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

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

DONALD J. TRUMP,

Defendant.

Index No. 71543-23

PRESIDENT DONALD J. TRUMP'S OPPOSITION TO THE PEOPLE'S MOTION TO "CLARIFY" THE GAG ORDER

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I. INTRODUCTION

President Donald J. Trump respectfully submits this opposition to the People's March 28, 2024 letter (the "Motion") asking the Court to "clarify" the March 26, 2024 gag order, to "warn" President Trump "that his recent conduct is contumacious," and to "direct him to immediately desist." These requests lack merit, and the Court should deny the motion.

Contrary to the People's argument, the gag order—which President Trump reserves all rights to appeal—plainly does not apply to "family members of the Court, [and] the District Attorney." Mot. at 1. The fact that the gag order has been publicly interpreted in the way that President Trump reads it further supports the defense position on the order's meaning.[1] In addition, the People's abuse of this process to try to further restrict President Trump's constitutionally protected speech is highlighted by the fact that they failed entirely to address the standard that they proposed, and the Court adopted, for statements regarding counsel and the Court's "staff": whether the challenged statements were "made with the intent to materially interfere with, or to cause others to materially interfere with, counsel's or staff's work in this criminal case, or with the knowledge that such interference is highly likely to result." The D.C. Circuit interpreted that language to require far more than what the People believe, incorrectly, were "intemperate or rude remarks" by President Trump. *United States v. Trump*, 88 F.4th 990, 1027 (D.C. Cir. 2023). Thus, the Motion fails on this alternative basis.

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[1] *See, e.g.*, Michael R. Sisak, *Donald Trump assails judge and his daughter after gag order in New York hush-money criminal case*, ASSOCIATED PRESS (Mar. 27, 2024), https://apnews.com/article/donald-trump-judge-merchan-hush-money-gag-order-truth-social-daughter-578a0c6334b206d81dc2ebf6a410a502 (explaining that the gag order "does not bar comments about Merchan or his family"); Antonio Pequeño IV, *Trump Again Targets Judge's Daughter In New York Criminal Case*, FORBES (Mar. 28, 2024), https://www.forbes.com/sites/antoniopequenoiv/2024/03/28/trump-again-targets-judges-daughter-in-new-york-criminal-case/?sh=29a7983f5981 (explaining that social media posts at issue "are not barred by the gag order issued earlier this week").

Finally, the Court should reject the People's invitations to expand the gag order, which is already an unlawful prior restraint that improperly restricts campaign advocacy by the presumptive Republican nominee and leading candidate in the 2024 presidential election. In support of the motion, the People cite two social media posts by President Trump. Mot. at 1 n.1. That showing is not enough for the People to meet their "heavy burden" on this issue, *Ash v. Board of Managers of 155 Condominium*, 44 A.D.3d 324, 325 (1st Dep't 2007), and the two posts, alone, do not constitute the required "solidity of evidence" that is necessary, *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946).

President Trump's campaign advocacy on issues that bear on his candidacy, as well as the appearance of impropriety associated with these proceedings that warrants recusal,[2] is not a basis for violating the First and Sixth Amendments yet again by expanding the gag order. Such an expansion would be particularly inappropriate in light of the fact that the Court appears to have recently violated Canon 3 by making public statements about the case,[3] and, separately, used the Office of Court Administration to respond to media reports relating to Your Honor's daughter.[4] Under these circumstances, President Trump must be permitted to speak on these issues in a

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[2] Along with this opposition brief, President Trump is simultaneously submitting a pre-motion letter seeking leave to file a recusal motion based on changed circumstances and newly discovered evidence.

[3] Jennifer Peltz, *'There's no agenda here': A look at the judge who is overseeing Trump's hush money trial*, ASSOCIATED PRESS (Mar. 17, 2024, 10:21 a.m.), https://apnews.com/article/trump-hush-money-criminal-trial-judge-merchan-c227f5eab200cccffb19ed931b4dac92.

[4] *See, e.g.*, Laura Italiano and Madison Hall, *Trump is using a loophole in his new gag order to rage against his hush-money judge's progressive daughter*, BUSINESS INSIDER (Mar. 27, 2024), https://www.businessinsider.com/trump-uses-gag-loophole-rage-against-hush-money-judges-daughter-2024-3 ("'The X, formerly Twitter, account being attributed to Judge Merchan's daughter no longer belongs to her since she deleted it approximately a year ago,' said the spokesman, Al Baker. 'It is not linked to her email address, nor has she posted under that screen name since she deleted the account. Rather, it represents the reconstitution, last April, and manipulation of an account she long ago abandoned,' Baker said in a press statement.").

manner that is consistent with his position as the leading presidential candidate and his defense, which is not intended to materially interfere with these proceedings or cause harm to anyone. For all of these reasons, the Motion should be denied.

