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,

Case No. 2023-05859

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.

ANSWER AND AFFIRMATION IN OPPOSITION TO THE PETITION

Respondent, the Honorable Arthur F. Engoron, a Justice of the Supreme Court of the State of New York, New York County, by his attorney, David Nocenti, Counsel for the New York State Office of Court Administration, as and for his answer to the petition in this proceeding commenced pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR"), brought by petitioners herein, respectfully:

1. Denies each and every allegation of the application except to the extent that the allegations are admitted herein.

MICHAEL J. SIUDZINSKI, an attorney admitted to practice before the courts of this state, hereby affirms, under the penalties of perjury pursuant to CPLR § 2106, that the following is true and correct:

2. I am an Assistant Deputy Counsel in Counsel's Office, Office of Court Administration ("OCA"), counsel for the Honorable Arthur F. Engoron (hereinafter Justice Engoron or "State Respondent") in this Article 78 proceeding brought by petitioner Donald J. Trump and co-petitioners herein.

3. I submit this answer and affirmation in opposition to petitioners' Article 78 petition. I am familiar with this matter based upon a review of the petition, the papers annexed thereto, documents filed in the underlying court action, and conversations with the Chambers of Justice Engoron.

4. 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 prohibiting counsel for petitioners, including Alina Habba and Christopher Kise, from commenting or referring to any confidential communications between himself and staff. Petitioners further seek an order annulling and vacating Justice Engoron's findings that Mr. Trump had violated the first gag order on October 20 and 25, 2023 and the resulting sanctions orders.

5. Petitioners' attorneys in the underlying action are *not* parties to this proceeding.

6. For the reasons set forth below, petitioners' Article 78 petition should be denied, and the Court should dismiss this proceeding in its entirety.

BACKGROUND

A. <u>Supreme Court, New York County, Civil Action</u>

7. Copies of all relevant Orders and other documents are attached to the Petition and referred to herein as "Petition, Ex. __." A summary of the pertinent facts can be found in Lisa Evans' Affirmation in Opposition, dated November 22, 2023, and Dennis Fan's Affirmation in Opposition to Motion for a Stay, dated November 22, 2023, and all attachments submitted therewith. *See* Evans Aff., ¶¶ 2-5 (ECF # 9); Fan Aff., ¶¶ 6-30 (ECF #8). Additional relevant information is contained in Captain Charles Hollon's Affirmation, dated November 22, 2023, attached as Exhibit E to Evans' Affirmation.

8. In brief, on October 3, 2023, during the second day of trial in the underlying action, Justice Engoron issued an on-the-record limited gag order (hereinafter "Gag Order") directed at *all parties* after Mr. Trump made comments outside of the courtroom (in the hall of the courthouse) concerning Justice Engoron's Law Clerk, after which he posted similar comments on social media to his followers and the public.

9. Justice Engoron stated:

> This morning, one of the defendants posted, to a social media account, a disparaging, untrue and personally identifying post about a member of my staff. Although I have since order[ed] the post deleted, and apparently it was, it was also emailed out to millions of other recipients. Personal attacks on members of my court staff are unacceptable, inappropriate, and I will not tolerate them, under any circumstances. Yesterday, off the record, I warned counsel of this, and this was disregarded. My warning was

disregarded.

> **Consider this statement a gag order forbidding all parties from posting, emailing, or speaking publicly about any members of my staff.** Any failure to abide by this directive will result in serious sanctions. I hope I've been very clear.
> Petition, Ex. F, p. 270-271.

10. Counsel for petitioners did not object, dispute the Gag Order, seek to have the court reconsider its determination, nor otherwise move to vacate the Gag Order.

11. On October 20, 2023, Justice Engoron learned that Mr. Trump's presidential campaign website still contained images of the Law Clerk despite the Gag Order. Justice Engoron attributed the content of his campaign's website to Mr. Trump and sanctioned him in the amount of $5,000.

12. Seemingly unable to abide by the Gag Order, on October 25, 2023, Mr. Trump again made disparaging comments about Justice Engoron's Law Clerk outside the courtroom, claiming the remarks were directed at the witness testifying that day. Following a short hearing, during which Justice Engoron questioned Mr. Trump under oath, the court found Mr. Trump's answers incredible and sanctioned him a second time for violating the Gag Order in the amount of $10,000.

