No. ___-_________

In the Supreme Court of the United States

ALEX EMRIC JONES; FREE SPEECH SYSTEMS, LLC; INFOWARS HEALTH, LLC; INFOWARS, LLC; PRISON PLANET TV, LLC,

Applicants,

v.

ERICA LAFFERTY; DAVID WHEELER; FRANCINE WHEELER; JACQUELINE BARDEN; MARK BARDEN; NICOLE HOCKLEY; IAN HOCKLEY; JENNIFER HENSEL; JEREMY RICHMAN, DONNA SOTO; CARLEE SOTO-PARISI; CARLOS M. SOTO; JILLIAN SOTO; WILLIAM ALDENBERG,

Respondents.

On Application to Stay the Judgment of the Connecticut Supreme Court

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APPLICATION FOR A STAY PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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EMERGENCY APPLICATION FOR A STAY PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

To the HONORABLE STEPHEN BREYER, Associate Justice of the Supreme Court of the United States:

This case presents an outcome never before seen in First Amendment law and totally antithetical to the First Amendment's protections for the press and free speech: a court's content-based censorship and sanctioning of Alex Jones, a renowned media personality, for remarks he made during a public radio and television broadcast that it claimed constituted threats against opposing counsel and an incitement of further threats with no finding that an exception to the First Amendment applied to his remarks. The basis for such a ruling? Mr. Jones's status as a civil litigant supposedly subjects him to a court's inherent supervisory authority over everything that he says about his pending case regardless of whether he says it in court or in front of a televised audience or whether it falls within an exception to the First Amendment.

This Court has established no such rule, and no such rule can be reconciled with the First Amendment. While the Court has considered cases concerning extrajudicial statements that carried a substantial likelihood of materially prejudicing an adjudicative process and discussed the proper exercise of a court's inherent supervisory authority, it has only done so in the context of extrajudicial statements made by either the press or a criminal trial participant's counsel. *See, e.g.*, *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); *Landmark Communications, Inc. v. Virginia, Inc. v. Virginia*, 435 U.S. 829 (1978). The Court has

never considered a case where a court has sanctioned a civil litigant, not his counsel, for extrajudicial statements because the statements posed an imminent and likely threat to the administration of justice.

A litigant's extrajudicial comments about his pending case represent classic political speech about a political process – the administration of justice through the courts. The Court has made clear that a litigant does not surrender his First Amendment rights to engage in political speech at the courthouse door.[1] *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 n.18 (1984). Unless a litigant's extrajudicial comments prejudice an opposing party's constitutional rights, the First Amendment does not give way to cultured sensibilities. No such prejudice exists in this case, but the Connecticut Supreme Court punished the Applicants without applying the Court's true threat or incitement exceptions to Mr. Jones' speech despite acknowledging that it would likely be protected if he was not a litigant. The Applicants now bear unwarranted consequences for others' unlawful actions that they neither encouraged or intended to encourage.

Furthermore, the Court's due process jurisprudence indicates that a person has, at a minimum, a constitutional right to adequate notice and a meaningful opportunity be heard. The Applicants received a completely inadequate notice at best

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[1] To the best of counsel's knowledge, while the Court has upheld restrictions on litigation participants' speech, all of its cases have restricted litigation participants' speech for the sole purpose of protecting a criminal defendant's right to a fair trial. *See Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539 (1976); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *Sheppard v. Maxwell*, 384 U.S. 333 (1966). The Court also rejected restrictions on civil litigation participants' speech the only time that it has confronted such a case. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981).

and a misleading one at worst. They also incurred criminal sanctions,[2] which required them to be afforded much more process than they were afforded. The Connecticut Supreme Court, however, ignored the fact that the trial court was, at the very least, partially motivated by Mr. Jones' comments – for which it expressed its distaste in strong language – to impose sanctions on him and held that he had received adequate notice and a meaningful opportunity to be heard, thus neglecting the criminal nature of the sanctions as well.

Hate speech presents a growing national controversy, and that controversy has sparked cries for the creation of a "hate-speech" exception to the First Amendment. This case is no aberration. It exemplifies the rapidly growing challenge to core First Amendment protections for expressive speech on the grounds of preventing the circulation of "hate." The Connecticut Supreme Court now leads the vanguard of the efforts to create a new, "hate-speech" exception to the First Amendment – either within existing First Amendment exceptions or through a new exception. *Compare State v. Leibenguth*, 2020 WL 5094669 (CT. Supreme Ct. Aug. 27, 2020) (upholding a conviction under the "fighting words" exception to the First Amendment for the use of the words "fucking nigger" toward a black police officer) *with Leibenguth*, 2020 WL 5094669 at 18 (Ecker, J., concurring) ("I understand that we must adhere to the fighting words doctrine until the United States Supreme Court says otherwise. But,

[2] While the trial court imposed neither a fine nor imprisonment on the Applicants, the nature of the sanctions that it did impose fall within the Court's definition of a criminal sanction. *International Union*, *United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994).

although the majority opinion does an admirable job fashioning a silk purse out of this particular sow's ear, I believe that we are better off in the end expressing our concerns openly and displaying a more determined preference for avoiding further entanglement with this untenable doctrine").

