OFFICE OF THE FULTON COUNTY DISTRICT ATTORNEY
ATLANTA JUDICIAL CIRCUIT
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Fani T. Willis
District Attorney

TELEPHONE [redacted]

September 7, 2023

Congressman Jim Jordan
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Via electronic mail to [redacted] and overnight delivery.

Dear Mr. Jordan:

I have received your letter dated August 24, 2023. On August 14, 2023, a Fulton County Grand Jury returned a true bill of indictment charging nineteen defendants with felony violations of Georgia law, including violation of Georgia's Racketeering Influence Corrupt Organizations Act ("Georgia RICO"), O.C.G.A. § 16-14-1 et. seq. Beyond that recitation of the charges, your letter contains inaccurate information and misleading statements. The true bill of indictment returned on August 14, 2023, is attached as Exhibit A.

(1) <u>Your Attempt to Interfere with and Obstruction This Office's Prosecution of State Criminal Cases is Unconstitutional.</u>

As you know, Chairman Jordan, the congressional power of inquiry "is not unlimited." *Watkins v. United States*, 354 U.S. 178, 187 (1957). Congress is not "a law enforcement or trial agency"; that function is reserved only for "the executive and judicial departments of government." *Id.* Moreover, "investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Id.* More fundamentally, "a congressional subpoena is valid only if it is 'related to, and in furtherance of, a legitimate task of the Congress.'" *Trump v. Mazars USA*, LLP, 140 S. Ct. 2019, 2031 (2020) (quoting *Watkins*, 354 U.S. at 187).

Your letter offends each and every one of these settled principles. Its obvious purpose is to obstruct a Georgia criminal proceeding and to advance outrageous partisan misrepresentations. As I make clear below, there is no justification in the Constitution for Congress to interfere with a state criminal matter, as you attempt to do. Furthermore, your note calls to mind another letter recently submitted to a House select committee: "This unprecedented action serves no legitimate legislative purpose and would set a dangerous precedent for future Congresses . . . the American people deserve better." *See* Letter from Rep. Jim Jordan to Chairman Bennie Thompson dated January 9, 2022.

a. Your letter offends principles of state sovereignty.

The demands in your letter—and your efforts at intruding upon the State of Georgia's criminal authority—violate constitutional principles of federalism. Criminal prosecutions under state law are primarily the responsibility of state governments. Congress's lawful prerogative to interfere with states' administration of their criminal laws is extremely limited. *See* Charles W. Johnson, et al., *House Practice: A Guide to the Rules, Precedents, and Procedures of the House* at 254 (GPO 2017) ("The investigative power cannot be used … to inquire into matters … which are reserved to the States.").

As the Supreme Court held in *United States v. Lopez*, "under our federal system, the States possess primary authority for defining and enforcing the criminal law." 514 U.S. 549, 561 n.3 (1995); *see also United States v. Morrison*, 529 U.S. 598, 618 (2000) ("We can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of . . . crime and vindication of its victims."). Indeed, because the power to create and enforce state criminal law is "an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has *not* conferred on Congress." *New York v. United States*, 505 U.S. 144, 156 (1992) (emphasis added). The Supreme Court has thus recognized a "fundamental policy against federal interference with state criminal prosecutions." *Younger v. Harris*, 401 U.S. 37, 44 (1971); *accord Mesa v. California*, 489 U.S. 121, 138 (1989); *Cameron v. Johnson*, 390 U.S. 611, 618 (1968). Pursuant to that rule, the federal government must observe a strict policy of "no interference" with state officers who are "charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this is to be done." *Younger*, 401 U.S. at 45; *see also Rose v. Mitchell*, 443 U.S. 545, 585 (1979) ("This Court repeatedly has recognized that criminal law is primarily the business of the States, and that absent the most extraordinary circumstances the federal courts should not interfere with the States' administration of that law."); *Gary v. Ga. Diagnostic Prison*, 686 F.3d 1261, 1278 (11th Cir. 2012). What is true of federal courts is doubly true of federal legislators: given state sovereignty over state criminal law, Congress has hardly any role to play in meddling with its sound administration.

