONALD TRUMP, JR., ERIC
TRUMP, ALLEN WEISSELBERG, JEFFREY
MCCONNEY, THE DONALD J. TRUMP
REVOCABLE TRUST, THE TRUMP
ORGANIZATION, INC., TRUMP ORGANIZATION
LLC, DJT HOLDINGS LLC, DJT HOLDINGS
MANAGING MEMBER, TRUMP ENDEAVOR 12
LLC, 401 NORTH WABASH VENTURE LLC,
TRUMP OLD POST OFFICE LLC, 40 WALL STREET
LLC, and SEVEN SPRINGS LLC,

Defendants.

Index No. 452564/2022
Engoron, J.S.C.

**AFFIRMATION IN SUPPORT OF
DEFENDANTS' MOTION FOR A
MISTRIAL**

CLIFFORD ROBERT, an attorney duly admitted to practice law before the Courts of
the State of New York, hereby affirms the following statements to be true under the penalties of
perjury:

1. I am the principal of the law firm of Robert & Robert PLLC, attorneys for
Defendants Donald Trump, Jr. and Eric Trump. I am fully familiar with the facts and
circumstances set forth herein based on the files and materials maintained by my firm.

2. This Affirmation is submitted on behalf of Defendants Donald J. Trump, Donald
Trump, Jr., Eric Trump, Allen Weisselberg, Jeffrey McConney, The Donald J. Trump Revocable
Trust, The Trump Organization, Inc., The Trump Organization, LLC, DJT Holdings LLC, DJT
Holdings Managing Member, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC,

Trump Old Post Office LLC, 40 Wall Street LLC, and Seven Springs LLC (collectively, “Defendants”) in support of their motion for a mistrial.

3. Trial in this matter began on October 2, 2023. Annexed hereto as **Exhibit A** is a true and correct copy of the transcript of that trial from October 2, 2023 to November 9, 2023.

4. The Court’s conduct at issue is not limited to on-the-record comments and rulings.

5. Specifically, the Court has repeatedly made *ex parte* comments on the subject matter of the case and parties and counsel thereto.

6. In an October 2, 2020, newsletter this Court maintains as an alumnus of the Wheatley School, this Court included links to articles about Eric Trump being compelled to testify in a subsection entitled “1967- Art Engoron – Articles about Decisions.” See <http://www.wheatleyalumni.org/BlogPost/Blogpost-20201002-51.html>.

7. In the December 28, 2020, newsletter, the Court included links to articles about this Court’s decision on the Trump Organization’s claims of privilege from, inter alia, Bloomberg, the Washington Post, and CNN. See <http://www.wheatleyalumni.org/BlogPost/Blogpost-20201228-54.html>.

8. In the February 16, 2021, newsletter, this Court included links to articles relating to the trial, characterizing one as a “humorous, irreverent take.” See <http://www.wheatleyalumni.org/BlogPost/Blogpost-20210216-56.html>. That newsletter, which is publicly available, was published just days after ruling that President Trump had to turn over documents to investigators.

9. In the November 7, 2021, newsletter, the Court, in a section entitled “1967 – Man in the News,” linked five articles, again from the Washington Post, CNN, and Bloomberg, about

his order in the special proceeding compelling Defendants to turn over documents. See <http://www.wheatleyalumni.org/BlogPost/Blogpost-20211007-63.html>.

10. In the March 14, 2022, newsletter, the Court likewise, in the “Graduate in the News” section, posted links to articles in the New York Times, Washington Post, and Politico regarding his decision in the special proceeding to order Defendants to testify. See <http://www.wheatleyalumni.org/BlogPost/BlogPost-20220314-68.html>.

11. In the May 8, 2022, newsletters, the Court posted links to New York Times and Newsweek articles regarding his decision to hold President Trump in contempt. See <http://www.wheatleyalumni.org/BlogPost/BlogPost-20220508-70.html>.

12. In the June 20, 2022, newsletter, the Court again posted a link to an NPR article that President Trump had lost the appeal. See <http://www.wheatleyalumni.org/BlogPost/BlogPost-20220620-72.htm>.

13. In the July 3, 2022, newsletter, the Court similarly linked an article from Business Insider about Cushman & Wakefield. See <http://www.wheatleyalumni.org/BlogPost/Blogpost-20220704-74.html>. Two days later, the Court held Cushman & Wakefield in contempt.

14. In the September 11, 2022, newsletter, ten days before the lawsuit was filed, the Court also posted a link to an Above the Law article criticizing Ms. Habba. See <http://www.wheatleyalumni.org/BlogPost/Blogpost-20220911-78.html>.