13. On or about October 26, 2023, Mr. Trump paid the sanction amounts. Petition, Ex. I.

14. Soon thereafter, counsel for petitioners in the underlying action, Ms. Habba and Mr. Kise, began making similar comments, on and off-the-record, concerning the Law Clerk. On November 3, Justice Engoron issued a separate gag order (hereinafter "Supplemental Gag Order") directed at petitioners' counsel, stating therein: "The First Amendment right of

defendants and their attorneys to comment on my staff is far and away outweighed by the need to protect them from threats and physical harm. Thus, for the reasons stated herein, I hereby order that all counsel are prohibited from making any public statements, in or out of court, that refer to *any* confidential communications, in any form, between my staff and me." (emphasis in original). Petition, Ex. J.

Current Article 78 Proceeding

15. By Notice and Verified Petition, both dated November 15, 2023, petitioners commenced this instant proceeding purporting to seek relief pursuant to CPLR Article 78 in the nature of a writ of prohibition. Additionally, if the Court grants the writ, petitioners seek an order annulling and vacating Justice Engoron's findings and imposition of sanctions on October 20 and 25, 2023.[1]

16. On November 16, 2023, petitioners sought an interim stay of the gag orders, which the Court granted after oral argument. The motion for the stay was fully briefed on November 22, 2023.

17. By Order, dated November 30, 2023, the Court denied the motion and lifted the temporary stay of the gag orders.[2]

1 Petitioners previously sought relief from this Court in the form of an interlocutory appeal and for a writ of mandamus to compel Justice Engoron to issue an order concerning the timeliness of the underlying charges. The interlocutory appeal was decided by Order, dated June 27, 2023, and petitioners withdrew the prior petition on consent.

2 By motion, filed December 4, 2023 and returnable December 11, 2023, petitioners seek leave from the Court to appeal the November 30 Order.

ARGUMENT

A. Petitioners do not have standing to challenge the Gag Order as it Applies to their Counsel

18. The petitioners herein are limited to the named defendants in the underlying action. None of petitioners' attorneys in the underlying action, including Ms. Habba and Mr. Kise, are listed as a party to this Article 78 proceeding.

19. The Supplemental Gag Order narrowly expands the Gag Order to include the parties' counsel and add a limitation that the parties and counsel are prohibited from referring to confidential communications between Justice Engoron and his staff.

20. Under normal rules of standing a party must have an injury in fact (*i.e.* an actual stake in the alleged claim) to demonstrate that there is a concrete and particularized interest in the relief sought. *See Lucker v. Bayside Cemetery*, 114 A.D.3d 162, 169 (1st Dep't 2013). Petitioners' asserted basis for seeking a writ herein is their alleged First Amendment rights, specifically Mr. Trump's alleged First Amendment right to speak as a candidate for the 2024 United States presidential election.

21. Even if the Court were to find that the gag orders violated Mr. Trump's First Amendment rights as a presidential candidate, his legal counsel in the underlying action do not share the same First Amendment rights. Petitioners have not established that they have been injured by the gag orders, particularly the Supplemental Gag Order, as it applies to their attorneys.

22. In contrast, petitioners allege that the Supplemental Gag Order limits counsel's ability to make a record and preserve matters for appeal. Counsel for petitioners have repeatedly raised the issue of alleged bias by Justice Engoron, both prior to and after the issuance of the gag

orders. Accordingly, the issue is preserved for appeal. Justice Engoron has already addressed petitioners' arguments and has specifically carved out an exemption for petitioners' attorneys to make any motion they deem appropriate. *See,* Petition ¶ 128. Any argument that the petitioners rights have been violated by the gag orders as applied to their attorneys is belied by the record.

23. If Ms. Habba and Mr. Kise's ability or rights as counsel to make a sufficient record are at issue, they are free to object to Justice Engoron's rulings on the record, assert whatever rights they believe are at issue, and pursue an appeal. *See, infra,* Point B. All of this can be done without violating the limitations set in the gag orders.