In light of these principles, your attempt to invoke congressional authority to intrude upon and interfere with an active criminal case in Georgia is flagrantly at odds with the Constitution. The defendants in this case have been charged under state law with committing state crimes. There is absolutely no support for Congress purporting to second guess or somehow supervise an ongoing Georgia criminal investigation and prosecution. That violation of Georgia's sovereignty is offensive and will not stand. *See Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 69 (2016) (holding that states enjoy the authority to undertake criminal prosecutions by virtue of their position as "separate sovereigns").

b. Your letter transgresses separation of powers principles.

In addition, your demand for information regarding an ongoing criminal prosecution—a core executive function—is offensive to any notion of separation of powers that recognizes the distinct roles of the executive and legislative functions of government. As the Supreme Court has explained, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683 (1974). Congress, in contrast, is barred by precedent from using investigations for "law enforcement purposes." *Watkins*, 354 U.S. at 187; *see also Kilbourn v. Thompson*, 103 U.S. 168, 194 (1881) (holding that Congress may not invoke its subpoena power to "interfere with" a case "pending in a court of competent jurisdiction"). You have thus violated the basic constitutional rule

that "the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary." *Quinn v. United States*, 349 U.S. 155, 161 (1955).

Indeed, given that two of your requests concern any documents or communications among federal officials, we must note the position taken on similar matters by the United States Justice Department. As a leading scholar writes, "Congress seems generally to have been respectful of the need to protect material contained in open [federal] criminal investigative files." Todd David Peterson, *Congressional Oversight of Open Criminal Investigations,* 77 Notre Dame L. Rev. 13 73, 1410 (2002). More recently, DOJ explained that "[l]ongstanding Department policy prevents us from confirming or denying the existence of pending investigations in response to congressional requests or providing non-public information about our investigations." Letter from Assistant Attorney General Carlos Uriarte to Chairman Jordan, dated January 20, 2023, at page 3-4. As DOJ emphasized: "The Department's mission to independently and impartially uphold the rule of law requires us to maintain the integrity of our investigations, prosecutions, and civil actions, and to avoid even a perception that our efforts are influenced by anything but the law and the facts. So does the Department's obligation to protect witnesses and law enforcement, avoid flight by those implicated in our investigations, and prevent additional crimes and attacks." *Id.* Those points are equally true here.

Given that your inquiry implicates core federalism and separation of powers concerns, the "careful inquiry" imposed by *Mazars* further constricts your lawful authority. *See* 140 S. Ct. at 2035. Under that test, federal courts must (1) "carefully assess whether the asserted legislative purpose warrants the significant step of involving the [target of the investigation," including by asking whether "other sources could reasonably provide Congress the information it needs," (2) "insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective," (3) "be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose," and (4) "assess the burdens imposed . . . by a subpoena." *Id.* at 2035–36. For the reasons set forth in this letter, it is clear that you cannot satisfy any of these constitutional requirements—let alone all of them—in the inquiry you describe.

c. Your letter improperly interferes with the administration of criminal justice.

There are extremely good reasons why congressional committees have historically avoided interfering with criminal trial proceedings. Sharing non-public information about pending criminal matters may violate local and state confidentiality obligations and professional ethics rules. It may also prejudice defendants, victims, or witnesses, or affect the overall integrity of proceedings. In some cases, it could produce a bizarre dual-track discovery scheme that circumvents court rules that are carefully calibrated to ensure compliance with principles of sound criminal procedure. For these reasons, objections to a criminal investigation or prosecution are properly raised—at least in the first instance—at courts with lawful jurisdiction, not through partisan legislative inquiries. The courts in the State of Georgia are fully up to the task of adjudicating the rights of all parties at issue.

Returning to first principles, federal courts have long recognized the need for a zone of non-interference around prosecutorial decision-making. Within our criminal justice system, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). Federal

courts are therefore "properly hesitant" to review prosecution decisions under the United States Constitution, since "examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Wayte v. United States*, 470 U.S. 598, 607 (1985).

Congress has even less of an appropriate basis to interfere in criminal matters. As an expert on the subject writes: "The Constitution excludes Congress from any involvement in prosecutorial decisions in individual cases even more forcefully than it excludes the judiciary [and] . . . requires federal prosecutorial independence from congressional interference in order to protect individual liberty and preserve the integrity of the criminal justice system." Todd D. Peterson, *Federal Prosecutorial Independence*, 15 Duke J. Const. L. & Pub. Pol'y 217, 260-61 (2020). Of course, while it is disturbing for Congress to involve itself in *federal* cases, it is even more troubling for Congress to tread upon *state* criminal matters that are doubly beyond its constitutional authority.

