APP NO. 24A372

In the Supreme Court of the United States

JOSEPH NIERMAN,

Petitioner,

v.

JUAN M. MERCHAN,

Respondent.

EMERGENCY APPLICATION FOR IMMEDIATE STAY OF GAG ORDER PENDING DISPOSITION OF PETITION FOR REVIEW

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

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October 16, 2024

PARTIES TO THE PROCEEDINGS

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

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

Good Lawgic, LLC is a limited liability company wholly owned by Joseph Nierman and with separate counsel (co-appellant below).

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

LIST OF ALL PROCEEDINGS

Good Lawgic LLC ("Good Lawgic") has filed a separate Petition with the Supreme Court of the United States.

The State of New York Court of Appeals, APL-2024-00088, *Matter of Good Lawgic, LLC et al. v. Juan M. Merchan, 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. Petition sought 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 Good Lawgic, LLC and Joseph Nierman v. 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. 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 the verdicts of guilt.

This Court has jurisdiction under 28 USC §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:

Petitioner Joseph Nierman ("Petitioner" or "Nierman"), a member of the New York press credentialed via the Press Credentials Office of the City of New York, has sought comment from President Trump ("Trump" or the "Defendant") about potential bias in his criminal trial. Citing restrictions arising from the Gag Orders, President Trump declined comment. Under New York law, the Court's impediment to Petitioner's newsgathering via a gag order wrongfully placed upon a criminal defendant is actionable by Petitioner as a violation of his Federal and State rights to freedom of the press. *See New York Times v. Rothwax*, 143 A.D.2d 592, 533 N.Y.S.2d 73, 74 (1st Dept. 1988).

As detailed below, the Gag Orders were wrongful. Accordingly, Nierman moves for an Order vacating the Gag Orders imposed on President Donald Trump by Juan M. Merchan, an Acting Judge of the New York Supreme Court ("Judge Merchan").

The New York courts relied on *United States v. Trump*, 88 F.4th 990 (2023) ("*Trump*"), in its rulings below. *Trump* and the Gag Orders relied heavily upon *Landmark Communications v. Virginia*, 435 US 829 (1978) *Sheppard v. Maxwell*, 384 US 333 (1966) and *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 at 558 (1976) as opening a doorway to silence a defendant to further the "fair administration of justice."

The Supreme Court has indicated that "fair administration of justice" could potentially warrant restricting First Amendment rights. However, "fair

administration of justice" referenced by the Supreme Court bears distorted resemblance to the "fair administration of justice" objective in *Trump* or the Gag Orders.

When the Supreme Court has used that term to consider infringing a party's First Amendment rights, "fair administration of justice" meant protecting a defendant's right to a fair trial under the Sixth and/or Fourteenth Amendments. Only when a defendant's fundamental right to a fair trial is imperiled will the Supreme Court consider restricting a third-party's First Amendment rights. Even in those scenarios, the Supreme Court mandates strict scrutiny to assure that the employed measure was both a compelling need and as narrowly tailored as possible.

The high yardstick of strict scrutiny applies for any First Amendment limitation. That yardstick rises higher still for a prior-restriction on free speech, such as a gag order, which bears a heavy presumption of unconstitutionality. *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70, 83 S. Ct. 631, 9 L.Ed.2d 584 (1963); *United States v. Salameh,* 992 F.2d 445, 446-47 (2d Cir. 1993). The bar reaches its maxim when assessing the legality of a First Amendment infringement in the form of a gag order that relates to core political speech.

Read in context with each other, the Supreme Court decisions create a clear framework for assessing the Constitutionality of a gag order. There is a heavy presumption that a prior-restraint on free speech is not constitutional. However, sometimes the manifestation of First Amendment rights by "Party A" is so thoroughly intrusive on the constitutional rights to a fair trial of "Party B," that fair

administration of justice warrants a balancing test. *See e.g. Nebraska Press Assn. v. Stuart.*

In *United States v. Quattrone,* 402 F.3rd 304 (2d Cir. 2005) then-Judge Sotomayor addressed a restriction on prior speech in the form of limiting news coverage, writing

> "In cases where, as here, a trial court seeks to restrict news coverage in order to ensure a fair trial, the court must consider: (1) whether the nature and extent of news coverage in question would impair the defendant's right to a fair trial; (2) whether measures other than a prior restraint on publication exist to mitigate the effects of unrestricted publicity; and (3) the likely efficacy of a prior restraint to prevent the threatened danger. *See Nebraska,* 427 U.S. at 562, 96 S. Ct. 2791; *see also Salameh,* 992 F.2d at 447."

