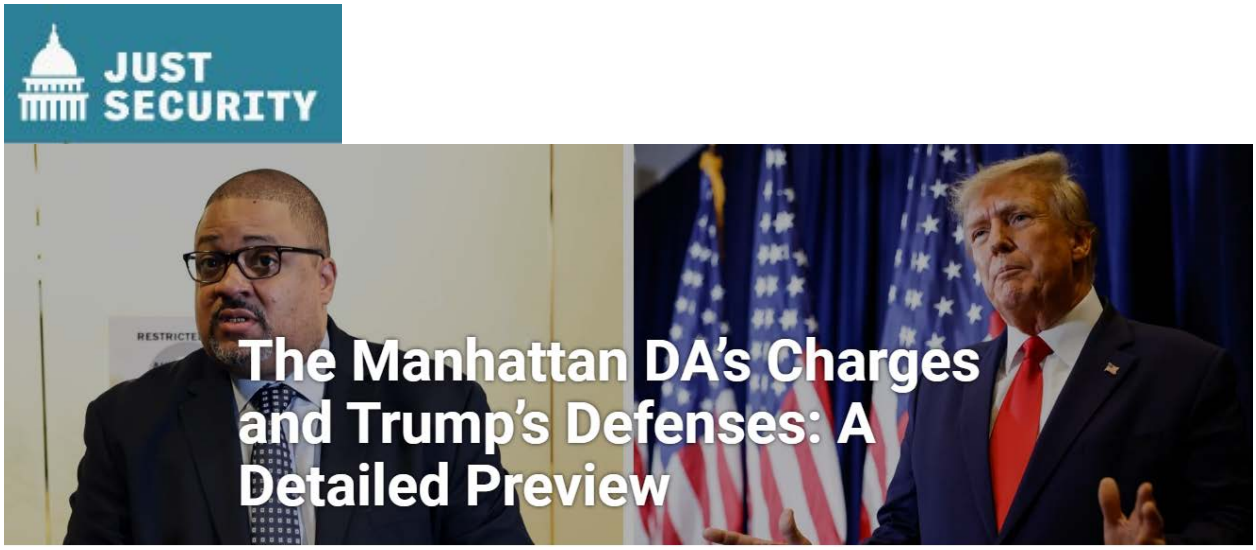

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by Joshua Stanton, Norman L. Eisen, E. Danya Perry and Fred Wertheimer

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Manhattan District Attorney Alvin L. Bragg is apparently on the verge of charging Donald J. Trump under New York state's business records statute for concealing hush money payments that may have affected the outcome of the 2016 presidential election. In the first essay in this series, as well as in some of the authors' prior writing, we analyzed the applicable facts and law and predicted that charges were likely. In this next installment, we dive into a particular sticking point: the legal bases for elevating the misdemeanor business records violation to a possible felony. To our knowledge, no in-depth review of these bases has yet been made publicly available, and so we walk through them here. We also analyze Trump's likely defenses, and conclude by addressing his inflammatory recent calls to action and what the DA will do next.

Falsifying Business Records

Falsifying business records under New York law can be charged either as a misdemeanor or a felony. The misdemeanor requires proof of one of several potential acts. Relevant to Trump is the statute's prohibition of making "a false entry in the business records of an enterprise." The evidence indicates he personally signed checks to Michael Cohen as reimbursement for the hush money payment. If DA Bragg can prove that Trump signed those checks—and it appears he can—and that Trump knew the payment for hush money was being falsely recorded as "legal expenses," then Trump committed a misdemeanor (or likely a number of misdemeanors, if each false entry is charged separately).

To establish a felony (i.e. falsifying business records in the first degree), prosecutors would need to prove, in addition to the elements of the misdemeanor, that Trump's "intent to defraud include[d] an

intent to commit another crime." There are a number of candidate crimes—and we offer below an assessment of just some of the more likely options.

Potential Predicate Crimes for a Felony Charge

Despite the numerous possible violations that could theoretically be charged, we focus our analysis on three possibilities based on publicly available information and our collective decades of experience prosecuting and defending criminal cases: (1) federal campaign finance crimes; (2) state campaign finance crimes; and (3) conspiracy to promote or prevent an election.