15. In 2022, Allison Greenfield (the “Principal Law Clerk”), the Court’s Principal Law Clerk since 2019, campaigned unsuccessfully for a Democrat nomination to Manhattan Civil Court.

16. As part of that campaign, the Principal Law Clerk participated in a virtual forum hosted by the Grand Street Democrats. During that forum, she framed her role as almost a co-

equal, describing her participation in a high-profile real estate case as follows: “*we* were incredibly active in that case” and “*we* tried to stop the two towers.” See <https://youtu.be/3Ug0lo7cYxo?feature=shared&t=2968> at 57:35 - 57:50. She also described her judicial philosophy as driven not by the facts and the law but by political considerations: “[o]ne thing that I think is incredibly important to consider, what would the people who elected me want me to do and is there any precedent . . . that would allow me to achieve that outcome.” Id. at 53:51-54:30.

17. During the pendency of the special proceeding leading up to this case and then after this case was filed by the Attorney General, the Principal Law Clerk contributed over \$3,000 to political organizations, including the West Side Democrats, Grand Street Democrats, Hell’s Kitchen Democrats, Village Independent Democrats, and New York County Democratic Committee, in 2022 and over \$900 in 2023 in violation of 22 N.Y.C.R.R. 100.5(c)(2). See <https://publicreporting.elections.ny.gov/Contributions/Contributions>.

18. The Principal Law Clerk also engaged with and financially supported numerous other political organizations, including, but not limited to, (1) the Manhattan Democrats, whose County Leader, Keith Wright, has spoken out against President Trump and in favor of Alvin Bragg’s indictment, (2) the Village Independent Democrats, who endorsed the Attorney General and campaigned actively against President Trump, and (3) the Four Freedoms Democratic Club, which has likewise taken anti-Trump positions.

19. In connection with her campaign, the Principal Law Clerk created and maintained a website, Instagram account, and Twitter account. The website “greenfield4civilcourt.com,” which remains functional, includes a link to, *inter alia*, the Principal Law Clerk’s Instagram page, created and maintained under the handle “@greenfield4civilcourt.

20. In February 2022, while the special proceeding against many of the same defendants was ongoing before this Court, the Principal Law Clerk posted on her public “greenfield4civilcourt” Instagram endorsements from the Village Independent Democrats and the Grand Street Democrats.

21. On February 26, 2022, the Principal Law Clerk made a post purporting to withdraw from the Democratic primary but advised followers to “[k]eep an eye on this space.”

22. The Principal Law Clerk actively posted on the “greenfield4civilcourt” account in the subsequent months, including with respect to Democratic primaries, the Village Democrats, and political gatherings at the National Arts Club, Arte Café NYC, and T.J. Byrnes Bar & Restaurant, the Porch, and Donnybrook NYC.

23. For example, on March 6, 2022, the Principal Law Clerk posted about “petitioning with the @villagedems who have endorsed incredible candidates like @bradhoylman @nycformaloney.”

24. The April 30, 2022, photograph of the Principal Law Clerk and Senator Schumer that ultimately became the subject of the Court’s initial gag order was originally posted by the Principal Law Clerk to the “greenfield4civilcourt” Instagram page. A caption accompanying the photograph read, in relevant part, as follows: “So thrilled to attend the Chelsea Reform Democratic Club Founder’s brunch today honoring incredible and fearless lifelong public servants like @senschumer and @repmaloney.”

25. It was then reposted by a public Twitter account, @JudicialProtest, and ultimately reposted by President Trump. President Trump’s caption to the post was as follows: “Schumer’s girlfriend, Alison [sic] R. Greenfield, is running this case against me. How disgraceful! This

case should be dismissed immediately.” Upon information and belief, the “greenfield4civilcourt” account is still active but was made private in the days leading up to trial.

26. This conduct has resulted in adverse rulings throughout these proceedings.

27. On October 3, 2023, the second day of trial, the Court *sua sponte* imposed its first gag order, based on President Trump’s reposting, to his Truth Social account, the Principal Law Clerk’s photograph with Senator Schumer, stating:

This morning, one of the defendants posted, to a social media account, a disparaging, untrue and personally identifying post about a member of my staff. Although I have since order[ed] the post deleted, and apparently it was, it was also emailed out to millions of other recipients. Personal attacks on members of my court staff are unacceptable, inappropriate, and I will not tolerate them, under any circumstances. Yesterday, off the record, I warned counsel of this, and this was disregarded. My warning was disregarded.

Consider this statement a gag order forbidding all parties from posting, emailing, or speaking publicly about any members of my staff. Any failure to abide by this directive will result in serious sanctions.

NYSCEF Doc. No. 1619. (emphasis added).

