APP NO. _____

In the Supreme Court of the United States

GOOD LAWGIC, LLC and

JOSEPH NIERMAN

Applicants,

v.

JUAN M. MERCHAN,

Respondent.

To the Honorable Sonia Sotomayor,
Associate Justice of the United States Supreme Court
and Circuit Justice for the Second Circuit

EMERGENCY APPLICATION FOR A STAY PENDING APPEAL

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PARTIES TO THE PROCEEDING

The Applicant is the Good Lawgic, LLC (petitioner-appellant below).

The Respondents is Juan M. Merchan (respondent-appellee below).

Joseph Nierman is *pro se* (petitioner-appellant below).

Alvin Bragg, Jr. is the District Attorney for the City of New York (intervenor-appellee below).

LIST OF ALL PROCEEDINGS

The State of New York Court of Appeals, APL-2024-00088, *In the Matter of Good Lawgic, LLC et al. v. Juan M. Merchan, &c., et al.,* Order entered September 12, 2024.

The Supreme Court of the State of New York, Appellate Division, First Department, Ind. No. 71543/23, Case No. 2024-02457, *In the Matter of Good Lawgic, LLC et al. v. Juan M. Merchan, et al.,* Order entered May 30, 2024

DECISIONS BELOW

The New York Court of Appeals' decision dismissing the petitioner's appeal is published at 2024. N.Y. LEXIS 1346 (September 12, 2024), and is reprinted at Appendix ("App.") A. The New York Appellate Division's decision denying an injunction is published at 227 A.D. 3d 612 (1st Dept. 2024) and is reprinted at App. B. Good Lawgic had been seeking an injunction of a Decision and Order of Hon. Juan Merchan, dated April 1, 2024, which had been entered in the matter styled *People of the State of New York v. Donald Trump*, Indictment Number 71543-23 ("Gag Order"), and is attached as App. C.

JURISDICTION

Good Lawgic, LLC ("Good Lawgic") and Joseph Nierman ("Nierman") filed their petition and an application for emergency injunctive relief with the New York Court of Appeals, First Department ("Appellate Division) on April 12, 2024. *In the Matter of Juan M. Merchan*, Case No. 2024-02457. The Appellate Division denied the preliminary injunction and dismissed the petition on May 30, 2024. (App. A). Good Lawgic and Nierman filed a Notice of Appeal from the denial of an injunction and dismissal of the petition on July 3, 2024. SSD 30. On September 12, 2024, the New York Court of Appeals dismissed the appeal which also sought the injunctive relief in question, such that the dismissal presumably denied a stay. (App. B). The Gag Order (App. C) remains in effect as the criminal defendant, President Donald J. Trump ("President Trump"), appeals his convictions.

This Court has jurisdiction under 28 USCS § 1257(a), and Supreme Court Rule 23. Per Supreme Court Rule 23.3, Good Lawgic and Nierman were parties to the action before the Court of Appeals, and the relief now sought was first sought in the courts below.

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To the Honorable Sonia Sotomayor, as Circuit Justice for the Second Circuit:

Good Lawgic and Nierman move for an Order vacating the Gag Order imposed on President Donald Trump by Juan M. Merchan, an Acting Justice of the New York Supreme Court ("Judge Merchan").

Good Lawgic and Nierman are members of the New York press and have sought comment from President Trump with respect to Merchan's family members. Due to the gag order, President Trump declined comment. Beyond the trial being of the highest newsworthiness, since it concerned the criminal prosecution of the former President of the United States who then was the presumptive Republican nominee for President, and who now is such nominee, it also was highly newsworthy due to Judge Merchan's irreconcilable conflicts of interest. The New York State Bar Association *Code of Judicial Conduct* is correlative with 22 *NYCRR* § 100.2, which provides the following with regard to judicial appearances of impropriety, and provides, in pertinent part as follows:

> **(B)** A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment.
>
> **(C)** A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

Canon 3 of the *Code of Judicial Conduct* provides, in pertinent part (emphasis added):

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

> ***
>
> (c) the judge knows that he … or the judge's spouse … has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other interest that could be substantially affected by the proceeding;
>
> ***
>
> (d) the judge knows that the judge or the judge's spouse, or a person known by the judge to be within the sixth degree of relationship to either of them …
>
> ***
>
> (iii) has an interest that could be substantially affected by the proceeding...