1. Federal Campaign Finance Crimes

There is strong evidence that Trump's conduct in the hush money payments involved federal campaign finance violations. —After all, Cohen was convicted for just such offenses, and the Justice Department's sentencing memorandum stated that he "acted in coordination with and at the direction of Individual-1," who was easily identified as Trump. There are two potential problems with federal campaign finance violations serving as the basis for a felony charge in New York. As we noted in our last article on the subject, there are nuances in the definition of the word "crime" under New York state law. The New York Penal Law defines "crime" as "a misdemeanor or a felony." Both "misdemeanor" and "felony" are separately defined as an "offense" for which a term of imprisonment can be imposed (the distinction between the two being the length of incarceration allowed).

Finally, "offense" is further defined as:

"conduct for which a sentence to a term of imprisonment or to a fine is provided [1] by any law of this state or [2] by any law, local law or ordinance of a political subdivision of this state, or [3] by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same."

Clearly, a *federal* law is not a "law of this state" or "any law, local law or ordinance of political subdivision of this state" – the first and second option. The third option in the statute, "any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same," could include federal law. In contrast to the other two clauses, the third does not explicitly limit "governmental instrumentality" to be "of this state." And of course Congress is "authorized by law" to adopt laws imposing sentences of incarceration. Further, the "same" in this context could mean "any order, rule or regulation," which could potentially include federal law. The text of the statute therefore could include federal crimes. Moreover, if the New York state legislature wished to limit the third option to New York state law, they certainly could have said so clearly. There also appear to have been cases in New York brought with a federal crime as a predicate offense, as we noted in our first essay in this series.

Nevertheless, the only appellate court in New York to have considered the meaning of "offense"—albeit in a very different context, and without parsing the third clause listed above—found that it applied only to New York crimes. That appellate court will not bind a Manhattan court because it is

out of another district and because its context is so distinguishable. But it will undoubtedly be pressed by Trump as persuasive authority if the federal crimes are relied upon to elevate the misdemeanor books and records charge into a felony. It remains to be seen how a judge would rule on this point if it is put to the challenge. If we were charging the case we would charge both federal crimes and state ones as alternative bases for elevating the misdemeanor to a felony, and we further discuss the scope of the federal case in subsection 4 of the legal defenses section below.

According to press reports, however, it appears state campaign finance crimes may be the primary or exclusive basis for the felony upgrade. Indeed, we pointed out their potential applicability in the first essay in this series. We turn to them next.

2. State Campaign Finance Crimes

New York has a robust set of laws regulating elections that purport to apply broadly, including explicitly to "federal" contests. New York's campaign finance laws also apply broadly to candidates who seek election "to *any* public office" (emphasis added). As a result, crimes outlined in New York's state campaign finance laws might appear on their face to apply to candidates equally whether running for federal or state office—including for the presidency.

But the reality is more complex. To see why, take one such crime: N.Y. Elec. Law § 14-126(6). It states that any person who, "acting on behalf of a candidate … make[s] expenditures in connection with the … election of any candidate … for the purpose of evading the contribution limitations of this article, shall be guilty of a class E felony." That the hush money payments were campaign expenditures seems relatively clear (as demonstrated, in good part, by Cohen's conviction of those offenses at the federal level). They transgressed applicable state (and federal) limits and/or reporting rules. Moreover, the evidence supports the proposition that Trump was aware of that. For example, one of Cohen's audio recordings of Trump indicates that Trump knew about the payments that would violate campaign finance laws. The audio recording also supports the contention that Trump knew the hush money payments were being made through a shell company that Cohen would be setting up.

In the recording, Cohen says, "I need to open up a company for the transfer of all of that info regarding our friend David." (David apparently refers to David Pecker, who was involved in the hush money scheme and appears to have testified in front of the Manhattan grand jury investigating Trump.) In proceedings with the federal government, Pecker's company admitted that the scheme was set up "to ensure that a woman did not publicize damaging allegations about that candidate before the 2016 presidential election and thereby influence that election" (AMI non-prosecution agreement). So, section 14-126(6) appears to apply to Trump's conduct.