Quattrone, 310-311.

The foundation for employing "fair administration of justice" to justify encroaching on a party's First Amendment rights is the defendant's constitutionally protected right to a fair trial. Without that foundation, there's no basis for conducting the balancing test in the first place. The principle that "fair administration of justice" serves solely as a shield for defendants, rather than a sword to be used against them, has arguably been the law of the land since 1789, but has been explicitly recognized for at least 35 years. As the Sixth Circuit held in *United States v. Ford,* 830 F.2d 596, 600 (6th Cir. 1987):

> It is true that permitting an indicted defendant like Ford to defend himself publicly may result in overall publicity that is somewhat more favorable to the defendant than would occur when all participants are silenced. This does not result in an "unfair" trial for the government, however.
>
> **It is the individual defendant to whom the Sixth Amendment guarantees a fair trial.** *See Levine v. United States District Court,* 764

> F.2d 590, 596 (9th Cir. 1985), *cert. denied,* ___ U.S. ___, 106 S.Ct. 2276, 90 L.Ed.2d 719 (1986). It is the public to whom the First Amendment guarantees reasonable access to criminal proceedings. *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). And 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.**

Ford, at 600 (Emphasis added.)

"Fair administration of justice" as used in *Trump* and in the underlying case however, had no aim of protecting a criminal defendant's constitutional rights; this is manifestly obvious as the Defendant vociferously objected to its entry. As used in *Trump* and in the New York Gag Orders, "fair administration of justice" references not the rights of the defendant which are protected by the constitution, but rather appear to attempt to invoke the State's and/or court's "right" to a fair trial which is not protected by the Sixth Amendment.

This inversion of "fair administration of justice" is wholly inconsistent with the perspective of the Sixth Circuit that "fair administration of justice" is rooted in Constitutional rights and exists solely to protect a defendant. *Trump* and the New York's Gag Orders' use of "fair administration of justice" as a sword to slash the Defendant's First Amendment rights created a new circuit split that merits the Court's immediate attention.

Petitioner respectfully urges the Court to reject this distortion of the concept of "fair administration of justice" because it is as dangerous as it is novel. It is unprecedented for the Court to justify a gag order against a criminal defendant based upon a purported concern that the defendant may foment mass hysteria or criminal

actions by unnamed, unknown, and unaffiliated persons toward trial participants. In this instance, the Court: i) never established a causal link between the Defendant's speech and purported harm; ii) never ascertained whether the harm from the restricted speech would be remediated via the Gag Orders; and iii) never explored less violative means of remediating the potential harms. At best, Judge Merchan employed a fatally flawed application of *Nebraska*. Worse yet, and far more damaging to American jurisprudence, it bespeaks of a dangerous trend toward violating a criminal defendant's most fundamental rights for the purpose of making the prosecution more convenient for the government.

The Court should note that the New York trial was and remains of the highest newsworthiness and political import. Since it concerned the criminal prosecution of the current Republican nominee for President, the guilty verdicts and questions of Judge Merchan's potential irreconcilable conflicts of interest remain daily public fodder at a national level.

Thus, Petitioner's First Amendment rights of a free press, President Trump's First Amendment right to free speech, and the Defendant's Sixth and Fourteenth Amendment rights to a fair trial were trampled by the Gag Orders. The gravity of these matters in settling a Circuit split and properly interpreting First Amendment rights would merit the Court's attention if the unconstitutional Gag Orders affected an unknown American in a relatively unknown town. Given the national impact of the case at bar, its magnitude only provides further justification for the Court's immediate intervention.

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 government 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 preliminary gag order which did not prohibit 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 forbade such commentary by President Trump.

B. Nierman Seeks to Enjoin the Gag Order

Nierman began podcasting under the YouTube channel called "Good Lawgic" and formed a limited liability company 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 Petitioner's freedom of press rights the moment they were entered. More specifically, Trump

petitioner's press inquiry to President Trump about Judge Merchan's relatives.

