IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	*	
	*	
v.	*	**CRIMINAL NO. 23-cr-257 (TSC)**
	*	
DONALD J. TRUMP,	*	
	*	
Defendant.	*	
	*	

GOVERNMENT'S SUR-REPLY TO DEFENDANT'S DISCOVERY MOTIONS

The Court ordered the defendant to supplement his discovery motions by identifying in his reply "any specific evidence related to Presidential immunity that Defendant believes the Government has improperly withheld," ECF No. 233 at 2 ¶ 2, so that he could subsequently "review any additional discovery he receives and incorporate it into his immunity briefing," ECF No. 243 at 5. The defendant did not comply. Instead, he filed a reply designed to disrupt the Court's previously ordered schedule. With respect to immunity demands—over which the defendant failed to confer with the Government before filing—the defendant's requests are too vague or irrelevant to be helpful to the Court's factbound immunity determinations, or they seek materials that the Government long ago produced in discovery. The defendant otherwise uses his reply to improperly demand dismissal and seek reconsideration of several of the Court's previous decisions, including the current briefing schedule for addressing immunity issues. The Court should reject all of the defendant's non-immunity-based discovery requests and reserve ruling on the defendant's immunity-based demands until he pursues them fulsomely, first by reviewing the Government's immunity brief and the disclosures he has already been provided, and then—and only if necessary—by including in his immunity filing due on October 17 any clear requests for specific, discoverable evidence on Presidential immunity that he still claims he lacks.

I. The Defendant's Immunity-Based Requests are Designed to Disrupt the Court's Schedule

The defendant's conduct in this litigation suggests that he is less concerned with promptly receiving and using additional immunity-based discovery—which the Government does not believe exists—and more interested in using the discovery process to delay the Court's immunity briefing schedule. First, despite the Government's direct invitation of specific immunity-related discovery requests and the Court's explicit expectation that the parties "meet and confer and discuss potential discovery issues," ECF No. 232 at 63, the defendant made no outreach about immunity-based discovery prior to filing his reply, *see* ECF No. 235 at 6 n.3 (promising to "transmit specific immunity-related discovery requests" to the Government).[1] Next, he filed his reply, in which he fails to identify "specific evidence" he claims to be necessary for his immunity filing and instead declares that the Court should abandon its considered briefing schedule for conducting the immunity analysis that the Supreme Court directed on remand. And on September 25, only after the Court granted the Government permission to file this sur-reply and rejected the defendant's unwarranted demand to upend the briefing schedule, the defendant sent the Government a letter purportedly requesting discovery on immunity issues. That letter does particular damage to the defendant's false suggestion here of "ongoing discovery violations in this case," ECF No. 235 at 1, because it makes multiple requests for material that the Government already produced. This series of actions suggests that the defendant will use his deficient discovery demands—and the fact that he will have obtained no new material through them—to try to delay his immunity filing and disrupt the Court's entire schedule. The Court should not countenance it.

Overall, the Court should not credit the defendant's claims that he lacks the discovery to which he is entitled because he does not appear to have command of the materials that the

[1] References to the defendant's reply cite to his pagination, not to the ECF header.

Government has already produced. As described throughout this sur-reply, the defendant's reply repeatedly demands materials that the Government has already provided him. And in the discovery letter that the defendant sent to the Government last week, *see* Attachment A (defendant's September 25 and 29 discovery letters, and Government's October 1 response), he asks for multiple categories of information that he has had for more than a year, including reports and transcripts for two interviews of a particular witness, *id*. at 4 and 9; text messages for specific individuals, *id*. at 4 and 9-10; and Presidential Daily Diaries (PDDs), *id*. at 4 and 9—all of which he received in the Government's first discovery production on August 11, 2023, as is evident from the Government's detailed Source Logs. *See* ECF No. 166-8. The defendant's request for PDDs is particularly notable because they are the defendant's own records, to which he has access even outside the criminal discovery process and which the Government received only after the defendant's designated representatives reviewed them in October 2022. *See* 44 U.S.C. § 2205(3) ("[T]he Presidential records of a former President shall be available to such former President or the former President's designated representative."); 36 C.F.R. § 1270.44(c)-(d) ("The Archivist promptly notifies the President (or their representative) during whose term of office the record was created . . . of a request for records" for consideration of "assert[ing] a claim of constitutionally based privilege against disclosing the record . . . ."). The Government responded to the defendant's discovery letter earlier today, *see* Attachment A, and stands ready, as always, to assist the defendant in locating all relevant materials already in his possession.

II. The Defendant's Immunity-Based Discovery Requests are Deficient

The entirety of the defendant's immunity-related contentions in his 34-page reply boil down to the following: (1) that the Supreme Court's decision in *Trump v. United States*, 144 S. Ct. 2312 (2024), requires the Government to conduct "a new case-file review based on a lawfully defined prosecution team," ECF No. 235 at 2; (2) that the defendant is entitled to attorney work-

product and internal deliberations on Justice Department officials' views of the scope of Executive authority and any "dangers of intrusion" on the Executive Branch posed by this prosecution, *id.* at 5; and (3) that the Government has failed to provide discovery that would provide "context" for the charged conduct that this Court will examine as part of its immunity determinations, including regarding his power to speak publicly, *id.* at 7, 8. All of these claims fail. Of them, only his requests for information providing context for his charged conduct would be material to the task at hand—providing briefing to the Court as it makes immunity determinations—if the requests sought legitimately discoverable information that the Government had not already provided. The defendant's requests, however, do not.

Below, the Government takes the defendant's contentions in turn and explains why (a) the defendant's new arguments continue to misstate the applicable legal standard; (b) the Government has already thoroughly reviewed its case file; (c) the defendant is not entitled to materials related to internal Justice Department deliberations; and (d) the defendant's requests for information related to context are unsound.

a. The Supreme Court's decision did not change the applicable legal standard for discovery.

The defendant urges a rudderless approach to discovery by seeking to do away with the materiality standard for discovery demands. Having previously argued—by misquoting the relevant law—that he was entitled to discovery with "some abstract logical relationship to the issues in the case," ECF No. 167 at 5, the defendant now abandons that erroneous test in favor of no materiality standard at all, ECF No. 235 at 21-22. To muddy the applicable standard, the defendant cites a single district court opinion, *United States v. Sutton*, No. 21-098-01, 2022 WL 2383974, at *9 (D.D.C. July 1, 2022), which does not reflect the overall state of the law in this District. *See United States v. Libby*, 429 F. Supp. 2d 1, 6 n.10 (D.D.C. 2006) (explicitly

rejecting the overly broad approach to discovery—"that the government's search was to be limited only by the 'rule of reason'"—in another case by the same district court that later decided *Sutton* because, the *Libby* court stated, it "needs not (nor does it believe it could) adopt such a broad reading of the applicable caselaw in this Circuit").

The applicable discovery rules all incorporate a materiality standard. *See United States v. Graham*, 83 F.3d 1466, 1473-74 (D.C. Cir. 1996) (discussing *Brady* and Rule 16 materiality standards); L. Cr. R. 5.1(a) (referencing *Brady* to require disclosure of favorable evidence "material either to guilt or punishment"). And as the Government previously laid out, ECF No. 181 at 6, and as the defendant previously conceded, ECF No. 167 at 6, materiality is inherently tied to the allegations in the indictment, *see Libby*, 429 F. Supp. 2d at 7 ("a court must first start with the indictment when determining what is material"); it is likewise tied to the evidence the Government plans to introduce at trial, which it laid out in detail in its Motion for Immunity Determinations, *see* ECF No. 245-1. The governing materiality standard rejects overbroad, speculative, vague, or tangentially relevant requests. *See* ECF No. 181 at 6-8 (citing cases regarding materiality standard); *id.* at 27, 31 (citing cases addressing speculative and vague discovery demands).