Good Lawgic presented a news article dated April 2, 2024, which provides substantial backup for the proposition that Judge Merchan's wife works for New York Attorney General Letitia James ("James"). Such article included a link to videos of James railing against President Trump during her campaign for Attorney General, including one clip where James repeatedly yelled into a bullhorn about President Trump, "Lock him up!" Such article also provided that Judge Merchan's daughter is a partner and part-owner of Authentic Campaigns, whose featured client is the Biden-Harris Campaign. Indeed, a recent report provides that the publicity company headed by Judge Merchan's daughter had revenues of more than $12,000,000 greater than the prior year, which revenues were generated while her father presided over President Trump's trial.

Such alleged conflicts are certainly newsworthy and may well have required Judge Merchan to recuse himself from the trial, which ultimately led to multiple convictions for President Trump. However, the Gag Orders prevented Good Lawgic from obtaining newsworthy comment from President Trump about such issues which appear to potentially place Judge Merchan in direct conflict with his obligations pursuant to 22 *NYCRR* § 100.2, and *Code of Judicial Conduct*, Canon 3. More

specifically, the alleged conflicts of Judge Merchan's wife and daughter placed him within one degree away from a person with an interest that may be substantially affected by the criminal trial. Yet the Gag Order prevented President Trump from speaking about the very people who were one degree away from Judge Merchan, thus helping to insulate Judge Merchan from scrutiny as the trial judge of what may have been the most sensational criminal trial in American history.

Consequently, significant concerns were raised by Good Lawgic which may have necessitated Judge Merchan's recusal as the trial judge. Such concerns certainly were (and continue to be) newsworthy and directly affected President Trump's right to a fair trial. Thus, the First Amendment rights of a free press, President Trump's First Amendment right to free speech, and President Trump's Sixth and Fourteenth Amendment rights to a fair trial were trampled by the Gag Order.

Moreover, and crucial to this motion, is that the restraint on Good Lawgic's newsgathering is the result of what was previously unprecedented restraints on a criminal defendant prior to the string of legal cases brought against President Trump. More specifically, prior to *United States v. Trump*, 88 F.4th 990 (2023) ("*Trump*"), it appears that the concept of entering a gag order against the defendant in a criminal trial was unprecedented when the intent was to silence that criminal defendant. The New York courts relied on such precedent in its rulings below. Such silencing of a criminal defendant bespeaks of a dangerous violation of a criminal defendant's right to comment to media on matters that may be of grave importance to what could be that criminal defendant's life, liberty, and property, for the purpose of making prosecution convenient. Prior to *Trump*, the Sixth Circuit looked at this very issue

and reached the opposite conclusion, which is that "[t]o the extent that publicity is a disadvantage for the government, the government must tolerate it." *United States v. Ford*, 830 F.2d 596, 600 (6th Cir. 1987).

Thus, a Circuit split has evolved and has resulted in there being an unprecedented restraint on a criminal defendant's speech and the First Amendment rights of the press to gather news directly from the source on information that apparently that may have compelled Judge Merchan to recuse himself. Instead, Judge Merchan insulated himself from such press scrutiny via the reception of commentary from President Trump, which may well have resulted in a wrongful conviction of the man who may soon again be elected President of the United States. Consequently, the public is being deprived of critical information that may affect the outcome of a presidential election. Given the critical constitutional implications of all these issues, particularly in light of the Circuit split, the Gag Order should be stayed pending review by the entire Supreme Court.