This case puts the question of whether courts can resort to various "silk purses" to conceal the fact that they are really fashioning an improper "hate-speech" exception to the First Amendment squarely before this Court. The Court's intervention is necessary to forestall a torrent of unlimited content-based censorship of speech protected by the First Amendment and to halt its course in Connecticut.

OPINIONS BELOW

The Connecticut Supreme Court's opinion is reported at 2020 WL 4248476 and reproduced at App.1-37. Its order denying reconsideration is reprinted at App.38-39. Its orders denying the Applicants' motions for a stay pending the filing and disposition of a writ of certiorari with this Court are reprinted at App.40-43. The transcript of the Connecticut Superior Court's order is reprinted at App.44-102.

JURISDICTION

The Connecticut Supreme Court issued its opinion on July 23, 2020. The Applicants timely moved for reconsideration, which the Connecticut Supreme Court denied on September 15, 2020. On July 28, 2020 and August 10, 2020, the Applicants filed two motions seeking a stay from the Connecticut Supreme Court pending the filing and disposition of a petition of a writ of certiorari with this Court. The Connecticut Supreme Court denied the Applicants' motions for a stay on September

15, 2020. This Court has jurisdiction over this case under 28 U.S.C. § 1257 and over this application under 28 U.S.C. § 2101(f).

STATEMENT OF THE CASE

The applicants comprise an alternative media conglomerate headed by renowned media personality, Alex Jones. They produce various radio and television programs much like the major news networks, and they also produce a wide variety of publications. Mr. Jones and his media entities specialized in asking tough and searching questions that other news organizations will not ask, including those that are perceived as insensitive and highly offensive. In the wake of the mass shooting at the Sandy Hook Elementary School in Newtown, Connecticut, Mr. Jones and his media entities covered certain so-called conspiracy theories including ones that argued that the Sandy Hook shooting was an elaborate hoax. Mr. Jones also voiced his own opinions on the shooting, including in interviews on mainstream news networks such as NBC.

The respondents to this application are family members of those killed during the Sandy Hook shooting and a first responder who responded to Sandy Hook Elementary School on the day of the shooting. App.4-5. They launched the underlying action in Connecticut Superior Court against Mr. Jones, his media entities,[3] and several other media personalities and entities who are not parties to the underlying

[3] The media entities controlled by Mr. Jones that are parties to the underlying appeal and this application are Infowars, LLC, Free Speech Systems, LLC, Infowars Health, LLC, and Prison Planet TV, LLC.

appeal or the instant application[4] for torts including defamation and intentional infliction of emotional distress. App.4-5.

The Applicants sought to remove the underlying action to federal district court, but the district court declined to exercise jurisdiction and returned the matter to Connecticut Superior Court. *See* App.260 (Dkt. 106.00, 112.00). The Applicants then filed a special motion to dismiss under Connecticut's Anti-SLAPP statute, Conn. Gen. Stat. § 52-196a, arguing that Mr. Jones's opinions and the statements made on the media entities' various platforms were protected by the First Amendment. *See* App.260 (Dkt. 113.00, 114.00). Connecticut Superior Court Judge Barbara Bellis then stayed discovery pending her decision on the Applicants' motion pursuant to the requirements of Conn. Gen. Stat. § 52-196a. App.272.

The Respondents then filed a motion for limited discovery under Conn. Gen. Stat. § 52-196a to find support for their claims and defeat the Applicants' special motion to dismiss. *See* App.261 (Dkt. 123.00). Judge Bellis granted the Respondents' motion and set a February 23, 2019 deadline for the Applicants to comply with discovery. App.5. The Applicants subsequently moved for and obtained an extension of time until March 20, 2019 to comply with discovery. App.5. On March 20, 2019, the Applicants moved for another extension of time, which Judge Bellis denied. App.5.

When the Applicants could not produce the extensive material requested by the Respondents by March 20, 2019, the Respondents moved to hold the Applicants

[4] The other remaining defendants who are not parties to the underlying appeal or the instant application are Wolfgang Halbig, Genesis Communications Network, Inc., and Midas Resources, Inc.

in contempt for violating the court-ordered discovery deadline. App.5. Judge Bellis took this motion up at an April 3, 2019 hearing, but she postponed argument until April 10, 2019 when the Applicants' counsel requested time to resolve an ethical concern. App.5-6. At the April 10, 2019 hearing, Judge Bellis declined to hold the Applicants in contempt because she found that they had substantially complied with her discovery orders. App.6. Subsequently, in late May 2019, the Respondents requested Judge Bellis to resolve a discovery dispute pertaining to the Applicants' confidential marketing data via Google Analytics and their requested complete search of Mr. Jones' cell phone. App.6. Judge Bellis resolved the discovery dispute in favor of the Respondents on the matter of the marketing data and ordered the Applicants to comply at the peril of sanctions. App.6.