Nevertheless, a potential problem for prosecutors is found in a separate New York state campaign finance law that states that the "filing requirements and the expenditure, contribution and receipt limits" under state law "shall not apply to any candidate" when that candidate is required to file statements at the federal level, "provided a copy of each such statement or report is filed in the office of the state board of elections." (The provision is a reflection of the federal preemption issues

which we shall cover in more detail in the next subsection.) Perhaps DA Bragg could argue that the appropriate statement or report was not really filed in the office of the state board of elections because it omitted any reference to the hush money payment. Essentially, the argument would be that if you lie to the federal authorities, then you are no longer subject to the exception under state law. We have found no case law assessing such an argument in New York—we will have to see what a judge decides.

3. Conspiracy to promote or prevent an election

A more likely candidate for the crime that may convert the books and records charge to a felony is N.Y. Elec. Law § 17-152: Conspiracy to promote or prevent election. Under that statute, "Any two or more persons who conspire to promote or prevent the election of any person to a public office by unlawful means and which conspiracy is acted upon by one or more of the parties thereto, shall be guilty of a misdemeanor." Trump appears to have conspired with Cohen (and others) to promote his own election by making the hush money payments. The key questions are whether "unlawful means" were used and whether this statute is preempted by federal law.

Under New York law, "unlawful means" appears to be construed broadly—and is not limited to crimes (which would therefore require yet another predicate crime). In a 100-year-old opinion, the state appellate court with authority over Manhattan ruled that "unlawful means" as written in another statute does not necessitate "the commission of a crime." Instead, the court held that "unlawful means" simply refers to conduct "unauthorized by law."

That case, although vintage, is consistent with what we would expect to find when construing the meaning of section 17-152. New York's highest court has noted that when language in a statute is not defined, words are generally to be given their "usual and commonly understood meaning" and that dictionaries are "useful guideposts" in ascertaining that meaning. Merriam Webster defines "unlawful" as "not lawful : ILLEGAL." "Illegal" is further defined as "not according to or authorized by law : UNLAWFUL, ILLICIT." Unlike with the definitions of "a crime" in the books and records statute, there appears to be no issue about the definition precluding the application of federal law. Indeed, these definitions appear to include *any* conduct that is inconsistent with the law, rather than just criminal conduct. And we would expect a judge ruling on the meaning of the statute to find as much.

Thus the potential "unlawful means" here are legion. There are the violations of federal campaign finance laws to which Cohen pleaded, as well as violations of state campaign finance laws, and potentially even the bank fraud for which Cohen was convicted in connection to the scheme. Some commentators have suggested that bank fraud is an option for a state law predicate, as it avoids the preemption problems of state campaign finance violations (more on that below). The biggest challenge to that theory is that New York generally requires some mental culpability as to each element of an offense. That would mean the prosecution would have to prove that Trump knew about Cohen's bank fraud, and it had a sufficient nexus to the election interference. No publicly available information indicates there is any evidence of that, but perhaps DA Bragg has something up his sleeve. If so, then bank fraud could be a viable option.

4. A catch-all alternative

Either in addition to or instead of any of the offenses outlined above, DA Bragg may also consider the catch-all offense within New York state's election code as the predicate crime for the books and records charge. That statute, N.Y. Elec. Law § 17-168, criminalizes any knowing and willful violation of any New York election law (to the extent the "violation is not specifically covered by" some other provision). There are many New York election laws Trump may have violated in the hush money scheme. As just one example, when Cohen made the payment to keep Stephanie Clifford silent, he was required to account for the expenditure consistent with New York campaign finance laws (so long as state campaign finance law applied to Trump's candidacy, as addressed above). To the extent Trump directed Cohen's conduct, he could himself be criminally liable under the catch-all provision for this violation.

Trump's Possible Counterpoints and Legal Defenses

In our first piece in this series, we addressed several legal hurdles that Trump may try to put in front of DA Bragg—including arguments that any charges would be barred by applicable statutes of limitations or that Trump could raise a defense based on the advice of counsel. We explained that those can be overcome.

Three more arguments that Trump may advance are: federal law preempts and thus blocks the campaign and election related state offenses at the state level; the funds used were not campaign money, and that the payment would have been made "irrespective" of the election. The federal preemption issue is a tricky one that requires unpacking but that appears to us to be ultimately unavailing. As for the other two hurdles we discuss below that Trump might advance, neither of them is persuasive either.

1. Federal Preemption

Using state campaign finance law violations as the "unlawful means" under N.Y. Elec. Law § 17-152 presents a federal preemption question.