STATEMENT OF THE CASE

A. President Trump is Subjected to the Gag Order.

On April 4, 2023, a Grand Jury in New York County, New York, indicted President Trump on thirty-four Counts of allegedly falsifying business records in the First Degree related to an alleged illegal scheme to influence the 2016 presidential election. *People of the State of New York v. Donald J. Trump,* Ind. No. 71543-23. On February 24, 2024, the People moved for a Gag Order which was consistent with the D.C. Circuit's decision in *Trump.* On March 26, 2024, Judge Merchan entered a gag order which did not proscribe President Trump from commenting on the family

members of Judge Merchan and prosecutors. After President Trump exercised his First and Fourteenth Amendment rights to speak on such subjects, on April 1, 2024, Judge Merchan entered the Gag Order which specifically proscribed such commentary by President Trump.

B. Good Lawgic and Nierman Seek to Enjoin the Gag Order.

Nierman is the sole owner of Good Lawgic. He began podcasting under the YouTube channel called "Good Lawgic" and formed the entity in September 2022, after which he began operating his podcast for the corporate entity's benefit Mr. Nierman is an official member of the New York press.

Good Lawgic and Nierman filed their Petition and an Order to Show Cause in the Appellate Division, the court of first instance in this matter, seeking an injunction against Judge Merchan enforcing the Gag Order and its predecessor ("Gag Orders"). Good Lawgic and Nierman argued that the Gag Orders violated the Petitioners' freedom of press rights the moment they were entered. More specifically, Good Lawgic's press inquiry to President Trump about Judge Merchan's relatives could not receive a response, and Good Lawgic was deprived of an interview of President Trump for such reason as well.

The Appellate Division denied the Order to Show Cause and dismissed the Petition. Appeal was taken as of right, based on the allegations that the Gag Order also violated New York's broader equivalent of the First Amendment The Court of Appeals dismissed that appeal on September 12, 2024.

ARGUMENT

A stay pending appeal requires a showing of four well-settled factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken* v. *Holder*, 556 U.S. 418, 434 (2009). Here, such factors weigh decisively in favor of a stay.

I. The Fact that the Gag Order Protected Judge Merchan from Having to Face Legitimate Media Inquiries to President Trump About Judge Merchan's Conflicts of Interest Merits a Stay.

At the outset, in light of the extraordinary circumstances of this matter in which a former President and leading presidential candidate has been gagged from discussing individuals whose conflicts appear to require recusal of the judge who entered the Gag Order, a stay should be granted. The Gag Order violates numerous bedrock constitutional principles.

The Gag Orders prevent Good Lawgic from obtaining newsworthy comment from President Trump about such issues which appear to potentially place Judge Merchan in direct conflict with his obligations pursuant to 22 *NYCRR* § 100.2, and *Code of Judicial Conduct*, Canon 3. As Judge Merchan's wife works for James, who conducted a campaign pitting herself against President Trump and urging the courts to "Lock Him Up!", Judge Merchan's wife is one degree away from a person with an interest that may be substantially affected by the criminal trial. Yet the Gag Order prevents President Trump from speaking about Judge Merchan's wife even after a jury has convicted him. Likewise, Judge Merchan's daughter has made

millions of dollars as a publicist for Biden-Harris, which may be based on Judge Merchan's serving as trial judge. Significant concerns have been raised as to whether President Trump has been convicted of crimes at a trial presided over by a judge who was conflicted and who was obligated to recuse himself because of the conflicts caused by his family members. Such concerns certainly are newsworthy and directly affect the criminal defendant's right to a fair trial. Thus, the First Amendment rights of a free press, President Trump's First and Fourteenth Amendment rights to free speech, and his Sixth and Fourteenth Amendment rights to a fair trial are all being trampled by the Gag Order as related to President Trump being silenced about Judge Merchan's wife and daughter. Moreover, the Gag Order and conviction exist in the midst of a presidential election and could impact the outcome based on President Trump not being able to comment on these critical facts which the broader public has a right to know--facts about which Good Lawgic has sought and was denied comment by President Trump because of the Gag Order.