Here, your letter seeks the revelation of non-public and privileged information concerning my office's investigation and prosecution of a specific case. Your public statements and your letter itself make clear that you lack any legitimate legislative purpose for that inquiry: your job description as a legislator does not include criminal law enforcement, nor does it include supervising a specific criminal trial because you believe that doing so will promote your partisan political objectives.

This leads me to a critical point: "[E]very President takes office knowing that he will be subject to the same laws as all other citizens upon leaving office. This is a feature of our democratic republic, not a bug." *House Comm. on Ways & Means v. U.S. Dep't of Treasury*, 45 F.4th 324, 338 (D.C. Cir. 2022). Indeed, even Mr. Trump himself has acknowledged before the U.S. Supreme Court that "state grand juries are free to investigate a sitting President with an eye toward charging him after the completion of his term." *Trump v. Vance*, 140 S. Ct. 2412, 2426–27 (2020). For the rule of law to prevail, nobody should be permitted to violate state criminal law with impunity.

d. Your letter burdens the deliberate process privilege.

Beyond the many problems that I have already identified, your letter fails to recognize the deliberate process privilege. This privilege protects information regarding a government official's decision-making process to allow her the ability to engage in the necessary investigative and deliberative process to make informed decisions. *See, e.g.*, *Fla. House of Representatives v. United States Dep't of Commerce*, 961 F.2d 941, 948 (11th Cir. 1992); *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997); *Fed. Home Loan Bank of Atlanta v. Countrywide Fin. Corp.*, 2011 Ga. State LEXIS 324 (Fulton County State Court Civil Action 11EV011779G, Dec. 23, 2011). Your attempts at probing communications among and involving counsel in my office are wholly improper.

(2) <u>My voluntary responses to portions of your letter are below.</u>

While settled constitutional law clearly permits me to ignore your unjustified and illegal intrusion into an open state criminal prosecution, I will take a moment to voluntarily respond to parts of your letter.

Chairman Jordan, I tell people often "deal with reality or reality will deal with you." It is time that you deal with some basic realities. A Special Purpose Grand Jury made up of everyday citizens investigated for 10 months and made recommendations to me. A further reality is that a grand jury of completely different Fulton County citizens found probable cause against the defendants named in the indictment for RICO violations and various other felonies. ***Face this reality, Chairman Jordan: the select group of defendants who you fret over in my jurisdiction are like every other defendant, entitled to no worse or better treatment than any other American citizen.***

a. Your notion that different standards of justice should apply to a select group of people is offensive.

Here is another reality you must face: Those who wish to avoid felony charges in Fulton County, Georgia – including violations of Georgia RICO law – should not commit felonies in Fulton County, Georgia. In this jurisdiction, every person is subject to the same laws and the same process, because every person is entitled to the same dignity and is held to the same standard of responsibility. Persons' socioeconomic status, race, gender, sexual orientation, or political prominence does not entitle them to an exemption from that basic standard.

b. Defendant Trump's status as a political candidate cannot make him legally immune from criminal prosecution.

The basic premise of your letter is wrong. The criminal defendant about which you express concern was fully aware of the existence of the criminal investigation being conducted by the Fulton County District Attorney's Office at the time he announced his candidacy for President. I have no doubt that many Americans are the subject of criminal investigations and prosecutions at any given moment. An announcement of a candidacy for elected office, whether President of the United States, Congress, or state or local office, is not and cannot be a bar to criminal investigation or prosecution. Any notion to the contrary is offensive to our democracy and to the fundamental principle that all people are equal before the law.

c. An explanation of the basic obligations of a prosecutor is below.

Your letter makes clear that you lack a basic understanding of the law, its practice, and the ethical obligations of attorneys generally and prosecutors specifically.

I direct your attention to O.C.G.A. § 15-18-6. Subsection (4) imposes upon me as District Attorney the duty "[t]o draw up all indictments or presentments, when requested by the grand jury, and to prosecute all indictable offenses." Subsection (11) requires me "[t]o assist victims and witnesses of crimes through the complexities of the criminal justice system and ensure that the victims of crimes are apprised of the rights afforded them under the law;" and (12) requires that District Attorneys "perform such other duties as are or may be required by law or which necessarily appertain to their office."