II. BACKGROUND

In March 2022, more than one year before the Indictment and before locking her X account, District Attorney Bragg's wife re-posted on social media that there was, "[f]inally, a bit of good news in the Manhattan DA criminal case against Donald Trump" because the People "ha[ve] Trump nailed on felonies."[5] Before, during, and after that post, Your Honor's daughter and her company, Authentic Campaigns, Inc., profited from offering strategic advice; preparing text for emails and social media posts, as well as other consulting services regarding campaign advocacy; and fundraising for President Trump's political rivals—including advertisements that specifically referenced, and solicited funds based on, this case. Similarly, before, during, and after the Indictment was unsealed, the People watched silently as their star witnesses assailed President Trump—including through political advocacy supportive of President Trump's political rivals.

At President Trump's arraignment on April 4, 2023, the Court recognized that prior restraints are extremely problematic:

> Certainly, the Court would not impose a gag order at this time even if it were requested. Such restraints are the most serious and least intolerable on First Amendment rights. That does apply doubly to Mr. Trump, because he is a candidate for the presidency of the United States. So, those First Amendment rights are critically important, obviously.

4/4/23 Tr. 12. For almost a year, until February 22, 2024, neither the Court nor the People raised any concerns regarding public statements by President Trump as he successfully campaigned for

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[5] @paulsperry_, X (Mar. 23, 2023, 1:48 pm), https://twitter.com/paulsperry_/status/1638960892149891072?lang=en; Jessica McBride, *Jamila Ponton Bragg, Alvin Bragg's Wife: 5 Fast Facts You Need to Know* HEAVY (Apr. 4, 2023, 2:53 pm), https://heavy.com/news/jamila-ponton-bragg-alvin-wife/.

the presidency.

On February 22, 2024, without any explanation regarding the timing of the motion, the People asked the Court to impose a gag order. The gag order motion claimed to seek relief that was "identical to relief the U.S. Court of Appeals for the D.C. Circuit just upheld . . . ." Mot. at 3 ¶ 6. However, insofar as the People submitted evidence specific to this case, they relied principally on an affidavit from Nicholas Pistilli, who focused on events from nearly a year ago, in March and April 2023. *See* Mot. Ex. 13 ¶ 10 (referring to "three weeks following March 18, 2023"); *id.* ¶ 12 (referring to a "peak" in "March 2023"); *id.* ¶ 13 (describing alleged threats by third parties in March and April 2023); *id.* ¶ 14 (describing so-called "terroristic" threats by third parties in March and April 2023). Pistilli emphasized the alleged "volume" of unspecified threats that had no apparent connection to this case. *See id.* ¶ 8; *see also id.* ¶¶ 11, 13(b), 13(d), 14(a). Neither the People nor the Court addressed these evidentiary deficiencies prior to the imposition of the gag order.

On March 17, 2024, the Associated Press published an article disclosing that Your Honor had participated in an interview with the media "last week."[6] The Court appears to have taken this step while President Trump's March 10, 2024 pre-motion letter seeking leave to file a motion for an adjournment based on pretrial publicity was pending, and the Court did not address that request—*i.e.*, did not even permit the defense to *file the motion*—until the March 25, 2024 hearing.

According to reports of the interview, Your Honor indicated that the Court "wouldn't talk about the case," but did so anyway. *See* 22 NYCRR § 100.3(B)(8) ("A judge shall not make any public comment about a pending or impending proceeding in any court within the United States

[6] Jennifer Peltz, *'There's no agenda here': A look at the judge who is overseeing Trump's hush money trial*, ASSOCIATED PRESS (Mar. 17, 2024, 10:21 a.m.), https://apnews.com/article/trump-hush-money-criminal-trial-judge-merchan-c227f5eab200cccffb19ed931b4dac92.

or its territories. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control."). Your Honor reportedly stated that (1) "getting ready for the historic trial is 'intense'"; (2) the Court is "striving 'to make sure that I've done everything I could to be prepared and to make sure that we dispense justice'"; and (3) "'There's no agenda here . . . . We want to follow the law. We want justice to be done. . . . That's all we want.'" As well-intentioned as those remarks may have been, those sentiments should go without saying. The comments appear to be inconsistent with 22 NYCRR § 100.3(B)(8), which includes a mandate that was even more important in the context of President Trump's then-pending and unaddressed request for leave to file an adjournment motion based on pretrial publicity.