The integrity of judicial decision making, of judicial decision making, *SEC v. Jarkesy*, 144 S. Ct. 2117, 2134 (2024), and the integrity of federal elections, *Trump v. United States*, 144 S. Ct. 2312, 2338 (2024), have both been subjects which were before this Court just last term. Judge Merchan's Gag Order implicates both, and in the wrong way. "The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1035 (1991). "Public vigilance serves us well, for the knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective

restraint on possible abuse of judicial power." *Ibid.*

By protecting his family members against comment by a criminal defendant in his court, Judge Merchan also helped to protect himself against significant public scrutiny that President Trump would bring to bear on the subject of his irreconcilable conflicts of interest--an abuse of judicial power. Further, President Trump was convicted of numerous felonies in Judge Merchan's court, all of which may well be tainted by Judge Merchan's conflicts of interest. President Trump undeniably has as strong of a media voice as any American who came before him. Thus, by silencing President Trump from speaking about the conflicts associated with Judge Merchan's family, significant damage is done to the public knowledge of critical issues that could impact the 2024 presidential election such that voters stand to be deceived by the information about the convictions. Such damage to judicial and election integrity, which also interferes with core First, Sixth, and Fourteenth Amendment rights, can only be undone by vacating the Gag Order, which will free Good Lawgic to report President Trump's words on the conflicts of interest that exist.

II. Good Lawgic is Likely to Succeed on the Merits.

Regarding the merits, an injunction "is an extraordinary remedy," *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008), and may be awarded only "upon a clear showing that the plaintiff" deserves it. *Id.* at 22. Good Lawgic meets such difficult standard herein because the Courts below failed to scrutinize the First Amendment protections afforded to Good Lawgic and Nierman as members of the press, and further undertook no examination of the conflicting Circuit holdings of *Trump* and

Ford, choosing to ignore the core substantive holding of *Ford* altogether, thus violating core First, Sixth and Fourteenth Amendment principles.

A. The First Amendment Right of a Candidate to Speak and the Citizenry to Hear that Candidate is entitled to the Strongest of First Amendment Protections.

"If there is any fixed star in our constitutional constellation, it is the principle that the government may not interfere with an uninhibited marketplace of ideas." *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2311 (2023) (quotations omitted, cleaned up). "The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *New York Times Sullivan,* 376 U.S. 256, 270 (1964)). "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Garrison v. La.*, 379 U.S. 64, 73 (1964). "Moreover, in the case of charges against a popular political figure it may be almost impossible to show freedom from ill-will or selfish political motives." *Id*. at 74 (quotation omitted).

"[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course

that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). "The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates." *Brown v. Hartlage*, 456 U.S. 45, 53 (1982) (quoting *Buckley*, 424 U.S. at 52-53). "That discussion is critical to enabling "the electorate [to] intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." *Id.*

B. Freedom of the Press is entitled to the Strongest of First Amendment Protections.

Similar to the general principles of free speech on matters of public concern, the right to a robust free press is entitled to the highest of constitutional protections. "Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets ... The press in its historic connotation comprehends 'every sort of publication which affords a vehicle of information and opinion.'" *Branzburg v. Hayes*, 408 U.S. 665, 704-705 (1972) (quoting *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)). "[N]ews gathering is not without its First Amendment protections." *Branzburg*, 408 U.S. at 707. "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. "The liberty of the press is indeed essential to the nature of a free state... [which] consists in laying no *previous* restraints upon publications ..." *Near v. Minn.*, 283 U.S. 697, 713 (1931). "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press." *Id.* at 714.

One needs to look no further than *New York Times Co. v. United States*, 403

U.S. 713, 714 (1971), to understand the wide berth that the First Amendment provides to the freedom of the press. Widely known as the *Pentagon Papers* case, this Court rejected efforts by the government to restrain publication of a stolen classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy," as that war raged.