In addition, and contrary to the defendant's arguments throughout his reply (ECF No. 235 at 9, 29), the Court must account for relevance and cumulativeness in deciding materiality, even if such factors are not dispositive. *See, e.g.*, *United States v. Nichols*, No. 21-0117, 2023 WL 6809937, at *11 (D.D.C. Oct. 16, 2023) ("Because the government has already produced video evidence on the requested topic, any further, duplicative evidence . . . is not material under either *Brady* or Rule 16."); *United States v. Cousin*, No. 20-10071, 2022 WL 314853, at *21 (D. Mass. Feb. 2, 2022) ("information in the other redacted portions of the SRT report is cumulative

and not material under either *Brady* or Rule 16"); *United States v. Flynn*, 411 F. Supp. 3d 15, 30 (D.D.C. 2019) (denying request for information that was "irrelevant" to defendant's "underlying offense"). These considerations are consistent with the principle that a defendant cannot undertake a "fishing expedition," *United States v. Williamson*, No. 14-151, 2014 WL 12695538, at *2 (D.D.C. Oct. 23, 2014), and instead must show that the discovery sought would enable him "significantly to alter the quantum of proof in his favor," *Graham*, 83 F.3d at 1474.

Specific to Local Criminal Rule 5.1, the defendant asserts that the Government "has ignored" that Rule, ECF No. 235 at 8, which he argues requires additional disclosures, including (as described further below) on the topic of presidential immunity. *Id*. at 8, 14. He is wrong. Overall, Local Criminal Rule 5.1 is coextensive with and confirms the mandate of *Brady v. Maryland*, 373 U.S. 83 (1963), requiring disclosure of things like information inconsistent with the defendant's guilt; mitigation evidence; evidence of "an articulated and legally cognizable defense"; and credibility or impeachment information. L. Cr. R. 5.1(a)-(b). The Rule requires the Government "to disclose such information to the defense as soon as reasonably possible after its existence is known," *id*. at (a), which the Government has done. Indeed, far from ignoring that Rule, the Government has exceeded its obligations and provided broad and early discovery. The discovery has included information bearing on the defendant's immunity defense and, in compliance with Rule 5.1(e) in particular, material from "government officials who have participated in the investigation and prosecution" of pending charges. L. Cr. R. 5.1(e). *See, e.g.*, ECF No. 181 at 12 (noting production of FBI materials); *id*. at 12 n.3 (production of DOJ-OIG and NARA-OIG materials). Although the defendant urges the Court to distrust the Government's "discovery compliance representations," ECF No. 235 at 8, he identifies no specific information purportedly withheld in contravention of Rule 5.1 or any other rule.

b. The Government has already thoroughly reviewed its case files.

The Supreme Court's decision in *Trump* did not expand the scope of the prosecution team, as the defendant implies, *see* ECF No. 235 at 14, and the Government already conducted a thorough review of materials in the prosecution team's possession and produced any discoverable material to the defendant. Contrary to the defendant's contention that the Government "cannot meet their obligations by arguing that they took a broad approach to discovery at the outset . . . and insisting that their initial collection adequately encompassed discoverable information relating to Presidential immunity," *id*. at 1-2, that is exactly the case—because as the Government has repeatedly explained throughout this matter, it routinely produced materials above and beyond its obligations under Rule 16, *Brady*, *Giglio*, *Jencks*, and their progeny. As a result of this expansive approach to discovery, the Government has already produced all of the evidence in its possession regarding the context of the defendant's acts. For example, the Government did not simply produce evidence of what the defendant said in his speech on January 6, 2021, but also the evidence that the Government possesses regarding the preparation, planning, and funding for that event. No new discovery review or production—apart from the Government's usual and continuing obligation—is necessary because it has already been done.

The expansive nature of the Government's previous searches—and resulting productions to the defendant—is evident from the Government's Motion for Immunity Determinations and accompanying Appendix. *See* ECF Nos. 245-1 and 245-2 to 245-5. With the exception of a handful of publicly available sources, the Government long ago produced this material to the defendant in discovery, even though much of it was arguably not discoverable. This includes material that goes to context and that the defendant incorrectly claims he does not already have—such as proof of the funding and organization of the Ellipse rally at which the defendant spoke on January 6; evidence about the defendant's actions surrounding meetings and communications that

the Government contends are unofficial; and other information indicating private, rather than official conduct, like Hatch Act warnings and use of private email accounts. The defendant's assertion that he does not have such material appears based on the faulty assumption that the Government did not already produce it, as it did. *See* ECF No. 232 at 60 (counsel "assuming" there is discovery that has not been turned over "because the Government never had to really look at issues relating to immunity before").

c. The defendant's request for information about internal legal analyses is not discoverable or relevant to the Court's factbound analysis.

The defendant makes a broad request for material regarding determinations of official conduct and for "information relating to actual or threatened 'dangers of intrusion on the authority and functions of the Executive Branch.'" ECF No. 235 at 5. To this end, he seeks discovery of the government's "prior positions" on the scope of Executive authority. *Id*. These legally unsupported demands seek disclosure of work product, legal opinions, and other material that is wholly irrelevant to any valid defense on the issue of presidential immunity or to the Court's factbound immunity determinations.

First, the government's prior non-public positions on Executive authority in other cases or contexts—to the extent they even exist—are not material to the issues in this case and are not discoverable. The Supreme Court remanded the case to this Court to determine whether the defendant's acts and statements were official and, if so, whether the presumption of immunity can be overcome. This exercise requires a factbound analysis of the defendant's words and actions, not consideration of the government's "prior positions" on purported exercises of Executive authority.

The defendant cites to two cases in which the government was either ordered or agreed to disclose Executive Branch decisions or deliberative documents. *Id*. at 6 (citing *United States v.*

Poindexter, 727 F. Supp. 1470 (D.D.C. 1989), and *United States v. George*, 786 F. Supp. 56, 64 (D.D.C. 1992)). In both cases, however, the Court ordered discovery of certain documents found to bear on the defendant's *mens rea:* they both related to specific acts charged in the indictment and were relevant to the defendant's motive and beliefs at the time of the alleged crimes. The presidential immunity inquiry in this case is decidedly different: it is an "objective analysis" of the defendant's conduct, *see Trump*, 144 S. Ct. at 2340, and his motives are specifically not to be considered, *id.* at 2333 ("In dividing official from unofficial conduct, courts may not inquire into the President's motives.").

The defendant cannot explain how the government's "prior positions" on Executive authority could be relevant and discoverable. He suggests that such material could lead to "testimony from current or former government officials who disagree with the [Special Counsel] Office's anticipated position on issues" related to presidential immunity. ECF No. 235 at 25. By advancing this near-limitless rationale, however, the defendant continues to ignore settled law confirming that government work product, opinions on legal issues, and mental impressions are not discoverable. *See* ECF No. 181 at 37; FED. R. CRIM. P. 16(a)(2); *United States v. Armstrong*, 517 U.S. 456, 463 (1996); *United States v. NYNEX Corp.*, 781 F. Supp. 19, 25-26 (D.D.C. 1991).