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. Petitioner Meets All Four Factors of a Stay

A. Petitioner 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. Petitioner meets such difficult standard herein because the Courts below failed to scrutinize the First Amendment protections afforded to petitioner as a member 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 basic First, Sixth, and Fourteenth Amendment principles.

1. The Court Incorrectly Analyzed and Misunderstood Supreme Court Precedents, Inventing a New Legal Theory that Contradicts and Reverses Established Rulings

The Supreme Court's default position is that a gag order carries a "heavy presumption of unconstitutionality". *Bantam Books, Inc. at* 70. In *Quattrone*, writing for the Second Circuit, then-Judge Sotomayor wrote:

Turning to the merits, we discuss first the doctrine of prior restraints.

> A "prior restraint" on speech is a law, regulation, or judicial order that suppresses speech — or provides for its suppression at the discretion of government officials — on the basis of the speech's content and in advance of its actual expression. *See Alexander v. United States,* 509 U.S. 544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993); *Hobbs v. County of Westchester,* 397 F.3d 133, 148 (2d Cir. 2005); *Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees and Rest. Employees Int'l Union,* 239 F.3d 172, 176 (2d Cir. 2001); *In re G. A. Books, Inc.,* 770 F.2d 288, 295-96 (2d Cir. 1985); *see also Alexander,* 509 U.S. at 566-72, 113 S.Ct. 2766 (Kennedy, J., dissenting) (discussing the distinction between prior restraints and subsequent punishments and the utility of that distinction). It has long been established that such restraints constitute "**the most serious and the least tolerable infringement**" on our freedoms of speech and press. *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); *see also Tunick v. Safir,* 209 F.3d 67, 91 (2d Cir. 2000) (quoting *Nebraska Press,* 427 U.S. at 559, 96 S.Ct. 2791). Indeed, the Supreme Court has described the elimination of prior restraints as the "'chief purpose'" of the First Amendment. *Gannett Co. v. DePasquale,* 443 U.S. 368, 393 n. 25, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) (quoting *Near v. State of Minnesota ex rel. Olson,* 283 U.S. 697, 713, 51 S.Ct. 625, 75 L.Ed. 1357 (1931)); *see also Nebraska Press,* 427 U.S. at 557, 96 S.Ct. 2791 ("'The main purpose of the First Amendment is to prevent all such previous restraints upon publications as had been practiced by other governments.'" (brackets, emphasis and further internal quotation marks omitted) (quoting *Patterson v. Colorado ex rel. Attorney Gen.,* 205 U.S. 454, 462, 27 S.Ct. 556, 51 L.Ed. 879 (1907))). Any imposition of a prior restraint, therefore, bears "**a heavy presumption against its constitutional validity**." *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963); *United States v. Salameh,* 992 F.2d 445, 446-47 (2d Cir. 1993) (per curiam).

Quattrone, 309-310 (emphasis added)

This Court has never employed the concept of "fair administration of justice" as a basis to necessitate a balancing test to restrict free speech of a criminal defendant unless the objective was to preserve a criminal defendant's Constitutional rights. The concept of "fair administration of justice" is too impotent to thwart First Amendment rights of a criminal defendant. It was this precise observation of the Supreme Court

in the very case imprudently cited by Judge Merchan in the Gag Orders, *Landmark Communications, Inc. v Virginia*, 435 US 829 (1978). In assessing whether sufficient "clear and present danger" existed to warrant a prior-restraint of free speech, the Supreme Court wrote:

> In a series of cases raising 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.** *See Bridges v. California, supra; Pennekamp v. Florida, supra; Craig v. Harney,* 331 U. S. 367 (1947); *Wood v. Georgia,* 370 U. S. 375 (1962). What 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," *Bridges v. California, supra* at 314 U. S. 263, and that a "solidity of evidence," *Pennekamp v. Florida, supra* at 328 U. S. 347, is necessary to make the requisite showing of imminence. "The danger must not be remote or even probable; it must immediately imperil." *Craig v. Harney, supra* at 331 U. S. 376.

Landmark, at 844-845. (Emphasis added.)

In exceedingly rare circumstances, when driven by the very powerful interest or preserving a Constitutional right, "fair administration of justice" may have the force to affect otherwise impenetrable First Amendment rights. To attain sufficient power to infringe on a fundamental freedom, administration of justice must play servant to a powerful master. That master must be the compelling need of protecting a competing Constitutional right.