24. In any event, it's not clear—as a legal or factual matter—how confidential communications between Justice Engoron and his staff would create an appealable issue. The working relationship between a judge and his or her staff is sacrosanct. Indeed, the role that a judge's staff plays in assisting and advising is so germane to the discretion of a judge that the common law doctrine of judicial immunity applies to court staff as well. As found by the Second Circuit Court of Appeals:

> "[T]he work of judges' law clerks is entirely [judicial in nature]. Law clerks are closely connected with the court's decision-making process. Law clerks are 'sounding boards for tentative opinions and legal researchers who seek the authorities that affect decisions. Clerks are privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be.' *Hall v. Small Business Administration,* 695 F.2d 175, 179 (5th Cir.1983). Moreover, the work done by law clerks is supervised, approved, and adopted by the judges who initially authorized it. **A judicial opinion is not that of the law clerk, but of the judge. Law clerks are simply extensions of the judges at whose pleasure they serve.**"

Oliva v. Heller, 839 F.2d 37, 40 (2d Cir. 1988) (quoting the District Court and finding that it "accurately described the role of the law clerk in the judicial process") (emphasis added). *See*

also, Bloom v. New York State Unified Court System, 2020 WL 6118828 at *5 (E.D.N.Y. Oct. 16, 2020) (citing to *Weiner v. State*, 710 N.Y.S2d 325, 327 (1st Dep't 2000).

25. Accordingly, so long as Justice Engoron and his staff are acting and communicating in the context of his role as a jurist, such acts and communications do not create an appealable issue, real or imagined.

B. By a Motion or an Appeal Petitioners have an <u>Adequate Remedy at Law for Their Claims</u>

26. It is statutory law that review under CPLR Article 78 review is not available where there is another adequate remedy at law. *See* CPLR § 7801. *See also Rush v. Mordue*, 68 N.Y.2d 348, 354 (1986); *Matter of Velox v. Rothwax*, 65 N.Y.2d 902, 903-04 (1985); *Matter of Hennessy v. Gorman*, 58 N.Y.2d 806, 807 (1983); *Matter of Legal Aid Socy. of Sullivan County v. Scheinman*, 53 N.Y.2d 12, 17 (1981); *LaRocca v. Lane*, 37 N.Y.2d 575, 579-80 (1975); *Matter of State v. King*, 36 N.Y.2d 59, 63, 65 (1975).

27. The appropriate course of action is for petitioners to move to vacate the gag orders on any grounds they deem appropriate, including constitutional or jurisdictional arguments. *See* CPLR R 5015. And, if the court denies such motion, they may take an interlocutory appeal to this Court. *See* CPLR § 5701(a)(2); *see also* CPLR § 5501. Given the availability to appeal a denial of any motion, petitioners are foreclosed from seeking Article 78 review herein. If petitioners believe they have been aggrieved by Justice Engoron's gag orders, their remedy is to make a motion before the underlying court or seek an interlocutory appeal to this Court, not to commence another Article 78 proceeding. Indeed, petitioners recognize that they may be able to appeal the gag orders. *See* Petition ¶ 106.

28. As the Court of Appeals held in *Veloz v. Rothwax*, 65 N.Y.2d at 904, relief by way of CPLR Article 78 will not lie to review a trial court's allegedly erroneous decision "since petitioner may obtain judicial review of his claim on direct appeal from a judgment of conviction." If petitioners believe Justice Engoron's gag orders were erroneously ordered, the remedy is to move to vacate them and, if necessary, seek an appeal to this Court.

29. Even if petitioners established a clear legal right to the relief they seeks, *see, infra*, Point A, the extraordinary remedy of a writ of prohibition will not lie because petitioners have access to another adequate legal remedy. To the extent the Court finds that petitioners have raised a sufficient argument in their petition, the argument can be raised by a motion before the Supreme Court (J. Engoron), and by means of an appeal to this Court. *See* New York Constitution, art. VI, § 5; *LaRocca*, 37 N.Y.2d at 579; *see also Gorman*, 58 N.Y.2d at 807; *Lewis v. Moskowitz*, 149 A.D.2d 419 (2d Dep't 1989); CPLR § 5501, § 5701, R 5015. Consequently, the instant application must be dismissed. *See* CPLR §§ 7801(1) and 7804(f); *Wilcox v. Dwyer*, 48 N.Y.2d 965 (1980) (where an issue may be raised on direct appeal it is error to entertain an application for Article 78 relief in the nature of prohibition).