As I explain above, the defendants about whom you express concern have been indicted by a Fulton County Grand Jury. That indictment identifies victims. The State of Georgia's Constitution and laws impose a duty upon me to protect, serve, and seek justice on their behalf. I will fulfill that duty in this case, notwithstanding your attempt to interfere.

Furthermore, I have exercised my duties as the chief law enforcement officer for Fulton County independently and based on my obligations to the citizens of Georgia under our Constitution and laws — and nothing will deter me from the just, fair, and proper enforcement of the law.

d. Your questioning of the overt and predicate acts listed in the indictment is misinformed.

Your questioning of the inclusion of overt and predicate acts by the defendants in the indictment's racketeering count shows a total ignorance of Georgia's racketeering statute and the basics of criminal conspiracy law. Allow me the opportunity to provide a brief tutorial on criminal conspiracy law, Chairman Jordan.

As I explained to the public when announcing the indictment, the overt and predicate acts are included because the grand jury found probable cause that those acts were committed to advance the objectives of a criminal conspiracy to overturn the result of Georgia's 2020 Presidential Election.

For a more thorough understanding of Georgia's RICO statute, its application and similar laws in other states, I encourage you to read "RICO State-by-State." As a non-member of the bar, you can purchase a copy for two hundred forty-nine dollars [$249].

e. Your questioning of the length of the investigation and timing of the indictment in unfounded.

Your letter raises questions about the length of time this investigation has taken. This investigation began with my office believing that critical witnesses would cooperate.

Several witnesses did, in fact, voluntarily come forward and cooperate, and we were able to collect pertinent evidence during calendar year 2021. Many witnesses, however, were uncooperative and required subpoenas to compel their cooperation. As a result of this resistance, we requested and received authorization from the Fulton County Superior Court judges to convene a Special Purpose Grand Jury (SPGJ) to compel testimony and production of documentary evidence. You will find attached as Exhibit B my letter dated January 20, 2022, to then-Chief Judge Christopher S. Brasher requesting an SPGJ.

On January 24, 2022, the Fulton County Superior Court judges authorized a SPGJ to be empaneled on May 2, 2022, the beginning of the third term of court of that year. The order granted my request that the SPGJ be empowered to investigate "possible criminal disruptions" of Georgia's administration of its 2020 Presidential Election. The empaneling order is attached as Exhibit C.

Rather than accept service of lawful subpoenas from the SPGJ, multiple out-of-state witnesses chose to resist compliance and forced my office to litigate in multiple state and federal courts to obtain orders compelling their appearance. For example, Senator Lindsey Graham, the Ranking Minority

Member of the Senate Judiciary Committee, was a witness who refused to voluntarily comply and required my office to obtain a decision affirming his obligation to testify from the United States Supreme Court. See Exhibit D. That is but one example of the use of litigation by a witness to resist providing information to this investigation and to delay justice.

As a result of the litigation necessary to overcome this resistance, the SPGJ required eight months to complete its investigation, and was released in January 2023. It should be noted that this was four months before the expiration of their term on May 2, 2023.

If you are sincerely interested in improving federal law, I encourage you to make it incumbent upon your Congressional colleagues to cooperate with lawful investigations without requiring intervention by the highest court in the land. That would be a productive federal initiative.

f. The Fulton County District Attorney's Office has used federal grant funding for its intended purposes.

You have no basis for your implication that this office has inappropriately spent federal funds. This office receives federal grant funds via United States Department of Justice (USDOJ) programs and has received local and national recognition for its work with community partners on grant-funded programs.

I have attached a summary of our programs funded with federal grant dollars as Exhibit E. You will note that the grant-funded programs include our nationally recognized initiative to process long-neglected sexual assault kits and prosecute dangerous sexual offenders who are identified via DNA results. These prosecutions are handled through the Sexual Assault Kit Initiative (S.A.K.I.) grant. We also receive federal grant funds for our groundbreaking hate crimes prosecution program, our community violence interruption efforts, and our programs with at-risk children.

If you and your colleagues follow through on your threats to deny this office federal funds, please be aware that you will be deciding to allow serial rapists to go unprosecuted, hate crimes to be unaddressed, and to cancel programs for at-risk children. Such vengeful, uncalled for legislative action would impose serious harm on the citizens we serve, including the fact that it will make them less safe.