On June 14, 2019, Mr. Jones and the undersigned counsel, Norman A. Pattis, appeared on Mr. Jones' radio show to discuss the case. App.6, 112. Mr. Jones informed his audience that someone had embedded child pornography in "hate" emails – sent to him after the Respondents began their lawsuit against him – excoriating him for his coverage of so-called Sandy Hook conspiracy theories that he had been compelled to turn over in discovery and that the former federal prosecutor serving as the Respondents' counsel had contacted the FBI and, in Mr. Jones' opinion, had tried to get him into criminal trouble despite the emails having never been opened. App.127-31.

Mr. Jones then grew more and more furious on live radio and television at what he perceived as a deliberate attempt by his enemies to frame him and cause him

criminal trouble. App.127-46. He launched into a profane and emotional tirade directed at those enemies and offered a one-million-dollar reward for evidence that revealed who was responsible for the emails. App.127-46. He also declared war and repeated his offer of a bounty directed at whoever sent the emails:

> You're trying to set me up with child porn. I'm going to get your ass. One million dollars. One million dollars, you little gang members. One million dollars to put your head on a pike. One million dollars, bitch. I'm going to get your ass. You understand me now? You're not going to ever defeat Texas, you sacks of shit. So you get ready for that.

App. 130-31.

On the very same broadcast and mere minutes later, Mr. Jones made unmistakably clear that he was not advocating violence or unlawful actions: "And now I ask my listeners and everyone, you claimed I sent people. I never sent anybody. *And I want legal and lawful action*. But I pray to God that America awaken[s]. Will Texas be defeated? You will now decide. This is war." App.146. (emphasis added).

The following Monday, June 17, 2019, the Respondents filed a motion asking Judge Bellis to review Mr. Jones' broadcast at a hearing scheduled for June 18, 2019 because they self-servingly concluded that Mr. Jones' remarks were directed at their counsel. App.103-09. The Respondents' motion did not even suggest what sanctions that it intended to seek and styled itself more as a notice to Judge Bellis of the Applicants' conduct. App.103-09. The Respondents' motion also indicated that they would request Judge Bellis to issue an expedited briefing schedule. App.107. At the hearing, Judge Bellis asked for "argument" on the Respondents' motion despite them

not asking for anything other than an expedited briefing schedule.[5] App.49. The Respondents clearly acknowledged that they intended to file a motion for sanctions up to and including default for Mr. Jones' comments, thus conceding that they had not properly moved for sanctions. App.56. Judge Bellis then stated that her understanding of the Respondents' motion was that it was a motion for sanctions and asked for argument on sanctions.[6] App.56-57.

After the Respondents made their argument that Mr. Jones' comments constituted a threat against their counsel, the Applicants' counsel[7] began his argument and ultimately received the lunch hour to review a recent state appellate court case[8] that Judge Bellis announced that she intended to rely on to make her decision. App.62-63, 67-68. Upon return from the lunch break, the Applicants' counsel[9] introduced a discussion of true threat exception to the First Amendment for

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[5] The undersigned who was also the Applicants' trial counsel was on trial in a family case on June 18, 2019 and was putting on testimony from a very expensive out-of-state expert. Because he could not fairly conclude from the Respondents' motion that sanctions would be addressed at this hearing and only expected Judge Bellis to rule on the discovery issues. Consequently, he had his associate appear at the hearing because his associate had been handling much of the discovery matters. The undersigned had to pause his trial and appear before Judge Bellis when his associate informed him that she was considering sanctions including default for Mr. Jones' comments. App.68.
[6] Judge Bellis also appeared to treat the Applicants' counsel's three-page motion for a stay to resolve ethical concerns related to discovery issues and Mr. Jones' comments as briefing on Mr. Jones' comments because it contained a brief discussion of his comments. App.59. Judge Bellis also orally denied the Applicants' counsel's motion for a stay before considering the Respondents' so-called motion for sanctions. App.46.
[7] The undersigned's associate made the first part of the argument. *See* n. 5 *supra*.
[8] *Maurice v. Chester Housing Associates Limited Partnership*, 188 Conn. App. 21 (2019).
[9] The undersigned left his trial and took over the argument from his associate. *See* n. 5 *supra*; App.68.

the first time in the proceedings. App.69-70. The Applicants' counsel also requested that Judge Bellis require Mr. Jones to testify as to what was going through his mind when he made his comments before issuing sanctions. App.79.

After hearing argument, Judge Bellis ruled from the bench without conducting any sort of a true threat analysis.[10] App.94-99. She imposed sanctions on Mr. Jones for his comments: the permanent denial of his statutory right to file a special motion to dismiss and attorney's fees. App.98-99.

The Applicants took an expedited appeal known as a public interest appeal to the Connecticut Supreme Court, challenging Judge Bellis' sanctions on First Amendment and due process grounds. App.9. The Connecticut Supreme Court rejected both challenges to Judge Bellis' ruling, and the Applicants will seek a writ of certiorari from this Court. App.32.