28. On October 20, 2023, this Court *sua sponte* issued another order finding that President Trump violated the gag order because the original post was inadvertently still archived on President Trump’s website. This Court continued:

[W]hether intentional or the result of mere ‘campaign structure’ negligence, the effect of the post on its subject is unmitigated by how or why it remained on Donald Trump’s website for 17 days....

In the current overheated climate, incendiary untruths can, and in some cases already have, led to serious physical harm, and worse.

NYSCEF Doc. No. 1584.

29. This Court proceeded to state that “this Court is way beyond the ‘warning’ stage” and imposed punishment. Id.

30. On October 25, 2023, Michael Cohen (“Cohen”) took the stand as a witness for the Attorney General.

31. During a break in the proceedings, President Trump spoke to the press outside of the courtroom and this Court’s presence.

32. President Trump stated to the press, in relevant part: “This judge is a very partisan judge with a person who is very partisan sitting alongside of him, perhaps even much more partisan than he is.” Ex. A at 2373:2-10.

33. When the parties reconvened in the courtroom, this Court *sua sponte* raised President Trump’s statement to the press made moments before and outside of his presence:

It was just brought to my attention that the Associated Press reported, I wasn’t there, this is the Associated Press, that President Donald J. Trump just stated the following to the press outside the courtroom:

“This judge is a very partisan judge with a person who is very partisan sitting alongside of him, perhaps even much more partisan than he is.”

Now, it’s very easy for the public, for anyone to know who that person is.

Id.

34. This Court simply assumed that President Trump was referring to the Principal Law Clerk. NYSCEF Doc. No. 1598.

35. The Court then summoned President Trump to the stand in order for the Court to examine him as a witness.

36. President Trump testified, under oath, that he had been referring to Mr. Cohen, but that he did believe the Principal Law Clerk was “very biased against us” and that he had “made that clear.” Ex. A at 2413:21-25.

37. This Court nonetheless concluded, relying on his own testimony describing the layout of the bench and witness box, that:

As the trier of fact, I find that the witness is not credible; that he was referring to my law clerk, the principal law clerk, who is sitting much closer to me, who doesn't have a barrier, whom I believe has been accused by the defendant of being partisan or Democrat or partisan Democrat. I hereby fine you \$10,000, which is on the low side, to be paid within 30 days to the Lawyer's Fund for Client Protection.

Id. at 2415:13-20

38. In an effort to shield that co-judging from public scrutiny, the Court *sua sponte* entered an unconstitutional gag order prohibiting all parties from “posting, emailing, or speaking publicly” about any members of his staff. NYSCEF Doc. No. 1619.

39. Nonetheless, the Principal Law Clerk's unusual role in the proceedings has continued to be the subject of significant on-the-record comment by defense counsel.

40. On October 25, 2023, Mr. Kise described the “considerable tension” caused by her position on the bench and indicated that it is “unusual” for a Principal Law Clerk to sit on the bench. Ex. A at 2416: 6-14.

41. Yout affirmant described his experience in New York State, such that he had never seen a situation where “you're literally trying the case to two judges” with “notes constantly being passed,” where it “would appear the Court is in consultation with the Principal Law Clerk” with each ruling. Id. at 2418:3-12.

42. Yout affirmant further described that this Court would “appear to be leaning in one direction and then [will] either receive a note or there will be an eye gesture or a roll of the face and something changes and it is of significant concern to [Defendants.]” Id. at 2418:13-25.

43. Ms. Habba added “[i]t is incredibly distracting when there are eye rolls and constant whispering at the bench when I'm trying to cross-examine a witness.” Id. at 2308:6-9.

44. The following day, counsel continued to engage the Court, adding “I think that [President Trump] has a legitimate basis to raise these arguments because he is seeing as he’s told me on a regular basis head nods, eye rolls, notes being passed, head shaking, you know, comments on arguments that I’m making.” Id. at 2476:22-2477:4

45. Specifically, counsel has noted that it occurs only when counsel for Defendants is speaking and not when the Attorney General is speaking. Id. at 3404:5-21.

46. The following week, Counsel requested further clarification of how they could continue to make a record of the Court “accept[ing] a note” or other conduct they believed might evince bias, particularly in light of news reports of violations of the ethical rules by both this Court and the Principal Law Clerk. Id. at 3417.

47. Counsel also noted that since comments were made on the record about the Principal Law Clerk’s constant note-passing, the camera angle had been changed, which made it more difficult for the public to see any note-passing. Id. at 3418:8-21. The Court admitted knowing the camera angle had been changed but feigned ignorance as to the reason: “[a]s for the camera being moved, I was vaguely aware that Rob, the tech person, was switching the angle of the camera. Never occurred to me that it could have anything to do with what we’re discussing today or why it was.” Id. at 3422:25 - 3423:3.