The defendant's reliance on *Poindexter*, 727 F. Supp. 1470, for this issue is misplaced. In *Poindexter*, the defendant was charged with obstruction crimes in connection with his alleged participation in a scheme to conceal the National Security Council's Iran-Contra activities from Congress. *Id*. at 1473. The court found that contemporaneous Executive Branch documents supporting the legality of those activities that were known to the defendant could show that he lacked a motive to lie to Congress, which could in turn negate the specific intent element required

for the charged crimes. *Id*. at 1476. The court further found discoverable certain documents "regarding the knowledge of other high government officials of the NSC's Iran-Contra activities," but only after discerning specific ways such knowledge could bear on the defendant's motive or *mens rea*. *Id*. at 1476-77. Implicit in the court's reasoning was that the knowledge of others would be relevant if the defendant knew at the time of the alleged crimes what others knew. Without the defendant's knowledge, what others knew could have no bearing on his *mens rea* or motive, as the courts in *United States v. Secord* and *George* later explained:

> In *United States v. Poindexter,* 727 F. Supp. 1470 (D.D.C. 1989), Judge Greene permitted discovery concerning the knowledge of others involved in Iran–Contra because such discovery might tend to show that the defendant had no intent to conceal information and that he thought his actions were legal. In *United States v. Secord,* 726 F. Supp. 845 (D.D.C. 1989), former Chief Judge Robinson denied this sort of discovery to the defendant on the grounds that the defendant had not been able to establish (nor had even proffered) that the defendant *knew* what information others had. Without this crucial link, the discovery was not material to the defense because it revealed nothing about the defendant's state of mind. This court believes that Judge Robinson has the better of the argument. It is immaterial what Congress knew unless the defendant was aware of their knowledge.

George, 786 F. Supp. at 64.

In other words, *Poindexter* does not hold, as the defendant suggests, that Executive Branch documents, or evidence of what others knew or believed at the time of the alleged crimes, are *per se* disclosable, even if they may touch on the subject matter in an abstract sense. Rather, there must be a specific and articulable relationship to an issue in the case, whether it be the immunity determination or the defendant's *mens rea*. *See* ECF No. 181 at 6-8; *Poindexter*, 727 F. Supp. at 1478-79 (requiring detailed proffer to meet the materiality standard); *George*, 786 F. Supp. at 60-61 (finding that defendant failed to meet materiality standard for broad requests). Here, the defendant fails to show any logical connection between evidence of the government's "prior

positions" on Executive authority and the context-driven "factbound" immunity determinations before the court.

d. The defendant's requests for discovery regarding alleged context are irrelevant, vague, and call for material the Government has already produced.

The defendant further requests, broadly and without specificity, "discovery regarding the 'context' in which the alleged conduct took place." ECF No. 235 at 7. As with all requests, this demand must meet the ordinary requirements of discovery, namely, (1) whether the requested documents are within the possession of the prosecution team, in that they are held by an entity that is "closely aligned with the prosecution" and thus can be easily and fairly obtained by the Government; and (2) whether the defendant has established that the requested documents meet the test of materiality to the defense for which it is sought. *See Libby*, 429 F. Supp. 2d at 9-17 (assessing both scope and materiality); ECF No. 181 at 2-8 (setting forth requirements).

In this respect, "context" is not an infinitely elastic term justifying vague discovery demands. For context evidence to be material to an immunity defense, it must logically bear on the immunity determination before the Court—that is, whether the specific acts of the defendant to be proven in the case are official and, if so, whether the immunity presumption can be rebutted. In imposing a requirement that the Court consider context, the Supreme Court in *Trump* offered the example of the defendant's communications on January 6, stating that "what else was said contemporaneous to the excerpted communications, or who was involved in transmitting the electronic communications and in organizing the rally, could be relevant to the classification of each communication." *Trump*, 144 S. Ct. at 2340. The Supreme Court's reliance on *Snyder v. Phelps*, 562 U.S. 443, 453 (2011), is also a guide; there, in reviewing the context of the speech at issue in that case, the Supreme Court considered where the speech occurred. *Id*. at 454. To be sure, relevant context evidence may be narrower or broader depending on the act or speech under

consideration. But at a minimum, there must exist an articulable and logical connection between the purported "context" and the specific allegation to be proven or the evidence to be admitted at trial. In making his ill-defined demands for "context" discovery, the defendant has not even attempted to meet this standard.

In any event, the Government previously disclosed to the defendant all discoverable information that it possessed relevant to context, and it went a step further in its filing on September 26 when, in ECF No. 245-1, it provided the defendant with a detailed, fact-based proffer of its case-in-chief. That proffer shows that the defendant's demands for contextual discovery are either irrelevant because they pertain to conduct that is not charged in the superseding indictment and that the Government does not plan to use at trial, or the defendant already has all responsive material within the Government's possession.

Take, for example, the defendant's demands for disclosures regarding his public statements. *See* ECF No. 235 at 8. The Government has already provided the defendant with voluminous and complete discovery related to the context of this conduct relevant to the superseding indictment, including information in the Government's possession regarding the timing, drafting, and funding of those statements. And the Government's extensive factual proffer and contextual analysis of these issues in its Motion for Immunity Determinations and accompanying Appendix, *see* ECF Nos. 245-1 and 245-2 to 245-5, provide the defendant with specific references to evidence regarding his public statements that the Government previously produced to him in discovery. The voluminous Appendix, for instance, includes interview transcripts and reports, PDDs, emails and text messages, and other relevant records that the defendant has long possessed, and the Motion explains to the defendant how the Government

believes these records are material. Because the defendant's demand regarding his public statements is so vague, it is unclear what more he seeks.

Similarly, the defendant makes a generalized request for national security information like the 2016 and 2020 Election Intelligence Community Assessments, *see* ECF No. 235 at 25-26, and new arguments regarding SolarWinds, *id*. at 26 (both of which the Government addresses further in its classified supplement), and he again demands information related to requests for security at the Capitol on January 6, *id.* at 26-27. Here too the Government already provided to the defendant all discoverable materials in its possession on these issues. But in addition, as is clear from the superseding indictment and the Government's factual proffer, none of these materials is relevant to any defense to the evidence of the defendant's private conduct that the Government will present at trial, *see Libby*, 429 F. Supp. 2d at 7 (required Rule 16(a)(1)(E)(i) discovery limited to the "defendant's response to the Government's case in chief"), or to the Court's consideration of context as it makes its immunity determinations.

III. The Court Should Reserve Ruling on the Defendant's Immunity-Related Demands and Order Him to Perfect Them in His October 17 Filing

For all of these reasons, the Court should reserve ruling on the defendant's immunity-related demands. Specifically, the Court should direct the defendant to try again to do what it previously ordered, and what he could easily have done in the three months since the Supreme Court's decision: to thoroughly review the expansive discovery he has already received and then make clear demands for any specific contextual evidence related to Presidential immunity that he believes is in the Government's possession and has been improperly withheld. The Government is confident that no such additional material exists. But such a process would ensure that the Court has the benefit of all information relevant to its immunity determinations.

This process—necessitated by the defendant's delay tactics—should be incorporated into, rather than delay, the Court's ongoing schedule for briefing on immunity determinations. The Government's opening immunity filing not only provided the defendant with a detailed roadmap of its case-in-chief and evidence regarding context; it also provided him with a voluminous Appendix pointing him to material that the Government long ago produced to him in discovery, much of which directly answers variations of the requests the defendant submitted in his discovery letter the day before the Government's filing. In light of the defendant's deficient discovery demands here, the Court should order the defendant to review the material he has already received and include in his responsive immunity filing, due October 17, any properly specific remaining demands. Such a process will clarify any live discovery issues for the Court's resolution or otherwise confirm that no further discovery is necessary before the Court makes its immunity determinations.

There is another reason the Court should reserve ruling: to ensure that it makes all of its immunity-related decisions, even those regarding discovery, at the same time in a single order. Given the history of this litigation, the defendant's repeated efforts to resist the Court's schedule for addressing immunity issues, *see* ECF Nos. 235 and 242, and his implied preference for successive, inefficient rounds of appellate review, *see* ECF No. 242 at 4 (claiming that a schedule that leads to only one additional interlocutory appeal is "extralegal"), the defendant may attempt to use any interim denial of his deficient immunity-related discovery demands as the basis for a frivolous interlocutory appeal (an appeal that the Government would contest). *Cf. United States v. Zone*, 403 F.3d 1101, 1106-07 (9th Cir. 2005) (per curiam) (discussing appealability of discovery demands in conjunction with a double-jeopardy-based interlocutory appeal). The Court should thus refrain from entering an order denying the defendant's frivolous immunity-related discovery

demands at this time and should instead direct him to perfect them, as part of the Court's ongoing process of addressing all immunity-related issues.