REASONS FOR GRANTING A STAY

Applicants who seek a stay of a lower court judgment pending the filing and disposition of a petition for a writ of certiorari must show "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below;

[10] The parties to the appeal to the Connecticut Supreme Court both understood Judge Bellis' ruling to rest, at least in part, on a true threat determination – a fact that the Connecticut Supreme Court recognized. App.35-36, n.29. The Connecticut Supreme Court, however, declined to conduct a true threat analysis because it held that its determination that Mr. Jones' speech "constituted an imminent and likely threat to the administration of justice." App.35-36, n.29.

and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 709-10 (2010); *see also Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (considering the same three factors as well as a fourth factor – "the balancing of the equities").

I. There Is A Reasonable Probability That At Least Four Justices Will Consider The Issues Sufficiently Meritorious To Grant Certiorari And A Majority Will Vote To Reverse The Connecticut Supreme Court's Judgment.

The Applicants will raise two issues in their petition for a writ of certiorari. First, they will ask the Court to review whether a court's inherent supervisory authority allows it to impose sanctions for extrajudicial statements without an express finding that a litigant's speech falls within a First Amendment exception. Second, they will ask the Court to determine whether a court must allow a litigant to testify before it imposes criminal sanctions.

For the reasons discussed below, these questions raise issues of sufficient important that there is a reasonably probability that at least four Justices will consider at least one of these issues to be sufficiently meritorious to grant certiorari and a majority of the Court will vote to reverse the Connecticut Supreme Court's judgment.

A. Whether A Court's Inherent Supervisory Authority Allows It To Impose Sanctions For Extrajudicial Statements In The Absence Of An Express Finding That A Litigant's Speech Falls Within A First Amendment Exception.

1. The Connecticut Supreme Court created the case that it wanted to decide rather than the case that the parties presented, raising due process questions as to its impartiality under the party presentation rule and denying Mr. Jones of a meaningful opportunity be heard.

The trial court did not base its sanctions against the Applicants on whether Mr. Jones' speech posed an imminent and likely threat to the administration of justice – a fact that the Connecticut Supreme Court acknowledged.[11] App.20-21. Instead, the trial court censured Mr. Jones for his speech under its inherent authority to address extrajudicial, "bad-faith litigation misconduct where there is a claim that a party harassed or threatened or sought to intimidate counsel on the other side." App.20-21, 94. The Connecticut Supreme Court, however, did not simply review and opine on the trial court's stated basis for its decision to sanction the Applicants. It found its own basis to uphold the sanctions on the Applicants by recharacterizing Mr. Jones' speech as a threat to the administration of justice – a characterization that no party ever made.[12] *See* App.20-21.

The Connecticut Supreme Court's decision tramples all over the party presentation rule that the Court just emphatically reaffirmed early this year in another First Amendment case. *See United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1579 (2020). "In both civil and criminal cases, in the first instance and on appeal…," courts serve as neutral arbiters of the matters that the parties frame and present for their consideration. *Id.* at 1579 (quoting *Greenlaw v. United States*, 554 U.S. 237, 243

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[11] Out of an abundance of caution, the Applicants, however, expressly argued that Mr. Jones's speech did not pose a threat to the administration of justice before the trial court. App.77-78, 82. They did not raise that argument on appeal because it was not the basis for the trial court's decision.

[12] The Applicants have included in the Appendix the full briefs of the parties before the Connecticut Supreme Court. As the Court will note, the parties focused entirely on whether Mr. Jones' speech was a true threat or an incitement to violence. App.148-256.

(2008)). While the Court has never explicitly characterized the party presentation rule as a component of due process, it is an undeniable component of due process because it bears directly on the tribunal's impartiality and a litigant's right to an opportunity to be heard on an issue "at a meaningful time and in a meaningful manner" – a fact that this case makes painfully obvious. *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976).

Mr. Jones' speech was impassioned and objectionable to cultivated sensibilities. The First Amendment, however, does not require speakers to either elucidate with Shakespearean dignity or to conform "woke" standards. The Court's First Amendment jurisprudence makes clear that no exception would apply to Mr. Jones' speech, thus mandating the reversal of the trial court's order imposing sanctions on the Applicants. The Connecticut Supreme Court, however, transformed the case into one that the parties never asked for and the trial court never considered — whether Mr. Jones' speech posed an imminent and likely threat to the administration of justice. The Applicants have no way to question the Connecticut Supreme Court on why it chose to uphold the sanctions under "an imminent and likely threat to the administration of justice" rather than a true threats or incitement analysis as the parties argued for, and the Connecticut Supreme Court did not elaborate beyond stating that Mr. Jones' speech had the potential to influence the fairness of the proceedings because it produced additional threats from third parties. App.21.