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (emphasis added). "The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" *New York Times Co. v. United States*, *supra,* 403 U.S. at 714 (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)). "It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist." *Bridges v. California,* 314 U.S. 252, 268 (1941). "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." *Ibid.* at 269.

C. The Cases Relied on by Judge Merchan in imposing the Gag Order Contradicts all Prior Jurisprudence.

None of the cases cited by Judge Merchan in entering the Gag Orders concerned an Order intended to gag the criminal defendant himself. Historically, the law has taken extra precautions to ensure that all activities surrounding a criminal trial take into account, first and foremost, the criminal defendant's right to a fair trial under the Sixth and Fourteenth Amendments, which includes his or her

right to speak out about the charges and circumstances surrounding the trial. Moreover, some of the cases relied on by Judge Merchan were not even criminal cases. Recognizing that the State bears the burden of proof, such basis for imposing the Gag Order, which was affirmed by the Courts below herein, fails to meet such burden.

For instance, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 22 (1984), was a civil case wherein this Court precluded media companies from disseminating potentially harmful materials about the civil plaintiff that had been developed during discovery. The holding was limited to discovery from the civil legal case. Yet Judge Merchan relied on it in entering the Gag Order.

Sheppard v. Maxwell, 384 U.S. 333, 350 (1966), limited speech because its form of expression was damaging to the criminal defendant's ability to obtain to a fair trial and thereby violated the Defendant's Fourteenth Amendment fair trial rights. Thus, *Sheppard's* holding contradicts Judge Merchan's determination to impose a Gag Order on President Trump. Notably, in *Sheppard,* this Court quoted *Chambers v. Florida*, 309 U.S. 227, 236-237 (1940), when writing that "the Court has insisted that no one be punished for a crime without 'a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power.'" *Sheppard*, 384 U.S. at 350 (emphasis added). In other words, this Court's concern when restricting speech at a trial is not related to a criminal defendant's speech so that the prosecution is deprived of a smooth trial which is not subject to scrutiny, but rather is concerned with the defendant being deprived of his rights to a fair trial by preventing the criminal defendant from being silenced.

Finally, Judge Merchan relied on *Gentile, supra.*, 501 U.S. 1030, which concerned the standard for placing restrictions on attorney speech related to pretrial publicity. Again, the question of whether a criminal defendant could be gagged during a trial was not in issue. Rather, the crux of the issue was whether a standard that the attorney's speech presented a "substantial likelihood of material prejudice," as opposed to the long-held standard that such speech presented a "clear and present danger," violated the attorney's First Amendment protection. This Court held that the standard itself did not cause a violation of the attorney's First Amendment protection, but rather that the State had not demonstrated that the attorney's speech (which was the subject of a disciplinary hearing after the conclusion of trial) had, in fact, demonstrated a substantial likelihood of material prejudice.

Gentile is highly pertinent in the context of the case *sub judice* only to the extent that it defeats rather than supports a claim that the Gag Order is warranted in this setting. For instance, this Court noted that in *Gentile* that regardless of whether a "serious and imminent threat" or a "substantial likelihood of material prejudice" standard is applied, each requires an assessment of proximity and degree of harm." *Id.* at 1037. Judge Merchan offered no evidence that President Trump's words have proximity to any real time harm of any degree. Rather, a review of Decision from which the Gag Order arose reveals that Judge Merchan relied entirely on anecdotal incidents which were lacking in proximation. Moreover, *Gentile* concerned an issue of significant public concern, causing this Court to assert, "[p]ublic awareness and criticism have even greater importance where, as

here, they concern allegations of police corruption." *Id*. at 1035. "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *Ibid.* "[L]imits upon public comment about pending cases are likely to fall not only a crucial time but upon the most important topics of discussion." *Ibid.* (quotation omitted). *Gentile* continued as to gag orders: "We have held that 'in cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Id*. at 1038 (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984); *New York Times v. Sullivan, 376 U.S. 254, 284-286 (1964*).