On March 26, 2024, the Court adopted the People's proposed gag order in a ruling that made specific reference to President Trump's public statements regarding the District Attorney as well as "this Court and a family member thereof." 3/26/24 Op. at 2. The gag order states, in pertinent part:

> Defendant is directed to refrain from the following:
>
> [. . .]
>
> b. Making or directing others to make public statements about (1) counsel in the case other than the District Attorney, (2) members of the court's staff and the District Attorney's staff, or (3) the family members of any counsel or staff member, if those statements are made with the intent to materially interfere with, or to cause others to materially interfere with, counsel's or staff's work in this criminal case, or with the knowledge that such interference is highly likely to result . . . .

3/26/24 Op. at 4.

Two days later, the People submitted the Motion, in the form of a one-page pre-motion letter. Pursuant to the Court's March 8, 2024 order regarding pre-motion letter procedures, President Trump responded on Friday, March 29. That afternoon, the Court directed President Trump to file any further opposition to the Motion by 2:00 p.m. on April 1, 2024.

III. DISCUSSION

The Court should deny the Motion. President Trump has not violated the gag order, and expanding the gag order would exacerbate the existing and ongoing constitutional violations that the order is inflicting.

The gag order does not prohibit the public statements that are the basis for the Motion. The pertinent provision of the gag order, subparagraph b, is limited to "family members of any *counsel* or *staff member*." 3/26/24 Op. at 4 (emphasis added). The preceding clauses in subparagraph b confirm that the term "counsel" is limited to "counsel in the case *other than the District Attorney*," and that the term "staff" is limited to "the court's staff," as opposed to Your Honor. *Id*. (emphasis added). Thus, the text of the order is clear, unambiguous, and not as broad as the People claim.

Consistent with that reality—but not their Motion—the People cite *DEP-NYC v. DEP-NY*, 70 N.Y.2d 233, 240 (1987). In that case, the Court of Appeals reasoned that, "[t]o sustain a finding of either civil or criminal contempt based on an alleged violation of a court order it is necessary to establish that a lawful order of the court *clearly expressing an unequivocal mandate* was in effect." *Id.* (emphasis added). The March 26, 2024 opinion indicates that the Court was aware of prior public statements by President Trump relating to Your Honor's daughter, as relevant to the recusal issue, but the Court did not extend the gag order as the People suggest. No violation has occurred, much less a violation of a clearly expressed and unequivocal mandate. Therefore, there is no basis for the disingenuous contempt warning proposed by the People.

The Motion also overlooks a key feature of the gag order. *See DEP-NYC*, 70 N.Y.2d at 240 (reasoning that it "must also appear with reasonable certainty that the order has been disobeyed"). Subparagraph b requires a finding that a challenged statement be "made with the intent to materially interfere with, or to cause others to materially interfere with, counsel's or staff's

work in this criminal case, or with the knowledge that such interference is highly likely to result." 3/26/24 Op. at 4. President Trump's social media posts amplified defense arguments regarding the need for recusal that have been, and will continue to be, the subject of motion practice. The posts also addressed specific political opponents who are clients of Authentic, where Your Honor's daughter is a partner and executive, and responded to media reports regarding a social media account attributed to Your Honor's daughter. President Trump also noted in one of the posts that these issues are relevant to "the 2024 Presidential Election."

Such protected political advocacy does not reflect "intent to materially interfere" with these proceedings. "No form of speech is entitled to greater constitutional protection" than "[c]ore political speech." *McIntyre v. Ohio Elec. Comm'n*, 514 U.S. 334, 347 (1995); *see also Meyer v. Grant*, 486 U.S. 414, 425 (1988) (reasoning that campaign speech lies "at the core of our electoral process and of the First Amendment freedoms—an area . . . where protection of robust discussion is at its zenith" (cleaned up)). The First Amendment's "protection afforded is to the communication, to its source and to its recipients both." *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976); *see also Packingham v. North Carolina*, 582 U.S. 98, 104 (2017) (recognizing the right to "speak and listen, and then . . . speak and listen once more," as a "fundamental principle of the First Amendment"); *see also Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969); *Armstrong v. D.C. Pub. Library*, 154 F. Supp. 2d 67, 75 (D.D.C. 2001) (citing "long-standing precedent supporting plaintiff's First Amendment right to receive information and ideas"). This right to listen to President Trump's campaign speech has its "fullest and most urgent application precisely to the conduct of campaigns for political office," especially for the Presidency. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162 (2014). Therefore, interpreting the gag order in a manner that is inconsistent with the order's text would inflict a

"reciprocal" injury on the tens of millions of Americans who listen to him. *Va. State Bd. of Pharm.*, 425 U.S. at 757.