Adopting this course will advance the Court's "responsibility to police the prejudgment tactics of litigants," *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985), and avoid "piecemeal, prejudgment appeals" that "undermine[] 'efficient judicial administration,'" *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (citation omitted). It also will not prejudice the defendant. If the Court ultimately grants the defendant's motion to dismiss on immunity grounds, then any immunity-related discovery requests will become moot. And if the Court instead addresses the defendant's immunity-related discovery demands in the same ruling in which it makes its other immunity determinations, the defendant may pursue an interlocutory appeal on any denial of additional immunity-based discovery at the same time he seeks any review of the merits of the Court's other immunity determinations. *See United States v. Rashed*, 234 F.3d 1280, 1285 (D.C. Cir. 2000).

IV. The Court Should Deny the Defendant's Non-Immunity-Related Discovery Requests and Improper Requests for Dismissal and Reconsideration

For the reasons in the Government's Opposition, ECF No. 181, the Court should deny the defendant's non-immunity-based discovery demands. The defendant also uses his reply as an opportunity to improperly request additional relief—dismissal and reconsideration of several of the Court's previous sound rulings. First, the defendant dramatically seeks dismissal of the charges against him, pronouncing at the outset of his brief that "[t]his case should be dismissed. Promptly." ECF No. 235 at 1. Yet he offers no authority for his requested dismissal and, apart from his opening salvo, never mentions it again. Then, the defendant attempts to seek reconsideration, without any basis, of the Court's September 5 scheduling Order, ECF No. 233—which the Court has already denied, *see* ECF No. 243 at 6—and the Court's Order denying his motion to dismiss

for vindictive and selective prosecution, ECF No. 199. *See* ECF No. 235 at 3-5, 7, 28. For both, the defendant simply recycles arguments already offered to, and rejected by, the Court, and he does not even address the standard for reconsideration—likely because he cannot possibly meet it. *See United States v. Purdy*, No. 22-29, 2024 WL 2720444, at *2 (D.D.C. May 28, 2024) (laying out bases for reconsideration and finding it "not warranted" where a defendant "mostly reiterates the reasons already rejected by the Court and any additional reasons fall short of a significant change that would justify reconsideration"); *United States v. Hassanshahi*, 145 F. Supp. 3d 75, 80-81 (D.D.C. 2015) (same). The Court should deny the defendant's improper efforts to seek dismissal and relitigate his empty selective and vindictive prosecution claims just as it did his rehashing of complaints about the briefing schedule.

V. Conclusion

The defendant's arguments in support of his discovery motions, including those invoking the issue of presidential immunity, fail to provide any factual or legal basis for his broad requests. His attempts to secure dismissal of this case and reconsideration of the Court's prior orders are equally meritless. The Court should deny the defendant's non-immunity-related motions and should reserve ruling on the defendant's immunity-related demands until after the defendant addresses the deficiencies in them in the course of the Court's schedule for immunity briefing.

Respectfully submitted,

JACK SMITH
Special Counsel

By: /s/Molly Gaston
Molly Gaston
Thomas P. Windom
Senior Assistant Special Counsels
950 Pennsylvania Avenue NW
Room B-206
Washington, D.C. 20530

LAURO & SINGER
FLORIDA ♦ NEW YORK

FLORIDA
400 N. Tampa Street
15th Floor
Tampa, Florida 33602
[redacted]

1101 Brickell Avenue
South Tower, 8th Floor
Miami, FL 33131
[redacted]

NEW YORK
250 E. 53rd Street
Suite 1701
New York, New York 10022
[redacted]

WWW.LAUROSINGER.COM

VIA E-MAIL ([redacted])

September 25, 2024

Molly Gaston
Thomas P. Windom
Senior Assistant Special Counsels
950 Pennsylvania Avenue NW
Room B-206
Washington, D.C. 20530

Re: United States v. Trump, No. 23 Cr. 257 (TSC)

Dear Ms. Gaston and Mr. Windom:

We have identified additional discovery issues that must be addressed prior to any factual presentation, if necessary, on the issue of presidential immunity. These requests are intended to enable us to prepare for appropriate briefing and present evidence related to immunity. We are entitled to this discovery pursuant to Rule 16(a)(1)(E), *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976), *Giglio v. United States*, 405 U.S. 150 (1972) and their progeny; as well as the Fifth and Sixth Amendments to the United States Constitution. Further, you have represented to the Court and in your filings that you are willing to assist beyond any otherwise applicable legal requirement. As such, we request that you specifically search for and produce discovery responsive to the following requests and, as to certain requests, provide us with information so we can determine how best to proceed.

I. Background

Each of the requests set forth below calls for production of documents or information irrespective of their classification level. As used herein, the term "documents" includes (i) all communications, including memoranda, reports, letters, notes, emails, text messages, videos, and other electronic communications; (ii) hard copies and electronically stored information, whether written, printed, or typed; and (iii) all drafts and copies.

The Requests call for specified documents in the possession of the prosecution team, as we defined that term in our October 15, 2023, letter to you and in our motion regarding the scope of the prosecution team (Doc. 169).

II. Requests

1. In light of the recent Supreme Court opinions in *Trump v. United States* and *Fischer v. United States*, the scope of potentially exculpatory discovery pursuant to *Brady* and its progeny has changed. Nonetheless, you have indicated to the Court that no additional exculpatory information exists, and have allowed the September 10, 2024, deadline to comply with this obligation lapse without additional production. Doc. 233 at 2. This is implausible given the greatly expanded scope of issues relevant to immunity. We request you re-evaluate and produce all discovery that would fall within your *Brady* obligation pursuant to Local Criminal Rule 5.1, D.C. Rule 3.8, and the Court's September 5, 2024, order. *See also Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009) ("[T]he obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations.").

2. Please provide Rule 16(G) expert disclosures for any expert witness the prosecution intends to use to support its presentation on presidential immunity.

3. Please provide all published, classified, and unpublished opinions, memos, letters, and advice documents of the Office of the Attorney General, Office of Legal Counsel (OLC), and the Solicitor General's Office bearing on the powers, authority, duties, obligations, responsibilities and acts of the Executive Branch. Providing us with an index of all documents would not be sufficient, but we are amenable to conferring with you on acceptable search terms to identify all relevant documents.

4. We have identified certain public DOJ Office of Legal Counsel ("OLC") opinions. However, not all opinions or research are public, particularly informal memos/letters. We understand many such memos are stored in OLC's "DAMS" system. We would like to run search terms on DAMS system to identify relevant discovery. We prefer to provide the search terms to someone unassociated with the prosecution team in order to protect the confidentiality of the terms. We ask for you to arrange a contact for us with knowledge of the DAMS system who has the capability to run searches.

5. Please provide all published, classified, and unpublished opinions, memos, letters, and advice documents of the Office of the Attorney General, Office of Legal Counsel (OLC), and the Solicitor General's Office regarding the application of the Westfall Act (the Federal Employees Liability Reform and Tort Compensation Act), 28 CFR § 15.4, the Federal Tort Claims Act, and *In re Neagle*, 135 U.S. 1 (1890), related to the scope of presidential authority, power, capacity, and employment and/or discretionary functions and duties.