Sheppard v. Maxwell, 384 US 333 (1966) provided that first amendment rights of the press can be restrained, but only for the specific benefit of the criminal defendant based on the right to a fair trial implicit in the Fifth and Sixth amendment. The Court recognized that the unchecked First Amendment tidal wave of media

intervention in the *Sheppard* trial devastated the defendant's ability to have a fair trial and that was a violation of his Fourteenth Amendment Due Process rights. Because the Court was concerned with preservation of the Defendant's constitutional right to a fair trial, fair administration of justice warranted tempering of First Amendment rights.

In *Nebraska Press Assn. v. Stuart*, 427 US 539 (1976), the Court made evident that the only time a Court should even consider overcoming the "heavy presumption of Constitutional invalidity" that attaches to a gag order is when there are competing Constitutional rights.

> The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. ...Yet it is nonetheless clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it.

Nebraska Press Assn., at 561.

In every Supreme Court decision cited by the Gag Orders, there were competing Constitutional interests. Despite the compelling need of protecting a Constitutional right the Supreme Court remained exceedingly hesitant to ever impact First Amendment Rights. Generally, we see a conflict between freedom of speech/press versus an individual's Due Process rights. When girded by a Due Process interest, First Amendment rights will still prevail over "interest of justice" unless the danger is both certain and imminent.

In the case at bar, we have the highly unusual scenario where both Constitutional interests are on the same side of the equation favoring the Defendant

and obligating rejection of any gag order.

Interpreting *Landmark*, *Sheppard* and/or *Nebraska Assn.* as empowering a Court to issue a gag order in the face of both the First and Fourteenth Amendments is fanciful.

Not one of the cases cited by Judge Merchan 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 like *Landmark Communications* 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. Because *Sheppard* is rooted in preserving the defendant's constitutional rights, it has

no valid application in Judge Merchan's determination to impose a Gag Order on a criminal defendant. 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, when this Court considers restricting speech during a trial, its concern is not about limiting a criminal defendant's speech to provide the prosecution with an unchallenged or smooth trial. Rather, the Court is focused on preventing the defendant from being silenced, thereby ensuring the defendant's right to a fair trial is protected.

Finally, Judge Merchan relied on *Gentile v. State Bar of Nev.,* 501 U.S. 1030, 1035 (1991), 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 at issue. Rather, the focus was whether 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. The Court determined that the standard itself did not infringe upon the attorney's First Amendment protections. Instead, it found that the State had not proven that the attorney's speech—which was the subject of a disciplinary hearing after the trial concluded—actually demonstrated a substantial likelihood of causing material prejudice.

Gentile only serves to underscore that even if New York was permitted to

engage in a balancing test, it wholly failed to do so in accordance with *Nebraska*.

2. The Court's Failure to comport with *Nebraska Press Assn.* is a Fatal Flaw

Even if the Court had not erred by engaging in a balancing test, its utter failure to comport with *Nebraska* warrants an immediate stay of the Gag Orders. As the Second Circuit held in *Quattrone*:

> Where the category of speech otherwise receives First Amendment protection, however, courts subject prior restraints on speech or publication to exacting review. In cases where, as here, a trial court seeks to restrict news coverage in order to ensure a fair trial, the court must consider: (1) whether the nature and extent of news coverage in question would impair the defendant's right to a fair trial; (2) whether measures other than a prior restraint on publication exist to mitigate the effects of unrestricted publicity; and (3) the likely efficacy of a prior restraint to prevent the threatened danger. *See Nebraska Press,* 427 U.S. at 562, 96 S.Ct. 2791; *see also Salameh,* 992 F.2d at 447 ("This Court has stated that before a district court issues a blanket prior restraint, it must, *inter alia,* explore whether other available remedies would effectively mitigate the prejudicial publicity, and consider the effectiveness of the order in question to ensure an impartial jury." (citations and internal quotation marks omitted)). The reviewing court must examine closely both the record and the "precise terms" of the restrictive order. *Nebraska Press,* 427 U.S. at 562, 96 S.Ct. 2791. Application of the *Nebraska Press* test to the instant case demonstrates that the district court's order violated appellants' First Amendment rights.

Quattrone, 310-311.