Federal preemption refers to the circumstance where federal law renders a state law unenforceable. The Supremacy Clause of the United States Constitution makes federal law "the supreme Law of the Land." As a result, when there's some irreconcilable conflict between state and federal law (conflict preemption), when Congress' legislation of an area of law is sufficiently pervasive (field preemption), or even when Congress just says so (express preemption), the federal law wins and the state law is unenforceable.

The Federal Election Campaign Act of 1971 (FECA), as later amended in 1974, includes an express preemption statute that states, with certain exceptions not relevant here (e.g., involving voter fraud) the following:

"[T]he provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office."

The Federal Election Commission (FEC) rule interpreting that statute further states that "Federal law supersedes State law concerning the … [d]isclosure of receipts and expenditures by Federal candidates and political committees" and "[l]imitation on contributions and expenditures regarding Federal candidates and political committees."

Although the FEC has taken the position that FECA "occupies the field with respect to Federal election campaign contributions," some courts interpreting the Act have instead found that FECA's preemptive effect is narrow. Those courts have allowed state statutes to stand that clearly "relate to" or "concern" federal campaign contributions in a variety of circumstances, including: a limitation on corporate contributions to federal campaigns; a violation of consumer protection laws related to recurring donations to a political action committee (PAC) that exclusively funded federal campaigns; and fraudulent transfers of donations from PACs ostensibly founded to support presidential campaigns. One federal appellate court explained that courts appear to allow such laws to stand when they are "tangential" to the regulation of federal campaign financing.

How does that apply to the crimes we have outlined above?

First, a falsifying books and records charge itself would not be preempted, whether or not the predicate offense were a campaign finance violation—so long as the underlying violation itself were not a preempted state law—as it is analogous to the kinds of laws that courts have consistently found permissible under a narrow reading of FECA's preemption statute. If consumer protection laws related to political donations are okay, as another federal appellate court has held, then surely laws promoting accurate corporate record-keeping are as well.

Second are the state campaign finance crimes, where the issue of federal preemption looms large. Indeed, Trump may argue preemption applies to any New York campaign finance crime used as the basis to charge a felony false records offense against Trump. New York's highest court has stated that FECA "occupies the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees." The court further indicated that the preemptive scope of FECA may cover all regulation of the "financing of campaigns for Federal elective office."

DA Bragg could still argue that section 14-126(6) is tangential to FECA, in that it really regulates expenditures made to violate campaign finance laws, rather than regulating the financing itself of a campaign for federal office. Even so, it appears Trump would have had to have been subject to New York's campaign spending limits in the first place, which themselves are arguably preempted.

The issue is fairly novel, and we will have to wait and see what a judge decides if DA Bragg takes this route.

Third is the offense of conspiracy to prevent an election by "unlawful means." Here the specific question is whether section 17-152 would be preempted if the "unlawful means" used to achieve the conspiracy to promote a candidate is a violation of *federal* campaign finance laws. As a preliminary matter, a state statute that directly criminalized any violation of federal campaign

finance laws could be preempted. Section 17-152 with a federal campaign finance law violation as the "unlawful means" in effect criminalizes a conspiracy to violate a federal campaign finance law, and is arguably subject to preemption for the same reason.

DA Bragg could however reply that the FEC regulation, which a federal court of appeals has said is "definitive evidence of the scope of FECA's preemption clause," does not cover such a crime. That regulation, in relevant part, supersedes state laws concerning the "[d]isclosure of receipts and expenditures by Federal candidates and political committees" and any "[l]imitation on contributions and expenditures regarding Federal candidates and political committees." By its express terms, the regulation does not explicitly say that criminalizing violations of federal campaign finance laws—or conspiracies to do the same—are preempted. As a result, DA Bragg could plausibly argue that 17-152 under this theory is not preempted. And he could point to the substantial number of cases we cite above for the proposition that courts have refused to preempt state statutes touching on federal campaign contributions in a variety of circumstances that are arguably comparable.

Here, the question is whether a state criminal law that effectively criminalizes federal campaign finance violations would be deemed to be "with respect to" or "concern" the areas covered by the preemption provisions. This is another novel situation, and again we will see what a judge decides if Bragg pursues this path.