If anything, rather than supporting Judge Merchan's Gag Orders, *Gentile* holds to the contrary. Restrictions on free speech at trials is to be extremely circumscribed, and it is the state that bears the burden of proof with respect to such restriction. Efforts to gag a criminal defendant are to be even more narrowly tailored because the criminal defendant has Sixth and Fourteenth Amendment rights to a fair trial which weighs heavier in balance than does the State's rights to prosecution. Moreover, Judge Merchan performed no analysis of the whole record to determine whether the Gag Order breached the fundamental free expression rights of President Trump, as is required by *Gentile*.

To convict a criminal defendant the State must prove its case beyond a reasonable doubt. See *People v. Bailey*, 121 A.D.2d 189, 191 (1st Dept. 1986) (noting that the reasonable doubt standard of proof in criminal cases is codified in New

York). No lesser standard should apply when the State seeks to gag that criminal defendant. Absent a clear and present danger that the criminal defendant's words are likely to tamper with the jury, it is hard to imagine any other basis for gagging a criminal defendant of his or her First Amendment right to speak about the subject matter of the trial, or of the press to report those words.

This Court in *Gentile* declined to permit a curtailment of a defense attorney's speech in a police corruption case because of the adverse impact it may have had on core constitutional protections for the criminal defendant therein. In light of such holding, it seems unfathomable that this Court would curtail the speech of the former President during the first-ever criminal trial of a former President, and thereafter as his campaign for the presidency raged as he is awaiting sentencing. The public's perception of the subject criminal trial is magnified multiple times that of a police corruption trial, especially since that former President is also the nominee for President of the political party in opposition to the prosecution's political party. If the gag order in *Gentile* did not persuade this Court as to its constitutionality, this Court should not find otherwise here.

D. The Split in the Circuits on the Issue of Gagging a Criminal Defendant so that His Words may not Hamper the Conduct of a Criminal Trial Should Be Resolved in Favor of Free Speech.

As noted above, circuit courts are split regarding whether it is appropriate to gag a criminal defendant so that his or her words do not potentially prejudice a trial due to adverse publicity. In assessing whether one or the other circuit court correctly analyzed the question, we are reminded that the ultimate protection of life, liberty, and property in criminal trials belongs to the accused. It is the prosecution

which bears the burden of proof. The accused is entitled to all constitutional protections, including the right to publicly declare his or her innocence. Thus, the question becomes whether and under what circumstances the accused may be gagged from speaking out about the issues that may directly affect his or her guilt or innocence. Good Lawgic asserts that the Sixth Circuit's analysis in *Ford* is in keeping with this nation's history of protecting the rights of the criminal defendant above all else. Contrarily, the D.C. Circuit in *Trump* broke new ground in an unprecedented evisceration of long-held constitutional protections for the accused and for the press. The Courts below upheld Judge Merchan's Gag Order on such basis, which cannot withstand constitutional scrutiny.

In *Ford*, *supra*, 830 F.2d 596, the Sixth Circuit was confronted with a lower court's gag order imposed on Congressman Harold Ford, who had been charged with mail and bank fraud. The gag order prohibited Congressman Ford from "making any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication, including any opinion of or discussion of the evidence and facts in the investigation or case, any statement about a prosecuting attorney, any statement about any alleged motive the government may have had in filing the indictment or any statement which relates to any opinion as to . . . the merits of the case." *Id.* at 597 (internal quotations omitted). The Sixth Circuit noted that as the accused, Congressman Ford "has a First Amendment right to reply publicly to the prosecutor's charges, and the public has a right to hear that reply, because of its ongoing concern for the integrity of the criminal justice system and the need to hear from those most directly affected by it."

Id. at 599 (quoting Freedman & Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 Stan. L. Rev. 607, 618 (1977)). The Sixth Circuit further wrote that "[o]nce parties and witnesses in a criminal case are outside the courtroom, they have the full prerogatives of any private citizen to question, criticize, or condemn the actions of government even though they may be swept up on its processes at the time." *Ibid.* (quoting 2 *ABA Standards for Criminal Justice, Standard 8-3.6 & Commentary* at 8-54-55 (2d Ed. 1980)).