Please note the USDOJ keeps meticulous records of our grant funding and I invite you to request this information from them. You will undoubtedly be proud of the amazing work that has been done to serve victims with this funding, and you will discover that this office is in compliance with the terms of its grant funding.

To educate you on the important work that our partnership with the federal government funds, you may watch "'I felt like I got let out of prison:' Atlanta rape victim gets justice after 22 years – WSB-TV Channel 2 - Atlanta (wsbtv.com)." It is a compelling example of the work our S.A.K.I. Unit does with the federal grant funding provided by the USDOJ.

Our Community Violence Interruption program, also funded by a USDOJ grant, has been nationally recognized. The United States Attorney General singled out our program for praise at a national conference on February 16, 2023. The leader of our program was honored as a presenter on July 19, 2023,

at a conference on protecting children from violence sponsored by Centers for Disease Control and Prevention.

Those are the sort of joint federal-state initiatives that you and your colleagues are threatening to "defund" because you are offended that a select group of people have been indicted.

g. Your allegations that I have used this prosecution for political benefit are unfounded.

Your letter makes allegations that I have somehow used the investigation and prosecution about which you have inquired in a political manner. Nothing could be further from the truth.

In fact, the allegations that you raise are thoroughly debunked and rated "False" by independent fact checking website PolitiFact in "PolitiFact | Did Fulton County DA Fani Willis campaign to 'get Trump'? No, she didn't say that."

h. Below are Suggestions for Productive Activity by the U.S. House Judiciary Committee.

I do have some suggestions on how you can engage in productive legislative activity.

First, victim-witness advocates, who take care of vulnerable victims and witnesses in prosecutors' offices across the United States, are grossly underpaid. Many have advanced degrees and specialized training on serving people in distress. Fulton County, Georgia, like many jurisdictions, face significant challenges in recruiting and retaining such highly trained, dedicated public servants at current pay rates. Congress should provide more funding to states and localities for victim-witness advocate pay and ensure that such funding flows to the jurisdictions that need it most.

Second, the federal government – as noted above – has admirably provided funding so that local prosecutors can investigate old rape cases via the S.A.K.I. grant. Federal grant funding has allowed us to test a portion of untested old rape kits. That testing revealed that in a batch of approximately 1,500 untested Fulton County kits dating back to the 1990s, DNA from 40 different serial rapists was found. Federal grant funding should be increased to allow the testing of ALL untested rape kits, as well as the capacity for the successful investigation and prosecution of offenders identified by that testing. That initiative would make America a much safer place.

Third, the federal government is funding a program to turn children around who find themselves in trouble with the criminal justice system. We partner with the United States Attorney's Office in Atlanta to sponsor the Credible Messengers program, which matches at-risk youth with adults who have been in trouble and who can share their own life experiences and serve as mentors who show them a better way. You can learn more about the program by watching "Program aims to keep kids out of gangs – WSB-TV Channel 2 - Atlanta (wsbtv.com)". This program, while valuable, has a very limited capacity and leaves too many youths in need unserved. Congress should greatly expand it.

Fourth, state crime labs across the nation are not properly funded. In fact, Georgia's State Crime Lab is so overwhelmed its leadership informed me that it does not have the capacity to test drugs like Fentanyl or firearms used in violent crimes in a timely manner and referred us to private testers to obtain necessary evidence. Further, Georgia's State Crime Lab does not have the adequate financial resources to properly pay their scientists, test rape kits, drugs, or other scientific evidence in a timely manner.

Congress must take action to address this crisis by providing resources to state crime labs to test evidence so that cases can be moved expeditiously.

i. The safety of persons serving in the criminal justice system should be a primary concern of yours.

As it seems you have a personal interest in the Fulton County District Attorney's Office, you should consider directing the USDOJ to investigate the racist threats that have come to my staff and me because of this investigation. For your information, I am attaching ten examples of threats this office has received. See Exhibits F through O. I am providing these examples to give you a window into what has happened to my staff and me as I keep the promise of my oath to the United States and Georgia Constitutions and do not allow myself to be bullied and threatened by Members of Congress, local elected officials, or others who believe lady justice should not be blind and that America has different laws for different citizens.

Yours in Service,

Fani T. Willis
Fulton County District Attorney
Atlanta Judicial Circuit

Attachments

cc: The Honorable Jerrold L. Nadler, Ranking Member, via electronic mail to [redacted] and [redacted], as well as overnight delivery.