2. Campaign funds versus personal funds

Trump and his attorneys have noted that the hush money payments and repayments were not made with campaign money, as if that exonerated him. But as a starting point, that offers no defense to whether misdemeanors of falsifying business records were committed. The question of whether it helps the other crime needed to convert that charge to a felony depends on the other crime. It certainly offers Trump no assistance as to any of the three crimes discussed above.

For state campaign finance violations, the payment counts as a qualifying "contribution" even if it comes from non-campaign funds. New York Election Law § 14-100(9)(3) defines "contribution," in part, as "any payment, by any person other than a candidate or a political committee authorized by the candidate, made in connection with the nomination for election or election of any candidate." Cohen made the payment to Clifford, and not candidate Trump; a corporation (American Media Inc.) made the initial payment to Karen McDougal.

Likewise under FECA, a campaign "expenditure" includes any payment "made by any person for the purpose of influencing any election for Federal office." The money not being campaign money therefore does not help Trump with federal campaign finance violations either. And a prosecution under the election conspiracy statute suffers from the same problems for Trump, as those are the likely "unlawful means." (And if something other than campaign finance serves as the "unlawful means," it would seem not to matter if it came from the campaign coffers or not.)

Trump's counsel has asserted that Trump would have made the payment "irrespective of the campaign" which "ends this case," but that line of argument does not hold up legally or

factually. Legally, an expenditure is personal and not campaign-related if it is an expense "that would exist irrespective of the candidate's election campaign." But here the payment and entire scheme with American Media Inc.appeared calculated for campaign purposes rather than personal reasons. As we discuss below, Trump did not make the payment because he was hiding it from his wife—public evidence suggests that Melania already knew—and there is other evidence in the public record showing the payments were made to suppress the stories coming out before the election. And even if the payment were made both for campaign and personal reasons, Trump would have been required to document that expense, which he apparently did not.

3. Statute of Limitations

The misdemeanor/felony distinction also bears upon the statute of limitations issues we addressed in our last article. As we noted in our prior piece, it appears more or less certain that prosecutors have a great deal of time left on the clock to charge Trump with a felony for his role in the hush money scheme before the statute of limitations runs. However, it is closer in the event that only a misdemeanor is charged, or if a court ultimately buys Trump's legal arguments and rules all the felony charges against him must be dismissed (leaving only misdemeanor offenses standing). Misdemeanors in New York are subject to a two-year statute of limitations. As we also noted in our first piece, however, statutes of limitations can be paused for every day Trump spent outside New York after the last criminal act he committed. The last known check Trump signed to reimburse Cohen—which Trump reportedly knew was to be falsely recorded as a legal expense—was apparently signed on December 5, 2017.

The question is therefore how many days Trump has spent outside New York since December 5, 2017. Apparently, the answer is a lot. According to a report by the Washington Post, Trump spent at most 81 days in New York during the rest of his presidency (and very possibly fewer). That left approximately 21 months on the clock at that point to charge him with a misdemeanor. And although it has been approximately 26 months since the end of his presidency and he could theoretically have run out the clock, it seems clear he has not spent approximately 80% of his days in New York (as would have been required for the clock to run by now). That means that so long as the Court of Appeals does not overturn any existing law on the issue, even a misdemeanor is not time-barred.

4. What About the John Edwards Case?

Some commentators, and Trump's defense attorney, appear to be trying to equate the hush money payments in this case to the contributions at issue in the unsuccessful prosecution of former Senator and presidential candidate John Edwards. Let us state clearly—whereas the Edwards case was borderline as to whether it should have been brought, both legally and factually, the Trump case is relatively straightforward.

The Case Against John Edwards

Edwards was charged in a North Carolina federal court with five counts of campaign finance violations and one count of conspiracy (essentially, to commit the scheme contained within the other five counts). Many of the facts in the case were uncontested. From early 2006 through approximately August 2008, Edwards had an extramarital affair with Rielle Hunter, a former campaign videographer. The National Enquirer published allegations of the affair in October 2007, and a subsequent article in December 2007 alleging Hunter was pregnant. Edwards initially denied the affair, and his campaign aide Andrew Young claimed paternity over the baby. Over months, Edwards used payments from donors, some of which Young had collected, to pay for travel and accommodations for Young and Hunter to escape media attention. In the background of the affair, its coverup, and Edwards' presidential campaign was his wife Elizabeth, who had stage-IV breast cancer. In an April 2007 interview, she acknowledged the cancer was likely terminal. She passed away in December 2007, survived by three children.