The paramount importance of the party presentation rule as a component of due process reaches its zenith in First Amendment cases in which the content of a speaker's remarks is at issue. If a court transforms the case into issues that the parties neither raised nor argued and completely ignores the issues that the parties present, the speaker ultimately faces a third adversary: the court itself. When the court finds the content of his speech to be repugnant to its cultivated sensibilities, it can search endlessly for rationales to sanction that speech while giving the speaker no opportunity to be heard on the rationales that it raises sua sponte. Furthermore, when the court that breaks from the party presentation rule is a state supreme court, the speaker has no opportunity to seek review as a matter of right and must appeal to this Court's discretionary review powers, potentially receiving no opportunity to be heard on a state supreme court's transformation of his case based on nothing more than a dislike for the content of his speech.

The Connecticut Supreme Court deprived the Applicants of such an opportunity to be heard by upholding the sanctions against the Applicants for Mr. Jones' speech on grounds that the trial court never turned to and that the parties neither raised nor argued. Consequently, the Applicants did not receive a meaningful hearing as *Eldridge* requires to contest the alternative rationale that the Connecticut Supreme Court raised to affirm the sanctions against them. This Court's due process precedents clearly weigh in favor of requiring that they receive a meaningful opportunity to contest the alternative rationale, and the Court's party presentation

precedents clearly indicate that they should not be forced to confront another adversary in the form of a state supreme court.

2. **The Connecticut Supreme Court characterized Mr. Jones' speech as a threat against opposing counsel and an incitement to unlawful action, and it then erred by failing to analyze Mr. Jones' speech under the Court's true threat and incitement analysis.**

The content of Mr. Jones' speech is the gravamen of this case. The Connecticut Supreme Court characterized it as a threat against the Respondents' counsel. It also accused Mr. Jones of inciting others to threaten the trial court and the Respondents' counsel. Both the characterization and the accusation came with no analysis under the Court's true threat and incitement exceptions to the First Amendment despite the Connecticut Supreme Court acknowledging that, outside litigation, Mr. Jones' speech "may be protected." App.21. Instead, the Connecticut Supreme Court held that

> the trial court's duty to ensure a fair trial for those appearing before it permits some restrictions on harassing and threatening speech toward participants in the litigation. Without the ability to place such restrictions, trial courts will be left defenseless to stop both actual interference and perceived threats to just adjudications.

App.21.

In 2015, the Court reaffirmed the principle that a government's content-based restrictions on speech are presumptively unconstitutional. *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2226 (2015); *see also National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371 (2018) (same). The Court also indicated that a government regulation of speech is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. Of particular egregiousness to the Court was government regulation that regulates

speech based on viewpoints. *Id.* at 2230 (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). Innocent motives do not save the regulation either. *Id.* at 2229.

The Court, however, has developed limited exceptions to the First Amendment's strong prohibitions against content-based regulation: incitement, obscenity, defamation, speech integral to criminal conduct, "fighting words," child pornography, fraud, and speech presenting some grave and imminent threat the government has the power to prevent. *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (compiling cases). Each of these exceptions, though, is carefully circumscribed by methods of analysis to ensure that they do not swallow the First Amendment whole.

Courts are not above the Constitution. They can transgress on constitutional liberties just as readily as the legislative or executive branches, particularly when they regulate the speech of those subject to their jurisdiction. The Applicants do not dispute that a court has an important interest in ensuring the fair administration of justice. Protecting that interest, however, cannot come at the expense of the First Amendment's free speech protections.

A litigant stands in a unique position in society. He has intentionally or unwittingly become a participant in one of our nation's great political processes. As a participant, he gains a unique perspective of how that process works and how its various participants conduct themselves, including all of their infirmities. Consequently, his views on the judicial process and the conduct of its various

participants are core political speech protected by the First Amendment regardless of whether he expresses them with Shakespearean eloquence or with quintessential American vim and vigor.

The Connecticut Supreme Court, however, drew a distinction between a litigant's speech and a non-litigant's speech that is antithetical to the First Amendment. It expressly acknowledged that Mr. Jones' speech would likely be protected by the First Amendment if he was not a litigant, but stated that his status as a litigant made him a participant in a government function: "As a party to a judicial proceeding, Jones is participating in a government function and therefore is under the court's jurisdiction. For this reason, the trial court may sanction him for speech that, when made by a stranger to the litigation, may be acceptable." App.22.

The implications of a rule of this nature pose a serious threat to every Connecticut litigant's free speech rights. What if a litigant chooses to publicly suggest that the trial court judge was improperly biased? Would he be sanctioned for perverting the administration of justice for raising a legitimate question about the fundamental fairness of the judicial process? What if a litigant chooses to publicly state a belief that the opposing parties had manufactured the lawsuit in an effort to weaponize the judicial process for political purposes and offered a reward for anyone who could get him evidence to support that belief? Would he be sanctioned for ostensibly discouraging a litigant from availing himself of the judicial process or compromising the fairness of the proceedings?

The Connecticut Supreme Court clearly did establish such a broad and vague rule to place litigants on substantially different ground than non-litigants, and it then harnessed the rule's breadth and vagueness to sanction the Applicants for Mr. Jones' speech – the content of which was offensive to its sensibilities. In doing so, however, the Connecticut Supreme Court left an Achilles' heel to its analysis when it specified the bases for its decision were that (1) Mr. Jones threatened opposing counsel and (2) Mr. Jones' speech "produced additional threats to those involved in the case and created a hostile atmosphere that could discourage individuals from participating in the litigation." App.20-21.