The first test referenced in *Quattrone* is consistent with *Gentile* which held 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 did not, however, provide any evidence that President Trump's words were linked to immediate harm of any

kind. Indeed, in issuing the Gag Orders, Judge Merchan never verified that Trump's statements had any causal link whatsoever to any harm complained of. Rather, a review of the Decision from which the Gag Order arose reveals that Judge Merchan relied entirely on anecdotal incidents and a correlative connection while dispensing with verifying the existence of a causal link.

The record is further devoid of any indication that Judge Merchan spent any time considering the viability of less restrictive measures as required under *Nebraska*. The Court could have considered protective custody for witnesses, anonymity of the jury, and a host of other remedies before jumping into a prior restraint of free speech. Failure to undergo this process of narrow tailoring is a fatal flaw.

Finally, the Court completely disregarded its obligation to verify the probable efficacy of the Gag Orders. Trump's criticism of the underlying trial that purportedly incited harm (although the Court never established that it did) were and are being discussed by countless other sources every day. The only "investigation" Judge Merchan engaged in was prosecutorial claims that during the one year prior to trial Trump increased his verbal attacks on various trial participants and that trial participants purportedly experienced an increase in verbal hostility from unrelated third parties during that year. The Court never investigated whether the hostility displayed any temporal or content relation to Trump's statements or whether the hostility continued even during periods when Trump was silent about trial participants. In simple terms, since the topics the Gag Order seeks to suppress are

routinely discussed across all imaginable political media, the effectiveness of the Gag Orders silencing one individual alone appears to be minimal.

Accordingly, even if *Nebraska's* balancing test were appropriate and not prohibited in this content by binding Supreme Court precedent, the Court's failure to properly implement *Nebraska* warrants a likelihood of Petitioner's success and an immediate stay.

B. Petitioner's Harm is Irreparable

If the Petitioner's application for relief is denied they will suffer irreparable harm. The Supreme Court said in *Elrod v. Burns*, 427 US 347 (1976) "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* at 373. *See also Roman Catholic Diocese Of Brooklyn, New York v. Cuomo*, 592 U.S. 14 (2020).

C. Grant of a Stay Will Not Substantially Injure Other Members of the Proceeding

At present the trial has concluded, the jury has issued its verdict(s) and the parties are awaiting sentencing. Every person on the planet can discuss the trial without fear of legal repercussion, save the Defendant. While the Court never conducted a proper investigation to establish a causal link between Trump's speech and the purported harm, if ever there was potential harm, it has certainly passed with the conclusion of trial. There is a veritable sea of media influencers continually discussing the Trump trial. Accordingly, it is implausible that Trump's remarks regarding the trial and its participants will produce any material consequences beyond the effects already generated by the extensive coverage from numerous other

media organizations.

D. Issuance of the Stay Serves the Public's Interest

As the Court is aware, political speech is the most protected speech. Discussions about Trump's criminal trials, including the New York trial are inextricably linked to 2024 political discourse. As the Presidential candidate, the public is entitled to hear from the Defendant his thoughts about the trial and issues regarding its legitimacy without the sword of Damocles dangling over his head.

It seems inarguable to claim that issuance of a stay does anything but serve the public interest. Based on the foregoing, all four factors weigh considerably in favor of issuing an immediate stay.

II. 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 courts 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. Petitioner 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 *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 ..." *Ford.* 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 petitioner'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 (emphasis added). 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 (1947)).

Despite its reliance on *Landmark Communications*, the D.C. Circuit did not

apply the "clear and present danger" standard. Rather, it looked to *Nebraska*, 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 *Nebraska* by asserting that its holding constituted an exhortation to courts to take "remedial measures that will prevent [prejudice to] 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 *Nebraska* 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. 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, *Nebraska* 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.

Similarly, Judge Merchan did not apply the "clear and present danger" standard and failed to analyze the cases he relied upon when issuing the Gag Orders from the perspective of President Trump's right to a fair trial. This oversight includes neglecting President Trump's First Amendment rights to speak about Judge Merchan's conflicts of interest, which should have required the judge to recuse himself. Judge Merchan cited *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 determining that President Trump was to be prevented from legitimately criticizing the prosecution and Judge Merchan regarding their family members, an unsustainable standard of review was applied. This ignored the State's obligation to prove 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 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.*

IV. 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). "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.

V. Because the Gag Order Shielded Judge Merchan from Legitimate Media Inquiries to President Trump About the Judge's Conflicts of Interest, a Stay is Justified

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 Order prevents Petitioner from obtaining newsworthy comment from the Defendant 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 Letitia James, who conducted a campaign to become Attorney General by 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 found him guilty. Likewise, Judge Merchan's daughter has made millions of dollars as a publicist for Biden-Harris, an opportunity which may be based on Judge Merchan's serving as trial judge and potentially an attempt to curry favor. Significant concerns have been raised as to whether President Trump has been found guilty 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. Moreover, the Gag Order and guilty verdicts exist in the midst of a presidential election and could impact the outcome based on the Defendant not being able to comment on these critical facts which the broader public has a right to know--facts about which Petitioner has sought and were denied comment by President Trump because of the Gag Order.