6. Please provide all Department of Justice documents regarding the characterization of presidential official acts, including, but not limited to, all documents related to the Department of Justice's internal discussions and preparations for its amicus curiae position in *Blassingame v. Trump* that "immunity reaches all of the President's conduct within the vast ambit of his Office, including its 'innumerable' constitutional, statutory, and historical dimensions.... In all contexts, questions of Presidential immunity must be approached with the greatest sensitivity to the unremitting demands of the

Presidency." Brief for United States as Amicus Curiae in *Blassingame v. Trump*, Nos. 22-5069, 22-7030, 22-7031, at 1–2 (D.C. Cir. filed March 2, 2023).

7. Please provide all Department of Justice documents regarding the scope and application of presidential immunity addressed in *Nixon v. Fitzgerald*, including, but not limited to, all documents where the Department of Justice supported a presidential act to be within the outer perimeter of Presidential responsibility and/or the powers, authority, duties, or responsibilities of the President.

8. Please provide all communications between the Office of Legal Counsel and any Special Counsel, including, but not limited to the Office of Jack Smith, regarding the scope of Presidential immunity, the outer perimeter of Presidential responsibility, and/or the authority, powers, duties, or responsibilities of the President.

9. Please provide all communications between the Department of Justice, including the Office of Legal Counsel and the Special Counsel's Office, and White House Counsel regarding the issue of presidential immunity, the outer perimeter of Presidential responsibility and/or the powers, authority, duties, or responsibilities of the President.

10. Please provide all communications between the Department of Justice, including the Office of Legal Counsel and the Special Counsel's Office, and any Congressional committee, sub-committee, or member regarding the issue of presidential immunity, the outer perimeter of Presidential responsibility and/or the powers, authority, duties, or responsibilities of the President.

11. Please provide all communications between the Department of Justice, including the Office of Legal Counsel and the Special Counsel's Office, and any state or local prosecutors, or any outside group or individual (including, but not limited to, Citizens for Responsibility and Ethics in Washington) regarding the issue of presidential immunity, the outer perimeter of Presidential responsibility and/or the powers, authority, duties, or responsibilities of the President.

12. Please provide all grand jury transcripts and exhibits related to the Superseding Indictment in this matter (Doc. 226) including the summations and legal instructions.

13. The initial grand jury production did not separate out each grand jury transcript with its testimony, exhibits, and memos nor did each grand jury transcript attach all of the exhibits, memos, and prior testimony presented during that session. Please provide an organized production of these materials.

14. Please provide all 302s and other investigative memoranda regarding the analysis or application of the Electoral Count Act by constitutional and legal scholars.

15. Please provide all photographs and video by the White House photographers of President Trump and anyone known to the government to have met with President Trump from November 3, 2020, through January 6, 2021.

16. Please provide all Daily Diaries of the President (DDP) from November 3, 2020, through January 6, 2021, including all attachments, where not previously provided. For example, SCO-[redacted] contains attachments such as the White House Switchboard Presidential Call Log, Situation Room Call Log, schedule, emails, and handwritten notes. Please provide all other DDPs with the same or similar attachments.

17. Please provide all Department of Justice and White House memos, policies, rules, and guidelines regarding the expenditure and reimbursement of presidential expenses, including, but not limited to, the allocation of expenses between government and personal expenses.

18. Please provide all documents related to the allocation of presidential and personal expenses for the last twelve months of President Trump's first term in office.

19. The discovery production does not contain any transcripts, memoranda, 302s or any documents related to the individuals identified as Republican contingent electors for the states named in the Superseding Indictment. We found letters (SCO-1[redacted], SCO-[redacted], SCO-[redacted], SCO-[redacted], SCO-[redacted]) indicating that the Government interviewed and sought records from electors. Please provide all documents related to the electors.

20. Please provide the [redacted], and [redacted], interview memoranda and transcripts for [redacted].

21. We do not appear to have a complete production of the text messages for many individuals. For example, you only produced approximately 20 for [redacted] and 3 for [redacted]. These are relatively few messages considering how extensively the Superseding Indictment discusses these individuals. Please provide all text messages for the individuals named in the Superseding Indictment (Doc. 266).

22. Please provide all documents and communications related to election law complaints received by the Department of Justice, the FBI and any other law enforcement agency relating to the 2020 election and investigations thereof. This would include all investigations with case classification "56D-" or the like. [redacted] However, the production contains no discovery related to these investigations.

23. Please provide all documents and communications related to any investigations into any allegations of fraud or irregularities in the 2020 Presidential Election by the Department of Justice, any U.S. Attorney's office, or any state or local investigation.

24. Please provide all transcripts, memoranda, 302s, and other investigative documents for all investigations into allegations of fraud or irregularities in the states identified in the Superseding Indictment. This request includes all independent reports and summaries of any fraud or irregularities in the 2020 Presidential Election.

25. Please provide all written objections to electoral votes either submitted or proposed to be submitted at the January 6 Congressional hearing.

26. Please provide all documents regarding the organization, preparation, and funding for the events in which President Trump participated on January 6, 2021.

27. Please provide all documents regarding the preparation of President Trump's speech on January 6, 2021.

28. Please provide all documents related to President Trump's travel on January 6, 2021.

29. Please provide all documents related to the drafting and delivery of the statements attributed to President Trump in the Superseding Indictment (Doc. 266).

As stated, these requests do not encompass all discovery you are required to provide and we and reserve all rights to seek further discovery as appropriate. We ask that you provide the discovery sought by this letter as soon as possible.

Sincerely,

John Lauro

John F. Lauro
JFL/gms

cc: Todd Blanche ([redacted])

LAURO & SINGER
FLORIDA ♦ NEW YORK

FLORIDA
400 N. Tampa Street
15th Floor
Tampa, Florida 33602
[redacted]

1101 Brickell Avenue
South Tower, 8th Floor
Miami, FL 33131
[redacted]

NEW YORK
250 E. 53rd Street
Suite 1701
New York, New York 10022
[redacted]

WWW.LAUROSINGER.COM

VIA E-MAIL ([redacted])

September 29, 2024

Molly Gaston
Thomas P. Windom
Senior Assistant Special Counsels
950 Pennsylvania Avenue NW
Room B-206
Washington, D.C. 20530

Re: **United States v. Trump, No. 23 Cr. 257 (TSC)**

Dear Ms. Gaston and Mr. Windom:

I write regarding an additional discovery matter that has arisen since our last letter to you on September 25, 2024. Also on September 25th, Department of Justice Inspector General Mark Horowitz testified before the House Select Subcommittee on the Weaponization of the Federal Government that he has prepared a draft report reviewing the Department of Justice's actions surrounding the events of January 6, 2021. You have previously acknowledged DOJ-IG "worked on the investigation leading to this case." Nov. 25, 2023, Ltr. Regarding Discovery (Doc. 166-7). Therefore, DOJ-IG is part of the prosecution team and you are required to search for and produce discoverable information in its possession. Please provide the draft report along with all documents and communications gathered during Mr. Horowitz's investigation, including, but not limited to, any responses to the report provided by the Department of Justice and law enforcement agencies. As Mr. Horowitz stated that the report could not yet be made public pending a classification review, we are available to review the report as we have with other classified material. The events of January 6 are germane to the immunity issues currently before the Court. Therefore, it is imperative that we have access to the report before we are required to file our responsive immunity brief. Please provide the report and all related documents and communications by October 3, 2024.

Sincerely,

John Lauro

John F. Lauro
JFL/gms

cc: Todd Blanche ([redacted])

U.S. Department of Justice

Special Counsel's Office

October 1, 2024

Todd Blanche, Esq. (*via email*: [redacted])
Blanche Law
99 Wall Street, Suite 4460
New York, NY 10005

John Lauro, Esq. (*via email:* [redacted])
Lauro and Singer
Bank of America Plaza
101 Kennedy Boulevard, Suite 3100
Tampa, FL 33602

Re: *United States v. Donald J. Trump*, Case No. 23-cr-257 (TSC)

Dear Counsel:

We write in response to your discovery letters dated September 25 and 29, 2024.