Moreover, President Trump's comments concerning Your Honor's daughter are, properly understood, a criticism of the Court's prior decision not to recuse itself. The People's attempted distinction between criticisms of Your Honor—which are fully protected by the First and Sixth Amendments, as explained by the D.C. Circuit, and not covered by the gag order—and references to family members of the Court is thus illusory, because one legitimate and constitutionally protected criticism of the Court relates to the Court's failure to recuse notwithstanding one member of the Court's immediate family having a financial interest in all ongoing attacks on President Trump, including this case, by virtue of her senior role at Authentic. Thus, extending the gag order to the Court's family would necessarily extend the gag order to cover the Court itself.

But "[c]riticism of government is at the very center of the constitutionally protected area of free discussion" and so such criticisms "must be free, lest criticism of government itself be penalized." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). The challenged social media posts reflect President Trump's exercise of core constitutional rights under the First and Sixth Amendment. The advocacy was also necessary and appropriate in the current environment. The Court has given a public interview that included comments about the case, during a period where the Court failed to address President Trump's request to file a motion based on prejudicial pretrial publicity. Subsequent to the challenged posts by President Trump, the Court weighed in again by issuing a public statement through the Office of Court Administration regarding the social media account that has been used by Your Honor's daughter. In short, a criminal defendant does not "interfere" with a criminal prosecution, as that term is used in the gag order, by exercising constitutional rights.

Careful enforcement of the materiality provision in the gag order is necessary to protect First Amendment freedoms, and consistent with the People's efforts to obtain a gag order that is "identical to relief the U.S. Court of Appeals for the D.C. Circuit just upheld . . . ." Mot. at 3 ¶ 6. In this regard, the D.C. Circuit found that the "*mens rea* requirement" at issue was necessary to "balance the court's institutional interests and the free speech values at stake." *United States v. Trump*, 88 F.4th 990, 1026 (D.C. Cir. 2023). In so holding, the court reasoned that "speech about the criminal justice system is vital" and necessary to "guard[] against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Id.* at 1003, 1025 (cleaned up). Moreover, the court explained that "by requiring that the interference be material, we make clear that statements including or leading to intemperate and rude remarks—without more—are not proscribed." *Id.* at 1027; *see also id.* (reasoning that only "[w]ords inducing mass robocalling, doxing, or true threats being called into offices or the courthouse" are "the types of material interference" prohibited by the order). Accordingly, because the gag order expressly does not apply to family members of the Court or the District Attorney, and because the challenged social media posts were not intended to materially interfere with these proceedings, President Trump did not violate the gag order and no contempt warning would be appropriate.

Finally, the Court should not expand the gag order because it is already an improper prior restraint. In seeking such an expansion, the People bear "*heavy burden* of demonstrating justification for its imposition." *Ash*, 44 A.D.3d at 325 (emphasis added) (citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) and *Near v. Minnesota*, 283 U.S. 697, 713 (1931)). Recent social media posts comprised of constitutionally protected speech, alone, do not constitute the "solidity of evidence" necessary to support expanding the gag order—especially

when those posts are examined in the context of the Court's public statements and the recusal issue. *Pennekamp*, 328 U.S. at 347; *see also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 565 (1976) (invalidating a prior restraint where "the record is lacking in evidence to support such a finding"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964) (holding that "repression" of speech about court proceedings "can be justified, if at all, only by a clear and present danger of the obstruction of justice").

The Supreme Court has "never allowed the government to prohibit candidates from communicating relevant information to voters during an election." *Republican Party of Minnesota v. White*, 536 U.S. 765, 782 (2002). In *United States v. Ford*, the Sixth Circuit reasoned that a candidate was

> entitled to attack the alleged political motives of the Republican administration which he claims is persecuting him because of his political views and his race. One may strongly disagree with the political view he expresses but have no doubt that he has the right to express his outrage. He is entitled to fight the obvious damage to his political reputation in the press and in the court of public opinion, as well as in the courtroom and on the floor of Congress.

830 F.2d 596, 600-01 (6th Cir. 1987).

President Trump has the same rights, and the gag order already violates them in a way that implicates federalism concerns. *See Ford*, 830 F.2d at 601 ("We agree with the House leadership that the doctrine of separation of powers—a unique feature of our constitutional system designed to insure that political power is divided and shared—would be undermined if the judicial branch should attempt to control political communication between a congressman and his constituents."). Furthermore, the Court imposed the prior restraint in subparagraph c of the gag order without addressing *Capital Cities Media, Inc. v. Toole*, where Justice Brennan expressed concern about a gag order that prevented the publication of "the names or addresses of any juror" in a high-profile criminal case. 463 U.S. 1303, 1304 (1983). Expanding the gag order as requested by the People

in the Motion would exacerbate these problems with the existing prior restraints.

IV. CONCLUSION

For all of the reasons described above, President Trump respectfully requests that the Court deny the Motion.

Dated: April 1, 2024
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