Despite clearly stating that it found that Mr. Jones threatened opposing counsel and incited additional threats against opposing counsel, the Connecticut Supreme Court's opinion is totally bereft of any true threats or incitement analyses. The lack of analysis is unsurprising. Mr. Jones did engage in a profane rant. App.116-146. He did use numerous expletives. App.116-146. He did declare war. App.116-146. He did declare that he was "going to get [his] ass," referring to whoever sent the emails. App.130-31. He did offer a bounty of a million dollars to put whoever's head was responsible on a pike. App.130-31. However, in the midst of his rant, Mr. Jones still made it very clear that he only wanted legal and lawful action. App.145-46. His attorney – the undersigned – made it clear that they were only looking for legal and lawful action. App.141, 143-44.

The Court's true threat jurisprudence clearly forecloses any finding that Mr. Jones' speech was a true threat. "'True threats' encompass those statements where

the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). Likewise, "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360. Mr. Jones clearly stated that he was offering a bounty to bring those responsible for the planting of child pornography on his computer servers to justice. App.129-130. He clearly stated that he wanted legal and lawful action only. App.145-46. His attorney also stated the same thing. App.141, 143-44. Consequently, while Mr. Jones' rant was indeed overwhelmingly hyperbolic,[13] there was no doubt that the only threat, if any, that Mr. Jones levied at opposing counsel was that of legal action. Thus, the Connecticut Supreme Court could not have found his speech to be a true threat under the Court's true threat jurisprudence.

The Court's incitement jurisprudence is equally unavailing as a basis for the sanctions imposed against the Applicants. Speech falls within the incitement exception when it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[14] *Brandenburg v. Ohio*, 395 U.S. 444, 447

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[13] The Court has held that the government "has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us," reasoning that "one man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971). Mr. Jones' profanity or perceived vulgarity carries minimal weight in the analysis.

[14] As a legal term of art, incitement is "the act or an instance of provoking, urging on, or stirring up… The act of persuading another person to commit a crime." *Incitement*, Black's Law Dictionary (11th ed. 2019).

(1969). As stated above, Mr. Jones did engage in a rant that contained impassioned expressions of his emotions.[15] He, however, made it unmistakably clear that he was only advocating for legal and lawful action. App.145-46. Consequently, the Connecticut Supreme Court could not have found that Mr. Jones incited anyone to lawless action when he made it abundantly clear that he was only advocating lawful action.

Since the Connecticut Supreme Court could not find fault with Mr. Jones' speech by fairly analyzing its content, it chose to punish the Applicants for the unlawful actions of others while ignoring Mr. Jones' clear advocacy for lawful action. Mr. Jones chose to act lawfully. Others did not. The Connecticut Supreme Court punished the Applicants for the sins of others, ostensibly because Mr. Jones inspired their sins. The Court's true threat and incitement doctrines, however, both require Mr. Jones to intend to act unlawfully or intend to incite others to act unlawfully. Mr. Jones neither advocated nor intended to advocate for others to act unlawfully.

The Connecticut Supreme Court acknowledged that Mr. Jones' speech would likely be protected if he was not a litigant. It unquestionably would be protected. There is no justification for its arbitrary distinction between litigants and nonlitigants, especially when both would be engaging in core political speech — the criticism of actors in a political process. Consequently, upon a full presentation of the issues in this case through a petition for a writ of certiorari, at least four Justices will likely consider the issues to be sufficiently meritorious to grant the petition, and at

[15] See n.13 *supra*.

least five Justices will likely vote to reverse the Connecticut Supreme Court's decision.

B. Whether The Trial Court Failed To Give The Applicants Sufficient Due Process Protections Before Imposing Criminal Sanctions On Them When It Had Warned Them Of The Possibility Of The Same Sanction For An Unrelated Issue.

Due process requires, at a minimum, adequate notice and a meaningful opportunity to be heard. *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). It, however, "is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The Connecticut Supreme Court and the trial court, in this case, ignored the fact that they were imposing, and affirming, a sanction for criminal contempt on the Applicants. Consequently, they grossly denied the Applicants a meaningful opportunity to be heard fully and to present testimony to rebut any reasoning that could have supported the criminal sanctions against them.

In the first place, the Respondents did not file a formal motion for sanctions. App.104-08. Instead, they filed a "Motion For Review of Broadcast By Alex Jones Threatening Plaintiffs' Counsel," which did not request sanctions and stated an intention "to move to seek specific relief on an expedited basis." App.104-05. The Respondents were crystal clear that they were not requesting to be heard on the merits of sanctions immediately, but were only requesting an expedited briefing schedule on sanctions and possibly interim relief. App.107. The very next day, the trial court took up the issue of Mr. Jones' speech at a hearing initially intended to address discovery issues without letting counsel know that it intended to impose

sanctions that day. App.49. At that hearing, it revoked the Applicants' statutory right to file a special motion to dismiss as a punishment for Mr. Jones' speech. App.98-99.