Your September 25 letter claims to "have identified additional discovery issues that must be addressed prior to any factual presentation, if necessary, on the issue of presidential immunity." We broadly disagree with your assertion and, below, we respond to each of your twenty-nine requests. We also respond to the additional request in your September 29 letter.

As an initial matter, we note that—despite our repeated offers—you did not engage with us on discovery issues or send us your September 25 letter until after filing your reply in support of your discovery motions. Had you done so, we could have pointed you to the discovery productions that contain many of the materials you requested. Otherwise, to the extent you do not already have the material you claim you lack, your requests seek information that exceeds the scope of the Government's discovery obligations and/or is not within the possession of the prosecution team. And they all rely on an improperly broad definition of the "prosecution team." *See* Gov't Discovery Letter (10/24/23); Gov't Discovery Letter (11/3/23); Gov't Opposition to Defense Discovery Motions (ECF No. 181 at 1-18).

As with our prior responses to your discovery letters, other than where we provide the Bates numbers of specific individual items, the Bates ranges provided below are examples of ranges that contain documents responsive to your requests and are not an exhaustive list of where in the productions responsive material may be located. Moreover, to the extent that we have produced information that is responsive to your discovery requests, that production does not imply that we concede the information's discoverability or obligate us to make any additional productions that exceed our existing discovery obligations.

September 25 Letter

Request 1: As we have said previously, the Government "took from the very beginning of this case an extremely comprehensive view of what should be produced in discovery." ECF No. 232 at 63. At this time, we have "nothing further to provide." *Id.* We are mindful that our discovery obligations remain ongoing, *see* ECF No. 233 at 2, and to the extent that we later come into possession of discoverable material, we will provide it to you.

Request 2: Expert testimony is unnecessary for the Court to conduct the factbound analysis required on remand, nor did the briefing schedule you proposed prior to the status hearing contemplate expert disclosures. *See* ECF No. 229. If you intend to designate and rely on expert opinions or testimony, please advise us and the Court promptly.

Requests 3-11: As an initial matter, these nine requests are vague and overbroad. But on a more granular level, each fails to identify any discoverable information. To the extent your requests seek the Government's internal correspondence made in connection with investigating or prosecuting this case, they run afoul of Federal Rule of Criminal Procedure 16(a)(2). To the extent your requests seek the Justice Department's non-public internal positions unrelated to this case, they seek information not in the possession of the prosecution team or that otherwise is not discoverable. And to the extent your requests seek the Justice Department's public positions on the issues you identify, we are unaware of any discovery rule that requires us to scour the public record to answer your request. If you have any binding precedent to establish your entitlement to the discovery you seek in these requests, please provide it to us so that may reconsider our position if necessary.

Request 12: Your request seeks "all grand jury transcripts and exhibits related to the Superseding Indictment" as well as "the summations and legal instructions." As you know, we already have provided the grand jury transcripts and exhibits. *See, e.g.*, Discovery Production 17 Cover Letter (9/3/24) ("Discovery Production 17 . . . includes grand jury transcripts and exhibits in support of the superseding indictment."); ECF No. 232 at 40 ("Two days ago, we provided to the defense the grand jury transcripts and the attendant exhibits that underlie the return of that superseding indictment."). As for "the summations and legal instructions," we advised you on a meet-and-confer telephone call on August 28, 2024, that we did not intend to produce this material, and invited you to provide us with binding precedent establishing your entitlement to it. Neither your recent discovery letter nor any other correspondence references such binding precedent. Accordingly, we maintain our position that "the summations and legal instructions" are not discoverable.

Request 13: The initial grand jury production from August 11, 2023, already is organized in the way you now request—with each grand jury witness's transcript, followed by the exhibits used in his or her examination. We refer you to our discovery letter of August 28, 2023, which included "more detailed Source Logs . . . with additional information to help you determine the Bates range" for grand jury witnesses. If you require additional information to help you find documents already in your possession, and already clearly delineated in the detailed Source Logs accompanying the discovery productions, please let us know. Your request also refers to "memos" for each grand jury witness; the word "memos" as used is vague, and we request clarification of this request.

Request 14: To the extent we possess discoverable information responsive to this request, we have produced it to you. *See, e.g.*, SCO- through SCO-; SCO- through SCO-.

Request 15: To the extent we possess discoverable information responsive to this request, we have produced it to you. *See, e.g.*, SCO- through SCO-. Additionally, we understand that pursuant to the Presidential Records Act, the defendant has access, through his designated representatives, to materials from his administration that are in the custody and control of NARA, and that his representatives had the opportunity to review any records NARA provided to us before we received them.

Request 16: To the extent we possess discoverable information responsive to this request, we have produced it to you. *See, e.g.*, SCO- through SCO-; SCO- through SCO-. Additionally, we understand that pursuant to the Presidential Records Act, the defendant has access, through his designated representatives, to materials from his administration that are in the custody and control of NARA, and that his representatives had the opportunity to review any records NARA provided to us before we received them.

Request 17: Your request seeks information not in the possession of the prosecution team or that otherwise is not discoverable. That said, you may find information potentially responsive to your request at: https://www.justice.gov/olc/opinion/payment-expenses-associated-travel-president-and-vice-president.

Request 18: To the extent we possess discoverable information responsive to this request, we have produced it to you. Additionally, we understand that pursuant to the Presidential Records Act, the defendant has access, through his designated representatives, to materials from his administration that are in the custody and control of NARA.

Request 19: Your request incorrectly asserts that the "discovery production does not contain any transcripts, memoranda, 302s or any documents related to the individuals identified as Republican contingent electors for the states named in the Superseding Indictment" and, on that faulty premise, requests that we "provide all documents related to the electors." The detailed Source Logs accompanying our productions disclose the location of the information you seek. Nonetheless, to aid your review, we include as Exhibit A to this letter a spreadsheet identifying material related to approximately fifty individuals listed on your client's fraudulent elector certificates.

Request 20: This material was provided to you on August 11, 2023. *See, e.g.*, SCO- through SCO-; SCO- through SCO-; SCO- through SCO-; SCO- through SCO-. And we previously directed you to these specific interview transcripts in response to one of your other discovery requests. *See* Gov't Discovery Letter (11/3/23) at 2 (regarding Request #4 to your October 23 discovery letter).

Request 21: To the extent we possess discoverable information responsive to this request, we have produced it to you. It is unclear to us why you are able to locate such a limited number of text messages for and . To assist you, below we have assembled certain information regarding facilities and subpoena productions for

[redacted] that we already provided to you in the detailed Source Logs accompanying our discovery productions. Please note that, in productions or warrant returns for other custodians, you may also identify documents reflecting text messages with [redacted] and [redacted] by searching by their phone numbers within the discovery materials.

[redacted]

Requests 22-24: This appears to be at least the third time you have made these requests. *See* Defense Discovery Letter (10/4/23) at 1-2; Defense Discovery Letter (10/23/23) at 2-4. Accordingly, we refer you to our prior responses. *See* Gov't Discovery Letter (10/13/23) at 1-2; Gov't Discovery Letter (11/3/23) at 2. We previously invited you to explain how the information you seek is potentially pertinent to the trial of this case. As examples, we invited you to let us know if your client is aware of a specific investigation that revealed evidence of outcome-determinative election fraud in any state, or that revealed evidence to support any of the specific lies that the charging document alleges your client knowingly propagated. To date, we have not received any substantive response, only substantively identical requests without elaboration.