The integrity 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 found

guilty of numerous felonies in Judge Merchan's court, all of which may well be tainted by Judge Merchan's conflicts of interest. 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 trial. 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 petitioner to report President Trump's words on the conflicts of interest that exist.

VI. Alternatively, the Court Should Grant *Certiorari* and Expedite Review

For all the above reasons, 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 guilty verdicts 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 15, 2024

Respectfully submitted,

/s/ Joseph Nierman
JOSEPH NIERMAN
Petitioner, *pro se.*
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APPENDIX A

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Kern, J.P., Kapnick, Gesmer, González, O'Neill Levy, JJ.

2486 & M-1928	In the Matter of GOOD LAWGIC, LLC et al., Petitioners,	Ind. No. 71543/23 Case No. 2024-02457
	-against-	
	THE HONORABLE JUAN M. MERCHAN, etc., et al., Respondents.	

Murray-Nolan Berutti LLC, New York (Ronald A. Berutti of counsel), for Good Lawgic, LLC, petitioner.

Joseph Nierman, Flushing, petitioner pro se.

David Nocenti, Office of Court Administration, New York (Lisa Evans of counsel), for Hon. Juan M. Merchan, respondent.

Alvin L. Bragg, Jr., District Attorney, New York (Philip V. Tisne of counsel), for The People of the State of New York, respondent.

Petition challenging the orders of Supreme Court, New York County (Juan M. Merchan, J.), entered March 26, 2024 (the Original Restraining Order) and amended on or about April 1, 2024 (the Amended Restraining Order, and together with the Original Restraining Order, the Restraining Order), which, among other things, prohibited nonparty Donald J. Trump (Trump), the defendant in the underlying criminal action, from making certain extrajudicial statements, unanimously denied, and the proceeding brought pursuant to CPLR article 78 dismissed, without costs.

In this original article 78 proceeding, petitioners are essentially seeking a judgment pursuant to CPLR 7803(2). We decline to exercise our discretion to grant this

extraordinary remedy (*see Matter of Rush v Mordue*, 68 NY2d 348, 354 [1986]; *see also Matter of Dondi v Jones*, 40 NY2d 8, 14 [1976]).

It is well established that "[a]lthough litigants do not surrender their First Amendment Rights at the courthouse door, those rights may be subordinated to other interests that arise in the trial setting" (*United States v Trump*, 88 F4th 990, 1007 [DC Cir 2023] [internal quotation marks and brackets omitted] [the Federal Restraining Order Decision]). The Federal Restraining Order Decision found that a restraining order was necessary under the circumstances, holding that "Mr. Trump's documented pattern of speech and its demonstrated real-time, real-world consequences pose a significant and imminent threat to the functioning of the criminal trial process" (*id.* at 1012). In the same vein, Justice Merchan properly determined that petitioner's public statements posed a significant threat to the integrity of the criminal trial proceedings. Furthermore, petitioners' objections to the Restraining Order are merely derivative of Mr. Trump's rights, and we have already declined to grant relief to him in a separate article 78 proceeding (*see Matter of Trump v Merchan*, ___ AD3d ___, 2024 NY Slip Op 02680 [1st Dept 2024]).

We have considered petitioners' remaining contentions and find them unavailing.

M-2024-1928 – *Good Lawgic, LLC, et al. v Hon. Juan Merchan, et al.,*

Motion for a stay of enforcement of the Restraining Order during the pendency of this proceeding and a preliminary injunction, dismissed as moot.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: May 30, 2024

Susanna Molina Rojas
Clerk of the Court

APPENDIX B

State of New York
Court of Appeals

Decided and Entered on the twelfth day of September, 2024

Present, Hon. Jenny Rivera, *Senior Associate Judge,* ***presiding.***

SSD 30
In the Matter of Good Lawgic, LLC et al.,
Appellants,
v.
Juan M. Merchan, &c., et al.,
Respondents.