C. Petitioner Has Failed to State a Basis Upon Which a Writ of Prohibition May Issue

30. Petitioners seek a writ of prohibition on the grounds that Justice Engoron has exceeded his authority by issuing the gag orders, allegedly limiting Mr. Trump's First Amendment rights.

31. Even if petitioners were foreclosed from moving to vacate the gag orders and seeking an appeal therefrom, *see, supra* Point B, petitioners do not have a clear legal right to a writ of prohibition because judges have broad discretion to control the conduct of litigants,

including by issuing gag orders and sanctions, even if such orders may impinge on a litigant's First Amendment rights.

32. A writ of prohibition is an "extraordinary remedy" which "lies only where there is a clear legal right and only when the body or officer acts or threatens to act without jurisdiction over which it has no power over the subject matter or *where* it exceed[s] its authorized powers in a proceeding over which it has jurisdiction." *Hirschfeld v. Friedman*, 307 A. D. 2d 856, 858 (1st Dep't 2003), quoting *Matter of Holtzman v. Goldman*, 71 N.Y. 2d 564, 569 (1988); *see also Matter of Crain Communications, Inc. v. Hughes*, 74 N.Y.2d 626, 628 (1989); *Mordue*, 68 N.Y.2d at 352; *King*, 36 N.Y.2d at 62; *Matter of Gimprich v. Bd. of Education of the City of New York*, 306 N.Y. 401, 406 (1954); *Kevilly v. Honorof*, 287 A.D.2d 504, 505 (2d Dep't 2001).

33. Although the primary function of a writ prohibition is to prevent a violation of a person's rights, particularly constitutional rights, consideration of factors such as the "gravity of the harm" of the challenged action is required. *See Nicholson v. State Comm. on Judicial Conduct*, 50 N.Y.2d 597, 605-06 (1980). As stated by the Court of Appeals, "[a] proper analysis calls for examination of the degree of interference with the First Amendment interests, the strength of the governmental interest justifying the restriction and the means chosen to prevent the asserted evil." *See id. at 607*.

34. **The only potential harm that exists here is the risk of violence against Justice Engoron's staff if this Court grants a writ of prohibition.** Any purported harm to Mr. Trump's (and his co-petitioners') First Amendment rights is risible.

35. First, the gag orders are a *de minimis* interference, at best, with Mr. Trump's First Amendment rights. Given the absence of any argument concerning the other petitioners' ability

to engage in the prohibited speech, the gag orders are not an interference to the co-petitioners. To be clear, the Gag Order only prevents the parties from speaking (or posting or emailing) about Justice Engoron's staff, NOTHING ELSE. It does not prevent statements about Justice Engoron himself, not the Attorney General or her staff, not the substance of the claims and allegations against petitioners, not the facts or evidence or witness testimony, not the judicial process, nor any other topic concerning the underlying action. The Supplemental Gag Order is also extremely narrow in that it only prevents statements about communications between Justice Engoron and his staff, which by their nature are considered confidential communications. *See*, *infra*, Point A.

36. Petitioners offer no argument in the petition or in their reply (in support of their motion for a stay) as to how the gag orders have interfered with Mr. Trump's First Amendment rights, other than the meritless argument that, as a candidate for U.S. President, his First Amendment rights should be unfettered. It is unclear, however, how his ability to talk about Justice Engoron's court staff is necessary for his campaign when this country faces a number of issues more worthy of debate. Any argument by petitioners that the gag orders have interfered with their First Amendments rights should be viewed with extreme skepticism.

37. Second, Justice Engoron has a strong interest in ensuring the safety of his staff. It is undisputed that Mr. Trump has an inordinate ability to draw attention, fervor, and animosity to those he singles out for attention. Whether he seeks it or not, some of Mr. Trump's followers are willing to engage in violence to show their support. As articulated by Justice Engoron, his staff's safety was his primary purpose and interest in issuing the Gag Orders. *See* Petition, Ex. J., Supplemental Gag Order.