48. After further colloquy, this Court concluded that he would continue to “consult” with the Principal Law Clerk “for the trial” and to consider the record preserved and closed:

If you want to appeal or move to recuse or whatever you want to do, you have plenty of ammunition. The problem is it’s totally useless and meaningless because I have an unfettered, absolute right to consult with my law clerks anytime, anyplace about any matter.

Id. at 3449:13-21.

49. The Court then issued the second gag order prohibiting counsel from commenting on his Principal Law Clerk's conduct in the courtroom. That order specifically proscribed "any public statements, in or out of court, that refer to *any* confidential communications, in any form, between my staff and me." NYSCEF Doc. No. 1631 (emphasis in original).

50. On November 6, 2023, counsel sought clarification on the scope of the gag orders. Specifically, counsel asked whether moving for a mistrial would implicate the gag order, to which the Court responded, using counsel's given name rather than his surname, "[d]on't file that motion, Chris." Id. at 3646:6.

51. After yet another "confidential communication" with the Principal Law Clerk, the Court concluded that any motion referencing the Principal Law Clerk would "ha[ve] to be in writing." Id. at 3649:9-10.

52. Consequently, the Court directed counsel to file this motion by order to show cause, in writing. Id. at 3649:18-19.

53. The foregoing conduct from both this Court and his Principal Law Clerk has resulted in adverse rulings throughout these proceedings.

54. First, the Court flatly refused to transfer this complex case to the Commercial Division, where it unquestionably belongs.

55. Shortly thereafter, on November 22, 2022, before the Attorney General even opposed Defendants' motion to dismiss or any discovery had been exchanged, this Court determined that the trial would begin on October 2, 2023, the date suggested by the Attorney General in her proposed preliminary conference order.¹ NYSCEF Doc. Nos. 228-229.

¹ This Court entered the Attorney General's proposed preliminary conference order essentially as written. NYSCEF Doc. Nos. 228-229.

56. The Court's order ignored both the presumptive 15-month standard in complex commercial cases and the burden imposed on the defense to review and assimilate millions of pages of documentary evidence and evaluate dozens of witnesses.

57. This compressed schedule also provided an advantage to the Attorney General, whose staff had already conducted an exhaustive, three-year investigation in preparation for filing the case and taking it to trial. The third-party discovery received by Defendants in December 2022 consisted of several terabytes of data containing 700,000 documents, which, after processing and de-duplicating, would require more than 11,000 hours to review.

58. Thereafter, despite a letter request and a motion by Defendants, this Court refused to adjourn the trial, stating that it did not "see a need for extensive disclosure." NYSCEF Doc. No. 528, 558.

59. On November 6, 2023, during President Trump's testimony, the Court stated it is "not here to hear what [President Trump] has to say." Ex. A at 3510:3.

60. The Court expounded as follows: "[w]ell, Mr. Kise, I think you said several times we should hear what he did, what the witness has to say. No, I am not here, and these people are not here, and the Attorney General is not here to hear what [President Trump] has to say." Id. at 3509:19-21.

61. Additionally, this Court has made evidentiary rulings in favor of the Attorney General.

62. As a matter of course, this Court has overruled Defendants' objections to time-barred evidence. Ex. A at 991, 1029, 1036.

63. This Court has also permitted the introduction of hearsay testimony under inapplicable exceptions and, in some circumstances, without identifying *which* Defendant(s) it might be admissible against.

64. The Court has given wide latitude to the Attorney General in presenting irrelevant evidence otherwise inadmissible due to the statute of limitations. Conversely, the Court immediately instructed Defendants' counsel to "just move on" within seconds of counsel starting cross-examination. Id. at 3792:22-3793-6.


65. The Court has overruled Defendants' continuing objections to documents indisputably predating the claims remaining after the First Department modification, as well as testimony on events prior to 2014, going so far as to characterize overruling Defendants' objections as a "Pavlovian reaction [sic]," and stating that he seeks only to "get the whole picture" and not "blind" itself. Id. at 3683, 3716:8-9.

66. Finally, on November 9, 2023, the Court, during oral argument on the motion for a directed verdict, asked if he could "bring up something not in the record, but a matter of public knowledge?" Specifically, he noted that he thought that "the perfect call with Zelensky about the military aid, there might have been code rather than straightforward talk." Id. at 3881:22-25.

67. When counsel raised that it was a "political issue that really has no bearing on anything in the courtroom," this Court quickly responded that he "understood" and "only base[d] [his] decision and rules on what's in the record." Id. at 3882:1-9.

68. For the reasons set forth above, as well as in the accompanying memorandum of law, Defendants respectfully request their motion for a mistrial be granted.

Dated: Uniondale, New York
November 15, 2023



CLIFFORD S. ROBERT