SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT
In the Matter of the Application of

DONALD J. TRUMP, DONALD J. TRUMP, JR., ERIC TRUMP, ALLEN WEISSELBERG, JEFFREY MCCONNEY, THE DONALD J. REVOCABLE TRUST, THE TRUMP ORGANIZATION, INC., THE TRUMP ORGANIZATION, LLC, DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER, TRUMP ENDEAVOR 12 LLC, TRUMP OLD POST OFFICE LLC, 40 WALL STREET LLC, AND SEVEN SPRINGS LLC,

Petitioners,

for a Judgment pursuant to Article 78 of the Civil Practice Law and Rules

-against-

THE HONORABLE ARTHUR F. ENGORON, J.S.C., AND PEOPLE OF THE STATE OF NEW YORK by LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

Case No. 2023-05859

AFFIRMATION IN OPPOSITION

MICHAEL SIUDZINSKI, an attorney duly admitted to practice law before the Courts of the State of New York, affirms under penalties of perjury, the truth of the following:

1. I am an Assistant Deputy Counsel in the Office of Court Administration of the State of New York, and am of counsel to David Nocenti, attorney for Justice Arthur F. Engoron, a Justice of the Supreme Court, New York County ("Justice Engoron"). I make this affirmation in opposition to petitioners' application for leave to appeal the Court's Order, dated November

30, 2023 (Exhibit B to Robert's Affirmation of Urgency, dated Dec. 3, 2023), to the Court of Appeals. The Court's Order lifted its interim stay (issued on November 16, 2023) of the gag orders issued by respondent Justice Engoron in *People of the State of New York v. Donald Trump, et al.,* Index No. 452564/2022.

Background

2. By the petition, dated November 15, 2023, petitioners seek relief in the nature of a writ of prohibition, alleging that Justice Engoron exceeded his jurisdiction by (i) issuing a "gag" order on the record on October 3, 2023 in the underlying Supreme Court, New York County civil action, *People of the State of New York v. Donald Trump, et al.,* Index No. 452564/2022, and (ii) issuing a second gag order on November 3, 2023, prohibiting counsel for petitioners, including Alina Habba and Christopher Kise, from commenting or referring to any confidential communications between himself and staff. The petition is returnable on December 11, 2023 and respondents submitted their respective answers on December 6, 2023.

3. On November 16, 2023, the Court, upon application for interim relief, granted a stay of Justice Engoron's gag orders at issue in this proceeding, until it could be heard by a full panel of the Court. On November 22, 2023, respondents opposed the application on the grounds that the petitioners' First Amendment rights are not unlimited, and because Justice Engoron was well within his authority and discretion to issue the gag orders, particularly to prevent the real risk of harm to his staff stemming from Mr. Trump's public statements and social media posts.

4. On November 30, the Court issued its Order lifting the interim stay of the gag orders.

5. On December 4, petitioners commenced the current application for leave to appeal the Court's Order to the Court of Appeals on an expedited basis. The Court denied petitioners' request for expedited review and set a briefing schedule, directing respondents to respond to the motion by 10 a.m. on December 11, 2023.

Argument

6. The Court's Order concerns petitioners' request for interim relief pending final determination of the Article 78 petition. Accordingly, the Order is "nonfinal" and is not appealable as of right. *See* CPLR § 5601; *see also* Petitioners' Memorandum of Law in Support of Emergency Application for Leave to Appeal (hereinafter "Petitioners' Memo."), p. 10 ("a judgment resolving the underlying Article 78 proceeding would be appealable to the Court of Appeals as of right.")

7. Petitioners, in support of seeking leave herein, rely on CPLR § 5602(a)(2) and (b)(1), which allow for appeals of certain nonfinal orders. *See* Petitioners' Memo, p. 11.