The Court continued that although Congressman Ford's commentary may bring more publicity to his case that is favorable to him than would occur if he was silenced, "[t]his does not result in an 'unfair' trial for the government ..." *Id.* at 600. Instead, the Court noted that "[i]t is the public to whom the First Amendment guarantees reasonable access to criminal proceedings." *Ibid.* (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)). Further, the Court asserted, "it is individuals, not the government, to whom First Amendment interests attach. To the extent that publicity is a disadvantage for the government, the government must tolerate it. The government is our servant, not our master." *Ibid.* Thus, applying the "clear and present danger" standard, *see Schenck v. United States*, 249 U.S. 47, 52 (1919), the Sixth Circuit determined that the subject gag order failed to comply with the First Amendment. To so comport with the First Amendment, the Court noted that a gag order must be based on the question of whether the subject speech presents a "serious and imminent threat of a specific nature, the remedy for which can be narrowly tailored in an injunctive order." *Ibid.* (internal quotations omitted)

(citing *Carroll v. President and Commissioner of Princess Anne*, 393 U.S. 175, 183, (1968)).

To the contrary, in *Trump*, on which the Courts below relied in upholding the Gag Orders in the face of Good Lawgic's challenge, the D.C. Circuit eschewed the "clear and present danger" standard and examined the issue as being "whether any compelling interest justifies an appropriately limited speech restriction." *Trump, supra,* 88 F.4th at 1009. The D.C. Circuit cited *Landmark Communications v. Va.*, 435 U.S. 829 (1978), when reaching its conclusion that a gag order was merited against President Trump. However, the D.C. Circuit misread *Landmark Communications* and, in doing so, turned against all prior precedent by determining that it was appropriate to enter a gag order against President Trump based on an unprecedented standard to use against a criminal defendant in a criminal trial.

Landmark Communications concerned the press' First Amendment right to report on alleged misconduct of a judge. This Court noted therein that on the question of, "whether the contempt power could be used to punish out-of-court comments concerning pending cases or grand jury investigations, this Court has consistently rejected the argument that such commentary constituted a clear and present danger to the administration of justice." *Id.* at 844 Reviewing prior cases, this Court noted that if the threat of contempt is to be employed, "[w]hat emerges from these cases is the 'working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished … and that a solidity of evidence, is necessary to make the requisite showing of imminence." *Id.* at 845 (internal quotations omitted)(quoting

Bridges, *supra,* 314 U.S. at 263; *Pennekamp v. Florida,* 328 U.S. 331, 347 (1946)). This Court continued that "[t]he danger must not be remote or even probable; it must immediately imperil." *Ibid.* (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1978)).

Despite its reliance on *Landmark Communications*, the D.C. Circuit did not apply the "clear and present danger" standard. Rather, it looked to *Neb. Press Ass'n v. Stuart,* 427 U.S. 539 (1976) ("*Stuart")*, and also misapplied that case to determine that a gag order was permissible by employing a standard that "Trump's speech poses a significant and imminent threat to the fair and orderly adjudication of the criminal proceeding against him." *Trump*, 88 F.4th at 1010. However, in leading to such conclusion, the D.C. Circuit misstated the central premise of *Stuart by* asserting that its holding constituted an exhortation to courts to take "remedial measures that will prevent * * * prejudice * * * [by] * * * the accused" and other persons "coming under the jurisdiction of the court". *Id.* at 553. What the D.C. Circuit failed to recognize is that the *Stuart* Court also applied the "clear and present danger" standard and that the Court's overarching concern was to preserve the defendant's right to a fair trial by the empanelment of impartial jury.[1] As noted above, shy of perhaps a criminal defendant's words presenting a clear and present danger of damaging the integrity of the jury pool, *Stuart* presents no foundation for a general gag order against a criminal defendant for the purpose of easing the burden of the trial on the prosecution and the presiding judge, as is the case here.