Based on the Respondents' motion, the Applicants expected that they would have an opportunity to fully brief the issue of Mr. Jones' speech before the trial court ruled. Consequently, when the trial court indicated that it would be ruling that same day, the undersigned had to leave a trial that he was participating in the same courthouse and only received an hour to prepare an argument against sanctions based on what First Amendment law he could recall from memory and the case that the trial court provided him. He then appeared, argued, and asked the trial court to allow Mr. Jones to testify about his speech – a request that the trial court ignored. App.79.

Even under a minimal standard of due process, the trial court's actions, at best, fell far short of giving the Applicants adequate notice and a meaningful opportunity to be heard. At worst, the notice that the Applicants received – the Respondents' motion – was misleading because it led the Applicants to expect that they would receive an opportunity to brief the issues pertaining to Mr. Jones' speech. Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections…. The notice must be of such nature as reasonably to convey required information." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). If the Applicants had adequate notice, they would have, at the very least, offered an affidavit from Mr. Jones to further affirm his intentions, and, at best, they

would have offered his testimony. They would have also prepared substantially more detailed arguments to oppose the sanctions.

The Applicants, however, were entitled to far more than minimal due process because the trial court's sanctions were criminal in character. In *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994), the Court drew a marked distinction between civil and criminal contempt: "A contempt sanction is considered civil if it 'is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.'" *Bagwell*, 512 U.S. at 827-828 (quoting *Gompers v. Bucks Stove & Range Co*, 221 U.S. 418, 441 (1911)). The Court has further distinguished criminal sanctions from civil sanctions based on whether they are conditional: "An unconditional penalty is criminal in nature because it is 'solely and exclusively punitive in character….' A conditional penalty, by contrast, is civil because it is specifically designed to compel the doing of some act." *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 633 (1988).

Criminal sanctions may not be imposed on someone without giving him the due process protections traditionally associated with criminal proceedings. *Bagwell*, 512 U.S. at 826. That includes the rights to receive adequate notice of proceedings and to receive an opportunity to present an adequate defense. *Id.*

While it is true that the trial court did not imprison or fine the Applicants, it stripped them of a statutory right in the judicial system, which is a deprivation of their liberty. It did not strip them of that right to compel compliance with any of its orders. Indeed, there was no order that the trial court had issued that would have

put Mr. Jones on notice that his speech was impermissible. Furthermore, its sanctions were not conditional in any sense. Consequently, under the Court's jurisprudence, there is no question that the trial court imposed criminal sanctions on Mr. Jones without attaching the label of criminal contempt to them.

The Connecticut Supreme Court, however, held that the Applicants were properly on notice that sanctions were a possibility and had ample opportunity to prepare their objections because the trial court had repeatedly warned them that it would strip them of their right to file a special motion to dismiss for discovery violations. App.31. This reasoning misses the mark by a wide breadth.

While the trial court did warn the Applicants that it would strip them of their statutory right to file a special motion to dismiss for discovery noncompliance on several occasions, it only did so in the context of discovery noncompliance. In the hearing that ultimately led to sanction on Mr. Jones, the trial court devoted the entire hearing to discussing his comments and no time to discussing discovery issues. *See* App.45-101. It then ruled on the Respondents' pending motions for discovery compliance and sanctions along with its own initiation of sanctions on the Applicants for Mr. Jones' speech. App.91-99. While the trial court did find that the Applicants had not been complying with their discovery obligations, it explicitly ignored and gave no treatment to the Applicants' counsel's representation that he had sought to physically tender the outstanding discovery to the Respondents and they had refused to accept it. App.61-61.

Consequently, the discovery issues were clearly secondary to the trial court's punishment of Mr. Jones' speech, which it clearly did not like and described as "indefensible, unconscionable, despicable, and possibly criminal behavior…." App.95. The trial court clearly indicated that, for both the discovery issues and Mr. Jones' speech, it was sanctioning the Applicants: "So for all these reasons, the Court is denying the Alex Jones defendants the opportunity to pursue their special motions to dismiss…." App.98.

In First Amendment employment retaliation cases, the Court has made it clear that a plaintiff need not establish that the sole and primary reason for a government's adverse action against him was its dislike for his constitutionally protected speech. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Instead, a plaintiff only needs to show that it was a motivating factor in an adverse action. *Id.* The standard should be no different when it comes to a court's sanctioning of a litigant for constitutionally protected speech.

Thus, the Connecticut Supreme Court clearly erred by completely absolving the trial court of any error on due process grounds through its holding that the sanction was appropriately imposed on the separate and independent basis of punishing the Applicants for discovery violations. The trial court clearly imposed the sanctions for purported discovery violations and for Mr. Jones' speech. Under the Court's precedents, Mr. Jones was entitled to far more notice and a much more meaningful opportunity to be heard than he received. Consequently, upon a full presentation of the issues in this case through a petition for a writ of certiorari, at

least four Justices will likely consider the issues to be sufficiently meritorious to grant the petition, and at least five Justices will likely vote to reverse the Connecticut Supreme Court's decision.