Appellants having appealed to the Court of Appeals in the above title;

Upon the papers filed and due deliberation, it is

ORDERED, that the appeal is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Chief Judge Wilson and Judge Halligan took no part.

H Davis

Heather Davis
Deputy Clerk of the Court

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

THE PEOPLE OF THE STATE OF NEW YORK

– against –

DONALD J. TRUMP

Defendant

DECISION and ORDER

People's Motion for Clarification or Confirmation of An Order Restricting Extrajudicial Statements

Indictment No. 71543-23

JUAN M. MERCHAN, A.J.S.C.:

BACKGROUND

Defendant is charged with 34 counts of Falsifying Business Records in the First Degree in violation of Penal Law § 175.10. The charges arise from allegations that Defendant attempted to conceal an illegal scheme to influence the 2016 presidential election. Specifically, the People claim that Defendant directed an attorney who worked for his company to pay $130,000 to an adult film actress shortly before the election to prevent her from publicizing an alleged sexual encounter with Defendant. It is further alleged that Defendant thereafter reimbursed the attorney for the payments through a series of checks and caused business records associated with the repayments to be falsified to conceal his criminal conduct. Trial on this matter is scheduled to commence on April 15, 2024.

On February 22, 2024, the People filed a motion for an order restricting extrajudicial statements by Defendant for the duration of the trial. The restrictions sought were consistent, in part, with those upheld in the U.S. Court of Appeals for the D.C. Circuit in *United States v. Trump*, 88 F4th 990 [2023]. On March 4, 2024, Defendant filed a response in opposition, arguing that his speech may only be restricted by the application of a more strenuous standard than applied by the D.C. Circuit and that the People had failed to meet that standard in this case.

On March 26, 2024, this Court issued its Decision and Order Restricting Extrajudicial Statements by Defendant.

On March 28, 2024, the People filed a pre-motion letter seeking clarification or confirmation of the Order as to whether it proscribes extrajudicial speech against family members of the Court, the District Attorney, and of all other individuals mentioned in the Order. Today, April 1, 2024,

Defendant filed his opposition to the People's motion. The People have today also filed a supplement to their pre-motion letter.

DISCUSSION

The Defendant has a constitutional right to speak to the American voters freely, and to defend himself publicly. The Order issued on March 26, 2024, was narrowly tailored to protect that right. To clarify, the Order *did not* proscribe Defendant's speech as it relates to the family members of the District Attorney or this Court. The Court now amends the March 26, 2024, Order to include the family members of this Court and of the District Attorney of New York County. This Decision and Order is equally narrowly tailored and in no way prevents Defendant from responding to alleged political attacks but does address Defendant's recent speech.

One day following the issuance of said Order, Defendant made several extrajudicial statements attacking a family member of this Court. Contrary to the position Defendant took in his opposition to the People's February 22, 2024 motion for an order restricting extrajudicial statements, i.e. that his statements "plainly constitute core political speech on matters of great public concern and criticism of major public figures," Defendant's opposition to 2/22/24 Motion, pgs. 8-9, this pattern of attacking family members of presiding jurists and attorneys assigned to his cases serves no legitimate purpose. It merely injects fear in those assigned or called to participate in the proceedings, that not only they, *but their family members as well*, are "fair game" for Defendant's vitriol.

Courts are understandably concerned about the First Amendment rights of a defendant, especially when the accused is a public figure. *U.S. v. Ford*, 830 F2d 596 [1987]. That is because "the impact of an indictment upon the general public is so great that few defendants will be able to overcome it, much less turn it to their advantage." 29 Stan.L.Rev. 607, 611. The circumstances of the instant matter, however, are different. The conventional 'David vs. Goliath' roles are no longer in play as demonstrated by the singular power Defendant's words have on countless others. The threats to the integrity of the judicial proceeding are no longer limited to the swaying of minds but on the willingness of individuals, both private and public, to perform their lawful duty before this Court. This is evidenced by the People's representations that "multiple potential witnesses have already expressed grave concerns [...] about their own safety and that of their family members should they appear as witnesses against defendant." People's 3/28/24 Pre-Motion Letter. It is no longer just a mere possibility or a reasonable likelihood that there exists a threat to the integrity of the judicial proceedings. The threat is very real. Admonitions are not enough, nor is reliance on self-