[1] See also *United States v Quattrone*, 402 F.3d 304 (2d Cir. 2005), wherein Justice Sotomayor, writing for the Second Circuit, reversed the District Court's gag order on grounds that it violated *Stuart*.

Judge Merchan similarly failed to apply a "clear and present" danger standard and also failed to analyze the cases on which he relied in issuing the Gag Orders from the perspective of President Trump's right to a fair trial, including his First Amendment rights to speak about Judge Merchan's conflicts of interest which should have necessitated his recusal. Judge Merchan did cite to *Ford* in the Decision to enter the Gag Order, but failed to cite its central holding that criminal defendants are entitled to the highest First Amendment protection since it is their liberty which is at stake. By holding that the prosecution and Judge Merchan himself were to be insulated from legitimate criticism of their family members by President Trump, which determination was upheld in the Courts below herein, an unsustainable standard of review was employed and relieved the State of proving the clear and present dangers that the defendant's speech allegedly presented to the trial. Such standard is likely to be reversed on the merits herein.

III. The Equities Warrant A Stay.

Good Lawgic has demonstrated that it is likely to succeed on the merits herein since the Gag Order violated Good Lawgic and Nierman's freedom of press rights, President Trump's First Amendment rights, and President Trump's right to a fair trial under the Sixth and Fourteenth Amendments. Thus, irreparable harm has already occurred and will continue to occur in the absence of a stay. Consequently, the equities warrant a stay of the Gag Order.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). A felony conviction causes "irreparable damage to one's reputation …" *United States v. Wulff*, 758 F.2d 1121, 1122 (6th Cir. 1985).

As noted, First Amendment rights of Good Lawgic, Nierman, and President Trump have been violated by the Gag Order. Since the Gag Order remains in effect, the irreparable harm is continuing. Similarly, President Trump was convicted of felonies. Not only do those felonies adversely affect his reputation generally, but they also cannot help but do him harm as a candidate for President just weeks away from the election. No equities support maintaining the Gag Order since Judge Merchan has no right to shield his family from legitimate criticism related to his role as presiding judge, and has no right to interfere with the media's ability to speak with President Trump about the conflicts caused by such family members. It is the State's burden of proof to support the Gag Order, which is unsupported by existing precedents of this Court. Thus, the equities lie completely in Good Lawgic's favor.

IV. The Public Interest Weighs in Favor of a Stay.

With the presidential election season in full swing, questions regarding the integrity of the process leading to President Trump's conviction in Judge Merchan's court are of the most important public nature. There also is a very important public interest in ensuring the integrity of criminal trials. If one cannot trust that the presiding judge is not conflicted, then the legitimacy of the entire criminal justice system is endangered.

On the other hand, the public interest in the Gag Order remaining in effect is virtually non-existent. It only serves to shield certain individuals from prospective criticism about their potentially being the cause of Judge Merchan improperly sitting as the presiding judge over a trial which led to President Trump's conviction.

Weighing such factors in the balance, it is certain that the public interest favors a stay of the Gag Order.

V. Alternatively, The Court Should Grant *Certiorari* and Expedite Review.

For all the above reasons just explained, this Court should stay the Gag Order. Alternatively, the Court could construe this application as a petition for a writ of *certiorari*, grant the petition, and set this case for expedited briefing and argument this Term on the question of whether the Gag Order was unconstitutional. Particularly with the presidential election just weeks away, the question of the Gag Order on President Trump's ability to communicate with the press concerning his convictions should be reviewed without delay so that the public has a full and fair opportunity to hear President Trump's commentary on the issues so that their decisions as to the candidate for whom they will cast their votes is better informed.

CONCLUSION

The Court should stay the Gag Order. In the alternative, this Court should grant *certiorari* and set an expedited briefing schedule.

Dated: October 1, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this application was served by email and United Parcel Service to the counsel listed below in accordance with Supreme Court Rule 22.2 and 29.3:

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