(i) The Court of Appeals does not review orders granting or denying interim relief

8. The Court should deny petitioners' request because the Court of Appeals does not normally hear appeals of denials (or granting) of interim relief. *See James v. Bd. of educ. of City of N.Y.*, 42 N.Y.2d 357, 363 (1977); *see also Walker Mem. Baptist Church, Inc. v. Saunders*, 285 N.Y. 462, 474 (1941) (stating therein:

> "The plaintiff urges upon this appeal that the law of the case was conclusively determined by the order of the Appellate Division affirming the granting of the temporary injunction since that order, it is argued, constitutes an adjudication that the complaint sets forth a good cause of action. A complete answer to this contention is that the granting of a temporary injunction serves only to hold the matter in *statu quo* until opportunity is afforded to decide upon the merits. **The granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits, and the issues must be tried to the same extent as though no temporary injunction had been**

applied for. In addition, since the injunction order lay in the discretion of the Special Term and the Appellate Division, the decision thereon was not appealable to this court (*Brown v. Keeney Settlement Cheese Assn.*, 59 N. Y. 242; *Strasser v. Moonelis*, 108 N. Y. 611; *Schneider v. City of Rochester*, 155 N. Y. 619), and the proceeding is not material here.") (emphasis added)

(ii) CPLR §§ 5602(a)(2) and (b)(1) are inapplicable herein

9. Furthermore, the Court of Appeals does not review the type of order at issue here pursuant to §§ 5602(a)(2) and (b)(1).

10. Section 5602(b)(1) is not applicable here because, to the extent an appeal could be taken from this Court's nonfinal Order, the Order is encompassed by the language of § 5602(a)(2) and therefore is specifically excluded from review under § 5602(b)(1). Section 5602(b)(1) states:

> "An appeal may be taken to the court of appeals by permission of the appellate division:
> 1. from an order of the appellate division which does not finally determine an action, **except an order described in paragraph** [(a)(2)] . . ." (emphasis added)

11. The Court of Appeals has declined to review nonfinal orders under § 5602(a)(2), except in narrow circumstances not present here.

12. CPLR § 5602(a)(2) was enacted following the 1951 New York State constitutional amendment found at Article VI, § 3(5), the language of which is identical to § 5602(a)(2) apart from the omission of the final clause concerning availability of appeal by stipulation for final order absolute.

13. Despite the seemingly broad language of § 5602(a)(2), the original legislative purpose for its enactment was narrow. As explained by the Court of Appeals in *F. J. Zeronda Inc. v. Town Bd. of the Town of Halfmoon*, the original constitutional amendment of 1951 (and §

5602(a)(2)) was designed to meet the special situation at that time confronting administrative agencies where a determination was reversed or annulled by a nonfinal order of the Appellate Division which remitted the matter to the agency for further proceedings entailing a new hearing. *See F. J. Zeronda*, 37 N.Y.2d 198 (1975).

14. Prior to 1951, an agency in such circumstances could not seek appellate review unless it was willing to file a stipulation for final order absolute, nor could it perform a new hearing and take an Appeal to the Court of Appeals upon its own agency determination because agencies are not considered "aggrieved" for purposes of an appeal. *See id.* at 200-01.

15. As stated by the Court therein:

> The procedural remedy fashioned to relieve the agency from this dilemma was to confer jurisdiction on our court to grant leave to appeal from any nonfinal determination of the Appellate Division affecting the action of an administrative agency. As is noted in Cohen and Karger, Powers of the New York Court of Appeals (s 65, pp. 293—294) however: **'Plainly, the remedy goes far beyond the necessity.'**

Id. at 200 (emphasis added).

16. Accordingly, appellate review under the 1951 amendment and § 5602(a)(2) was created for an agency or public body to avoid conducting a new hearing without recourse thereafter, *not for individuals or entities* subject to an agency's determination despite its broad language.