To secure a conviction, federal prosecutors had to prove that each of the six offenses were done willfully, which required a jury to find that Edwards knew his conduct was unlawful. That appears to have been one of their major challenges. The Government relied almost entirely on the testimony of Young—who was granted immunity for cooperating in the prosecution—and that of his wife, Cheri. Both had motivation to fabricate testimony. Young had the threat of criminal prosecution hanging over his head if he failed to implicate Edwards. And Young had significant exposure were he convicted: he testified that he kept approximately $1 million in payments for his own personal use. Cheri's motivation to fabricate was not as strong, but a desire to support her husband and perhaps to seek revenge against the man she believed had wronged them likely played a role in the jury's minds. Additionally, the proof as to whether the donors knew where their payments were going or that the campaign solicited the payments for that purpose was less than ironclad, in part because the donors themselves were unavailable as witnesses.

Among Edwards' defense team's many arguments were (1) that the money was personal and not election-related for the purpose of FECA because he used the money solely to hide the affair from his dying wife, and subsequently from their surviving children; and (2) in any event, he did not know that he could be violating of federal campaign finance laws. He mounted a robust defense, calling a number of witnesses, including both a former FEC chairman (who testified as to how complicated campaign finance law is) and one of Edwards' former lawyers (who testified in support of Edwards' contention that he did not know the payments were illegal).

Ultimately, the jury deadlocked on five counts and acquitted Edwards of one count. Any prosecutor who tries these types of cases (or defense lawyer who defends them) will tell you that without a proverbial smoking gun, proving a willful violation of a complex statute is challenging. Nevertheless, the fact that the Government came close in this case with a deadlocked jury suggests that when the proof is substantially more compelling, conviction is a real possibility. (In that case, the government decided against re-trying the charges on which the jury hung).

Contrast With the Case Against Trump

Trump's defense will lack many of the attributes that helped Edwards avoid conviction. Compare Cohen (an imperfect, yet credible witness who already has served his time) with Young, whose motivation to stay out of prison clearly had an impact on his credibility. Trump also lacks the personal motivation that Edwards was able to argue—whereas Edwards' wife was unaware of the affair, public evidence suggests that Melania already knew about Trump's affair with Clifford. Edwards therefore could credibly argue he had a strong motive to keep the affair secret from his wife and their children. The fact that Edwards even made a payment after he dropped out of the election further buttresses that point. Moreover, whereas both McDougal and Clifford were in negotiations to go public about their affairs, there is no indication that Edwards' mistress had any similar inclination.

What's more, the Trump payment was made only weeks before the election. And there is likely to be testimony from Cohen, Pecker, and perhaps others that the purpose of the payment was related to the election (the non-prosecution agreement with Pecker's AMI is one piece of evidence, and the audio recording of Trump and Cohen referring to the arrangement with Pecker is another). The Justice Department's sentencing memorandum in Cohen's federal criminal case is also replete with references to how the arrangement was designed—starting two months after Trump announced his presidential run—to suppress stories being published before the election. And whereas Edwards' former lawyer testified in his defense as to his good faith, Trump's former lawyer (Cohen) will testify as to his bad faith. The proof as to the facts of a falsified business record and whichever likely predicate crime is alleged against Trump are also much stronger than were the facts of the campaign finance violations alleged against Edwards.

In short, although the two cases share some overlaps involving presidential campaigns and secret affairs, the outcome of the cases is likely to be very different.

Conclusion

The hush money payments were a significant matter for our democracy. The election of 2016 was a close one, in which Donald Trump was already coping with a sex scandal because of the *Access Hollywood* tape. Had the Clifford allegations emerged, they might have changed the outcome of the election. And the payments certainly seem to run afoul of the New York books and records statute. While bringing a felony case presents complexities, DA Bragg is to be applauded for taking the matter seriously.

Trump for his part recognizes the peril he faces and is responding in a familiar fashion. His call to "PROTEST, PROTEST, PROTEST!!" is reminiscent of his "will be wild!" tweet summoning the mob to January 6. Bragg has said his office does not tolerate attempts to intimidate—rightly so. Trump's incitement failed last time and will here as well.

We await the DA's next move.

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