II. It Is Absolutely Certain That Irreparable Harm Will Result To The Applicants If A Stay Is Denied.

This case is a complex one because the Respondents accused the Applicants of defaming them, inflicting emotional distress on them, and engaging in a civil conspiracy and deceptive trade practices under Connecticut's Unfair Trade Practices Act. To even have a chance on sustaining any of their claims, the Respondents will need to proffer extensive discovery requests to the Applicants, and the Applicants' responses will undoubtedly be voluminous and costly to produce. Furthermore, unlike federal civil practice, the Respondents do not need to wait until a Rule 26 conference has been held to begin discovery, and they can begin to schedule depositions and serve interrogatories and requests for document production immediately upon appearing in the case. *See* Connecticut Practice Book § 13-6(a) ("Written interrogatories may be served upon any party without leave of the judicial authority at any time after the return day"); Connecticut Practice Book § 13-9(c) ("Requests for production may be served upon any party without leave of court at any time at any time after the return day"); Connecticut Practice Book § 13-26 ("any party who has appeared in a civil action… may, at any time after the commencement of the action or proceeding…, take

the testimony of any person, including a party, by deposition upon oral examination").[16]

All of the Respondents' accusations, however, have their factual basis in speech protected under the First Amendment, and Connecticut's legislature has statutorily recognized the importance of protecting parties from vexatious litigation when the First Amendment offers them a defense. *See* Conn. Gen. Stat. § 52-196a (colloquially known as Connecticut's anti-SLAPP statute). Under Conn. Gen. Stat. § 52-196a, a civil defendant has the statutory right to file a special motion to dismiss, and the court must stay all discovery upon filing of the special motion to dismiss with the limited exception of discovery necessary to allow a plaintiff to contest the special motion to dismiss.

The Applicants in this case properly filed a special motion to dismiss, and the Respondents filed a motion to conduct limited discovery pertaining to that motion.[17] During that discovery process, Mr. Jones uttered the extrajudicial remarks that have given rise to the instant application. The trial court determined that the appropriate sanction for Mr. Jones' comments was to strip him of his statutory right to be heard on his special motion to dismiss. App.98-99. The Connecticut Supreme Court affirmed

[16] For the Court's convenience, the Applicants include a copy of these practice book sections at App.273-79. Alternatively, the Court can find the current Connecticut Practice Book (Connecticut official rules of procedure) at the following link: https://www.jud.ct.gov/publications/PracticeBook/PB.pdf.

[17] The scope of the Respondents' discovery requests had been an ongoing issue in this case, but those issues are now mooted by the Connecticut Supreme Court's decision. If the Court grants the stay and ultimately reverses the Connecticut Supreme Court's decision on its merits, the Applicants do not waive their arguments regarding the scope of the Respondents' requests.

the trial court's decision, and it declined to issue a stay while the Applicants sought review from this Court, thus subjecting the Applicants to precisely the type of discovery process that Conn. Gen. Stat. § 52-196a protects them from.[18] App.40-43.

As Justice Marshall pointed out, "the most compelling justification for a Circuit Justice to upset an interim decision by a [lower court is] to protect this Court's power to entertain a petition for certiorari…." *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers) (quoting *New York v. Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers)). If the Court does not stay the Connecticut Supreme Court's judgment, the Court's jurisdiction to entertain a petition for certiorari will likely be destroyed because the Respondents will undoubtedly move to request extensive discovery from the Applicants before the Court can determine whether to hear the Applicants' petition. The Applicants will be compelled to respond to avoid sanctions including default, thus permanently losing the benefits of Conn. Gen. Stat. § 52-196a and incurring substantial monetary costs. Furthermore, if the Applicants respond to the Respondents' discovery requests, any decision from the Court would have no practical effect on the proceedings below, thus leaving the Applicants completely unable to seek further review of a sanction that clearly infringes on their First Amendment rights.

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[18] In accordance with their responsibilities below, the Applicants moved to strike (the Connecticut equivalent of a Fed. R. Civ. P. 12(b)(6) motion to dismiss) to avoid defaulting in the trial court or incurring further sanctions. This action does not waive their right to seek a stay or review from this Court and merely reflects the requirements of the situation that they find themselves in.

The issuance of a stay will also not cause irreparable harm to the Respondents. At worst, they will need to wait whatever amount of time that the Court takes to decide the Applicants' petition on the merits. When the dust settles, however, they will still be able to litigate their claims – either under the posture of a special motion to dismiss or under the current procedural posture. Consequently, a stay will not harm the Respondents beyond causing delay while the denial of a stay will deprive the Applicants of their opportunity to seek this Court's review of the sanctions imposed on them, which infringe on their First Amendment liberty.

CONCLUSION

For the foregoing reasons, this Court should grant the application for a stay.

Respectfully submitted

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APPENDIX