17. The Court of Appeals further clarified the narrow scope of CPLR § 5602(a)(2) in the *Matter of New York State Assn. of Plumbing-Heating-Cooling Contrs. v. Egan*, 56 N.Y.2d 1030 (1982) (denying motion for leave to appeal Appellate Division's nonfinal order of a writ of mandamus directing the service of a summons (*see Egan*, 86 A.D.3d 100 (3d Dep't 1982)) on

grounds "that the order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution and **is not within the curative intent of CPLR § 5602(a)(2).**") (emphasis added)

18. Since then, the Court of Appeals has generally held that appellate review is available under § 5602(a)(2) for determinations made in situations in which a quasi-judicial hearing is required by law and a record is developed (*i.e.* "substantial evidence" standard under CPLR 7803(4))[1], but is *not* available for agency determinations made without a hearing (*i.e.* "arbitrary and capricious" standard under CPLR 7803(3)).[2]

19. In any event, petitioners have not identified, nor is respondent aware of, any case in which the Court of Appeals has reviewed a nonfinal order from the Appellate Division concerning relief against a court or judge thereof and it seems unlikely that it would do so considering the legislative intent of § 5601(a)(2) and the Court of Appeal's subsequent rulings.

20. As demonstrated herein, the Court of Appeals is not the forum for determining the legal question presented here except after a final order or judgment of this Court. *See*, *supra*,

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1 *See, e.g., F. J. Zeronda, Inc.*, 37 N.Y.2d 198 (1975); *Strongin v. Nyquist*, 42 N.Y.2d 998, (1977); *Long Island Lighting Co. v. State Tax Commission*, 45 N.Y.2d 529 (1978); *DiMarsico v. Ambach*, 48 N.Y.2d 576 (1979); *Eastern Milk Producers Co-op. Ass'n, Inc. v. State Dept. of Agriculture*, 58 N.Y.2d 1097 (1983); *Queens Farms, Inc. v. Gerace*, 60 N.Y.2d 65 (1983); *Power Authority of State v. Williams*, 60 N.Y.2d 315 (1983); *Niagara Mohawk Power Corp. v. Public Service Com'n of State of N.Y.*, 66 N.Y.2d 83 (1985); *Brooklyn Union Gas Co. v. Commissioner of Dept. of Finance of City of New York*, 67 N.Y.2d 1036 (1986); *New York City Transit Authority v. State Div. of Human Rights*, 78 N.Y.2d 207 (1991); *Mercy Hosp. of Watertown v. New York State Dept. of Social Services*, 79 N.Y.2d 197, 203 n.3, (1992); *Camperlengo v. Barell*, 78 N.Y.2d 674 (1991).

2 *See, e.g., Church of Scientology of New York v. Tax Com'n of City of New York*, 69 N.Y.2d 659 (1986); *Riverview Apartments Co. v. Golos*, 62 N.Y.2d 976 (1984); *Tax Assessment by Syracuse University v. City of Syracuse*, 59 N.Y.2d 668 (1983); *Monroe-Livingston Sanitary Landfill, Inc. v. Bickford*, 65 N.Y.2d 1025 (1985); *Mialto Realty, Inc. v. Town of Patterson*, 66 N.Y.2d 696 (1985); *F.L.D. Const. Corp. v. Williams*, 68 N.Y.2d 996 (1986); *Cushion v. Gorski*, 78 N.Y.2d 1057 (1991); *Civil Service Employees Association, Inc. v. Newman*, 47 N.Y.2d 762 (1979); *Holliswood Care Center v. Axelrod*, 60 N.Y.2d 631 (1983); *Cangro v. Mayor of City of N.Y.*, 77 N.Y.2d 865 (1991); *Grayson v. Christian*, 46 N.Y.2d 729 (1978); *Augello v. Board of Educ. of Lynbrook Union Free School Dist.*, 77 N.Y.2d 871 (1991); *EFCO Products v. Cullen*, 77 N.Y.2d 822 (1991); *Brooklyn Union Gas Co. v. State Bd. of Equalization and Assessment*, 68 N.Y.2d 883 (1986); *Dusanenko v. Lefever*, 65 N.Y.2d 940 (1985).

James, 42 N.Y.2d at 363. Accordingly, the Court should deny petitioners' motion for leave to appeal.

Dated: New York, New York
December 10, 2023

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/S/
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