Request 25: Your request appears to seek written information originating from members of Congress. To the extent we possess discoverable information responsive to this request, we have produced it to you. *See, e.g.*, SCO-[redacted] through SCO-[redacted]; SCO-[redacted] through SCO-[redacted]; SCO-[redacted] through SCO-[redacted]; SCO-[redacted] through SCO-[redacted]; SCO-[redacted] through SCO-[redacted].

Requests 26-29: To the extent we possess discoverable information responsive to these requests, we have produced it to you. *See, e.g.*, SCO-[redacted] through SCO-[redacted]; SCO-[redacted] through SCO-0[redacted]; SCO-[redacted] through SCO-[redacted]. We also refer you to our Motion for Immunity Determinations, ECF No. 245-1. Additionally, we understand that pursuant to the Presidential Records Act, the defendant has access, through his designated representatives, to materials from his administration that are in the custody and control of NARA.

September 29 Letter

Your September 29 letter continues to evince a fundamental misunderstanding of the scope of the prosecution team. We previously have said that "[t]he prosecution team consists of the prosecutors of the Special Counsel's Office and law enforcement officers who are working on this case." Gov't Discovery Letter (10/24/23); *see also* ECF No. 181 at 11-12. And we have identified as the "law enforcement agencies that worked on the investigation leading to this case . . . the Federal Bureau of Investigation; the Department of Justice Office of the Inspector General (DOJ OIG); the National Archives Inspector General (NARA OIG); and the United States Postal Inspection Service (USPIS)." Gov't Discovery Letter (11/25/23). It does not follow that the Government then possesses, for purposes of discovery, all records of everyone who works at the FBI, DOJ OIG, NARA OIG, or USPIS just because some of those agencies' officers worked on this investigation. We have made this point before specifically with respect to the FBI's Washington Field Office. *See, e.g.*, ECF No. 181 at 11-12. The same principle applies to DOJ OIG. Whichever team within DOJ OIG is working on the internal review and draft report referenced in your September 29 letter is not part of the prosecution team here.

Moreover, from publicly available information regarding the scope of that internal review, the focus of the draft report appears to be unrelated to the charges in the superseding indictment. *See United States v. Libby*, 429 F. Supp. 2d 1, 7 (D.D.C. 2006) ("a court must first start with the indictment when determining what is material"). Specifically, the DOJ Inspector General "initiat[ed] a review to examine the role and activity of DOJ and its components in preparing for and responding to the events at the U.S. Capitol on January 6, 2021." *See* https://oig.justice.gov/sites/default/files/2021-01/2021-01-15.pdf. That review apparently "will include examining information relevant to the January 6 events that was available to DOJ and its components in advance of January 6; the extent to which such information was shared by DOJ and its components with the U.S. Capitol Police and other federal, state, and local agencies; and the role of DOJ personnel in responding to the events at the U.S. Capitol on January 6." *Id.* And the review "will assess whether there are any weaknesses in DOJ protocols, policies, or procedures that adversely affected the ability of DOJ or its components to prepare effectively for and respond to the events at the U.S. Capitol on January 6." *Id.* While your letter makes the broad assertion that "[t]he events of January 6 are germane to the immunity issues currently before the Court," nowhere does it explain how a draft report into the Justice Department's preparation for, and response to, the attack on the Capitol are tethered to the allegations in the superseding indictment.

* * *

Lastly, we previously have offered assistance should you have any technical issues accessing specific discovery. That offer stands.

Respectfully,

JACK L. SMITH
Special Counsel

/s/ Thomas P. Windom
Thomas P. Windom
Molly Gaston
Senior Assistant Special Counsels

EXHIBIT A

Exhibit A to

Gov't Discovery Letter (10/1/24)

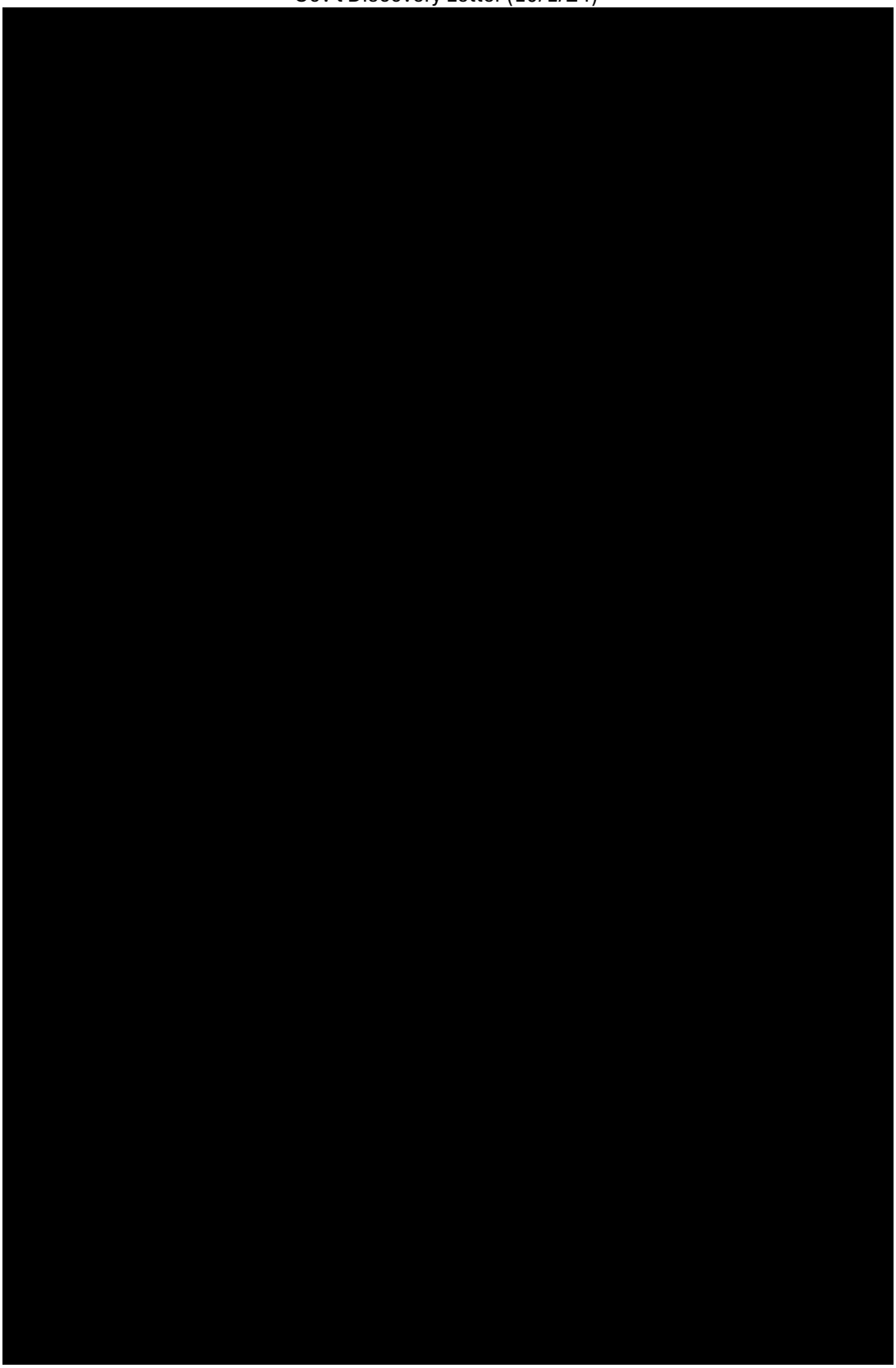

Exhibit A to

Gov't Discovery Letter (10/1/24)