38. As previously demonstrated, throughout the trial in the underlying action, Justice Engoron and his Law Clerk have been inundated with threats of violence and derogatory comments, which increase in frequency every time Mr. Trump has made comments about them. *See* Hollon Affirmation, dated November 22, 2023, attached as Exhibit E to the Evans Affirmation. Given the real and demonstrated likelihood of harm that could come to Justice Engoron's court staff if the gag orders were annulled, Justice Engoron's legitimate and justifiable interest in preventing such harm greatly outweighs the *de minimis* interference to Mr. Trump's rights.

39. Lastly, the gag orders were issued pursuant to Justice Engoron's broad authority to control the conduct of litigants appearing before him and are narrowly tailored to accomplish his goal of preventing harm to his staff. As demonstrated by co-respondent the Attorney General in her opposition to petitioners' motion for a stay, First Amendment rights are not unlimited and caselaw supports Justice Engoron's limitations on petitioners' speech. *See* Fan Aff., ¶¶ 36-59. Justice Engoron herein adopts the Attorney General's arguments concerning petitioners' First Amendment rights.

40. While prior restraints are viewed with a strong presumption against their validity, this Court has recognized that "reasonable limitations may be placed on speech where an important countervailing interest is being served." *Fischetti v. Scherer*, 44 A.D. 3d 89, 93 (1st Dep't 2007). In contrast to petitioners' argument, the First Amendment does not prohibit courts from limiting speech that threatens the safety of the court's staff. Courts have broad discretion to control the conduct of litigants and attorneys in ongoing proceedings. *Sheppard v. Maxwell*, 384 U. S. 333, 363 (1966) ("The Court must take such steps by rule and regulation that will protect

their process from prejudicial interference."). Here, Justice Engoron reasonably determined that the limited gag orders were necessary for the protection of his staff and to protect the ongoing trial from prejudicial interferences. While freedom of expression is given wide latitude, "it must not be allowed to divert the trial from the very purpose of a court system to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures." *Sheppard*, 384 U.S. 350-51 (quotations and citations omitted).

41. Accordingly, the petition should be dismissed because petitioners cannot demonstrate a clear legal right to a writ of prohibition to prevent Justice Engoron from issuing the gag orders or sanctioning the parties and counsel for violations thereof. The petition should be dismissed as a matter of law.

42. Given the totality of the circumstances here, including the very real risk of harm to court staff, this Court should find that Justice Engoron exercised his discretion and authority in issuing the narrow gag orders and that such orders have not interfered with petitioners First Amendment rights.

WHEREFORE, Justice Engoron respectfully requests that the Court dismiss petitioners' Article 78 proceeding in its entirety and grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
December 6, 2023

DAVID NOCENTI
Counsel-Office of Court Administration
Attorney for Justice Engoron
By:

/S/
MICHAEL J. SIUDZINSKI
Assistant Deputy Counsel
25 Beaver Street
New York, New York 10004
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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MICHAEL J. SIUDZINSKI, being duly sworn, deposes and says:

I am an Assistant Deputy Counsel and of counsel to DAVID NOCENTI, Counsel for the New York State Office of Court Administration, attorney for respondent the Honorable Arthur F. Engoron, a Justice of the Supreme Court of New York, New York County.

I am familiar with the facts of this proceeding and make this verification pursuant to § 3020(d)(2) of the Civil Practice Law and Rules because Justice Engoron is an officer of the State of New York.

I have read the foregoing Answer and Affirmation and am familiar with its contents. The statements made therein are true to the best of my knowledge, and are based upon the proceedings, record, decisions of prior proceedings, and conversations with the Justice Engoron. As to those matters therein stated on information and belief, I believe them to be true based upon the same review and conversations.

MICHAEL J. SIUDZINSKI

Sworn to before me this
6th day of December, 2023

Notary Public

LISA NAZIA HANIFF
Notary Public, State of New York
No. 01HA6348480
Qualified in Queens County
Commission Expires September 26, 2024