restraint. The average observer, must now, after hearing Defendant's recent attacks, draw the conclusion that if they become involved in these proceedings, even tangentially, they should worry not only for themselves, *but for their loved ones as well*. Such concerns will undoubtedly interfere with the fair administration of justice and constitutes a direct attack on the Rule of Law itself. Again, all citizens, called upon to participate in these proceedings, whether as a juror, a witness, or in some other capacity, must now concern themselves not only with their own personal safety, but with the safety and the potential for personal attacks upon their loved ones. That reality cannot be overstated.

Defendant, in his opposition of April 1, 2024, desperately attempts to justify and explain away his dangerous rhetoric by "turning the tables" and blaming those he attacks. The arguments counsel makes are at best strained and at worst baseless misrepresentations which are uncorroborated and rely upon innuendo and exaggeration. Put mildly, the assortment of allegations presented as "facts" and cobbled together, result in accusations that are disingenuous and not rational. To argue that the most recent attacks, which included photographs, were "necessary and appropriate in the current environment," is farcical.

The People argue in their submission that Defendant's attacks, which include referring to a prosecution witness last week as "death", are based on "transparent falsehoods." People's 4/1/24 Supplement at pg. 2. The People provide a plethora of compelling arguments in support of their claim that Defendant's conduct is deliberate and intended to intimidate this Court and impede the orderly administration of this trial.

The People request in their submission of April 1, 2024, "that any order this Court enters clarifying or confirming the scope of its March 26 Order should also include the relief the People requested in our February 22 Motion for a Protective Order; namely, that defendant be expressly warned that any statutory right he may have to access to juror names will be forfeited by continued harassing or disruptive conduct." People's 4/1/24 Supplement at pg. 7. The Court at that time reserved decision on the People's motion. The People's motion is now **GRANTED.**

It remains this Court's fundamental responsibility to protect the integrity of the criminal process and to control disruptive influences in the courtroom. *See Sheppard v. Maxwell*, 384 U.S. 333 [1966]. "Neither prosecutors, counsel for defense, *the accused*, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function." *Id.* at 363 (emphasis added).

Consistent with the decision dated March 26, 2024, the uncontested record reflecting the Defendant's prior (and most recent), extrajudicial statements establishes a sufficient risk to the

administration of justice consistent with the standard set forth in *Landmark Communications, Inc. v. Virginia*, and there exists no less restrictive means to prevent such risk. 435 US 829, 842-843 [1978].

THEREFORE, Defendant is hereby put on notice that he will forfeit any statutory right he may have to access juror names if he engages in any conduct that threatens the safety and integrity of the jury or the jury selection process; and it is hereby

ORDERED, that the People's motion for clarification is **GRANTED**. The Court's Order of March 26, 2024, did not contemplate the family members of this Court or of the District Attorney. It is therefore not necessary for this Court to determine whether the statements were intended to materially interfere with these proceedings; and it is further

ORDERED, that the Court's Order of March 26, 2024, is amended as indicated below. Defendant is directed to refrain from:

a. Making or directing others to make public statements about known or reasonably foreseeable witnesses concerning their potential participation in the investigation or in this criminal proceeding;
b. Making or directing others to make public statements about (1) counsel in the case other than the District Attorney, (2) members of the court's staff and the District Attorney's staff, or (3) the family members of any counsel, staff member, the Court or the District Attorney, if those statements are made with the intent to materially interfere with, or to cause others to materially interfere with, counsel's or staff's work in this criminal case, or with the knowledge that such interference is likely to result; and
c. Making or directing others to make public statements about any prospective juror or any juror in this criminal proceeding.

FURTHER, Defendant is hereby warned that any violation of this Order will result in sanctions under Judiciary Law §§ 750(A)(3) and 751.

The foregoing constitutes the Decision and Order of the Court.

Dated: April 1, 2024
New York, New York

APR 01 2024

Judge of the Court Claims
Acting Justice of the Supreme Court

HON. J. MERCHAN

CERTIFICATE OF SERVICE

A copy of this application was served by email and U.S. mail to the counsel listed below in accordance with Supreme Court Rule 22.2 and 29.3:

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Dated: October 16, 2024

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