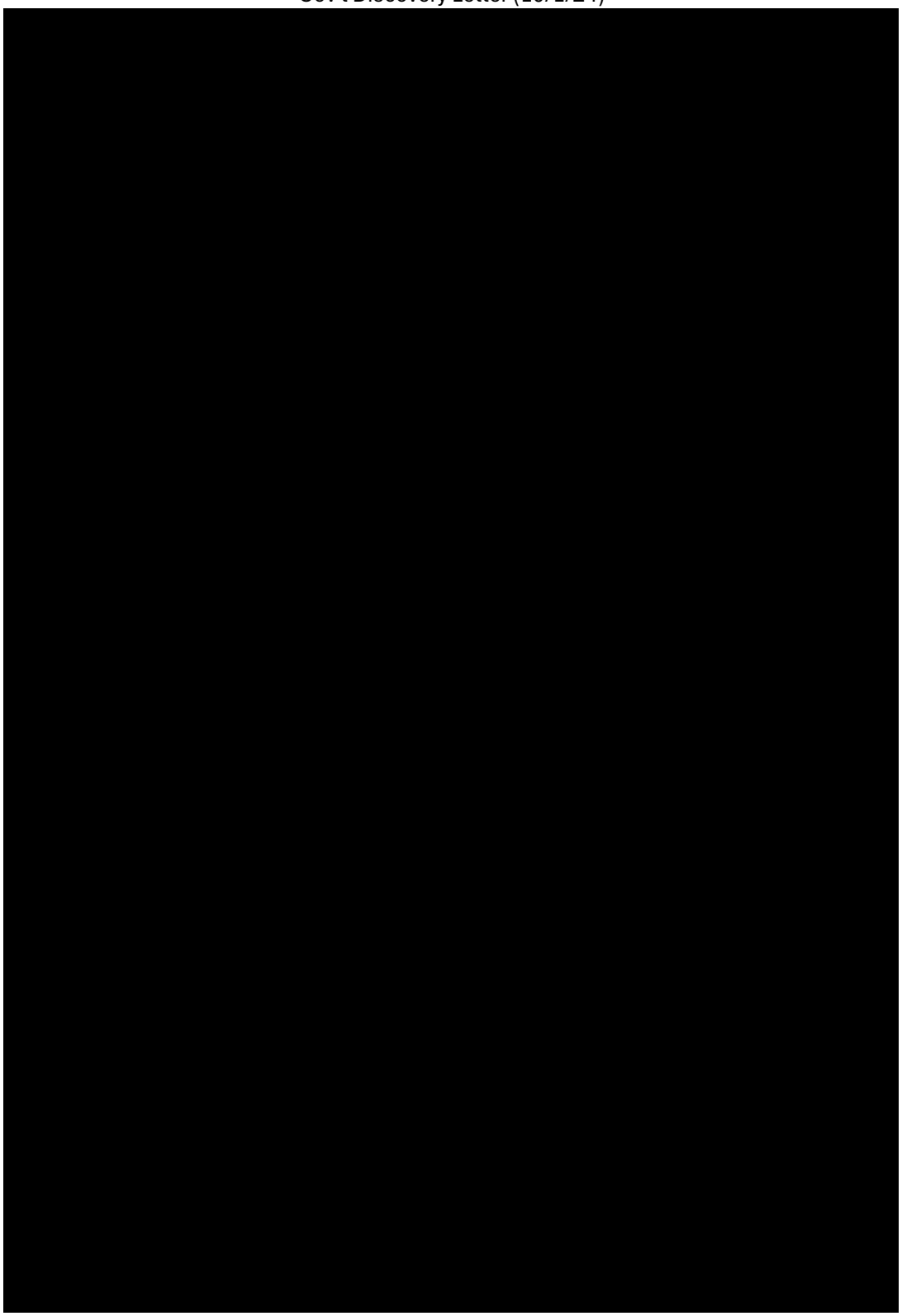

Exhibit A to

Gov't Discovery Letter (10/1/24)

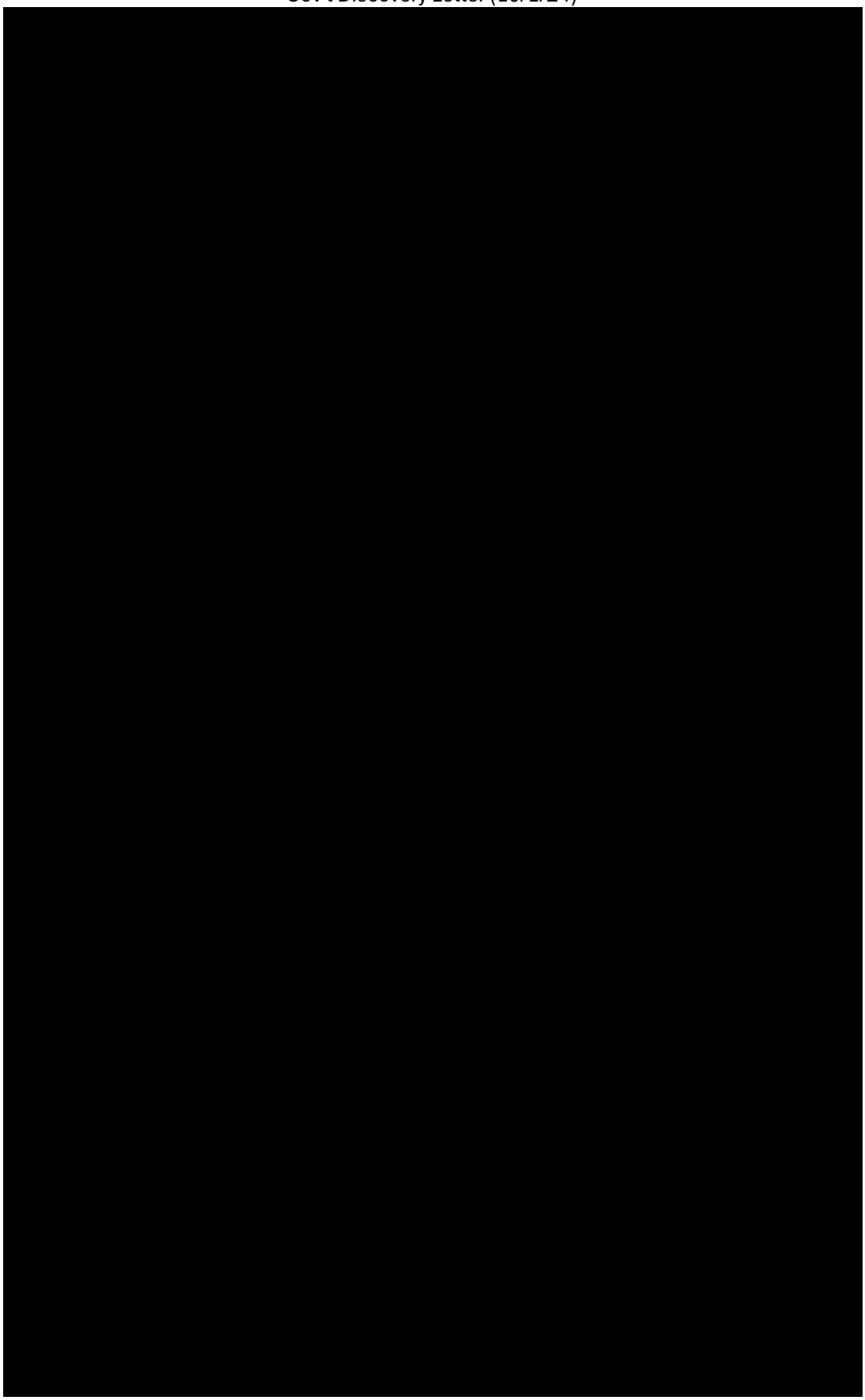

Exhibit A to

Gov't Discovery Letter (10/1/24)